



Billing Code: 6325-39-P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 315, 432 and 752

RIN 3206–AN60

Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations governing probation on initial appointment to a competitive position, performance-based reduction in grade and removal actions, and adverse actions. The final rule will effect a revision of OPM’s regulations to make procedures relating to these subjects more efficient and effective. The final rule also amends the regulations to incorporate statutory changes and technical revisions.

DATES: Effective [Insert date 30 days after date of publication in the Federal Register.]

FOR FURTHER INFORMATION CONTACT:

Timothy Curry by e-mail at employeeaccountability@opm.gov or by telephone at (202) 606-2930.

SUPPLEMENTARY INFORMATION:

The Office of Personnel Management (OPM) is issuing revised regulations governing probation on initial appointment to a competitive position; performance-based

reduction in grade and removal actions; and adverse actions under statutory authority vested in it by Congress in 5 U.S.C. 3321, 4305, 4315, 7504, 7514 and 7543. The regulations assist agencies in carrying out, consistent with law, certain of the President's directives to the Executive Branch pursuant to Executive Order 13839 that were not subject to judicially-imposed limitations at the time of the proposed rule, and update current procedures to make them more efficient and effective. The revised regulations update current regulatory language, commensurate with statutory changes. They also clarify procedures and requirements to support managers in addressing unacceptable performance and promoting employee accountability for performance-based reduction-in-grade, removal actions and adverse actions while recognizing employee rights and protections. The revised regulations support agencies in implementing their plans to maximize employee performance, as required by Office of Management and Budget (OMB) M-17-22 (April 12, 2017), and to fulfill elements of the President's Management Agenda relating to the Workforce for the 21st Century.

At the time revisions to these regulations were proposed, there were judicially imposed limitations on implementing certain other portions of Executive Order 13839. These revised regulations were not intended to implement portions of the Executive Order that were previously enjoined when OPM initially proposed them. As the previously enjoined portions of the Executive Order are now fully effective and binding on executive agencies, OPM anticipates proposing additional revisions to regulations, pursuant to the Administrative Procedures Act's notice-and-comment process, consistent with the President's expressed policy goals.

The Case for Action

With the issuance of Executive Order (E.O.) 13839 on May 25, 2018, President Trump set a new direction for promoting efficient and effective use of the Federal workforce---reinforcing that Federal employees should be both rewarded and held accountable for performance and conduct. Merit system principles provide a framework for employee conduct that is aligned with the broader responsibility Federal government employees assume when they take the oath to preserve and defend the Constitution and accept the duties and obligations of their positions. In keeping with merit system principles, the President's Management Agenda (PMA) recognizes that Federal employees underpin nearly all the operations of the Government, ensuring the smooth functioning of our democracy. The Federal personnel system needs to keep pace with changing workplace needs and carry out its core functions in a manner that more effectively upholds the public trust. Finally, the PMA calls for agencies to establish processes that help agencies retain top employees and efficiently terminate or remove those who fail to perform or to uphold the public's trust.

Prior to establishment of the current PMA, the Office of Management and Budget (OMB) issued a memorandum to agencies on April 12, 2017 entitled "M-17-22 – Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce." M-17-22 called on agencies to take near-term actions to ensure that the workforce they hire and retain is as effective as possible. OMB called on agencies to determine whether aspects of their current policies and practices present barriers to hiring and retaining the workforce necessary to execute their missions as well as appropriately managing the workforce and, if necessary, removing poor performers and employees who

commit misconduct. Notably, M-17-22 directed agencies to ensure that managers have the tools and support they need to manage performance and conduct effectively to achieve high-quality results for the American people. Agencies were recently reminded of these important requirements in OPM guidance issued on September 25, 2019 and entitled: Maximization of Employee Performance Management and Engagement by Streamlining Agency Performance and Dismissal Policies and Procedures.

E.O. 13839's purpose is based on the merit system principles' call for holding Federal employees accountable for performance and conduct. The applicable merit system principles state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. 5 U.S.C. § 2301(b)(4) - (b)(6). The merit system principles further state that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards. *Id.* E.O. 13839 states that implementation of America's civil service laws has fallen far short of these ideals. It cited the Federal Employee Viewpoint Survey which has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. E.O. 13839 also finds that failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and inhibits the ability of executive agencies to accomplish their missions.

On September 17, 2019, OPM issued proposed regulations governing probation on initial appointment to a competitive position, performance-based reduction in grade

and removal actions, and adverse actions (84 FR 48794, September 17, 2019). The proposed regulations were revising OPM's regulations to make procedures relating to these subjects more efficient and effective. The proposed regulations were also amending the regulations to incorporate other statutory changes and technical revisions. After consideration of public comments on the proposed regulations, OPM is now issuing these revised regulations to implement certain requirements of E.O. 13839 as well as to fulfill the vision of the PMA and the objectives of M-17-22. These revisions not only will support agency efforts in implementing E.O. 13839 and M-17-22, and pursuing the PMA, but also will facilitate the ability of agencies to deliver on their mission and provide good service to the American people. Ultimately, these changes support President Trump's goal of effective stewardship of taxpayers' money by our government.

Data Collection of Adverse Actions

Section 6 of E.O. 13839 outlines certain types of data for agencies to collect and report to OPM as of fiscal year 2018. To enhance public accountability of agencies, OPM will collect and, consistent with applicable law, publish the information received from agencies aggregated at a level necessary to protect personal privacy. OPM may withhold particular information if publication would unduly risk disclosing information protected by law, including personally identifiable information. Section 6 requires annual reporting of various categories of data, including: (1) the number of civilian employees in a probationary period or otherwise employed for a specific term whose employment was terminated during that period or term; (2) the number of civilian employees reprimanded in writing by the agency; (3) the number of civilian employees afforded an opportunity period by the agency under section 4302(c)(6) of title 5, United

States Code, breaking out the number of such employees receiving an opportunity period longer than 30 days; (4) the number of adverse actions taken against civilian employees by the agency, broken down by type of adverse action, including reduction in grade or pay (or equivalent), suspension, and removal; (5) the number of decisions on proposed removals by the agency taken under chapter 75 of title 5, United States Code, not issued within 15 business days of the end of the employee reply period; (6) the number of adverse actions by the agency for which employees received written notice in excess of the 30 days prescribed in section 7513(b)(1) of title 5, United States Code; (7) the number and key terms of settlements reached by the agency with civilian employees in cases arising out of adverse actions; and (8) the resolutions or outcomes of litigation about adverse actions involving civilian employees reached by the agency.

On July 5, 2018, OPM issued guidance for implementation of E.O. 13839. This guidance included instructions for each department or agency head to coordinate the collection of data from their components and compile one consolidated report for submission to OPM using the form attached to the guidance memo. Forms must be submitted electronically to OPM via e-mail at employeeaccountability@opm.gov generally no later than 60 days following the conclusion of each fiscal year. In lieu of outlining the data collection requirements in OPM regulations, OPM will issue reminders of this requirement annually and provide periodic guidance consistent with the requirements of E.O. 13839.

Public Comments

In response to the proposed rule, OPM received 1,198 comments during the 30-day public comment period from a wide variety of individuals, including current and

retired Federal employees, labor organizations, Federal agencies, management associations, law firms, and the general public. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments ranged from categorical rejection of the proposed regulations to enthusiastic support. Many comments focused on issues relating to fairness, the opportunity to demonstrate acceptable performance, and the protection of employee rights.

Several Federal agencies, organizations, and commenters agreed with many aspects of the proposed regulations. Those in support of the regulatory changes cited the benefit of streamlined processes and the benefits to management of the Federal workforce associated with increases in efficiency and accountability. An agency commented that the use of progressive discipline has led to many delays in removal and hardship for supervisors. The agency highlighted that this rule will give more discretion to supervisors to remove problematic employees and shorten the years-long process for getting rid of poor performers and those with misconduct issues, thus increasing the efficiency of the service. In addition, some organizations commended OPM for reiterating that progressive discipline is not a requirement. One of these organizations further noted that progressive discipline has grown within most agencies to the point of being a roadblock in many instances to removals or suspensions that would promote the efficiency of the service because there was no prior discipline. Also, with reference to tables of penalties, this organization stated that the rule is “right on point” in its reference to tables of penalties as contrary to the efficiency of the service. Some agencies and organizations expressed support for providing notifications to supervisors about probationary periods ending but requested clarification on how the process should be

implemented. Additionally, included among the comments of Federal agencies were concerns regarding: the consequence of supervisors not taking affirmative steps to retain employees before the end of a probation period; the non-delegation from the head of the agency to adjudicate retaliation claims, as well as whether such “decisions could be perceived to be politically motivated resulting in claims of whistleblower retaliation”; and whether agencies may satisfy the requirement to provide assistance before or during the opportunity period without placing agencies at risk of acting contrary to statute or other OPM regulations.

Many of the comments were from national labor organizations and their members, including many which were seemingly submitted using text from a template. This widely utilized letter expressed general opposition to the proposed regulations. Specific concerns expressed included: commenters’ confusion about probationary period notifications, the lack of required utilization of progressive discipline and the discouraged use of tables of penalties, the existence of adequate assistance for employees with unacceptable performance to demonstrate improvement, and the loss of ability to modify personnel records through settlement agreements. Other commenters had similar concerns in addition to concerns regarding whether the revised regulations were consistent with existing statutes, other regulations, case law, and merit principles.

OPM reviewed and carefully considered all comments and arguments made in support of and in opposition to the proposed changes. The comments are summarized below, together with a discussion of the changes made as a result of the comments. Also summarized are the suggestions for revisions that we considered and did not adopt. In addition to substantive comments, we received several editorial suggestions, one of

which was adopted. Finally, we received a number of comments that were not addressed below because they were beyond the scope of the proposed changes to regulations or were vague or incomplete.

In the first section below, we address general or overarching comments. In the sections that follow, we address comments related to specific portions of the regulations.

GENERAL COMMENTS

Federal agencies, management associations, some Federal employees and some members of the public expressed strong support for the changes. An agency concurred with the proposed rule as written and other individual commenters and management associations asserted that the rule changes are prudent and long overdue. Some commenters stated that they had observed Federal employees who do not perform their jobs acceptably, expressed the belief that the burden on managers in handling underperforming employees is too onerous, and welcomed the regulation changes as a means of addressing these issues. Commenters stated that the current rules protect “bad” employees and this change would make it easier for employers to remove “bad” employees and focus more time on the “stellar” employees including rewarding them. Another commenter referred to these changes as common-sense reforms that will aid in holding all Federal employees more accountable. Another commenter stated that it is time to hold all Federal employees accountable, including management. One commenter, who did not identify whether he or she is a member of a union, stated that although the national union may encourage its members to voice disagreement, the commenter agrees with the rule. This commenter also asserted that for far too long Federal government unions have protected poor performers. Some commenters asserted that Federal

employees should not expect to be treated differently than private sector workers and voiced their support of the rule changes. A commenter fully supported the rule and believed it is long overdue for the Federal government to get in sync with the private sector when addressing both employee performance and conduct. The commenter added that the proposed changes will assist in retaining appropriate employee safeguards while promoting the public trust in government. Another commenter supported the proposed rule because high performing employees will now be able to be rewarded and subpar employees removed from an agency. A commenter also expressed full support and stated that supervisors should be held equally responsible as rank and file employees. A management association expressed that overall it was in favor of the proposed rule, although some members of this management association “expressed concern in the area of subjectivity if someone has a boss that is ‘out to get them.’”

Two management associations, while offering their support of the rule, emphasized the importance of training. One management association urged OPM to act with all haste to process the comments it receives, issue a final rule, and ensure managers are educated and trained about the changes. This management association asserted that ultimately, OPM proposes much needed and reasonable reforms that give management clearer control over their workforce from the initial hiring process through the individual’s tenure in the Federal service. However, the management association stated that the most important determinant of these rules’ success will be not how they are written but how the managers and supervisors are trained on their implementation. The management association stated that managers and supervisors must be given the tools and support to institute these reforms within their offices. Further, the management

association stated that performance appraisals for managers should be tied to their adherence to these rules. This management association asserted that, in order to create a culture that values accountability and efficiency, leaders in the Federal government must be efficient and accountable in inaugurating the changes. Another management association stated that when finalized and implemented, the rule will provide much needed simplicity and clarity for federal leaders who are responsible for managing an accountable workforce.

OPM acknowledges the support for the rule received from commenters. In regard to tools and support to assist managers and supervisors, one of the requirements of E.O. 13839 is that the OPM Director and the Chief Human Capital Officers Council undertake a Government-wide initiative to educate Federal supervisors about holding employees accountable for unacceptable performance or misconduct under those rules, and that this undertaking begins within a reasonable time after the adoption of any final rule issued to effectuate the principles of accountability in the Federal workforce in Section 2 of E.O. 13839..

Other commenters expressed numerous other concerns about the proposed rule. National unions, organizations and many other commenters urged OPM to withdraw the proposed rule and consider what they believe to be more reasoned and equitable approaches to addressing employee probation, and employee performance and conduct concerns. Some commenters stated that the changes to the regulations are invalid, and others stated that they are unnecessary. One national union and a commenter voiced opposition to all proposed changes except the whistleblower provisions. In expressing their opposition, other commenters remarked that the rule purports to accomplish the goal

of “assist[ing] agencies in streamlining and clarifying procedures and requirements to better support managers in addressing unacceptable performance and promoting employee accountability for performance-based reduction in grade and removal actions as well as adverse actions,” but does not actually do so. A national union stated that contrary to what the proposed rule states, these regulations will not reward good workers or promote public trust in the Federal government. A commenter asserted that because civil servants are dedicated to Government service and work with pride regardless of the conditions, the performance management system should reciprocate the same tolerance and adaptability when agencies are administering disciplinary action against Federal employees, which, the commenter observes, would not be the case if these changes are adopted.

One commenter stated that, on its face, the proposed changes seem reasonable. The commenter asserted, however, that it appears as though the goal is to reduce Government rules, regulations, agencies and employees. The commenter disagreed with these reductions as agencies and employees keep our country moving forward and serving people. Another commenter asserted that adoption of the proposed rule would demonstrate poor judgement and a blatant disregard for the Federal government’s most valuable asset, its employees.

OPM disagrees with those commenters who challenge the underlying validity of and necessity for these regulations. Congress has conferred upon OPM general authority to regulate in these areas; see, e.g., 5 U.S.C. 3321, 4305, 7504, 7514 and 7543. OPM is also promulgating these rule changes to implement the requirements of E.O. 13839 and M-17-22, as well as to fulfill administration policy priorities laid out in the PMA.

Furthermore, these rules are being promulgated under the President's authority provided in 5 U.S.C. 3301, 3302 and 3303 and which he delegated to OPM. These changes not only support agency efforts to implement E.O. 13839 and M-17-22, and to pursue PMA goals, but also will facilitate the ability of agencies to deliver on their missions and provide service to the American people. To carry out E.O. 13839, the rule facilitates a Federal supervisor's ability to promote civil servant accountability while simultaneously preserving employee's rights and protections. We also disagree with the commenters' contention that the proposed rule does not streamline and clarify procedures and requirements to better support managers in addressing unacceptable performance and pursuing adverse actions. We decline to make changes based on these comments because the proposed rule effectuates changes that, in fact, make procedures more efficient and effective. The proposed rule was published to facilitate the ability of agencies to deliver on their mission and on providing service to the American people. For example, the requirement of the proposed rule for timely notifications to supervisors regarding probationary periods will assist agencies in making more effective use of the probationary period. Additionally, the proposed rule establishes limits on the opportunity to demonstrate acceptable performance by precluding additional opportunity periods beyond what is required by law, which encourages efficient use of the procedures under chapter 43. As another illustration of streamlining and clarifying performance-related procedures and requirements, the proposed rule makes clear that an agency is not required to use progressive discipline under subpart 752.202. Specifically, the proposed rule adopts the requirement to propose and impose a penalty that is within the bounds of tolerable reasonableness. Further, the proposed amendments emphasize that the penalty

for an instance of misconduct should be tailored to the facts and circumstances, in lieu of the type of formulaic and rigid penalty determination that frequently results from agency publication of tables of penalties. Thus, OPM believes the rule does make procedures more efficient and effective and is consistent with E.O. 13839's policy goals and requirements.

Many commenters and organizations asserted that OPM did not have the authority to promulgate this rule because employee procedural rights are governed by statute and should be modified only through congressional action. Some commenters said the rule would be unconstitutional if effected. An organization stated that the proposed regulations are contrary to statutory authority and established case law, and directly undermine the due process protections afforded to Federal employees. Another organization stated that OPM should dispense with these regulations as written or substantially revise them to conform to due process, fundamental fairness, Federal statute and Federal court precedent.

We disagree with the general assertions contesting OPM's authority and challenging the legality and constitutionality of the revised regulations. OPM is promulgating these regulations under its congressionally granted authority to regulate. Not all existing provisions were constitutionally or statutorily mandated, and to the extent they were not, OPM has authority to revise them to make the process work more effectively. In so doing, OPM has been mindful of the President's expressed policy direction. Further, this rule will not eliminate any employee rights provided under statute. Federal employees will continue to enjoy all core civil service protections

provided by statute, including merit system principles, procedural rights, and appeal rights.

An agency pointed out that when the proposed regulations were drafted, there were judicially imposed limitations on implementing portions of E.O. 13839 precluding inclusion of these subjects in the proposed regulation. The agency recommended that, due to the court injunction being lifted, any matter that would have been included in the regulation, but for the injunction, be added so that agencies can benefit from those matters as well.

The agency is correct that various sections of E.O. 13839 were subject to judicially imposed limitations when these regulations were proposed and that the proposed regulations did not seek to incorporate enjoined sections of the E.O. For the same reason, however, these sections were not subject to notice-and-comment rulemaking requirements. As a result, such changes will not be included in the final rule with respect to the current rule-making process.

As the previously enjoined portions of the Executive Order are now fully effective and binding on executive agencies, OPM anticipates proposing additional revisions to regulations, pursuant to the Administrative Procedures Act's notice-and-comment process, consistent with the President's expressed policy goals, at a future date.

One national union noted that "the proposed regulations will diminish employees' right to collectively bargain by limiting the topics that are negotiable. They noted the regulations are contrary to the vision and spirit of the Federal Service Labor-Management Relations Statute (the Statute), which allows Federal employees to collectively bargain

and participate in decisions affecting their working conditions.” This national union further noted that “while OPM has the authority to issue regulations in the area of federal labor relations, it may not dilute the value of employees’ statutory right to collectively bargain.” They further state “OPM does not consider how its proposed regulations will severely impede the right to collectively bargain. The regulations should not be implemented because they would diminish the core elements of collective bargaining by reducing negotiations over primary conditions of employment including discipline, improvement opportunities, and settlements.”

In response to these comments, OPM notes that there are numerous ways in which the proposed rule does not impact collective bargaining at all. Generally, in fact, the regulations simply provide direction to agency officials exercising the discretion afforded to them by law, including the right to discipline employees and the right to hire. Legally negotiated agreements, for instance, could not force agency officials to select a specific penalty based on employee misconduct, require them to enter into settlement agreements that provide employees clean records, or preclude them from utilizing probationary periods when making decisions regarding the nature of an appointment. These decisions remain at the discretion of the agency’s authority as to discipline, settlement, and hiring and employment. In other cases, the proposed rule provides only aspirational goals that constitute guides for agency officials rather than absolute mandates that would preclude bargaining over these subjects. An example is the provision providing that agencies should limit to the required 30 days the advance notice of adverse action *when practicable*. Similarly, the provision explaining that agencies are not required to use progressive discipline is a guide, not a mandate.

Although the proposed revisions to these Government-wide regulations may result in limiting collective bargaining on certain topics, we disagree with the view that these changes are contrary to the vision and spirit of the Statute (5 U.S.C. chapter 71). They are in accord not only with both of these concepts but also, and most importantly, with the letter of the law, including 5 U.S.C. 7117. Further, 5 U.S.C. 7101(b) states in its entirety that “[i]t is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements of Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.” These provisions include significant limitations on collective bargaining relating to matters that are the subject of Federal law or Government-wide rule or regulation; see 5 U.S.C. 7117(a)(1). And while commenters may disagree, as a matter of policy, with the subjects the President has determined are sufficiently important for inclusion in an Executive Order and federal regulation, it is well established that the President has the authority to make this determination and that OPM regulations issued pursuant to this authority constitute Government-wide rules under section 7117(a)(1) for the purpose of foreclosing bargaining. *See NTEU v. FLRA*, 30 F.3d 1510, 1514-16 (D.C. Cir. 1994).

We would also note that certain exceptions to collective bargaining are set forth in the Statute itself, including a prohibition on substantively bargaining over management rights as outlined in 5 U.S.C. 7106(a). This includes management’s statutory rights to suspend, remove, reduce in grade or pay, or otherwise discipline employees. Bargaining proposals that would, for instance, mandate a particular penalty determination, and

mandate the use of progressive discipline and/or tables of penalties would impermissibly interfere with the exercise of a statutory management right to discipline employees and thereby not appropriately be subject to bargaining.

One commenter also suggested that the “article” should be open for dialogue from the union. Because this comment is not clear, we are unable to respond to it. We note, however, that what we published is not a proposed article intended for inclusion in collective bargaining agreements between agencies and labor organizations. These provisions are proposed revisions to Government-wide regulations issued by OPM. We provided a copy of the proposed rule to labor organizations which have been granted consultation rights with OPM on Government-wide rules or regulations effecting any substantive change in any condition of employment in accordance with 5 U.S.C. 7117(d) and provided an opportunity to make comments and recommendations. Additionally, all unions were able to submit comments and recommendations through the rulemaking process and we have considered and responded to all comments that were within the scope of the rule.

Some commenters asserted that the timing of this notice is suspicious, and appears to coincide with alleged administration efforts to circumvent Congress on Federal agency appropriations and authorizations, cripple unions, remove Federal employees via proposing drastic agency budget cuts, and impose “absurd” new Federal workplace policies such as restricting telework.

The proposed regulations simply implement the requirements of E.O. 13839, along with the PMA and the objectives of M-17-22. There is no correlation between the timing of the notice and any budget or other administrative process.

Some commenters stated that reform to the civil service system has long been necessary, but that this proposed rulemaking is the wrong approach. A commenter stated while reform is needed, the approach must be fair. Further, an organization asserted that loosening adverse action standards, as demonstrated by a recent non-title 5 statute for Federal employees and “simply making it procedurally easier to fire employees does not in practice improve the overall efficiency of the Federal service.”

Commenters including labor organizations generally expressed concern that these changes, separately and together, would weaken or vitiate the procedural rights or protections of Federal employees. One commenter asserted that, at a time when protections for Federal workers should be strengthened, this proposed rule weakens protections. Many national unions, organizations and individual commenters expressed a desire to remain under the current system with its existing protections, citing too much power being given to managers and supervisors with no corresponding accountability, at the cost of destroying a properly functioning workforce. They argued that the changes would substantially make the Federal government an “at will” employer.

Another commenter observed that checks and balances are at the core of a functioning democracy and requested that we not tear down those attributes by implementing this “archaic” rule. Moreover, an organization stated that removing protections that ensure that such actions are warranted does not promote an efficient, professional and productive Federal workforce. It instead, they argue, takes the Federal civil service steps closer back to the spoils system, and thus is a “big step in the wrong direction.” Further, an organization opined that this administration’s approach of undermining due process protections is the wrong path to reforming government if the

goal is to improve the performance of services to the American people. This organization posited that if the goal is to dismantle the civil service, reduce the number of Federal employees by violating due process rights, and increase discrimination, harassment, and retaliation in the workplace, these changes will have the desired effect. A commenter remarked that OPM should not forget that procedures were set in place to protect an employee from retaliation or from being removed for arbitrary reasons.

Citing specifically the Civil Service Reform Act of 1978 (CSRA), a national union intimated that the proposed rule would permit agencies to act without meaningful review and that Federal employees would receive only lip-service to due process and stated that it was not the purpose of the CSRA to bring about such results. This national union asserted that instead the heart of the CSRA was the desire to balance the needs of an efficient government with due process and fundamental fairness for Federal employees. The national union stated that the proposed regulations upset this balance and stated that they should therefore be abandoned. A commenter also stated that the proposed regulations seem “anti-union” and “just unfair” and that the proposal “is an attack on Federal Employees.” Another commenter endorsed the importance of unions and stated that these regulations are another attempt to take union rights away.

An organization declared that one of the fundamental principles of this civil service system is due process for Federal employees and the “for cause” standard for termination. This organization further observed that due process protections in the civil service system are the most significant difference between most non-unionized private employees, who are at will, and most Federal employees, who can only be removed for cause. The organization additionally stated that the basic principle of due process is

derived from hundreds of years of our nation's civil service experience, which has shown that the best way to avoid nepotism, discrimination, and prohibited personnel practices is to ensure that Federal employees can be removed only for cause. National unions and commenters further stated that Congress created a comprehensive scheme to rectify past issues of arbitrary and discriminatory punishments against Federal workers and asserted that the proposed regulations weaken those protections. The organization further stated that preserving the rights of Federal employees is essential to furthering the principles of the civil service, merits system and continuous service, and it does not believe that the proposed regulations accomplish the goals of a fair and merit-based civil service.

Another commenter stated that OPM should understand that there is a foundation for the appeals process and requested that OPM not create a different problem by solely focusing on what could be summarized as opening up punishment without the process, review, or oversight that is due. One commenter stated that it is important for OPM to understand that anything that limits due process for employees is "a dangerous, slippery slope." The commenter stated that it is imperative that we have a strong due process system for Federal employees and a check-and-balances system so that supervisors with perverse incentives cannot act unilaterally. Another commenter expressed that the proposed rule was poorly drafted and an affront to the Federal workforce, citing that it does not meet the standards of due process.

We disagree with commenters' assertions that the regulation is not consistent with the rights and duties that the CSRA prescribes and removes procedural rights. Consistent with E.O. 13839, the rule streamlines adverse actions and appeal procedures, but without compromising constitutional Due Process rights. The remaining statutory and regulatory

procedures for the Federal workforce meet and exceed constitutional requirements. Employees will still receive notice of a proposed adverse action, the right to reply, a final decision and a post-decision review of any appealable action, that is, what the Constitution requires. But further, they retain their right to a full-blown evidentiary post-action hearing as well as judicial review. In fact, they retain a host of choices of avenues of redress. Further, we disagree with the many national unions, organizations and individual commenters who expressed that the regulation changes would substantially make the Federal government an “at will” employer. As discussed above, the rule does not remove constitutional Due Process rights or statutory or regulatory procedures. Thus, Federal employees are not deemed at will as a result of the rule. Further, the rule promotes fair and equitable treatment of employees through its provisions. The proposed regulations encourage managers to think carefully about when and how to impose discipline and to consider all relevant circumstances including the best interests of all employees, the agency’s mission, and how best to achieve an effective and efficient workplace when making decisions. The rule is intended to clarify the requirements in chapter 43 and chapter 75 of title 5 of the United States Code and to make sure that employee conduct and performance that are inconsistent with a well-functioning merit-based system are addressed promptly and resolutely. Therefore, the proposed rule will not “upset” the balance between efficient Government and employee protection as one commenter stated; it will restore it.

We also disagree that the proposed regulations take away union rights. Although the proposed regulations may result in limiting collective bargaining on certain matters of elevated importance to the President and OPM, similar to the impact any other

Government-wide rule may have under 5 U.S.C. 7117, the regulations do not change the rights and duties afforded to labor organizations in 5 U.S.C. chapter 71. The President has determined that these limitations are necessary to make procedures relating to performance-based actions and adverse actions more efficient and effective and has directed OPM to issue a Government-wide rule consistent with this imperative.

Additional commenters contended the rule removes protections against retaliation. National unions and other commenters voiced concerns that the proposed rule can have the impact of employees being disciplined or removed for whistleblower activity. A national union stated that Federal employment is deeply engrained with policies that promote efficiency and high-quality performance, while also protecting employees from arbitrary and discriminatory actions by supervisory and managerial personnel. The national union, citing a Merit Systems Protection Board (Board) study, stated that Congress has implemented safeguards to ensure Federal employees are “protect[ed] from the harmful effects of management acting for improper reasons such as discrimination or retaliation for whistleblowing.” This union stated that the proposed regulations will weaken protections for Federal employees and create a system that gives wide discretion to agencies to take punitive action against employees, regardless of whether that action is inequitable or discriminatory. Another commenter asked what the recourse is for someone who is harassed or mistreated and cannot report it to someone.

We disagree with the commenters’ suggestions that the proposed regulation will have the impact of employees being disciplined or removed for whistleblower activity. OPM is prohibited from waiving or modifying any provision relating to prohibited personnel practices or merit system principles, including continuing prohibitions of

reprisal for whistleblowing or unlawful discrimination. The regulations therefore do not modify these protections in any way. The commenters' apprehensions about the rule diminishing or removing protections against retaliatory action are not supported by the language of the rule itself. In fact, the rule reinforces the responsibility of agencies to protect whistleblowers from retaliation. These requirements are significant because of the essential protections they provide. OPM's rule incorporates new requirements pursuant to 5 U.S.C. 7515 and assists agencies in understanding how to meet the additional requirements in connection with whistleblower protections. The rule helps to undergird and support agencies in meeting their requirements to take action against any supervisor who retaliates against whistleblowers.

An organization asserted that current statutes and regulations, if appropriately applied by agencies, provide more than adequate means to regulate the civil service in meritorious cases where disciplinary or performance action is warranted. This organization stated that the revisions in the proposed rule are based on the erroneous stereotype that it is difficult to fire Federal employees and asserted that this is not the case. The organization pointed to the Government Accountability Office report, "GAO-18-48, FEDERAL EMPLOYEE MISCONDUCT: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct and noted that (based on OPM's statistics) almost 1% of the Federal workforce is subject to adverse actions every year.

Arguments against the proposed changes based on alleged erroneous stereotypes concerning the challenges of removing employees disregard the objectives of E.O. 13839. OPM proposed these revised regulations, as required by E.O. 13839, in order to promote more effective and efficient functioning of the Executive Branch and to provide a more

straightforward process to address misconduct and unacceptable performance, which will serve to minimize the burden on supervisors. Potential misconceptions regarding removal of Federal employees do not eliminate OPM's need to implement the Executive Order by proposing changes that support the Order's goals.

Commenters, including a national union, stated that the proposed changes will allow for unchecked supervisory conduct and favoritism. A national union asserted that it is unacceptable for OPM to put forth proposed regulations that, in the union's view, prioritize such arbitrary conduct under "the phony guise of government efficiency and effectiveness to eviscerate the protected rights of employees." Commenters and national unions voiced concerns that the regulations will likely cause significant harm to employees. A commenter also stated that employees would have a constant fear of being removed over minor infractions. In another instance, a commenter observed that creating a "nebulous employee concern by threatening discipline and salary decreases," as the commenter asserts this proposal does, has a negative impact on good employees. Further, the national union argued that the proposed changes will not achieve any of the supposed benefits for the Government; instead, these regulations will allow good employees to be terminated and create a high turnover rate among Federal employees and will cost the Government extra money as Federal employees are exposed to the arbitrary whims of supervisory personnel.

Other commenters stated that the proposed streamlining effort places the power in the hands of agencies and leaves employees to be at the will of their agencies or at the very least opens the door to abuse of power, authority and the threat of coercion in the workplace. These commenters expressed the view that, currently, inherent checks and

balances through established practices, peer review, and multistage discipline expose decisions to “ridicule” if improper. Furthermore, commenters asserted that, given what they believe to be the vagueness of this rule, there is not enough limitation on the power of supervisors, and dedicated public servants can be removed for any reason, including politics. Commenters stated that the proposed rule “skews the rights towards management and away from employees who will have little recourse.” Asserting that unions were created to ensure employees are treated fairly and management follows the rules, a commenter questioned what will prevent the abuse of the new rule and who the new rule will protect. The commenter stated that because of the rule changes, unfairness will perpetuate, if not increase, alleged management ineptness. The results, they argue, will be that employees will leave Federal service or be removed without due process. One commenter stated that while changes to discipline and removals can be beneficial, the rule gives management more power to remove someone without just cause. Moreover, another commenter observed that any change to the current regulation will only foster the negative feelings that the commenter believes already exists between management and employees. This commenter expressed the viewpoint that these matters are compounded if one is a person of color and that “inclusion of all should be the goal not exclusion due to a difference no matter how perceived [which] is, in my opinion, another form of discrimination.” Further, another commenter voiced concern that it will be easier to remove Federal employees and that procedures that provide fair and equitable treatment will be stripped away, which will sow further distrust between employees and management and will unnecessarily create unforeseen problems.

In response to commenters that expressed concern about negative impact on good employees, OPM notes that addressing misconduct or poor performance in this fashion will enhance the experience of well-performing employees, because poor performing employees place a resource strain on more productive employees and damage morale generally. OPM further believes that the positive impact associated with more effectively and expeditiously addressing poorly performing employees outweighs any negative impacts.

Further, national unions and other commenters voiced concern that the rule would give rise to nepotism. National unions and other commenters stated that the proposed rule changes are based on an Executive Order issued by an administration that, in the view of these commenters, has openly stated its anti-union animus and disregard for the laws that govern and protect Federal workers. The commenters asserted that these laws were designed to put a halt to nepotism, discrimination and unfairness at all levels of Federal employment. This proposed rule, they conclude, conflicts with the letter and spirit of those laws.

Notwithstanding these assertions, the regulation does not permit unchecked supervisory behavior and favoritism, remove employee protections, or permit nepotism. The final regulation streamlines and simplifies performance-based actions and adverse actions without compromising employees' statutory rights and protections. The statutory protections for Federal employees remain in force and are not affected by the rule. Thus, the concern of many commenters that managers will abuse their authority as a result of the rule is unfounded. While commenters advocated for remaining with the current system, the proposed rule carries out the requirements of E.O. 13839.

Importantly, agencies continue to be responsible for holding managers accountable for proper use of their authority. Regarding the comments that the proposed rule impacts employees' rights and the role of unions, we believe the changes appropriately protect employee statutory rights while providing for efficient government operations. E.O. 13839 requires executive agencies (as defined in section 105 of title 5, U.S. Code, excluding the Government Accountability Office) to facilitate a Federal supervisor's ability to promote civil servant accountability while simultaneously recognizing employees' procedural rights and protections. In response to the comment that the proposed rule changes are based on an Executive Order issued by this administration which has openly stated its anti-union animus and disregard for the laws which govern and protect federal workers, we reiterate that the policy goals of E.O. 13839 are to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections. These are the policy goals underlying the rule. Notwithstanding the commenter's speculations regarding the intent of the rule, the rule changes adhere to legal requirements.

A national union stated that the need for employee protections has been put into "sharp relief" by actions of this administration which appear to target Federal employees. Commenters voiced opposition to the proposed rule because it allows employees to be fired for political reasons or other non-work-related facets of an employee. A commenter noted that "people died for union rights" and OPM should not take them away. Another commenter stated that the rule changes are "punitive" for employees and enable management to continue "bad behavior" that is arbitrary and without employee recourse. This commenter posited that if these issues were not a reality, unions would have no need

to exist. Commenters stated that scientists and civil servants most likely to face censure under this administration are those who render their professional opinions or follow scholarly findings and evidence-based reasoning and thus the expanded powers of the proposed rule in no way benefits the public.

OPM does not agree that the proposed regulations target employees in any manner. The final regulations streamline and simplify performance-based actions and adverse actions without compromising employees' statutory rights and protections. The statutory protections for Federal employees remain in force and are not affected by the rule.

The regulations also do not change the rights and duties afforded to labor organizations and agencies pursuant to 5 U.S.C. chapter 71. OPM believes that these changes are necessary to make procedures relating to performance-based actions and adverse actions more efficient and effective.

Some commenters voiced confusion and believe that the rule is another action by the administration to arbitrarily punish and dispense with Federal employees and union representatives in the name of "efficiency." Many commenters stated that the proposed rule will make it easier to remove employees who do not comply with the administration's views. In particular, one commenter stated the proposal was politically motivated and that the ability of elected officials with political motives to quickly terminate Federal employees leads to excessive influence and poor decision making. The commenter observed that it needs to be "hard" to remove a Federal employee so that they can "operate independently." Another observed that competent people do not deserve to lose their jobs "based on who's in power." A commenter stated that one of the hallmarks

of our current system is its freedom from political influence which could change under this proposed rule. One commenter proposed adding protections for those employees who do not comply with the administration and opined that the protections will prevent employees from inadvertently breaking Federal laws, help the American public, and prevent costly wrongful termination lawsuits. This commenter asserted that the rule creates openings for managers to wield political influence in the Federal workplace and to change the workforce to meet a personal or political agenda, rather than fulfilling the mission of the organization. Finally, the commenter stated that Americans deserve a politically neutral Federal workforce.

In response to these concerns, please see our earlier discussion regarding protections. The statutory protections for Federal employees remain in force and are not affected by the rule. In addition, the current and revised procedures are content-neutral; there is nothing in the changes that further permits or encourages the initiation of a personnel action based on an employee's opinion or viewpoint. All avenues of redress for employees remain unchanged by this regulation, and, should an employee believe that he or she is the subject of a prohibited personnel action, reprisal, etc., the employee remains able to exercise rights to appeal to the Merit Systems Protection Board (MSPB or Board), to seek relief from the Office of Special Counsel (OSC), etc.

A significant issue raised in the public comments concerns the proposed rule's fairness. Many commenters stated that the rule is unfair, fosters a toxic work environment, or weakens employee protections. One commenter stated that when there is "no equal fairness," work productivity will suffer and that OPM "should tread softly" regarding the proposed rule. Another commenter further stated that he has seen the

workplace be degraded and morale reduced because of vindictive approaches to employee relations and questionable policy changes at the expense of workplace engagement, performance incentives, and public health and welfare.

Additional commenters were of the view that the proposed rule is senseless and wrong, while another commenter stated that the rule is “morally questionable.” Many commenters stated that the proposed rule would seriously disrupt and remove all notions of fairness when Federal employees are subject to adverse actions or that the rule is “abhorrent.” Multiple commenters asserted that the proposed rule would foster disparate standards for application to both performance and conduct-based actions. They expressed a view that parts of the rule are merely confusing, while other parts appear to be designed to foster contentious labor relations, rather than resolving these issues in a cooperative and constructive manner. Commenters voiced concerns regarding fairness for those civil service employees who are veterans. Without providing specifics, a commenter stated this rule is very unfair to those individuals who served in the military and those who work as Federal employees. Still another commenter, again without giving a basis for the comment, voiced concerns regarding stripping away rights of those Federal employees who have served this nation and continue to serve and stated that those rights should be left alone.

As previously explained, we disagree that the proposed regulations take employee rights away or are unfair. Although we have made changes to the proposed regulations, statutes that guard against arbitrary actions remain intact. Additionally, protection of employee rights is an important element of fair treatment in the Federal workforce. The rule observes and is consistent with the merit system principles which state that

employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. The rule and the procedures contained therein apply to all employees equally.

All employees, including those who served in the military, and labor organizations continue to have the right to challenge or seek review of key decisions. Although we have made changes to the proposed regulations, procedural rights and other legal protections are preserved. Mirroring statutory requirements, the regulations continue to provide employees with notice, a right to reply, a final written decision, and a post-decision review of any appealable action. Bargaining unit employees continue to have the option to use negotiated grievance procedures over subjects otherwise not excluded while other employees continue to have the ability to utilize administrative grievance procedures. These regulations do not change the rights and duties afforded to labor organizations in 5 U.S.C. chapter 71. We believe these changes are necessary to make procedures relating to performance-based actions and adverse actions more efficient and effective. It is not clear what the concern is regarding the comment about “fostering disparate standards for application to both performance and conduct-based actions.” The statutory scheme in 5 U.S.C. chapter 43, Actions Based on Unacceptable Performance, and 5 U.S.C. chapter 75, Adverse Actions, are different and each establishes a distinct procedural process. The proposed regulations are consistent with the statutes that govern these actions. Regarding those commenters who expressed a view that parts of the rule are confusing, while other parts appear to be designed to foster contentious labor relations, rather than resolving issues in a cooperative and constructive

manner, we are not able to provide a response without specific reference to the parts of the proposed rule about which they are commenting.

National unions and other commenters asserted that the approval of the proposed rule will set the efficiency of the Federal service back several decades and contribute to what they assert are current issues concerning retention of stellar employees and recruitment in key agencies. Many national unions and commenters expressed considerable apprehension about the rule's impact on retention and recruitment of employees in the Federal government with an already dwindling workforce. Some commenters pointed out that the rule changes will undermine integrity and morale as well as hamper the recruitment and retention of a quality Federal workforce. Some commenters requested that OPM reconsider given the long-term ramifications that this rule would cause and the dire effects these commenters believe it would have on employee morale, retention, and recruitment. Other commenters stressed that the proposed rule would "wreak havoc" on the stability of the civilian workforce, lower morale, and create a hostile employee/employer relationship during a time when many agencies already suffer from personnel shortages.

We disagree that the rule will unfavorably impact the retention and recruitment of employees in the Federal government or undermine morale. The rule is not a plan for reducing recruitment or interfering with the retention of staff performing at an acceptable level. Rather, the rule carries out E.O. 13839 which notes that merit system principles call for holding Federal employees accountable for performance and conduct. E.O. 13839 finds that the failure to address unacceptable performance or misconduct undermines morale, burdens good performers with subpar colleagues and inhibits the

ability of executive agencies to accomplish their missions. Accordingly, the rule is intended to have a positive impact on the Federal government's ability to accomplish its mission for the American taxpayers.

More specifically, with respect to retention, commenters asserted that many talented individuals will not consider the Federal government as an employer and those individuals currently in the Federal government will look elsewhere for employment. Some commenters stated that many agencies have recently executed poorly planned office moves and other reorganizations which have resulted in employees leaving in disgust and a loss of institutional knowledge, accelerating employee losses from attrition. These commenters stated that poorly planned changes to Federal employee performance management such as those in the proposed rule will ensure similar results. One commenter further reflected that imposing damaging rules will make employee retention more difficult than in the private sector and that it will make serving Federal customers "challenging" because it is a known fact that "happy employees work harder." One commenter asserted that, with what the commenter described as "the hiring restrictions," the proposed rule will result in reducing the efficiency and strength of the Federal workforce as there will be mass attrition and mass migration away from Federal jobs to the severe detriment of all U.S. citizens who need Federal employees.

A commenter stated that the rule serves as additional evidence that the rights of thousands of Federal employees no longer mattered or are valued. Another commenter asserted that these changes are a direct attack on Federal workers and their livelihoods as these rule amendments only make it easier for management to punish arbitrarily and fire at will; the changes thus constitute a major blow to the prospect of the Government

becoming a desirable place to work again. Further, one national union stated that the proposed regulations will allow good employees to be terminated and create a high turnover rate in the Federal government.

A commenter also wrote that the commenter felt disrespected by efforts to remove existing benefits for Federal employees and that this rule may result in employees deciding that the private sector is a better option. A commenter remarked that bad treatment of employees will ensure the inevitable failure of our government.

The assertions that the proposed rule would adversely impact retention of Federal employees are incorrect and not supported by any data. The rule does not remove statutory procedural rights afforded to Federal employees and does not turn Federal employees into at-will employees. The rule does not change the protections of notice, an opportunity to reply, the right to representation, and the right to appeal to a third-party entity (and, eventually, the entity's Federal reviewing courts). The rule clearly acknowledges the ongoing obligation of Federal employers to provide statutory safeguards to their workforce. It therefore should be evident from the rule that the Federal government remains committed to practices of fair treatment for employees. In fact, the rule promotes processes that help agencies retain employees who are performing acceptably and efficiently remove those who fail to perform or to uphold the public's trust.

Commenters also raised concerns about recruitment of talented individuals into the Federal workforce. A commenter stated that, although the existing system may have been overly generous to employees, the proposed changes are so "draconian" as to discourage "our best young people" from wanting to serve their country in Federal civil

service. Another commenter asserted that it was hard to believe that the proposed rule would have a positive impact on the Federal government and that “adding a ‘lifetime at will’ line to the contract after the first year will not attract the best and brightest”.

Further, a commenter stated that it is deeply troubling that it will be easier to remove Federal employees and that procedures that provide fair and equitable treatment will be stripped away, which would result in attracting a less qualified pool of applicants.

Additionally, with respect to recruitment, another commenter stressed that the role of a government employee is unique and the individuals occupying these roles hold specialized and institutional knowledge not common in private enterprise. This commenter went on to state that if the basic protections of Federal employment are removed, so will be any incentive for individuals to seek and apply for government jobs, an impact that may be hard to overcome or reverse. Another commenter asked what skilled persons would work for the Government if they knew they could be disciplined or fired abruptly for very little or no reason at all, and the commenter further stated that we need those who are skilled to perform the functions of the Federal government.

OPM disagrees that the rule will have an adverse effect on recruitment of talented individuals to the Federal government. Maintaining high standards of integrity, conduct, and concern for the public interest, as enumerated by the merit system principles, and furthered by the rule, only serves to help agencies to deliver on their mission and on providing service to American people. It is thus reasonable to conclude that adherence to these standards will contribute to successful recruitment efforts for the Federal workforce.

Referring to the probationary period in relation to recruitment, a national union stated that in certain regions, the Government experiences challenges in recruiting and retaining first responders. The national union added that the Government provides initial training and certification to new employees to help fill much needed positions. The national union further stated that under the proposed regulations, employees who must complete a two-year probationary period upon appointment could be terminated based on their supervisors' assessment that they cannot adequately perform the job duties. The national union asserted that the proposed regulations will result in the Government losing their investment in highly skilled workers and continuing to struggle to fill essential first responder positions, leaving government personnel and property more vulnerable to emergencies.

The rule does not change the procedures for terminating a probationer's appointment; it merely requires that agencies notify supervisors to make an assessment of the probationer's overall fitness and qualifications for continued employment at prescribed timeframes before the conclusion of the probationary period. Current regulation, as reinforced by E.O. 13839 and previous OPM guidance, already provides that an agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment. See 5 CFR 315.803(a).

In response to the comment regarding expenditure of agency resources associated with terminations in year two of a probationary period, OPM believes that while a termination in the second year of a probationary term represents a loss of value from significant agency expenses, it would be more wasteful to retain the individual past the

probationary period, allow him or her to acquire career status (and adverse action rights), and then be forced to pursue a formal performance-based action or adverse action to remove an employee who had proven to be unable to perform the duties of the position in an acceptable manner even before those rights accrued.

One national union stated that the proposed changes are unsupported by the facts and are likely to have an overall negative effect on government operations by reducing due process for Federal employees and increasing arbitrary and capricious agency conduct. This national union stated that what they described as “the so-called” Case for Action that OPM sets forth at the beginning of the proposed regulations is not grounded in fact. The national union further stated that OPM looks to the Federal Employee Viewpoint Survey (FEVS), which is a subjective survey of employee perceptions. That union further claims that, although “a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance,” the evidence actually shows that, far from failing to adequately address poor performance, Federal agencies routinely take actions against employees based on allegations of misconduct or poor performance and that those actions are almost always upheld. The national union stated that when cases are not upheld by the Board, this small number of cases is not a failure of the system but rather an example of the system working effectively in a manner that fosters merit system principles. The national union also pointed out that given the reasons on which each reversal was based, the proposed regulations will not avoid or eliminate similar outcomes in the future. The national union asserted that OPM’s contention that “interpretations of chapter 43 have made it difficult for agencies to take actions against unacceptable performers and to have

those actions upheld” is thus demonstrably untrue. The national union argues, therefore, that changes proposed by OPM to 5 C.F.R. part 432 are unwarranted. It further stated that the above-referenced case outcomes are neither anomalous nor confined to performance-based actions. The national union further expounded on its point and stated that, going back to fiscal year 2016, the Board’s Annual Report for Fiscal Year 2016 statistics continue to demonstrate that agencies are, in fact, overwhelmingly successful in taking actions based on misconduct or performance. Consequently, this national union stated that The Case for Action that OPM purports to make is illusory.

OPM disagrees with the union’s discounting of OPM’s reliance upon FEVS statistics. E.O. 13839 asserted that the FEVS has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. OPM believes that this statistic is particularly relevant to the intent of E.O. 13839 and thus to the changes proposed in these regulations. Merit system principles state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. They further state that employees should be retained based on the adequacy of their performance, that inadequate performance should be corrected, and that employees should be separated who cannot or will not improve their performance to meet required standards.

With respect to the frequency with which agencies prevail at the Board, we do not believe any such success makes the rule changes unnecessary. As previously discussed, even if this phenomenon is real, statistics surrounding rate of actions being sustained does not obviate the need to improve the effectiveness and efficiency of the process. These

regulations carry out E.O. 13839 to facilitate a Federal supervisor's ability to promote civil servant accountability while simultaneously recognizing employees' statutory procedural rights and protections. They clarify procedures and requirements to support managers in addressing unacceptable performance and promoting employee accountability for performance-based reduction in grade, removal actions and adverse actions.

Another national union also discussed The Case for Action, arguing that the rule weakens civil service protections and that it relies upon a premise, as its central argument, that it is too hard to fire Federal employees. The union, without evidence, opined that underlying that premise is the belief that more employees need to be fired. It also noted that while OPM relies upon the FEVS, where a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance, OPM does not cite responses to specific FEVS questions that support this statement. The union goes on to cite responses in 2018 to two FEVS questions: Question 23 – "In my work unit, steps are taken to deal with a poor performer who cannot or will not improve" and Question 25 – "Awards in my work unit depend on how well employees perform their job." The union gave the percentages of the total respondents who either disagreed or strongly disagreed with these statements and noted that this did not constitute a majority of responders. They also noted that a large percentage of respondents strongly agreed or agreed that they were held accountable for achieving results and felt that the overall quality of their unit's work was good to very good. According to the union, in general, respondents see themselves and others in their work units as being held accountable and performing well, while

perceiving that others are not. Additionally, the national union asserted that OPM has “simplistically” cited FEVS data and not followed OPM’s own advice, which cautions, on the page titled "Understanding Results," that the survey results do not explain why employees respond to questions as they do and that survey data should be used with other data to assess the state of human capital management.

OPM believes that the union’s reliance and characterization of the FEVS data for 2018 is inadequate to dismiss The Case for Action. While the national union asserts that OPM is “simplistically” citing FEVS data, it appears the national union may be doing this to support its own position. As explained in E.O. 13839, the FEVS has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. As noted in OPM’s FEVS Governmentwide Management Report for 2019, this continued a five-year trend of reporting concerns about the manner in which poor performance is addressed. From 2015 to 2019, as few as 28% and as many as 34% of employees believed that steps are taken to deal with poor performers in their work unit. Additionally, the FEVS is only one of the several foundations presented in The Case for Action. Merit system principles are referred to in The Case for Action as the basis for holding Federal employees accountable for performance and conduct. Merit system principles state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. They further state that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees who cannot or will not improve their performance to meet required standards should be separated. Also, the PMA is a key

component of The Case for Action. The PMA recognizes that Federal employees underpin nearly all the operations of the Government, ensuring the smooth functioning of our democracy. Further, The Case for Action sets forth that prior to establishment of the PMA, the memorandum M-17-22 called on agencies to take near-term actions to ensure that the workforce they hire and retain is as effective as possible. More recently, E.O. 13839 notes that merit system principles call for holding Federal employees accountable for performance and conduct and found that failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues and inhibits the ability of executive agencies to accomplish their missions. Finally, the union's reliance on how often agencies prevail in employee appeals before the Board is undermined by the FEVS data which shows that a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance. In fact, OPM did not state that these regulatory changes are related to how often agencies win or lose before the Board. How often agencies prevail on cases that are actually appealed to the Board is not relevant to why OPM proposed these changes.

One commenter asserted that OPM does not state that it has done a Federal workplace root cause analysis to justify the proposed rule, and that, instead, OPM cites a non-scientific FEVS based on subjective opinions. The commenter cautioned OPM that implementing the rule without such analysis can end up costing Federal agencies, although the commenter did not specify in what way there could be a cost to Federal agencies. Another commenter criticized OPM's use of FEVS results to justify the need to support drastic changes to regulations. Other commenters stated that E.O. 13563 cited

within the proposed rule emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules and of promoting flexibility and that the proposed rule appears to do none of these things. Some commenters criticized the proposed rule because it does not include an assessment. Two commenters further asserted that OPM should have provided an analysis of the costs and benefits anticipated from the regulatory action as well as an analysis of alternatives. The commenters stated that this omission is especially problematic in light of the Preamble on page 48794 of the Federal Register notice of the proposed rule, which “recognizes that federal employees underpin nearly all the operations of the Government, ensuring the smooth functioning of our democracy.” The commenters stated that, because the proposed rule is a “significant regulatory action” under E.O. 12866, OPM must assess the potential costs and benefits of the regulatory action. In addition, the commenters opined that, in addition to this status as a “significant regulatory action,” the proposed rule should also be considered “economically significant.” In the commenters’ view, it is likely to have an annual effect on the economy of \$100 million or more unless OPM can certify that Federal departments and agencies will use the rule to expedite adverse actions of fewer than 1,000 full time equivalents (FTEs) Government-wide. As the basis for this estimate, the commenters stated, “For example, the Proposed Rule would have an effect of \$100 million, such as cost savings, if it would lead to job losses of at least 1000 full-time equivalent employees earning approximately \$100,000 per employee in salary and benefits. The average salary for federal employees, excluding benefits, was \$84,558, according to OPM FedScope data for Sept. 2018 (most recent available data). . . . For example, IRS employees have an average return on investment of at least \$2 in revenue

collection per \$1 on enforcement staff costs, according to GAO-13-151. SSA employees performing certain eligibility reviews have an estimated return on investment of \$15 in savings per \$1 on staff costs, as noted in GAO-16-250. Similarly, productivity changes could result from other federal employees, including auditors, investigators, and inspectors general with returns on investment for taxpayers and effects on the economy. However, the rule does not assess costs and benefits and does not present or analyze alternatives.” The commenters asserted that the rule is likely to have “an annual effect” of at least \$100 million in terms of direct and indirect costs. In the view of the commenters, direct costs include appeals and litigation among other costs and indirect costs include productivity changes and secondary effects such as economic multiplier effects. The commenter did not further explain what is meant by “economic multiplier effects.”

We disagree that the proposed rule does not assess costs or reflect benefits that will be conferred, that there is a requirement for the proposed rule to present or analyze alternatives and that there is a requirement to conduct a root cause analysis. In The Case for Action, the proposed rule presents the costs and benefits in numerous instances. We discuss that in the FEVS, a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance. We refer to the PMA and its call for agencies to establish processes that help agencies retain top employees and efficiently remove those who fail to perform or to uphold the public’s trust. The Case for Action considers, as well, M-17-22 which notably directed agencies to ensure that managers have the tools and support they need to manage performance and conduct effectively to achieve high-quality results for the American

people. As explained in The Case for Action, the changes to the regulations are proposed to implement requirements of E.O. 13839, the vision of the PMA and the objectives of M-17-22. These proposed changes not only support agency efforts in implementing E.O. 13839, the PMA and M-17-22, but also will facilitate the ability of agencies to deliver on their mission and on providing service to American people.

Noting that merit system principles call for holding Federal employees accountable for performance and conduct, OPM also observed that the merit system principles require that employees should maintain high standards of integrity, conduct and concern for the public trust, and that the Federal workforce should be used efficiently and effectively. Similarly, OPM explained that the merit system principles provide that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards. Ultimately, as covered in The Case for Action, these changes support both the merit system principles and the President's goal of effective stewardship of taxpayers' money by our government. Thus, costs and benefits associated with the proposed rule are assessed in The Case for Action.

We disagree with the commenters' assertion that the proposed rule should be considered "economically significant" because it is likely to have an annual effect on the economy of \$100 million or more, unless OPM certifies that Federal departments and agencies use the proposed rule to expedite adverse actions of fewer than 1,000 full time equivalents (FTEs) Government-wide. The commenters assume incorrectly that the Federal government will remove a certain number of FTE positions in one year without any basis for arriving at that figure. Furthermore, in response to the commenters'

discussion of direct costs in the form of appeals and litigation, there is nothing to indicate that the changes pursuant to the regulations will in any way increase the number of formal disputes generated rather than make the process more efficient which will actually save the government money. The indirect costs put forward by the commenters include “productivity changes and secondary effects such as economic multiplier effects.” To reiterate, the supposition that the proposed rule would have an annual effect on the economy of \$100 million or more unless OPM certifies that the proposed rule would be used to “expedite adverse actions” of fewer than 1,000 FTEs is not based on any reasonable, objective criteria. OPM is unable to fully respond to these comments since the commenter did not explain the basis for their assertions.

Another individual commenter wrote that the proposed rule is a good idea but questioned whether the timeframes were realistic for management to meet, noting that adverse actions and performance-based actions require review and input from several offices in an agency and that coordinating these moving pieces is often a large part of why actions take so long. The commenter asked, “Is it really only the case that when there’s a deviation from the timeframes, the agency reports it to OPM and moves on? What are the consequences?” This commenter also requested that we clarify the extent to which the proposed rule applies to non-executive agencies and employees.

Although the commenter did not refer to a particular section, we surmised that the commenter is referring to § 752.404(b) of the rule which provides that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under subpart D to the 30 days prescribed in 5 U.S.C. 7513(b)(1). Any notice period greater than 30 days must be reported to OPM.

Regarding whether the timeframe is realistic, the provision stipulates that it is required only “to the extent an agency . . . deems practicable.” As to what consequences will ensue for departure from the time period prescribed, the rule provides only for a report to OPM. Finally, in response to the commenter’s question as to the extent to which the proposed rule applies to non-executive agencies and employees, those agencies covered by title 5 are enumerated in 5 U.S.C. chapter 1.

A national union critiqued the requirement for agencies to collect data about disciplinary, performance and adverse actions taken against probationers and employees as burdensome because it appeared to the national union to be intended to serve no purpose other than to encourage agencies to take such actions. The union averred that adverse personnel actions should be a last resort, not a primary tool for human resource management and that the rule will only discourage the public from pursuing government careers. Yet the overall, unfounded theme of these regulations, according to the union is that more Federal employees need to be fired more quickly. The union stated that OPM cites no authoritative data or studies to support this notion and that no reputable private sector employer publishes attrition or termination data for the obvious reason that it would send the message to prospective applicants: "You don't want to work here." The union surmises that perhaps that is the point of the data collection requirement.

The union recommended that instead of collecting data on punitive measures, data should be collected on agency efforts to improve the skills and performance levels of their workforce, such as the number of employees who successfully completed their probationary periods and the number of employees who successfully completed a performance improvement period. This union highlighted that much is invested in

recruiting and training employees, and if the government wants to portray itself as a welcoming workplace, it should place the emphasis on securing a return on that investment.

The data collection requirement in the rule's preamble carries out E.O. 13839 to enhance public accountability of agencies. It is not a signal to prospective candidates for employment to refrain from joining the Federal workforce. Also, private employers do not have the responsibility to be accountable to the public in the same way as the Federal government.

Some commenters stated that in addition to the issues concerning the legal and technical substance of the rule, there appear to be procedural issues as well. These commenters took objection to the preamble to the rule stating that the rule will not include new regulations to codify the "Data Collection of Adverse Actions" section of the guidance issued by OPM on July 5, 2018, and instead, OPM will issue reminders each year. The commenters asserted that this is a circumvention of requirements for transparent government, and that they believed OPM must issue rules for Federal agencies to comply with, rather than "conducting business and issuing directives behind closed doors, eroding the public's trust rather than building on it."

We disagree with the argument that OPM must outline data requirements in this rule and that not doing so is a circumvention of requirements for transparent government. The data collection requirements are transparent because they are outlined in the publicly available E.O., and OPM's guidance documents to agencies are typically posted on a public Government website.

5 CFR Part 315, Subpart H – Probation on Initial Appointment to a Competitive Position

Section 2(i) of E.O. 13839 provides a probationary period should be used as the final step in the hiring process of a new employee. Supervisors should use that period to assess how well an employee can perform the duties of a job. A probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to an agency before the candidate's appointment becomes final.

OPM proposed an amendment to 5 CFR part 315.803(a), which would require agencies to notify supervisors that an employee's probationary period is ending, at least three months or 90 days prior to expiration of the probationary period, and then again one month or 30 days prior to expiration of the probationary period, and advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action.

Pursuant to current OPM regulations, supervisors are currently required to utilize the probationary period as fully as possible to determine the fitness of employees and further required to terminate the services of a probationary employee if they fail to fully demonstrate qualifications for continued employment. Supervisors choosing to terminate a probationary employee under the procedures outlined in Part 315 must do so affirmatively prior to the conclusion of the probationary period, while an employee is permitted to continue employment following probation merely on the basis of the supervisor's *not* taking action. Nevertheless, and at the heart of this proposed regulation is the fact that supervisors actions or omissions determine whether a probationary employee is retained or terminated in each and every instance. The proposed rule simply

reminds supervisors of their responsibility to make an affirmative decision and not allow a probationer to become a career employ merely by default; it does not alter the decision-making process nor does it in any way alter the regulatory structure currently in place that governs the decision-making process.

An agency suggested that OPM amend the proposed rule to change the 90-day and 30-day notification periods to calendar days for clarity. The same agency suggested that agencies may need to develop stand-alone technology solutions for making supervisory notifications because of the lack of Government-wide or even department-wide technology solutions and capabilities. This agency recommends that OPM account for the time it may take for agencies to develop such automated solutions into any implementation timeframes.

OPM agrees that further clarification with respect to the notification periods would be helpful. We have modified the proposed language to require agencies to notify supervisors three months and one month in advance of an employee's expiring probationary period. For example, if an employee's probationary period is due to expire on June 19, 2020, the three-month notification would occur on March 19, 2020, and the one-month notification on May 19, 2020. OPM has updated the final rule accordingly. Agencies have the discretion to determine the method for making supervisory notifications, but OPM encourages agencies to use existing automated tools, to the extent practicable, to comply with the notification requirement.

Two management associations supported the proposed rule, citing reports issued by the MSPB and the Government Accountability Office (GAO) that highlight Government's inconsistent and poor use of the probationary period for new hires and for

new supervisors. These organizations also emphasized the importance of the effective use of probationary periods for both new supervisors and executives.

With regard to the assertion that probationary periods are handled poorly or inconsistently, these concerns are addressed in the current language of the regulation, in part, by encouraging full utilization of probationary periods which allows for effective review of employee fitness for a position and through the 90- and 30-day reminders in the amended regulation which serve both to promote consistency in this process and promote accountability by requiring that agencies affirmatively determine employee fitness rather than making such decisions through inaction. Also, the proposed rule does not impact supervisory or executive probationary periods, which are regulated at subpart I of 5 CFR 315 and subpart E of 5 CFR 317, respectively.

A management association supported the proposed rule and commented that some agencies have cumbersome and time-consuming review processes which make the 90-day notification period ineffective. This organization suggested OPM add a 180-day notification period with 90- and 30-day follow up periods. OPM is not adopting this suggestion. OPM believes the proposed intervals (three months and one month) before expiration are sufficient. Agencies may adopt more frequent reminder periods if they choose to do so.

One agency supported the proposed rule noting that it may make managers and supervisors more aware of probationary deadlines, thus preventing them from waiting until the last minute to decide whether an employee is fit for service beyond the probationary period, and requiring them to better utilize the probationary period. The agency also noted the proposed rule creates a new procedural technicality for agencies to

overlook, and noted that inconsistent notification methods may be problematic across agencies. This agency suggested OPM clarify that an agency's failure to notify supervisors at the proposed intervals does not give the employee any additional appeal rights with respect to probation.

OPM believes such an amendment to the regulation is unnecessary. The one- and three-month notification represents an administrative tool to be utilized internally by agencies to promote efficiency and accountability; it is not intended to, and does not, expand or otherwise impact procedural rights of probationary employees. An agency's non-compliance with these requirements does not give the employee any additional appeal rights beyond those an employee may already have. The procedures for terminating probationers for unsatisfactory performance or conduct are described in § 315.804 and those procedures are unaltered by the changes here.

Despite some support for the proposed rule, OPM received comments from many who expressed opposition and concern. One individual opposed the rule because it does not specify a timeframe within which a supervisor must respond to the employing agency with a decision on whether a probationer should be permanently employed. This individual also commented that the proposed rule change did not provide an avenue for an employee to address an untimely notification from his or her supervisor as to his or her continued employment. Finally, the commenter noted that the proposed rule does not specify any consequences for a supervisor who fails to make a timely notification to the employing agency.

The proposed rule implements Section 2(i) of E.O. 13839. This section provides that a probationary period should be used as the final step in the hiring process of a new

employee. This is consistent with OPM's longstanding approach, is supported by judicial decisions, and is also in accord with MSPB's oft-stated guidance urging supervisors to use the probationary period to the fullest possible extent. See, for example, "The Probationary Period: A Critical Assessment Opportunity" (2005) and "Navigating the Probationary Period after Van Wersch and McCormick" (2007). E.O. 13839 also encourages supervisors to use that period to assess how well an employee can perform the duties of a job. E.O. 13839 does not discuss when a supervisor should notify his or her employee of the supervisor's decision pertaining to the employee's continued employment. OPM defers to the employing agencies as to the frequency, timing, and method of supervisor-employee communications. OPM also defers to agencies in terms of how to address supervisors who fail to make timely decisions regarding their probationary employees, thus creating the potential for the retention, at least in the short run, of an employee unfit to perform the duties of the position and the imposition of additional burden if the agency determines to attempt to remove the employee through a performance-based or adverse action.

Another individual was concerned that the 90-day and 30-day period reminders would cause managers to second guess their hires. The commenter believes that a manager should know what the options are if there are issues within the first year of the employee's appointment and should not need a reminder. OPM disagrees with this comment. The purpose of the proposed rule is to encourage supervisors to make more effective use of the probationary period. The probationary period is the final, evaluative stage in the examining process, not a period to "second guess" new hires. The three-month and one-month notification reminders are designed to help supervisors take full

advantage of the probationary period in order to make informed decisions about whether to retain an individual in the agency's permanent workforce. The requirement also promotes accountability amongst supervisors by reminding them of their very important responsibility to assess employee fitness during the probationary period to ensure that public resources in the form of FTEs are being utilized smartly and efficiently.

An agency asked whether OPM foresees any negative impact related to the ability of an agency to terminate probationary employees if the agency fails to notify supervisors both at the 90-day and 30-day mark that an employee's probationary period is ending, and the supervisor fails to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action.

OPM does not foresee non-compliance with this notification requirement having this unintended effect. As explained previously, the proposed language is an internal administrative requirement intended as a reminder to supervisors to make timely determinations regarding probationary employees. It is not intended, however, to modify the current performance assessment process, change the manner in which a supervisor makes such a determination, or to otherwise bestow any additional rights upon probationary employees. Should an agency decide to issue a termination of an employee during the probationary period, the agency will still rely upon the same assessment pursuant to 5 C.F.R. § 315.804 regarding adequacy of employee performance and conduct.

The same agency commented that an assessment of the capability of existing automated tools, or some other method for notification to supervisors that probationary periods are ending is required to ensure consistent and efficient compliance with this

regulation. Agencies have the discretion to determine the method for making the notifications to supervisors. OPM encourages agencies to use existing automated tools to facilitate timely and consistent notification and understands that, for agencies that do not have this current technical capacity, there will be a need to take steps to implement a reliable system in a timely manner. The proposed rule does not, however, require the use of automated tools.

One individual commented that the proposed rule places probationers in limbo by requiring a supervisor to provide an affirmative determination for continued employment beyond the probationary period. In addition, this commenter noted the proposed rule does not address situations (or penalties) for supervisors who fail to make a determination either positively or negatively with respect to the determination and noted a lack of fairness because of this.

OPM disagrees with these comments. The proposed rule does not require supervisory determination for continued employment. The proposed regulation requires agencies to remind supervisors of their obligation to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action. Supervisors who let the probationary period lapse without consideration of the probationary employee for continued employment run the risk, in the short run, of having to retain poor performers or employees otherwise inadequately suited to perform the duties of a job. This failure to act will also have the effect of increasing the burden on the agency if it later seeks to remove the employee through performance-based or adverse action procedures. However, as explained earlier, it is within the discretion of each agency how they choose to address any such non-compliance.

Two individuals commented that OPM has not addressed why the current one-year probationary period is insufficient to assess employee effectiveness. These commenters recommended that instead of extending the probationary period, OPM should leave the current probationary period in place and encourage management to make better use of this period.

OPM disagrees with these comments, because the commenters have misunderstood the proposed rule. The rule does not seek to modify the length of the probationary period on initial appointment to a competitive position (currently established as one year in § 315.801). The rule seeks to encourage agencies to fully utilize the current probationary period by requiring agencies to notify their supervisors three months and one month prior to the expiration of an employee's probationary period of their obligations to make an assessment as to whether the employee should be retained beyond the one-year probationary period.

Seven national unions opposed the proposed rule, commenting that it requires supervisors to make a decision prior to the end of an employee's probationary period, thereby depriving an employee of the full probationary period during which the employee can demonstrate his or her fitness for continued employment. These unions stated that probationary periods are set in statute, and that there is no requirement or obligation on the part of an employee to seek a determination at the end of his or her probationary period. These organizations accurately note that the proposed rule does not address the status of an employee whose supervisor fails to make a determination for continued employment before the probationary period ends. For these reasons, these entities believe this requirement is deceptive and will worsen the Federal Government's hiring

and retention issues. Several members of one of the unions echoed the same concerns and added that it is improper for OPM to substitute its reasoning for that of Congress.

As a point of clarification, the length of a probationary period on initial appointment to a competitive position is currently established as one year in § 315.801, not statute. Nevertheless, the amended regulation does not mandate that a supervisory determination for continued employment take place at any particular time nor does it establish the 90- or 30-day benchmarks as the conclusion of a supervisor's assessment period. Rather, the rule merely requires agencies to remind a supervisor to make an affirmative decision regarding the employee's fitness for continued employment and take appropriate action. The supervisor may use this reminder to begin gathering materials or collecting his or her thoughts while still deferring the actual decision to the end of the probationary period. Thus, the rule does not prevent an employee from completing the entire one-year probationary period. OPM believes the proposed measures will improve the Federal Government's ability to hire and retain individuals more effectively than is currently the case. The intent is to avoid situations in which a probationer who is not fit for continued employment is retained because a supervisor was not aware of the probationary period expiration date. OPM trusts that commenters share the goal of providing the most comprehensive information possible to supervisors to enable them to make an informed decision that will ultimately best serve the public.

A national union commented that the revised regulation requires a supervisor to make an affirmative decision and thus for an employee to receive an affirmative decision for continued employment beyond the probationary period. This union suggested OPM clarify that the affirmative supervisory decision contemplated by the proposed rule has no

effect on whether an employee's probationary period has been completed, and also clarify that an employee is under no obligation to seek or obtain such an affirmative supervisory decision. Lastly, the union stated that if OPM is requiring agencies to notify supervisors in advance of the end of an employee's probationary period, OPM should also require supervisors to notify their employees. Similarly, a local union commented that there is no reason for a supervisor to provide an affirmative decision regarding an employee's fitness at the end of the probationary period. The union commented that employees will be harmed if a supervisor forgets to make an affirmative decision, and the proposed rule does not address the consequences of such an omission. The union also stated the proposed rule shortens the probationary period on their belief that supervisors must make an affirmative decision for continued employment 30 days before the end of the probationary period.

OPM disagrees with these comments. The rule does not require that a supervisor notify an employee or make an affirmative decision regarding an employee's fitness for continued service, nor does it require an employee to receive such a decision. The proposed rule requires agencies to notify their supervisors of the need to consider whether to retain probationers three months and one month prior to the expiration of an employee's probationary period. In addition, the proposed regulation requires an agency to advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment and take appropriate action in a timely manner to avoid additional burden. The proposed rule does not prevent an employee from completing the one-year probationary period.

Further, after completing a probationary period, with or without an affirmative supervisory determination, the individual becomes a non-probationary employee and attains appeal rights in accordance with 5 U.S.C. 7511. As noted above the proposed rule does not require an employee to receive an affirmative supervisory determination in order to complete the probationary period. Rather, the proposed rule requires agencies to advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action, so that the individual does not gain a career position solely by default.

OPM is not adopting the suggestion to require a supervisor to notify his or her employee of an expiring probationary period. The purpose of these rules is to improve communications between agencies and their supervisors with the aim of better utilizing the probationary period. This rule is not intended to modify or otherwise impact mechanisms for assessment of employee performance pursuant to part 432 and applicable agency policies.

Another national union strongly objected to the proposed rule, commenting that it is contrary to the goal of promoting public trust in the Federal workforce. The union went on to say that instead of using the probationary period to assess an employee's ability to perform the job, supervisors are encouraged to terminate probationers for any reason, simply because the probationary period is ending. The union also stated these rules facilitate agencies' ability to terminate probationers as well as permanent employees without providing them with an adequate opportunity to improve their performance.

OPM disagrees that the rule makes it easier for agencies to terminate probationary employees. Termination actions during the probationary period must be taken in

accordance with § 315.804 and the criteria for termination established pursuant to these regulations remains unchanged by the revised regulation. . OPM also disagrees with the union's comment that the proposed rule encourages agencies to terminate employees simply because the probationary period is ending. The purpose of the proposed rule is to assist supervisors in using the probationary period properly (i.e., as a period to determine whether an individual is fit for continued employment).

Another national union opposed the rule stating that it is unnecessary and that it sends the message that it is more important to terminate probationers than assist them with successfully completing their probationary period. The same union also commented that OPM should address the consequences of when an agency fails to notify the supervisor at the 90- and 30-day marks, and whether this situation creates a potential defense for a manager faced with a disciplinary or performance-based action for being a poor manager.

OPM disagrees with the assertion that supervisory notification is unnecessary and the suggestion that this rule sends a message that supervisors should terminate probationers rather than assist them in improving their performance. The message this change sends is that supervisors should fulfill their responsibilities by affirmatively making a determination as to the fitness of a probationary employee. It does not encourage supervisors to make any particular determination including to terminate an employee. Instead, it prevents instances where a supervisor may make a decision by default, where the probationary period lapses due to a lack of awareness of the end of the period. Supervisors who allow the probationary period to lapse without consideration of the fitness of the probationary employee to perform the duties of the position create a risk

of retaining poor performers or employees otherwise inadequately suited for their position. This outcome benefits neither the agency, the employee nor the public.

Several individuals who identified themselves as members of one of the national unions commented that the proposed rule is deceptive and or confusing in that it requires an employee to receive an affirmative supervisory determination in order to complete the probationary period, despite no statutory requirement for such a determination. The commenters suggested the proposed rule be eliminated or corrected to avoid confusion. They disagreed with the need to require a separate, affirmative supervisory approval before an employee is found to have completed his or her probationary period and noted there is no obligation on the part of the employee to seek supervisory approval. One of the individuals added, "The confusion between this rule and the statute will do nothing but create problems." Another added, "The end of a time period is the end." One of the union members stated that since probationary periods are controlled by statute, it is confusing to require supervisory determination.

OPM disagrees with any notion that the proposed rule is deceptive and notes that the probationary period for initial appointment to a competitive position is established in regulation at § 315.801. The amended regulation does not require an employee to receive an affirmative supervisory determination in order to complete the probationary period nor does it require a supervisor to take any action that they are not already required to take. The rule requires agencies to notify supervisors three months and one month prior to the expiration of an employee's probationary period, and to advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action. The purpose of this language is to serve as a reminder

to supervisors that an employee's probationary period will be ending soon, and of the need to consider whether the employee is fit for continued employment beyond the end of the probationary period. Thus, the communication is between the agency and the supervisor, not the supervisor and employee. It is an internal management matter that is not intended to, and does not, confer rights on probationary employees if a supervisor fails to heed this reminder. OPM is not adopting the suggestion to eliminate or amend the proposed rule because it does not conflict with or otherwise alter the statutory or regulatory authority pertaining to probationary periods. OPM is also not adopting the suggestion to require a supervisor to notify his or her employee of an expiring probationary period. The purpose of these rules is to improve communications between agencies and their supervisors with the aim of better utilizing the probationary period.

One individual commented that there is little need to require agencies to notify supervisors of the impending expiration of probationary periods because supervisors closely track these dates.

OPM disagrees with the notion that there is little need for the proposed supervisory notification of an employee's probationary period expiration date. In some instances, supervisors let the probationary period lapse because they are not mindful of the expiration date. Supervisors who let the probationary period lapse without consideration of the probationer for continued employment run the risk of having to retain poor performers or employees otherwise inadequately suited to perform the duties of a job in the short run and imposing additional burden on the agency if the agency wishes to remove the employee later by a performance-based or adverse action. This outcome benefits neither the agency nor the employee. By reminding supervisors to

diligently and promptly make required fitness determinations regarding probationary employees and by issuing these reminders at the same point in time during the probationary period, OPM believes that this requirement promotes procedural consistency and works to the benefit of supervisors and probationers alike.

An agency suggested OPM amend the proposed rule to require only one supervisory notification 90 days prior to the expiration of an employee's probationary period. The agency also asked OPM to address what the consequences will be for an agency which does not provide the supervisory notification.

OPM is not adopting the suggestion to require only one notification to supervisors 90 days before the end of an employee's probationary period. We believe the proposed notification periods are best designed to meet the aim of the Executive Order. We note that agencies may choose to provide more frequent notifications. A probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to an agency before the candidate's appointment becomes final. The procedures for terminating probationers for unsatisfactory performance or conduct are contained in § 315.804 and are not impacted by the revised regulation.

The same agency suggested that OPM amend the proposed rule to require supervisory notification during a set period of time, or window, rather than on the three-month and one-month marks. This commenter suggested OPM amend the rule to allow for supervisory notification "and then again at least one month or thirty days prior to the expiration of the probationary period."

OPM is not adopting this suggestion. We believe agency notification to its supervisors is more effective when it occurs on a specific date, rather than during a window of dates, because the supervisor will know precisely how much time is left in the employee's probationary period. This approach also promotes uniformity.

An organization opposed the proposed rule for four reasons:

First, the organization commented that the 30-day supervisory notification undermines § 315.805, which provides an employee a reasonable amount of time to respond in writing to a termination action for conditions arising before appointment. OPM disagrees the proposed rule could impact an employee's right to respond to a proposed termination action based on conditions arising before appointment pursuant to § 315.805. Under § 315.805(a) an employee is entitled to advanced written notice, and § 315.805(c) states the employee is to be notified of the agency's decision at the earliest practicable date. The proposed rule does not alter this regulatory structure and instead only requires an agency to remind supervisors three months and one month ahead of the end of an employee's probationary period. These provisions do not impact § 315.805.

Secondly, this organization commented that the proposed rule does not require a supervisor to in fact make a decision or to provide any notice to an employee with sufficient time to allow the employee to respond. The procedures for making determinations concerning employees serving in a probationary period, including criteria for termination, are covered under OPM regulations §§ 315.803 - 315.805. The commentator's assessment is accurate that no "notice" is required when issuing a termination under this authority, nor is there an opportunity to respond. Again, the changes proposed in this regulation do nothing to alter this regulatory structure.

Next, the organization stated that the proposed rule undermines due process because it provides no guidance or requirement that the agency notify the employee prior to their termination for performance or conduct deficiencies. Due process of law under the Constitution turns on the possession of a pre-existing property or liberty interest. The courts have held, therefore, that constitutional Due Process applies only to tenured public employees – not probationers, who are terminable at will. OPM’s regulations govern the procedures applicable to probationers. Agency termination procedures applicable to probationers, including notification to an employee of a termination action, are addressed in §§ 315.804 and 315.805.

Lastly, this organization stated that the proposed rule ignores what it considers to be the real issue which is constructive performance management. The organization commented that the proposed rule merely proposes a reminder system to notify supervisors of the need to terminate employees prior to the completion of their probationary period, without ever addressing an employee’s performance or conduct until their termination. The organization noted that a supervisory determination of poor performance made for the first time 30 days before the probationary period ends does not allow an employee to improve his or her performance.

The organization accurately notes the proposed rule creates a reminder system to aid supervisors in determining the fitness of their employees for continued service. However, the commenter misinterprets the regulation by stating that it constitutes a reminder to terminate a probationary employee rather than what this provision will actually serve to do, which will be to simply remind a supervisor of the need to prepare to make a timely determination regarding the future employment status of probationary

employees. The point is to remind supervisors of the impending end of the probationary period, to enable them to make thoughtful decisions, not to point the supervisors toward one direction or the other. Again, the intent of these provisions is to remind supervisors of the importance of considering a probationer's performance, good or bad, in determining whether the employee should be retained beyond the probationary period. As current regulations require supervisors to fully utilize the probationary period to assess employee fitness, OPM would contemplate that agencies would not want supervisors to wait until the final month of the probationary period to begin making any such assessment. OPM further notes that the proposed rule, by helping supervisors avoid "last minute" determinations, may improve the quality of such decisions, which is to everyone's benefit.

An agency recommended that supervisory notifications occur 120 days before the end of an employee's probationary period, rather than the proposed 90- and 30-day notifications. This agency expressed concern that the proposed notification intervals may mitigate or conflict with employee due process and adverse action appeal rights. The agency recommended that OPM amend the proposed language in § 315.803(a) to state that appropriate action will be taken to determine whether the employee meets the definition of employee in 5 U.S.C. 7511 and is entitled to due process and appeal rights.

OPM is not adopting the suggestion to require supervisory notification 120 days and 60 days prior to expiration of an employee's probationary period. We believe the proposed notification periods of three months and one month before expiration provide sufficient reminders to supervisors.

OPM is also not adopting the suggestion to amend § 315.803(a) to require agencies to take appropriate action with respect to determining whether an employee is entitled to Due Process and appeal rights under 5 U.S.C. 7511. OPM would again clarify that the purpose of the proposed rule is to implement Section 2(i) of E.O. 13839 and support OPM's consistent position (supported as well by reports of the MSPB) that agencies should make efficient use of the probationary period by requiring agencies to notify supervisors of the date an employee's probationary period ends. The proposed rule represents an internal administrative tool to be utilized by agencies to assist supervisors; it is not intended nor does it modify or impact any procedural processes or rights afforded by statute or regulation. The procedures for terminating probationers for unsatisfactory performance or conduct are contained in § 315.804 and employee appeal rights are described in § 315.806. These provisions are not impacted by the proposed rule. The proposed rule does not impact appeal rights for employees covered by 5 U.S.C 7511 nor does it preclude agencies from informing an employee covered by 5 U.S.C. 7511 (or the employee's supervisor) of any procedural rights to which he or she may be entitled under section 7511.

An organization commented that the proposed rule encourages agencies to terminate an employee before chapter 75 procedures are required. This organization believes the supervisory notification periods were proposed to remind supervisors to terminate any such employees before the end of the probationary period.

As discussed, OPM disagrees with the contention that the purpose of the proposed rule is to encourage agencies to terminate probationers before chapter 75 procedures are required. The purpose is to encourage supervisors to make a timely determination as to

whether to retain an employee beyond the probationary period, whatever that determination may be. The regulation is neutral in terms of what determination a supervisor ultimately makes as it does not steer supervisors in either direction. It simply reminds them of the need to make a determination which is already their responsibility.

5 CFR Part 432 – Performance-Based Reduction In Grade And Removal Actions

Section 432.101 Statutory authority

Part 432 applies to reduction in grade and removal of covered employees based on performance at the unacceptable level. In the proposed rule, OPM restated Congress' intent in enacting chapter 43, in part, to create a simple, dedicated, though not exclusive, process for agencies to use in taking actions based on unacceptable performance.

An organization concurred with OPM's explanation of its statutory authority in § 432.101 in the Supplementary Information. OPM will not adopt any revisions based on this comment as no revisions were requested.

Section 432.104 Addressing unacceptable performance

This section clarifies that, other than those requirements listed, there is no specific requirement regarding any assistance offered or provided during an opportunity period. In addition, the proposed rule stated that the nature of assistance is not determinative of the ultimate outcome with respect to reduction in grade or pay, or removal. Some commenters, including an agency and two national unions, voiced concerns that the proposed change minimized the importance of providing assistance or relieved agencies of the obligation to provide meaningful assistance. In response, as discussed in greater detail below, OPM has revised § 432.104 to remove the statement that the nature of assistance is not determinative of the outcome with respect to a reduction in grade or pay

or removal. However, it is still the case that assistance need not take any particular form. To that end, the final regulation will state that the nature of assistance provided is in the sole and exclusive discretion of the agency.”

The section also states that no additional performance improvement period or similar informal period to demonstrate acceptable performance to meet the required performance standards shall be provided prior to or in addition to the opportunity period under this part.

Three management associations commended OPM for streamlining methods for addressing unacceptable performance through chapter 43 procedures. The organizations lamented the status quo in agencies with respect to such actions as burdensome, cumbersome and slow. They expressed support for clarifying agency requirements with respect to the number and duration of opportunity periods, types of assistance offered to employees with unacceptable performance and the impact of such assistance on a final personnel decision. One of the organizations expressed the view that there should be no lengthy or extensive requirements beyond what the law requires to improve performance. The organizations did not recommend any changes to § 432.104. Indeed, OPM agrees with the commenters that the amended regulation promotes a straightforward and efficient process for addressing unacceptable performance.

Two agencies concurred with the amendment to § 432.104 because it dispels the misconception in some agencies that a pre-Performance Improvement Plan (pre-PIP) or similar informal assistance period is required or advisable for chapter 43 procedures. One of the agencies stated that it believes the amended regulation will result in a shorter, less burdensome, less discouraging, more efficient process for addressing poor

performance, but nevertheless made further recommendations. The agency recommended that the decision to extend an employee's performance period should be at the discretion of the employee's immediate supervisor if an employee needs more time to improve his or her performance. The agency stated that an employee with performance issues should be notified formally and given clear direction on how to correct the issues, or else the agency will have difficulty defending a decision to remove the employee. Finally, the agency recommended that OPM provide further guidance in the final rule regarding the types of situations where extending or limiting an opportunity period would be appropriate.

In response, OPM confirms that addressing poor performance should be a straightforward process that minimizes the burden on managers and supervisors and makes the best use of resources, including time spent by agency officials. There is nothing in the proposed rule that prevents or prohibits a supervisor from considering specific facts and circumstances that may impact an employee's job performance and developing a reasonable approach to helping the employee achieve acceptable performance. With regard to formal notice of unacceptable performance, OPM notes that requirements concerning performance evaluation and notification already exist within the law (see 5 U.S.C. 4302 and 4303) and that the proposed amendments to the regulations do not impact the regulatory requirements that currently exist for agencies to notify employees performing at an unacceptable level "of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position." See § 432.104. Concerning recommendations surrounding the

extension of an opportunity period, OPM notes that current and proposed § 432.104 both require that agencies afford *a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position*. (Emphasis added.) The factors and considerations that establish what constitutes a reasonable opportunity period are also delineated in OPM guidance and case law. For these reasons, OPM believes it is unnecessary to amend the regulation as the agency suggests.

The other agency that concurred with the amendment at § 432.104 stated that the changes lessen the likelihood that a “failure to provide adequate assistance” argument would be persuasive at the Merit Systems Protection Board (MSPB). The agency recommended adding a reference to agencies’ requirement to comply with their collective bargaining agreements. OPM agrees but would somewhat qualify the comment. The regulation should preclude employees from raising failure to provide assistance during the opportunity period as a defense against a chapter 43 action to the extent that agencies are required to provide assistance during the opportunity period, though the assistance may take whatever form the supervisor deems necessary to help the employee succeed in his or her position.

OPM will not adopt the agency’s recommendation as collective bargaining obligations are preserved as required by law under 5 U.S.C. chapter 71. Further, as stated in E.O. 13839, agencies must consult with their employee labor representatives about the implementation of the Executive Order.

National unions and commenters expressed concerns regarding the rule’s impact on performance-based actions, and an employee’s opportunity to improve

performance. A commenter stated that, although poor performers should be removed from the Federal government, the proposed rule may give some managers the ability to remove employees without factual evidence to back up the removal action. In a similar observation, a national union and commenter stated that the proposal would remove important protections from employees and deny them the ability to either counter the agency's assessment or correct through a mandated improvement process.

OPM disagrees with these comments. Nothing in the proposed regulations should be construed to relieve agencies of their obligations under Federal law. Additionally, 5 U.S.C. 2301(b)(2) provides that employees should receive fair and equitable treatment. Finally, as Government officials are entitled to a presumption of good faith, OPM does not accept that changes to the governing regulation intended to improve efficiency will lead to abuse. Accordingly, OPM does not believe that the proposed rule would lead to the removal of employees without factual evidence or interfere with important protections for employees, including the ability to provide a response to an accusation or receive the required opportunity to demonstrate acceptable performance. The amended rule does not relieve agencies of the responsibility to demonstrate that an employee was performing unacceptably – which per statute covers the period both prior to and during a formal opportunity period – before initiating an adverse action under chapter 43.

Many commenters objected to the proposed rule at § 432.104 on the bases that the amendment conflicts with certain Executive Orders, statutes, case law, and/or the merit system principles; sets bad management policy; opens the door to supervisors taking a performance-based action hastily without offering or providing assistance to an employee

who has rendered unacceptable performance; may result in agencies employing a one-size-fits-all approach to addressing unacceptable performance; weakens or violates protections for Federal employees; and may cause harm to or confusion among Federal employees and or the civil service.

One agency stated that there is a conflict between the current regulation, which requires that an employee be given an opportunity to demonstrate acceptable performance, and E.O. 13839 provisions that (1) promote the use of chapter 75 procedures for addressing unacceptable performance; and (2) require Executive Branch agencies to ensure that no collective bargaining agreements include a provision requiring the use of chapter 43 procedures to address unacceptable performance. To address this concern, the agency suggests rewriting this requirement to make it clearer that it applies under chapter 43 (i.e., if an employee's removal or demotion is proposed under chapter 43), rather than at "any time" an employee's performance is unacceptable.

OPM will not adopt revisions based on this comment because the regulation already makes it clear that the requirement in question relates to procedures pursuant to chapter 43. Because the requirement is only found under chapter 43, it will only apply if an agency opts to use that particular set of procedures to address an instance of unacceptable performance. If an agency opts to use chapter 75 procedures to address unacceptable performance, the opportunity period, pursuant to chapter 43 would not be applicable. Finally, OPM disagrees that the requirements of 5 U.S.C. chapter 43 or any of the revisions to 5 CFR part 432 conflict with the direction provided to Executive Branch agencies in E.O. 13839. Rather, E.O. 13839 states that chapter 75 should be utilized in appropriate cases and prohibits agencies from agreeing to incorporate into

collective bargaining agreements provisions that would preclude use of chapter 75 to address unacceptable performance. The Executive Order also directs agencies to streamline the process of addressing unacceptable job performance by more strategically using the legal authorities that already exist. The revisions to 5 CFR part 432 support the objectives described in the Executive Order by revising regulatory provisions that flow from long-standing and established statutory requirements.

Three national unions emphasized that an agency must meet all the requirements set forth in 5 U.S.C. 4302(c)(5) before taking an action based on unacceptable performance, a substantive right intended by Congress. One of the unions reasoned that, “The assistance required by § 4302(c)(5) is assistance during the opportunity period because (a) by definition, assistance ‘in improving unacceptable performance’ occurs after the agency has found performance to be unacceptable; (b) under 5 CFR § 432.104 the agency must notify an employee ‘[a]t any time . . . that an employee’s performance is determined to be unacceptable’; and (c) the opportunity period begins when the employee is so notified. Because a determination of unacceptable performance triggers the obligation to notify, and notification starts the opportunity period, these three events – the determination, the notification, and the start of the period – are essentially, simultaneous. Upon making the determination, the agency must provide, not delay, the notification; and the notification starts the opportunity period. Thus, § 4302 (c)(5) assistance ‘in improving unacceptable performance’ is assistance that occurs during the opportunity period.” The union recommended retention of the “correct, clear, and simple” language in the current regulation at § 432.104.

Two of the national unions cited *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 589 (1984) to support their point that the procedural requirements of chapter 43, including provision of a reasonable opportunity to improve, are substantive guarantees and may not be diminished by regulation. One stated that the amended regulation will lead agencies away from providing employees who face performance issues with genuine opportunities to improve, contrary to the language and intent of the Civil Service Reform Act (CSRA). The other union characterized the proposed rule as eliminating required assistance during the opportunity period, contrary to section 4302(c)(6), and minimizing the importance of the assistance provided during the opportunity period by stating that the nature of such assistance is not determinative of a performance-based action, contrary to MSPB case law.

Several national unions and many of their members (via what appeared to be a template letter) expressed concern that the proposed rule eliminates a meaningful opportunity period for Federal workers to improve performance and save agency resources. The commenters stated that the amendments will eliminate and change elements of statutory requirements for opportunity periods. They stated also that the proposed rule “discourages the use of simple, easy-to-follow, objective standards which (when used correctly by supervisors and managers) create consistency across the federal workforce.” Finally, the commenters asserted that supervisors will be granted power in a way that was not contemplated by Congress and that conflicts with substantive statutory rights.

In response to the union that recommended retention of § 432.104 as currently written, OPM disagrees. OPM notes that both the current and amended regulations flesh

out the statutory requirements of 5 U.S.C. 4302 and 4303 concerning the baseline requirements that all agencies must meet in addressing instances of unacceptable job performance. The proposed rule specifically acknowledges and incorporates the statutory requirement to provide assistance that is set forth in 5 U.S.C. 4302(c)(5). The reference to the relevant statute is intended to convey that the regulation will work in concert with the law. OPM understands further that the statute requires agencies to assist employees in improving unacceptable performance and in accordance with 5 U.S.C. 4302(c)(6), agencies may take a performance-based action only after affording an employee an opportunity to improve.

The amended regulation does not lead agencies away from providing employees who face performance issues with meaningful or genuine opportunities to improve, and nor is it contrary to the language and intent of the CSRA, as one of the unions contends. For further clarification regarding concerns that OPM is eliminating statutory requirements for opportunity periods or minimizing the importance of the assistance provided during the opportunity period, OPM has decided to further amend the regulation. Specifically, the language originally proposed for § 432.104 will be replaced with, “The requirement described in 5 U.S.C. 4302(c)(5) refers only to that formal assistance provided during the period wherein an employee is provided with an opportunity to demonstrate acceptable performance, as referenced in 5 U.S.C. 4302(c)(6). The nature of assistance provided is in the sole and exclusive discretion of the agency. No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section.”

Some commenters believe that OPM has not demonstrated that the current management tools are insufficient. The commenters argued that the tools exist today through performance assistance plans and performance improvement plans and OPM is removing these tools. The commenters further stated that changes in performance assessment could have a chilling effect on employees and allow for removals that cannot be suitably challenged. Also, the commenters expressed concern that these changes will undermine integrity and morale as well as hamper the recruitment and retention of a quality Federal workforce. One commenter in particular asserted that prohibiting an informal assistance period is excessively restrictive and is not mandated by E.O. 13839. The commenter recommended that OPM allow agencies maximum flexibility in managing their workforce by permitting use of informal assistance periods besides the period mandated by 5 U.S.C. 4302(c)(5). The commenter stated, “Retaining experienced employees who demonstrate temporarily unacceptable performance rather than moving swiftly toward removal increases stability and improves the efficiency of the Federal service.” The commenter recommended that OPM revise the proposed rule to state that no additional assistance period or similar informal period “is required” rather than “shall be provided.”

OPM disagrees and will not make any revisions based on these comments. Establishing limits on the opportunity to demonstrate acceptable performance by precluding additional opportunity periods beyond what is required by law encourages efficient use of chapter 43 procedures and furthers effective delivery of agency mission while still providing employees sufficient opportunity to demonstrate acceptable performance as required by law. It should also be noted that there is nothing in this new

requirement that precludes routine performance management practices such as close supervision and training for employees that encounter performance challenges prior to their reaching the point at which they are determined to be performing at an unacceptable level and OPM anticipates that such efforts will often take place prior to reaching this point.

Several commenters, also via a template letter, stated that the proposed revisions to performance-based actions “end-run,” or “violate,” employee rights and a chance to improve during the opportunity period. The commenters believe that the proposed rule gives no consideration to assisting an employee to attain acceptable performance or making the opportunity period genuine and meaningful. The commenters went on to say that the opportunity period is a statutory requirement that OPM may not eliminate or modify by regulation. They stated that OPM is making a mockery of the opportunity period by jettisoning well-established practices and essentially discouraging the use of objective standards and improvement plans, which will result in granting virtually unfettered discretion to supervisors in determining what constitutes an adequate opportunity period. The commenters urged OPM to acknowledge that a reasonable opportunity to improve is a substantive, statutory right that may not be diminished by regulation.

Again, OPM notes that the amended § 432.104 does not alter the statutory requirement concerning agency obligations to address instances of unacceptable job performance, providing that “[f]or each critical element in which the employee’s performance is unacceptable, the agency shall afford the employee a reasonable

opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position." OPM does not seek to eliminate or modify the statutory opportunity period as asserted; however, OPM does have the authority pursuant to its statutory delegation (see 5 U.S.C 4305) to elaborate on procedures for addressing unacceptable performance to the extent that those procedures are not already delineated in chapter 43. It is unclear what specific practices the commenters believe are being jettisoned and why the commenters believe that the proposed rule discourages the use of objective standards and improvement plans. Nonetheless, OPM disagrees with these characterizations.

One commenter recommended that the prohibition on additional performance assistance periods be deleted from the proposed rule and suggested new language providing an agency with "sole and exclusive" discretion to informally assist an employee in demonstrating acceptable performance. The commenter noted that "sole and exclusive" discretion would place such assistance outside the duty to bargain and otherwise provide agencies the ability to determine their own policies on such matters. The commenter found it ironic that the regulation would prevent agencies from determining their own policies while the Supplementary Information section in support of the proposed rule "quite plainly attacks disciplinary solutions 'imposed from above'" with regard to tables of penalties.

The commenter is correct that OPM is taking different approaches regarding the prohibition of additional performance assistance periods and the use of tables of penalties. However, we believe different approaches are appropriate. The Supplementary discussion on tables of penalties only informs agencies that the use of

tables of penalties is not required by law or OPM regulations and reminds them that it may limit the scope of management's discretion to tailor the penalty to the facts and circumstances of a particular case by excluding certain penalties along the continuum. These two issues do converge, however, in the sense that additional performance assistance periods are also not required by law or OPM regulations and can negatively impact efficient use of the procedures under chapter 43. While providing "sole and exclusive" discretion would limit collective bargaining on the use of informal assistance as the commenter suggests, the proposed regulatory language would have a similar impact on collective bargaining. In other words, by precluding the use of informal periods, any bargaining proposal that sought to establish an informal process beyond what is required by law would be considered nonnegotiable, pursuant to 5 U.S.C. 7117. For example, offering an additional opportunity period beyond what is required by 5 U.S.C. 4302(b)(6) would be nonnegotiable by these regulations. It should be emphasized that the regulation does not prevent agencies from making appropriate determinations when offering assistance required by law. Specifically, agencies are provided sole and exclusive discretion by Section 4(c) of E.O. 13839 to offer longer opportunity periods under 5 U.S.C. 4302(b)(6) to provide sufficient time to evaluate an employee's performance. OPM believes this discretion to provide for longer periods provides agencies sufficient discretion to address an employee's performance based on the circumstances.

A national union commented that the proposed change to § 432.104 would generally limit opportunity periods to 30 days, a period of time it deemed often

insufficient to determine if an employee can improve his or her performance. Similarly, an organization expressed opposition to E.O. 13839 Sections 2 and 6(iii), which it perceives as pressuring agencies to limit opportunity periods to a period (30 calendar days) that would be insufficient for the purpose of demonstrating improvement in many occupations of the Federal workforce. The organization also opposes amended §§ 432.104 and 432.105 to the extent that they excuse agencies from what it described as routine procedures, such as regular supervisor meetings and guidance, that support the opportunity period. The organization cites *Pine v. Department of the Air Force*, 28 M.S.P.R 453 (1985), and *Sandland* in support of its position that an opportunity to improve is not merely a procedural right but rather a substantive condition precedent to a chapter 43 action, and that counseling is a part of the opportunity period. The organization expressed concern that the proposed rule would allow supervisors to declare that an employee's performance is unsatisfactory without contextualizing the specific ways that an employee needs to substantively improve. An individual commenter weighed in with the observation that the proposed rule would "detrimentally push federal departments and agencies to limit the length of an opportunity period to 30 days," and that the existing regulations present a more reasonable approach and better comport with statutory requirements.

Although Section 4(c) of E.O. 13839 addresses the length of performance improvement periods and is in full force and effect, the proposed rule at § 432.104 does not limit the opportunity period to 30 days, as the national union contends. The regulation preserves statutory and regulatory requirements that agencies afford a reasonable opportunity to demonstrate acceptable performance, commensurate with the

duties and responsibilities of the employee's position, and offer or provide assistance during the opportunity period. There is also nothing in the regulation that would discourage supervisors from performing routine performance management duties such as providing guidance and meeting with employees and it is anticipated that supervisors would continue to give full consideration to the specific facts and circumstances impacting an employee's job performance and develop a reasonable approach to help the employee achieve acceptable performance.

Some commenters expressed concern that supervisors will deny assistance to employees who are performing unacceptably and hastily remove employees. An organization stated that the proposed rule reduces the requirements for an agency, including making no specific requirement regarding the nature of any assistance an agency should provide to an employee during an opportunity period. One individual asserted that amended § 432.104 is not aligned with the merit system principle at 5 U.S.C. 2301(b)(7), which states that employees should be provided effective education and training when such education and training would result in better organizational and individual performance. The commenter added that it would be a prohibited personnel practice against an employee, via 5 U.S.C. 2302(a)(2)(A)(ix), which encompasses decisions concerning pay, benefits, or awards, or concerning education or training, for an agency to withhold such education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in subparagraph (a)(2)(A). One individual observed that providing assistance with regard to performance issues is cost-effective given the significant amounts of money agencies invest in hiring, onboarding, and training. An agency wrote

about cases in which appropriate assistance proved successful and avoided unnecessary costs associated with turnover, litigation, training and rehiring.

With respect to the concern that supervisors may take abrupt actions without offering or providing assistance to an employee performing at an unacceptable level, OPM would emphasize that the amended regulation does not infringe upon an employee's right to a reasonable opportunity to improve, and it does not excuse Federal agencies from effective performance management or the merit system principles, including with regard to education and training. The amended regulation instead excludes additional assistance requirements outside of that described in 5 U.S.C. 4302(c)(5). OPM neither promotes nor encourages agencies to engage in prohibited personnel practices nor does it believe the changes to the regulation encourage prohibited personnel practices. (Indeed, OPM has an affirmative obligation to enforce the law governing the civil service. See 5 U.S.C. 1103(a)(5).) With regard to comments relating to potential cost savings associated with performance assistance, OPM believes that the procedures will make this process more efficient, which represents a cost savings. Many employees receiving performance assistance will improve their performance to an acceptable level; for those that do not, taking an action such as a removal or a demotion to a position and grade where the employee can perform duties at an acceptable level significantly reduces the public expenditure associated with low productivity.

One national union asserted that the proposed rule changes make it easier for agencies to terminate both probationary and permanent employees, without providing them an adequate opportunity to improve their performance. Another commenter observed that the proposed regulations limit the opportunities that employees have to

improve their performance thereby actually creating a more inequitable environment for Federal employees.

Regarding specific protections provided, OPM would reiterate that permanent employees continue to have the same protections as required by statute, including a reasonable opportunity to demonstrate acceptable performance. Individuals who are excluded from coverage under chapter 43 are not covered under part 432 of the regulations and are thus unaffected by the changes to this regulation.

Two national unions, one organization and several individuals voiced concerns that the proposed rule ignores the possibility that employees have different performance needs and types of jobs and may require different types of assistance and different periods of time to demonstrate improvement. Commenters noted that various professional and personal challenges, poor management, lack of training by supervisory staff, and other factors may underlie or contribute to unacceptable performance. One commenter included man-made or natural disasters, cyber security incidents, or continuing resolutions as events that may interrupt or impact an opportunity period. The same commenter compared the proposed rule to other laws, such as the Family and Medical Leave Act, that contain protections and provisions for employees to take more than 30 days in order to address employment, medical, and other factors. The commenter asserted that the proposed rule would run counter to the Americans with Disabilities Act and the Rehabilitation Act. Another commenter raised a concern that the amendment to § 432.104 will restrict management's ability to interact creatively and proactively to address workplace performance issues collaboratively with employees. Collectively, the commenters cautioned against a one-size-fits-all approach to addressing unacceptable

performance and advocated for granting supervisors maximum flexibility and empowering them to determine the best course of action for managing their workforce and improving employee performance, including with respect to the duration of an opportunity period, the number of opportunity periods and the degree to which an employee has improved. Some believe that the existing regulation provides just that.

As noted above, the amended regulation does not prevent management from evaluating the facts and circumstances underlying any individual case of unacceptable performance and collaborating with the employee to determine the best course of action for performance improvement. Under the current and amended regulation, in fact, the opportunity period must be commensurate with the duties and responsibilities of the employee's position. In addition, agencies must continue to abide by the requirements of the Family and Medical Leave Act and the Rehabilitation Act for eligible employees and the amended regulation does nothing to curtail the exercise of employee rights under these laws. Neither does the amended regulation curtail a manager's authority to determine whether an employee has improved during a formal opportunity period. Rather, it merely clarifies the procedures and requirements to support managers in addressing unacceptable performance and promoting employee accountability. The commenter's assertion that the performance assistance provided during the opportunity period is not and should not be a one-size-fits-all approach is well taken. Indeed, OPM views this comment as actually supporting the provision of the regulation that prevents agencies from being tied to any particular type of performance assistance. With respect to the concern over deficits in supervisory management skills and training and the potential impact on employee performance, OPM does not discount this possibility.

There is nothing, however, in the amended regulations that increases the likelihood of this circumstance, and OPM believes that the regulatory changes provide supervisors with the flexibility to rely upon the skills and expertise they possess to provide the most effective assistance.

Several national unions, organizations and individuals raised concerns about potential harm to employees and the civil service system as a whole. For example, one union described the limit on additional opportunity periods as “arbitrarily harsh” and believes that employees will be penalized for not making progress as quickly as the agency desires, contrary to the purpose of the opportunity period. One commenter described the proposed rule as punitive and mean-spirited, believing that it will weaken protections for Federal workers and make it easier for management to fire honest civil servants for ideological, partisan, extralegal or even illegal reasons. The commenter contends that OPM does not justify the proposed rule, other than citing the “non-scientific” Federal Employee Viewpoint Survey. Another commenter claimed not to have seen any incentives for positive performance, adding that there appear to be many approaches designed to limit achievement and prevent success. In the commenter’s view, no actual performance management is required, and this will destroy Federal agencies. The commenter shared a personal experience of having been told by a supervisor that the supervisor wanted to fire her because the supervisor disliked her, not due to her work. The commenter wrote that had the proposed rule been in place, she could have been fired, to the detriment of the mission.

Still another commenter stated that the proposed rule at § 432.104 will damage the civil service system. The commenter described having seen managers and

supervisors failing to provide any assistance to employees who were having problems doing a portion of their job. The commenter believes that many managers considered this to be a waste of their time and not worth the effort, though it is an essential part of the managers' duties to provide leadership and direction to their employees. One individual expressed support for changes to address poor performance but believes that the changes proposed for the opportunity period go too far. In a different commenter's view, the proposed revisions are an "injustice to the employee, whose opportunity and improvement will be at the discretion of the supervisor." The commenter expressed concern that employees will be open to discriminatory and biased decisions that are based on feeling, not on accomplishment or facts. Finally, a commenter stated that her agency has invested a great deal of training and money into its workforce, and retraining and retaining should be equally practiced for employees and management.

OPM does not agree that the amended regulation is arbitrary, harsh, or punitive, nor does OPM believe that it weakens or violates employee rights. OPM is not seeking to limit or prevent achievement, success or cooperation. The amended regulation continues to require, per statute and regulation, that supervisors of employees performing unacceptably provide them with performance assistance and provide them with an opportunity to improve in each and every case. The regulation does this while also supporting the principles and requirements for efficiency and accountability in the Federal workforce as outlined in E.O. 13839 and including a straightforward process for addressing unacceptable performance. Establishing limits on the opportunity to demonstrate acceptable performance, by precluding additional opportunity periods beyond what is required by law, encourages efficient use of chapter 43 procedures and

further effective delivery of agency mission while still providing employees sufficient opportunity to demonstrate acceptable performance as required by law. Federal employees will continue to enjoy all core civil service protections under the law, including the merit system principles, procedural rights and appeal rights.

Some commenters objected to the proposed rule at § 432.104 on the basis that OPM, in their view, added language that was unclear and confusing. A national union critiqued the sentence: “No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section” as “unclear” and “absurd or silly.” Instead, the union recommended: “Employees who properly are notified by the agency that their performance is unacceptable are entitled only to one period of time affording reasonable opportunity to demonstrate acceptable performance.” A different national union expressed concern that the reference to an informal assistance period will cause confusion because, in the union’s view, it is unclear whether assistance to improve marginal or unacceptable performance prior to an opportunity period would constitute an informal assistance period. The union added that such assistance should not be prohibited if the law does not require it. An agency described the same sentence as confusing and unnecessary, adding that the terms “informal period” and “additional performance assistance period” are not defined and are vague. An individual commenter offered the following revision: “Prior to initiating the reasonable opportunity to demonstrate acceptable performance, the agency has sole and exclusive discretion to informally assist the employee in demonstrating acceptable performance.”

OPM will not adopt the suggested changes as the recommendations are unnecessary. The amended regulation clarifies that agencies are precluded from allowing additional opportunity periods beyond what is required by law. OPM is effectuating the prohibition on additional opportunity periods -- beyond what the underlying statute requires -- in response to the direction in E.O. 13839. Some agencies have utilized additional, less formal opportunity periods, in response to unacceptable performance, that precede formal opportunity periods, and OPM does not believe that this practice constitutes an efficient use of resources. Moreover, it is not required by statute. For clarification purposes, OPM would distinguish between routine performance management measures such as training and coaching, which may be utilized when employees encounter challenges in the course of their duties, and informal opportunity periods. The first scenario is not impacted by the changes to the regulation; the second is impacted.

One individual commented that the Supplementary Information section of the proposed rule, in its discussion of § 432.104, refers to the 5 U.S.C. 2301(b)(2) requirement that employees should receive fair and equitable treatment without regard to political affiliation, race, color, religion, national origin, sex, marital status, age and handicapping condition. However, the commenter stated that the language needs to be revised to note that Executive Order 11478, as amended by Executive Order 13672, extends equal employment opportunity protections to include sexual orientation or identity as protected categories.

OPM agrees that Executive Order 13672 expands the categories described in the equal employment opportunity policy originally articulated at Executive Order 11478.

Executive Order 13672, however, did not (and could not) amend section 2301, the provision that OPM referenced in the Supplementary Information. And, in any event, case law precedents under the Civil Rights Act determine this issue, from a legal perspective. For this reason, the comment is inapt. Finally, the edit suggested by the commenter does not relate to any language in the proposed rule. Instead it relates solely to language found only in the Supplementary Information section of the notice, in which OPM explained its rationale for related changes to the regulations. Accordingly, there are no substantive changes that can be made to the regulations in response to this comment.

Section 432.105 Proposing and taking action based on unacceptable performance

This section specifies the procedures for proposing and taking action based on unacceptable performance once an employee has been afforded an opportunity to demonstrate acceptable performance. 5 U.S.C. 4302(c)(5) provides for “assisting employees in improving unacceptable performance;” and 5 U.S.C. 4302(c)(6) provides for “reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.” The intent of the proposed rule was to clarify the distinction between the statutory requirements found in 5 U.S.C. 4302(c)(5) and (6) by explaining, in § 432.105, that the opportunity to demonstrate acceptable performance required prior to initiating an action pursuant to 5 U.S.C. 4303 may include any and all performance assistance measures taken during the performance appraisal period to assist employees pursuant to 5 U.S.C. 4302(c)(5), not just those taken during the formal opportunity period. The effort to distinguish these provisions was met with significant opposition and concerns from

commenters, with the exception of three management associations. The vast majority of commenters who opposed the proposed rule presented arguments that the proposed rule, as written, could result in circumstances where an agency relies upon assistance provided *prior* to determining that an employee has unacceptable performance to fulfill the agency's obligation under 5 U.S.C. 4302(c)(5), which explicitly calls for assistance to an employee who has "unacceptable performance."

One commenter interpreted the proposed rule to suggest that an agency can satisfy a formal opportunity period before an opportunity to correct inadequate performance has begun, which the commenter described as unreasonable, unrealistic and out of alignment with the merit system principles at 5 U.S.C. 2301(b)(6). A self-described employee relations practitioner claiming more than 30 years of experience opposed the proposed rule and questioned whether it would be consistent with the law. The commenter noted 5 U.S.C. 4302(c)(5) states that "each agency's performance appraisal system shall provide for 'assisting employees in improving **unacceptable performance**.' (emphasis added)." The commenter went on to say, "If OPM means any kind of assistance offered at any performance level during the rating period, this is not what the statutory requirement in 4302(c)(5) addresses." The commenter described being "confident" in saying that an employee who learns that he or she is performing at an unacceptable level and is placed on an improvement plan during the opportunity period is often surprised and in disbelief. The commenter's concern is that, in such a scenario, the agency may say that it offered the employee assistance six months prior to this time and does not need to offer any further assistance during "this one and only opportunity period." The commenter believes that most employees will not know what steps to take to improve their

performance unless management provides them assistance in doing so. In the commenter's view, OPM is violating the spirit and intent of chapter 43 statutory requirements concerning assistance and an opportunity to improve. The commenter recommended that OPM reconsider and continue to require assistance during the opportunity period to alleviate potential for abuse and misuse by some agencies.

A national union objected to the proposed amendment at § 432.105(a)(1), calling it “nonsensical” and contrary to case law to allow the assistance requirement to be satisfied before the opportunity period. The union cited *Brown v. Department of Veterans Affairs*, 44 MSPR 635 (1990), and *Sullivan v. Department of the Navy*, 44 MSPR at 646 (1990), in which “the Board emphasized the critical, statutory requirement that employees be notified of the critical job elements which they are failing and be provided a ‘meaningful opportunity to demonstrate acceptable performance’ in those elements.”

A different national union objected to the proposed added language to § 432.105(a)(1) with the rationale that “the second sentence contradicts the first and is contrary to law.” The union stated that assisting an employee before determining that the employee has unacceptable performance and notifying the employee of such is not “for the purpose of assisting employees pursuant to 5 U.S.C. 4302(c)(5),” which requires “assisting employees in improving unacceptable performance” at any time the determination is made. The union recommended that instead of the proposed passage, OPM state, “For the purposes of this section, reasonable opportunity to demonstrate acceptable performance includes reasonable assistance in improving unacceptable performance that the agency provides during the appraisal period, either during the

opportunity period or after the opportunity period, and before the agency proposes a reduction-in-grade or removal action.”

An agency recommended that OPM’s proposed amendments to § 432.105(a)(1) not be added or applied to the final version of the regulation and raised a concern that, as written, the proposed rule will create situations where an employee may not get any management help, thereby putting agencies at risk for appeals and litigation.

One commenter recommended that OPM remove the sentence: “For the purposes of this section, the opportunity to demonstrate acceptable performance includes measures taken during the opportunity period as well as any other measures taken during the appraisal period for the purpose of assisting employees pursuant to 5 U.S.C. 4302(c)(5),” The commenter described the sentence as factually inaccurate, contrary to the plain language of the statute, and not mandated by E.O. 13839.

One individual asserted that the proposed rule is illogical because the statute requires that agencies assist employees who have unacceptable performance, and since employees who have unacceptable performance should be placed on a Performance Improvement Plan (PIP), there should not be a time other than the period during which the employee is on the PIP when an employee with unacceptable performance is receiving assistance that would meet the statutory requirement. The commenter expressed concern that performance assistance could devolve into a “check-the-box” exercise if the agency can demonstrate that it provided the employee with assistance at any point during the rating cycle.

One organization, an agency, and some individual commenters went so far as to say that the proposed rule gave the impression that an agency might take an action for

unacceptable performance prior to an impacted employee's completion of an opportunity period. The organization objected to distinguishing between 5 U.S.C. 4302(c)(5) and (c)(6). It stated that the proposed rule contradicts 5 U.S.C. 4302(c)(6) and is inconsistent with established case law interpreting that statute, including cases that have held a meaningful opportunity to improve to be a substantive right. In the organization's interpretation, the proposed rule could allow an agency to remove an employee for performance prior to an opportunity period, even if the employee has successful performance during the opportunity period. The organization stated that the proposed rule "purports to allow an agency to use assistance measures even if the employee has not been notified of the subpar performance," which would be "fundamentally unfair" and "dissuade supervisors from offering adequate training, counseling, and assistance" during an opportunity period.

Three management associations expressed support for the proposal to distinguish 5 U.S.C. 4302(c)(5) and 4302(c)(6), describing it as a valuable clarification of agency obligations and a modernization of the Federal performance review process that better matches the needs of agencies working to achieve mission success.

However, OPM finds greater merit in the objectors' arguments. Accordingly, the proposed amendment to the regulations at 5 CFR 432.105(a)(1), which adds the language "Agencies may satisfy the requirement to provide assistance before or during the opportunity period" will not be adopted. We will retain the provision that the obligation to assist can be met through measures taken during the appraisal period as well as measures taken during the opportunity period. Permitting an agency to include measures taken during the appraisal period for the purpose of assisting employees pursuant to

U.S.C. 4302(c)(5) encourages managers to engage in continuous performance feedback and early correction of performance concerns, thereby supporting the principles espoused in the Executive Order for promoting accountability.

A commenter stated that the intended purpose of the proposed amendment to § 432.105 could be achieved “by writing: There is no mechanical requirement regarding the form that assistance to an employee should take. Agencies shall satisfy the requirement to assist the employee by providing adequate instructions regarding the manner in which the employee is expected to perform the duties of his position.” The commenter added that this change “would establish that assistance is not an onerous burden without engaging in a misbegotten attempt to ‘delink’ the assistance from the opportunity period.” It is unclear where the commenter is proposing to insert the recommended language or what language it would replace. OPM will not adopt the commenter’s recommendation.

Section 432.108 Settlement agreements

This section effectuates Section 5 of E.O. 13839. Section 5 establishes a new requirement that an agency shall not agree to erase, remove, alter or withhold from another agency any information about a civilian employee’s performance or conduct in that employee’s official personnel records, including an employee’s Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action. Such agreements have traditionally been referred to as “clean record” agreements.

This new requirement is intended to promote the high standards of integrity and accountability within the Federal workforce by requiring agencies to maintain personnel records that reflect complete information and not to alter the information contained in those records in connection with a formal or informal complaint or adverse personnel action. This regulation, derived from a corresponding provision in E.O. 13839, is further intended to equip Federal agencies with full information needed to assess candidate qualifications and suitability or fitness for Federal employment and make informed hiring decisions. In furtherance of this important goal, instances of employee misconduct and unacceptable performance that may be determinative in these assessments should not be expunged as a function of a clean record agreement, as doing so deprives agencies of vital information necessary to fulfill their obligation to hire the best candidate within reach.

Section 5 requirements should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. Agencies have the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such

information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

Further, when persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency files. Section 5's requirements would continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

Section 5 requirements apply to actions taken under parts 432 and 752. All comments related to settlement agreements are addressed here in the Supplementary Information for the change at § 432.108, where the change appears first.

Three management associations expressed support for preventing agencies from erasing, removing, altering or withholding information about a civilian employee's performance in their official personnel record. Two of the organizations, however, noted that some agencies' practice of offering clean record settlement agreements has historically facilitated employee departures in a manner that minimizes litigation and

results in a mutually agreeable outcome for agencies and taxpayers. An individual expressed support for the proposed amendment to § 432.108, describing it as “very helpful to hiring managers who should have this information” before bringing on a potential “problem employee.” OPM will not make any revisions based on these comments.

An agency discussed potential benefits and drawbacks of the proposed rule, including that it would assist management in making better hiring decisions and discourage employees from using the Equal Employment Opportunity (EEO) process as a way to have records expunged while perhaps at the same time making it difficult and costly for agencies to settle cases. The agency recommended further clarification on the parameters of the rule. As the commenter did not pose specific questions about parameters, we are unable to respond.

Despite some showing of support for the proposed rule, many commenters objected for a variety of reasons. One commenter asserted that an agency cannot issue a rule unless granted authority to do so by law and believes that OPM has exceeded the scope of its regulatory authorities. Specifically, the commenter questioned whether OPM has the authority to regulate settlement agreements. OPM does not agree that it has exceeded its authority. E.O. 13839 directs OPM to propose appropriate regulations to effectuate the principles set forth in Section 2 and the requirements of Sections 3, 4, 5 and 6 of the order. This final rule effectuates the requirements of E.O. 13839.

With respect to the question of OPM’s authority raised by commenters, OPM would emphasize that OPM’s regulation pertains to the integrity of personnel files which are maintained by OPM and which OPM has the authority and responsibility to maintain;

see 5 U.S.C. 2951. OPM also has authority to regulate personnel management functions, hiring appointments, and to oversee the merit system principles; see e.g. 5. U.S.C. 1103(a)(5) (stating that OPM’s Director executes, administers, and enforces the law governing the civil service), and (7) (stating that functions vested with the OPM Director include “aiding the President, as the President may request, in preparing such civil service rules as the President prescribes, and otherwise advising the President on actions which may be taken to promote an efficient civil service and a systematic application of the merit system principles, including recommending policies relating to the selection, promotion, transfer, performance, pay, conditions of service, tenure, and separation of employees”); see also 5 U.S.C. 3301 (establishing the President’s authority to ascertain fitness of applicants for employment sought). OPM would also emphasize that other than those issues pertaining to areas for which OPM has the authority to regulate, agencies are free to handle settlement agreements as they choose, subject to other appropriate authorities.

Several individuals, via a template letter, commented that the proposed rule at §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607 will “only lead to bitter and contentious disputes.” The commenters stated that unless there is “some provision for settlement or informal resolution of disputes,” employees will have little choice but to pursue arbitration or litigation. The commenters urged for an amendment to the proposed rule that would allow cancellation of a proposed action as part of a settlement agreement, so long as no final agency action has been taken. The commenters believe this would “help resolve 90% of disputes without resorting to more legal processes.”

A group of several national unions and their members disagreed with the proposed rule at §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607 and requested that the changes be withdrawn on the basis that agency managers and Federal workers represented by unions disfavor the prohibition on settlement agreements. The commenters stated that the proposed change removes a tool that allows unions and managers to settle disputes efficiently and effectively and forces them to arbitration or litigation instead of encouraging the use of early alternative dispute resolution (ADR). The commenters asserted that OPM presumes that agency supervisors are infallible and their decisions not subject to review, which violates the spirit of the law and creates a Federal workforce which is corruptible, subject to undue influence, and puts the burden of a supervisor's mistake on an employee for the rest of their career.

OPM has not made changes based on these comments and believes that the concerns are unsubstantiated and, in many respects, addressed in the regulation itself. The proposed regulation effectuates E.O. 13839 requirements. While Section 5 of the E.O. 13839 places restrictions on agency management with regard to certain matters within settlement agreements, it neither prevents settlement agreements nor discourages other forms of alternative dispute resolution utilized by agencies seeking to resolve a formal or informal complaint and avoid litigation. The regulation has protections built in that address commenters' concerns. To the extent that an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, the action can be removed from the employee's personnel file or other agency files. As explained in the regulation, agencies are permitted to correct errors, either unilaterally or pursuant to a settlement agreement, based on discovery of agency error or illegality. The

regulation further permits agencies to cancel or vacate a proposed action when persuasive evidence comes to light casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation. The final rule promotes integrity and accountability and facilitates the sharing of records between Federal agencies in a manner that permits the agencies to make appropriate and informed decisions regarding a prospective employee's qualification, fitness and suitability as applicable to future employment.

Two organizations and several individuals objected to restrictions on settlement agreements that limit resolution options or reduce the likelihood of the parties reaching a mutually agreeable resolution of informal or formal complaints. One of the organizations opined that employees who seek such relief will be more inclined to litigate, which will increase the burden on the administrative bodies that hear such cases and cause "unnecessary cost and distraction in the workplace." The other organization strongly opposed the proposed rule at §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607 on the basis that its members' experience demonstrates that Section 5 has "eliminated the possibility of settlement agreements in cases involving disciplinary or performance actions, especially once the personnel action occurs." The organization claimed that the limiting effect of Section 5 has followed on the heels of agencies implementing new and stringent limits on "non-record modification settlements," which we understood to mean settlements that do not involve modification of records and pointed to a particular Federal agency as an example. From the organization's perspective, agencies have been "highly deterred" from agreeing to post-personnel action settlements involving record modification because they are "loath" to acknowledge a personnel action as illegal,

inaccurate or the product of agency error. The organization stated that this forces cases into costly merits litigation, which has risks for all parties involved.

The organization raised a concern that the proposed rule gives too much discretion to “low level supervisors” by rendering their decisions in personnel actions far harder to reverse later through settlement. The commenter stated that, previously, settlement mechanisms provided a means for higher-level management to review the actions of subordinates and make changes to their discretionary decisions through settlement agreements.

OPM will not make any revisions based on these comments. The amended regulation effectuates the requirements of E.O. 13839 and thereby facilitates a Federal supervisor’s ability to promote civil servant accountability and transparency across the Executive Branch.

An organization commented that the proposed rule at § 432.108 “fundamentally contradicts existing federal law in several respects” by (1) creating “an absolute bar” to potential mitigation of a final agency decision when persuasive evidence of an error or mistake is discovered *after* the final agency decision is issued (such as “during an appeal period or during an appeal”) [emphasis in original]; (2) not mandating that an agency correct an employee’s personnel record (before a decision) despite the agency obligation to correct an employee’s record when it determines there has been an error under the Privacy Act; and (3) causing unnecessary economic issues, such as litigating costs and lost salary and leave, for both employees and agencies and crowding the dockets of the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), and/or Equal Employment Opportunity Commission (EEOC).

In response, OPM notes that it is incorrect to interpret the proposed rule at § 432.108 as “an absolute bar” to potential mitigation of a final agency decision when persuasive evidence of an error or mistake is discovered after the decision is issued (such as during an appeal period or during an appeal). In fact, the change at § 432.108(b) permits an agency to take corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. OPM believes that it is understood that the scope of this provision would include actions taken that were out of compliance with the Privacy Act.

OPM also disagrees with the organization on the question of economic issues for employees and agencies and potential crowding of MSPB, OSC, and/or EEOC dockets. While the regulation implementing Section 5 of E.O. 13839 places restrictions on agency management with regard to certain matters within settlement agreements, it does not prevent all settlement agreements from occurring or being pursued by an agency involved in a dispute process.

With regard to comments expressing concerns over potential impact on the practice of higher-level settlement review, this comment presumes that all but the highest level management officials are equipped to use their discretion soundly and accurately, a presumption with which OPM does not agree. Further, as discussed elsewhere, all procedural protections built into the adverse action process, including a notice and opportunity for reply remain intact.

Additionally, the organization objected to §§ 752.104(a)-(c) and 752.203(h) for the reasons cited above and because the organization believes that the proposed

amendments are “blatantly prejudicial to employees and contrary to an agency’s duty to apply mitigating circumstances developed in *Douglas v. Veterans Administration*.” The organization stated that the proposed rule would provide agencies with an opportunity to impose disproportionate penalties.

OPM disagrees and notes that §§ 752.104(c), 752.203(h)(3), 752.407(c) and 752.607(c) permit an agency to cancel or vacate a proposed action when persuasive evidence comes to light, prior to a final agency decision, that casts doubt on the validity of the action or the ability of the agency to sustain the action in litigation. The proposed rule does not prevent the agency from mitigating a proposed penalty in such instances as long as the agency adheres to penalty determination provisions in §§ 752.102, 752.202, 752.403 and 752.603 as applicable.

The organization restated similar objections to § 752.407 and added more details to support its position. The organization expressed concern that the proposed rule will do the opposite of increasing the efficiency of management decisions because it undermines the ability of agencies to settle cases. In the organization’s views, the proposed rule is “simply inoperable in practice,” even allowing for corrective action to a personnel record based on discovery of agency error or discovery of material information prior to final agency action. The organization stated that agencies will be unwilling or unlikely to admit error, unless ordered to do so by a court, not least because of potential further liability.

OPM disagrees with the organization’s assessment. It is not unusual for dispositive information to come to light after an adverse action is proposed, such as during the employee’s reply period or in the submission of the employee’s supporting

material. Such dispositive information could very well lead to an agency cancelling or vacating a proposed action during settlement negotiations. The proposed rule facilitates a Federal supervisor's ability to promote civil servant accountability and simultaneously recognize employee's procedural rights and protections. Moreover, the proposed rule does not "bar" the EEOC, MSPB, arbitrators and courts from requiring modification of a personnel record as an appropriate remedy for a matter before them based on an agency's adverse personnel action.

One national union asserted that § 432.108 will diminish the right to collective bargaining, contrary to the spirit of the Federal Service Labor-Management Relations Statute (FSLMRS), by prohibiting agencies from agreeing to clean record terms during collective bargaining negotiations and settlement discussions. In the union's view, Congress did not intend for agencies and employees to negotiate an appropriate resolution to a matter only to be precluded from implementation by an "unnecessary regulation." The union believes that the clean record agreements are used by employees in many cases to remove "unfair, baseless charges" from their files and the amended regulations unfairly closes this avenue for employees.

OPM does not agree that the amended regulation impacts collective bargaining in the manner asserted by commenters. Initially, management's rights pursuant to 5 U.S.C. 7106, including the right to discipline, cannot be diminished through bargaining. Each and every decision as to whether to settle a case and what penalty is appropriate falls within the discretion of agency management and is outside the scope of bargaining. Further, to the extent that there are any narrow areas of negotiability relating to the use of settlement agreements, the regulation does not preclude bargaining in this area. Rather,

consistent with the Executive Order, it directs agencies in terms of how to proceed when making decisions, pursuant to the President's authority to issue such directives and pursuant to management's discretion in disciplinary context. These changes appropriately balance employee rights with efficient government operations.

A national union commented that damage to agencies' and employees' abilities to resolve disputes will outweigh whatever transparency may derive from the proposed rule. The union asserted that litigation will increase exponentially and added that allowing an agency to amend or rescind a record unilaterally is "hardly a savings" because parties are "loath" to admit fault. The union believes that the proposed restrictions on amending personnel records ignore realities. The union also accused OPM of impermissibly inserting itself into the collective bargaining relationship by taking clean record terms off the table, to the extent such clauses are not otherwise prohibited by law. In the union's estimation, because grievance settlements are an extension of the collective bargaining process, OPM's regulation would unilaterally constrict the scope of collective bargaining by precluding a commonly negotiated remedy. Another national union commented that by preventing clean record agreements, OPM "stymies" efficient and effective resolution of disputes. The union added that by giving agencies "unfettered power to unilaterally modify an employee's personnel record," the proposed rule opens the door to arbitrary and capricious agency action and potential Privacy Act violations. The union stated, "These regulations should be withdrawn."

As discussed in the proposed rule, this new requirement is intended to promote the high standards of integrity and accountability within the Federal workforce by requiring agencies to maintain personnel records that reflect complete and accurate

information, and not to alter the information contained in those records in connection with a formal or informal complaint or adverse personnel action. We disagree that OPM is impermissibly interfering in the collective bargaining relationship between the agency and the exclusive representative by prohibiting agencies from entering into clean record agreements. Individual supervisory decisions exercised in the context of settlement agreements are not subject to collective bargaining and cannot be diminished through the collective bargaining process. OPM does not agree that a link exists between settlement agreements of discrete, individual personnel actions and the collective bargaining process over broad conditions of employment which occurs under 5 U.S.C. chapter 71. Also, the President has broad authority to manage the conduct of the Federal workforce. This includes issuing directives to agency supervisors regarding how to exercise their discretion in the context of making decisions on disciplinary actions, including settlement agreements. It is also worth noting that the now vacated preliminary injunction by the D.C. District Court left intact Section 5 of E.O. 13839 regarding matters related to settlement agreements. Finally, OPM has the authority to require agencies to maintain specific information in personnel records. The prohibition on the use of clean record agreements by agencies would not prevent parties from entering into other types of settlement agreements or other forms of alternative dispute resolution. It would only preclude agencies from entering into agreements that could serve to circumvent necessary transparency. With respect to the concern that the proposed rule could violate the Privacy Act, OPM notes that there is nothing in the rule that relieves agencies of their obligation to maintain accurate personnel records in accordance with the Privacy Act.

A commenter objected to the proposed rule change for §§ 432.108, 752.203, 752.407 and 752.607 concerning settlement agreements, and stated that “prohibiting clean record settlements is a horrible waste of taxpayer money.” The commenter asserted that allowing such settlements provides maximum flexibility to agencies and promotes quick settlement of cases at low or no cost to the Government. The commenter stated also that prohibiting agencies from agreeing to alter, erase or withhold information in personnel records would force agencies to engage in lengthy, resource-intensive legal battles, “contrary to the effectiveness and efficiency of the government.” Another commenter shared a similar concern that restrictions on clean record agreements will lead to unnecessary, expensive results that are wasteful of time, money and resources. OPM disagrees. As stated above, this new requirement promotes the high standards of integrity and accountability within the Federal workforce by requiring agencies to maintain personnel records that reflect complete and accurate information, and not to alter the information contained in those records in connection with a formal or informal complaint or adverse personnel action. Agencies may experience fewer matters that give rise to arbitration and litigation because the prohibition on clean record agreements facilitates the sharing of records between Federal agencies. Agencies will be better able to make appropriate and informed decisions regarding a prospective employee’s qualification, fitness and suitability as applicable to future employment.

A commenter stated that the Supplementary Information references a “partial clean record,” and the proposed rule itself omitted any reference to a “partial clean record.” The commenter suggested that prohibition on expunging personnel records as part of a settlement may force aggrieved former employees to file suit under the Privacy

Act to enjoin the disclosure of false derogatory information to another agency or to another prospective employer. The commenter stated that the proposed rule provided no recourse for an employee to challenge the accuracy of the record, or to expunge information about an underlying incident if the employee and agency disagree about the accuracy or legality of the reported action. The commenter added that the “current law provides a workable procedure for bona fide allegations of misconduct or unsatisfactory performance.” As an alternative to the proposed rule, the commenter recommended improved guidance to supervisors and human resources staff and improved quality of data on misconduct.

OPM will not adopt any changes based on this comment. Partial clean record settlements are those in which the agency agrees to withhold negative information from any prospective future non-Federal employers but, in conformance with E.O. 13839, does not agree to withhold any negative information from other Federal agencies. Although the language in §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607, does not include the phrase “partial clean record,” the rule does in fact state that an agency may not erase, remove, alter or withhold from *another agency* any information about a civilian employee’s performance or conduct in that employee’s official personnel records. (Emphasis added.) Thus, there was no contradiction or inconsistency between the Supplementary Information and the proposed rule.

Some commenters erroneously interpreted E.O. 13839 and the proposed rule to mean that settlement agreements are eliminated or characterized the proposed amendments as having an intent to cause harm to Federal employees. One commenter stated that E.O. 13839 and the proposed regulations eliminate settlement agreements and

fail to recognize that there are “many incompetent managers whose motives do not align with public service.” The commenter stated that additional safeguards are warranted. The commenter asserted that a hardworking, capable employee who loses his or her job should not be further harmed by untruthful allegations that could impede his or her job search. The commenter expressed concern that probationary employees are often afforded no opportunity to contest or submit evidence to support continuation of employment, resulting in personnel files that may not have an accurate picture. A retiree who relies on OPM “for everything” expressed concern for OPM employees and a wish for OPM employees to be treated with respect and fairness. One individual described clean record agreements as a long-standing practice that, if removed, “will only hurt ... employees.” The commenter asked, “please stop seeking to eliminate federal employee rights.”

Other commenters likened the proposed rule to “prohibition on finding someone innocent” and called it “sadly disconcerting.” Yet another stated, “Basically any wrong can never be righted, regardless of time or improvement in performance.” An individual commented that removing the ability for a record to be “cleaned” is an unfair practice. Believing that everyone has a “bad day,” the commenter asked if this is “a just reason to have a black mark on their record?” A commenter stated that eliminating “clean record” agreements would mean that any negative mark on an employee’s record would be permanent, and that employee rights “should not be eliminated through Executive Order.” The commenter went on to say that employee rights are given via “congressional approval and the rule of law,” and should be changed in those venues. A commenter opposed the proposed changes that “abolish clean record settlements” on the basis that

OPM “wants to make it harder to amicably settle employment disputes and instead make their resolution less effective and efficient and more contentious.”

A national union commented that eliminating the opportunity to reach clean record agreements reduces workplace flexibility. The union asserted that a prohibition on clean record agreements “ensure[s] federal workers are seen in the worst possible light.” A local union commented that the proposed rule can only be interpreted as an attempt to “stack the deck” against an employee under consideration for punishment. The union asserted that under the proposed rule, performance issues from years ago would be used as justification for severe punishment, while letters of admonishment and reprimand are currently removed from an employee’s file after a set period of time. The union stated that clean record settlement agreements are a valuable tool to resolve labor-management disputes, since both parties prefer to settle disputes through settlement rather than through litigation.

OPM will not adopt any revisions to the proposed rule based on these comments. Section 5 of the E.O. 13839 does not prevent parties from entering into settlement agreements to resolve workplace disputes. OPM is not seeking to harm employees, cast them in the worst possible light, “stack the deck” against them, eliminate employee rights, or impede job searches. Further, the amended regulations will not convert time-limited personnel records such as letters of admonishment and reprimand into permanent documents. As previously discussed, Federal employees will continue to enjoy all core civil service protections under the law, be protected by the merit system principles and possess procedural rights and appeal rights. All procedural protections afforded employees who are subject to an adverse action remain unaltered, including the right to

contest a proposed adverse action if an employee believes the agency has acted impermissibly or relied upon an error and through submission of a reply and supporting materials. Also, agencies are permitted to correct errors based on discovery of agency error or illegality. The regulation further permits agencies to cancel or vacate a proposed action when persuasive evidence comes to light casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation. OPM is simply effectuating the requirements of E.O. 13839 and thereby facilitating a Federal supervisor's ability to promote civil servant accountability and simultaneously recognize employee's procedural rights and protections.

A commenter reacted to the proposed rule at §§ 432.108, 752.104, 752.203(h), 752.407 and 752.607 by stating that it subjects government employees to a standard unseen in the private sector. The individual added that government employees need the same protections as private sector employees with regard to sharing employment history. The commenter did not identify what "protections" private sector employees have with respect to sharing employment history. OPM notes that public sector employment is different from private sector employment in a number of key ways, including the fact that Federal employees enjoy *additional* job protections above and beyond what is codified and afforded to private sector employees (See e.g., 5 U.S.C. chapter 23 – Merit System Principles). OPM will not adopt changes based on this comment.

An agency recommended removing the references to the OPM report in § 752.104(b) because it is the only time a specific section of the OPM report is discussed. The agency went on to say that it is not clear why there is a "discrete reference" to one part of a larger OPM report "when the report is not otherwise discussed in the text of the

regulations.” The agency further recommended either adding a new separate section in the regulations discussing the report and its components, or having the report be covered by E.O. 13839 and OPM policy.

OPM notes that §§ 432.108(b), 752.203(h)(2), 752.407(b) and 752.607(b) also refer to the reporting requirements in Section 6 of E.O. 13839. OPM will not adopt the agency’s recommendations because OPM believes that the reference to reporting requirements, in addition to the instructions provided in E.O. 13839, OPM’s guidance memoranda of July 3, 2018, and October 10, 2018, and any instructions OPM will provide in the data call process constitute useful guidance.

A commenter expressed the view that eliminating clean record agreements would mean that any negative mark, such as letters of admonishment and reprimand, on an employee’s record would be permanent and could be used as justification for proposing a subsequent more severe form of punishment. OPM does not fully agree with this assertion. OPM notes that, for employees that engage in repeated misconduct, increasing the severity of disciplinary measures is likely to be appropriate, and, to the extent that preserving the integrity and accuracy of an employee’s personnel file facilitates an agency’s ability to take such appropriate measures, this is beneficial to the agency and to the public. OPM also notes that the questions of when, how, and for how long an agency may rely on prior incidents of misconduct is governed by a legal framework that is independent from and unaffected by this rule. Finally, OPM would note that the regulatory amendments also do not impact guidelines surrounding disciplinary instruments such as letters of reprimand or admonishment, the preservation of which is also governed by procedures that are independent of and unaffected by this rule.

A national union recommended that OPM rewrite § 432.108 to make it “clear, comprehensive, and less wordy” and offered the following revision: “(a) *Agreements to alter personnel records.* Except as provided in subsection (b), an agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee’s performance or conduct in that employee’s official personnel records, including an employee’s Official Personal Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action. (b) *Corrective action.* An agency unilaterally or as part of, or as a condition to, resolving by agreement a formal or informal complaint by the employee, or settling an administrative challenge to an adverse action, may at any time erase, remove, alter, or withhold from another agency any information about a civilian employee’s performance or conduct in that employee’s official personnel records, including an employee’s Official Personnel Folder and Employee Performance File if the agency has reason to believe that: (1) the complaint or administrative challenge is, or might reasonably be found by an adjudicator to be, valid; (2) the information is, or might reasonably be found by an adjudicator to be, inaccurate; (3) the adverse action was, or might reasonably be found by an adjudicator to have been, proposed or taken illegally or in error; or (4) the information records, or might reasonably be found by an adjudicator to record, an adverse action or other agency action that was proposed or taken illegally or in error. (c) *Reporting.* An agency should report any agreements relating to the removal of Information under subsection (b) as part of its annual report to the OPM Director required by Section 6 of E.O. 13839.”

OPM believes that the proposed changes would not make these provisions clearer while they would substantially change the meaning and intent of the proposed rule and would be inconsistent with the requirements of E.O. 13839. Also, as currently written, § 432.108(b) and (c) permit agencies to take corrective action based on discovery of agency error and discovery of material information prior to final agency action, respectively, before any adjudicator is involved. Further, the union's revision gives the impression that the reporting requirement applies to actions that are cancelled or vacated based on discovery of material information prior to final agency action, which is not the case. Finally, in response to suggestions regarding post-adjudication action, such a change to the rule would be unnecessary to the extent that OPM would be compelled to initiate any changes to personnel records required to conform to a judicial order. For the foregoing reasons, OPM will not adopt the union's recommended revision.

In sum, the amended regulation at § 432.108 effectuates Section 5 of E.O. 13839, and thereby promotes integrity and accountability and facilitates the sharing of records between Federal employers in a manner that permits agencies to make appropriate and informed decisions regarding a prospective employee's qualification, fitness, and suitability as applicable to future employment. However, Section 5 requirements should not be construed to prevent agencies from correcting records should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must

ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. Section 5 requirements should also not be construed to prevent agencies from entering into partial clean record settlements with regard to information provided to non-Federal employers.

Finally, when persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency files. However, the requirements described in Section 5 would continue to apply to any accurate information about the employee's performance or conduct which comes to light prior to issuance of a final agency decision on an adverse action. Based on the foregoing, the final rule at § 432.108 reflects E.O. 13839's restrictions on settlement agreements arising from chapter 43 actions.

Technical Amendments

The final rule corrects the spelling of the word "incumbents" within § 432.103(g) and the word "extension" at § 432.105(a)(4)(i)(B)(3). OPM replaces the term "handicapping condition" with "disability" at § 432.105(a)(4)(i)(B)(4) to bring the definition into conformance with 29 U.S.C. 705. In this rule, OPM also revises § 432.105(a)(4)(i)(C) to correctly identify the office that an agency shall contact if it

believes that an extension of the advance notice period is necessary for a reason other than those listed in § 432.105(a)(4)(i)(B). OPM revises § 432.106(b)(1) to replace “i.g.” with “i.e.” within the parenthetical concerning non-exclusion by the parties to a collective bargaining agreement. Finally, OPM corrects the use of the word “affected” versus “effected” within § 432.107(b).

An agency recommended reviewing and correcting the use of “affect” and “effect” throughout the proposed rule. The final rule corrects the use of the word “affected” versus “effected” within § 432.107(b). There were no other misuses of “affect” and “effect” in the proposed rule. Therefore, no additional changes are necessary based on this comment.

Another commenter recommended that agencies expunge records “after 90 days or until the next formal performance rating, whichever is shorter” if, because of performance improvement during the notice period, the employee is not reduced in grade or removed. OPM will not adopt any revisions based on this comment. The proposed rule is simply a technical amendment intended to make a grammatical correction (i.e., it changes the word “affected” to “effected”). The rest of the language in this section reflects requirements that exist today and predate this proposed regulatory revision.

5 CFR Part 752 – Adverse Actions

Subpart A — Discipline of Supervisors Based on Retaliation Against

Whistleblowers

Recent changes enacted by Congress modifying 5 U.S.C. 7515 establish mandatory procedures for addressing retaliation by supervisors for whistleblowing. The regulations, issued pursuant to this Statute, reinforce the responsibility of agencies to

protect whistleblowers from retaliation. These requirements are significant because of the essential protections they provide. Prohibited personnel actions are not consistent with the notion of a system based on merit, and failure to observe these prohibitions must be addressed promptly and resolutely.

OPM has revised our regulations to incorporate these statutory changes and to ensure that agencies understand how to meet the additional requirements in connection with prohibited personnel actions. This new rule falls under subpart A of 5 CFR part 752 as “Discipline of supervisors based on retaliation against whistleblowers.”

An agency suggested that OPM remove portions of the newly created subpart A on the rationale that the Office of Special Counsel (OSC) should issue regulations pertaining to discipline of supervisors based on retaliation against whistleblowers if it desires to do so. This agency stated also that the regulations should be in chapter VIII, of title 5, Code of Federal Regulations. We will not make any revisions to the final rule as a result of this comment. Congress granted OPM authority to regulate adverse actions. The final language implements the statutory authority and procedures of 5 U.S.C. 7515 and reinforces the principle that increased accountability is warranted in situations where a supervisor commits a prohibited personnel action against an employee of an agency in violation of paragraph (8), (9), or (14) of 5 U.S.C. 2302(b).

Two organizations and one individual expressed broad support for subpart A. One of the organizations fully commended OPM, while reminding us that claims of retaliation must be substantiated and proven and cautioning against mere allegations resulting in the dismissal of management. In addition, the organization reminded OPM that managers and supervisors can be whistleblowers as well, but often lack protections

equal to those applicable to other employees in making whistleblower disclosures.

Lastly, the organization encouraged OPM to protect whistleblowers at all levels and hold all employees equally accountable for retaliation. While another organization voiced its support for whistleblower protection, the organization emphasized that supervisors, managers, and executives can be whistleblowers, and changes to the system cannot embed an us-versus-them mentality between different levels of the workforce.

OPM agrees with these commenters. We understand that under the relevant statute (i.e., 5 U.S.C. 7515(b)), the claims of retaliation must be substantiated and proven and that mere allegations may not be the basis for the dismissal of management. Further, we believe that the regulations reinforce the responsibility of agencies to protect *all* whistleblowers from retaliation. These regulations help to undergird and support agencies in meeting their requirements to take action against “any” supervisor who retaliates against whistleblowers. Accordingly, different levels of the workforce are subject to the increased accountability and protections.

In response to these comments, OPM also provides the following clarification: The initiation of a removal action pursuant to 7515(b)(1)(B) should be understood to be required under this statute only if a disciplinary action, initiated pursuant to 7515(b)(1)(A) – based on an agency finding of retaliation made pursuant to procedures outlined in 7515(b)(2)(B) – is either uncontested or if contested, is upheld by a third party. As a corollary to this observation, OPM notes that, should a disciplinary action initiated pursuant to 7515(b)(1)(A) be contested and *not* sustained, a subsequent and separate determination by the agency that a supervisor engaged in a prohibited personnel

practice (again after following procedures in 7515(b)(2)(B)), would trigger a proposal under 7515(b)(1)(A), not 7515(b)(1)(B).

Section 752.101 Coverage

The final rule describes the adverse actions covered and defines key terms used throughout the subchapter. An organization suggested, without any additional information or specific recommendations, that clarification of definitions in this section is needed and would be helpful. Due to the lack of specifics, OPM did not consider any revisions based on this comment.

The final rule also includes a definition for “insufficient evidence.” OPM defines this new term as evidence that fails to meet the substantial evidence standard described in 5 CFR 1201.4(p). One commenter objected to this definition and recommended that OPM either remove it or change it as follows: “~~Insufficient~~ Sufficient evidence means evidence that ~~fails to meet~~ meets the substantial evidence standard described in 5 CFR 1201.4(p).” The commenter argued that the rule introduces the substantial evidence standard into chapter 75 adverse action procedures. He believes his recommendation will ensure that the agency retains the preponderance of the evidence burden of proof while still maintaining the substantial evidence burden of proof for the employee refuting an allegation of a prohibited personnel action. OPM will not adopt any revisions based on this comment because the recommended changes are unnecessary. First, the term “insufficient evidence” mirrors the content of 5 U.S.C. 7515, which OPM has no authority to change. Further, the employee’s burden of proof of substantial evidence in the proposed regulations applies only to the evidence furnished prior to any agency action. If an action is taken and the employee appeals to the MSPB, the agency bears the

burden of proof. The agency's action must be sustained by a preponderance of the evidence if the action is brought under chapter 75, as it is here.

Also, with respect to coverage, a commenter expressed concern that 5 U.S.C. 7515 fails to hold political appointees accountable for retaliation against whistleblowers and observed that the proposed rule weakens Federal workforce protections at a time when they should be strengthened. OPM did not adopt any revisions based on this comment. An agency head need not follow the procedures outlined in section 7515 in order to separate a political appointee who engaged in whistleblower retaliation. Political appointees serve at will and can be separated at the pleasure of the agency head at any time, including for violating whistleblower rights. Therefore, political appointees can be held accountable for retaliation against whistleblowers. As to the broader assertion that the proposed rule weakens Federal workplace protections, OPM emphasizes that Federal employees will continue to enjoy all core civil service protections under the law, be protected by the merit system principles, and possess procedural rights and appeal rights. The final rule does not remove the procedural protections afforded employees who are subject to an adverse action, including the right to contest a proposed adverse action if an employee believes the agency has acted impermissibly or relied upon an error and the right to submit a reply and supporting materials.

Section 752.102 Standard for action and penalty determination.

5 U.S.C. 7515 incorporates many of the procedural elements of 5 U.S.C. sections 7503, 7513 and 7543, to include the standards of action applied to each type of adverse action. For supervisors not covered under subchapter V of title 5, the proposed rule applies the efficiency of the service standard. For supervisors who are members of the

Senior Executive Service (SES), the proposed rule defines the standard of action as misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment, or to accompany a position in a transfer of function.

5 U.S.C. 7515 enhances statutory protection for whistleblowers through the creation of proposed mandatory penalties. In accordance with the statute, the final rule at § 752.102 outlines the penalty structure. Specifically, for the first incident of a prohibited personnel action, an agency is required to propose the penalty at a level no less than a 3-day suspension. Further, the agency may propose an additional action, including a reduction in grade or pay. For the second incident of a prohibited personnel action, an agency is required to propose that the supervisor be removed.

In one agency's view, the required penalties under § 752.102 seem to conflict with language regarding progressive discipline and the penalty determination in the remaining sections of 5 CFR part 752. The agency's commenter stated that it is possible a third-party would see the lower-tiered disciplinary level (suspension) and argue that it should have been taken first (absent any prior disciplinary action). For the first prohibited personnel action committed by the supervisor, the agency recommended modifying § 752.102(b)(1)(i) to state, "Shall propose a penalty up to and including removal."

Another commenter who was concerned about the penalty structure stated that a suspension of a minimum of three days for retaliation against a whistleblower is not sufficient given the severity of the offense and opined that a suspension should be a minimum of 30 days or more depending on the severity of the offense. This commenter further stated that if the offending supervisor is retained, then he or she should be

retrained for a minimum of 5 days in addition to the suspension. Finally, the commenter stated that if the whistleblower was terminated, the supervisor's penalty should also be termination.

We will not make any revisions to the regulation based on these comments. The mandatory proposed penalties as listed in § 752.102(b)(1) track the relevant statute, 5 U.S.C. 7515. Specifically, for the first incident of a prohibited personnel practice, an agency is required to propose the penalty at a level *no less than a 3-day suspension*. (Emphasis added.) Further, the agency may propose an additional action, including a reduction in grade or pay. We believe the regulation as written is sufficiently broad to give agencies the flexibility and guidance needed to propose a penalty suited to the facts and circumstances of the instant whistleblower retaliation, including severity of the offense.

One commenter stated that any rule change should include notifying employees of what action has been taken to correct a supervisor's "future behavior," which we understood to mean notifying employees of what action was taken to correct a supervisor's behavior to prevent any future wrongdoing. We will not adopt this proposed change based on the need to protect employees' personal privacy. An agency may only share information from an individual's personnel records with those who have a need to know, such as human resources staff involved in advising management and any management official responsible for approving the action.

Section 752.103 Procedures

The final rule establishes the procedures to be utilized for actions taken under this subpart. The procedures in the subpart are the same as those described in 5 U.S.C. sections 7503, 7513 and 7543. However, the final rule also includes some key exceptions, namely the provisions concerning the reply period and advance notice. Under this subpart, supervisors against whom an action is proposed are entitled to no more than 14 days to answer after receipt of the proposal notice. At the conclusion of the 14-day reply period, the agency shall carry out the proposed action if the supervisor fails to provide evidence or provides evidence that the head of the agency deems insufficient. To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond.

Several commenters, including three agencies, an organization and a national union, expressed concern about the procedures promulgated in § 752.103(d). The agencies inquired about any exceptions to the required timeframe of not more than 14 days to furnish evidence as provided in 5 U.S.C. 7515(b)(2)(B) in the instance of, for example illness, extenuating circumstances, or in response to a request for extension from the employee or the employee's legal representative. One of the agencies recommended specifically that OPM clarify this matter as to circumstances which may justify extension of this 14-day answer period, if any. With respect to § 752.103(d)(2), the organization characterized the proposed regulation as contrary to statute, stating that OPM cannot waive the statutory requirements for advance notice of proposed adverse actions by regulation, and so cannot set up a scheme whereby the effective date of an adverse action is less than the absolute statutory minimum. Similarly, an individual commenter asserted

that it contradicts 5 U.S.C. 7513(b)(1) and 5 U.S.C 7543(b)(1) with respect to an agency's requirement to give 30-day advance notice of a proposed adverse action. The commenter argued that a statutory amendment is required to exclude disciplinary actions for prohibited personnel practices from the statutorily prescribed notice and response times.

The national union also raised objections to the amount of time allowed for an employee to defend a proposed adverse action under § 752.103, claiming that the proposed rule does not consider the time it may take an employee to gather evidence or obtain capable representation. The union added that agencies must then evaluate evidence and render a decision within 15 days after the response period closes. The union called this a "hurried" approach that places unreasonable time constraints on employees and agencies and favors expediency over accuracy. Another agency recommended clarifying that the 15-business day limit does not apply to suspensions, reductions in grade or pay, or lesser penalties.

OPM will not adopt any revisions based on these comments. The response period and advance notice period in § 752.103 do not represent guidelines originating from OPM regulations, as indicated by these commenters but rather effectuate the statutory requirements in 5 U.S.C. 7515, and the principle outlined in Section 2(f) of E.O. 13839 that provides, to the extent practicable, agencies should issue decisions on proposed removals taken under chapter 75. The requirement regarding the 14 days to submit an answer and furnish evidence in support of that answer is derived from an explicit statutory limitation (*See* 5 U.S.C. 7515(b)(2)). The statute further states that if after the end of the 14-day period a supervisor does not furnish any evidence, the head of the

agency “shall” carry out the action proposed. The clear language of the statute specifically directing that the head of the agency carry out the action at the conclusion of 14 days reflects a mandatory process that provides no discretion for OPM to make exceptions through regulation nor does it offer discretion for agencies to diverge from the statutory requirements by permitting extensions.

Additionally, a commenting organization expressed concern that, although the 15 business days to issue decisions is “doable” and will speed up the process, these types of actions sometimes do not receive attention in a timely manner at senior level. The organization stated that some of their members have reported removal decisions that are pending for months with the employee in limbo and the office scrambling to accomplish work. The commenter recommended that the reporting requirement should emphasize the importance of meeting the time period of 15 business days to issue decisions.

OPM will not adopt the recommendation that the reporting requirement should emphasize the importance of adhering to the time period of 15 business days to issue decisions. By emphasizing the non-discretionary nature of this reporting requirement in the Data Collection section above., , OPM believes that it is conveying the importance of meeting this deadline. That said, OPM agrees that adhering to the time period of 15 business days to issue adverse action decisions is important and would further emphasize that this requirement supports the objective to make disciplinary procedures more efficient and effective.

OPM received comments as well on other requirements established in § 752.103. An agency raised a concern regarding written notice about the right of the supervisor to review the material relied on, as provided for at 752.103(c)(2); and written notice of any

right to appeal the action pursuant to section 1097(b)(2)(A), as provided for at 752.103(c)(3). The agency highlighted specifically that according to the National Defense Authorization Act (NDAA) for Fiscal Year 2018, Pub. L. 115-91, Sec. 1097(b)(2)(A) requirements only apply to proposal notices under 5 U.S.C. 7503(b)(1), 7513(b)(1), and 7543(b)(1) as stated in the law. The commenter stated that Pub. L. 115-91 Sec. 1097(b)(2)(A) requirements do not apply to 5 U.S.C. 7515 actions and therefore should not be applicable to proposal notices under section 7515. Also, the commenter went on to observe that 5 U.S.C. 7515 specifically states that its provisions are not subject to 5 U.S.C. 7503(b)(1), 7513(b)(1) and 7543(b)(1).

Upon further review and careful consideration of this comment, OPM has determined that it will not incorporate the requirement to provide information on appeal rights in any notice to an employee for an action taken under section 7515.

An agency and one individual commenter also raised concerns about including appeal rights information in the notice of proposed action. The agency commented that this seems to imply that an employee obtains a right to appeal an action under Public Law 115-91 section 1097(b)(2)(A) while the statute only requires that the agency provide notice of detailed information with respect to any right to appeal the action. The agency suggested that OPM revise § 752.103(c)(3) to read "...provides, pursuant to section 1097(b)(2)(A) of Public Law 115-91, notice of any right to appeal..." The individual commenter stated that parts 315, 432, and 752 require that a notice of proposed action include the employee's appeal rights and time limits, which is inappropriate at the proposal stage. The commenter's concern is that employees would file appeals before an action is final and create a bottleneck downstream.

As noted above, the amended regulation will not require that agencies include appeals rights information in a notice of proposed action taken under section 7515. Notwithstanding, it is important that the commenters understand that current and amended parts 315 and 432 do not require that agencies provide advance notice of appeal rights. (It is unclear if by “time limits” the commenter is referring to time in which to file an appeal or time to respond to notice of a proposed action.) Further, it is well-established in statute, regulation, and case law that an employee cannot appeal a proposed action.

Finally, the regulation at § 752.103 also includes the requirement that, if the head of an agency is responsible for determining whether a supervisor has committed a prohibited personnel action, that responsibility may not be delegated. This non-delegation provision generated a significant number of comments. One organization, three agencies, and one individual questioned how it would work to have the head of an agency responsible for determining whether a supervisor has committed a prohibited personnel action. The organization stated that larger agencies such as the Department of Defense have traditionally delegated authorities to Components who may further delegate within their command structure. The commenters asked for clarity on when an agency head would be responsible for determining whether a supervisor committed a prohibited personnel action. One of the agencies commented that the meaning of this provision is unclear specifically as to whether the head of the agency is responsible for determining, without delegation permitted, whether a supervisor committed a prohibited personnel action or if an agency has decided internally via its disciplinary procedures that the head of the agency must make this determination, then it cannot be delegated. The agency

suggested that OPM should exercise its authority to provide more guidance regarding the meaning of 5 U.S.C. 7515(b)(3). A second agency stated that as a political appointee, the head of an agency may be perceived as making politically motivated decisions, resulting in claims of whistleblower retaliation. Another of the agency's concerns is that a limitation on delegation could be inconsistent with the statute. This agency, along with a third agency, recommended agency discretion to determine delegation level.

Some clarification in response to these comments may be useful. The requirement regarding non-delegation is an explicit statutory limitation under 5 U.S.C. 7515(b)(3) contingent upon whether the head of any agency is responsible for determining whether a supervisor has committed a prohibited personnel practice. The statute states that *if* the head of the agency responsible for making the determination of whether a supervisor committed a prohibited personnel action in retaliation against a whistleblower, the responsibility may not be delegated. However, if that responsibility rests at a lower level within the agency, then decision-making authority as it relates to these types of actions would be similarly re-delegated. Consistent with this wording and with the general authority granted to agencies pursuant to 5 U.S.C. 302, OPM interprets this language to provide agencies with the discretion to internally re-delegate this function to an appropriate level resulting in these responsibilities then resting at that level for the purpose of making these determinations regarding supervisory conduct.

Section 752.104 Settlement agreements

The language in this section establishes the same requirement that is detailed in the rule changes at § 432.108, Settlement agreements. Please see discussion in § 432.108.

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

This subpart addresses the procedural requirements for suspensions of 14 days or less for covered employees.

Section 752.201 Coverage

Pursuant to the creation of subpart A within the final rule, § 752.201(c) reflects an exclusion for actions taken under 5 U.S.C. 7515.

Section 752.202 Standard for action and penalty determination

While the standard for action under this subpart remains unchanged, the final rule makes clear that an agency is not required to use progressive discipline under this subpart. The final rule supports Section 2(b) of E.O. 13839, which states that supervisors and deciding officials should not be required to use progressive discipline. Three management associations endorsed this clarification. Two of the associations recognized explicitly that supervisors, managers and executives encounter unique circumstances whereby they must apply their judgment, understanding of context and knowledge of their workforce and organization in a manner that collectively informs personnel decisions. One of the groups added that managers who have greater autonomy over personnel actions can better work with their employees to determine which personnel actions will foster success for the agency in the long term.

One association stated that the amended regulation “takes the penalty out of the bargaining arena,” and added that it “never belonged there in the first place.” As reflected in the language of the rule, specifically that a penalty decision is in the sole and exclusive discretion of the deciding official, bargaining proposals involving penalty

determinations such as mandatory use of progressive discipline and tables of penalties impermissibly interfere with the exercise of a statutory management right to discipline employees, and are thus contrary to law.

Two of the associations recommended that OPM use “plain English” as much as feasible when updating the regulations. The organization noted that there are many legal phrases used in the Federal employment context which can be highly confusing if not properly defined and clarified. OPM will not make any revisions based on these comments as the commenters did not identify any specific phrases or terms for consideration and the regulations are based on statutory requirements.

An agency expressed support for OPM’s clarification that agencies are not required to use progressive discipline, adding that use of progressive discipline has led to many delays in removal as well as hardship for supervisors. The agency noted that the rule will give more discretion to supervisors to remove “problematic” employees, thus increasing the efficiency of the service. However, the agency added that progressive discipline is often useful to justify an agency’s action; defeat claims of favoritism, preferential treatment, and discrimination; and provide more consistency between managers. The agency recommended that OPM provide further guidance on when and to what extent progressive discipline should be used as well as clarification on the extent to which agencies should rely upon tables of penalties in making disciplinary decisions. In fact, OPM recently provided such information in a memorandum, “Guidance on Progressive Discipline and Tables of Penalties,” issued on October 10, 2019.

An individual commenter also expressed support for the clarifications as they relate to progressive discipline, tables of penalties and selection of a penalty appropriate

to the facts and circumstances, including removal, even if the employee has not been previously subject to an adverse action. Another commenter found the clarification at § 752.202 to be helpful, with the caveat that implementation will be difficult as labor and employee relations staff seem to have it ingrained that progressive discipline is the “safest way to go” to avoid litigation. The commenter observed that without support from labor and employee relations staff, front-line supervisors are often constrained by senior managers. OPM will not make any revisions based on these comments as no revision was requested.

Many commenters objected to the regulatory amendments regarding standard for action and penalty determination. Some, including four national unions, characterized the amendments as eliminating, attacking, or discarding progressive discipline, and argued strongly for withdrawal of the proposed rule. One of the unions commented that “eliminating” progressive discipline places an inordinate amount of power in the hands of deciding officials, who are being directed to impose the most severe penalty possible. The union added that agencies will impose penalties “within the bounds of tolerable reasonableness” in a manner that leads to subjective discipline. Another national union argued that progressive discipline helps to foster a successful workplace by giving employees an opportunity to learn from their mistakes and ensuring that discipline is proportionate to mistakes. The union went on to say that the rule weakens workplace flexibility and eliminates the ability of Federal managers and employees to come together to develop fair disciplinary procedures. Yet another national union described progressive discipline as an important tool that agencies should use in order to avoid “arbitrary and capricious” penalty determinations. The union expressed concern that a critical safeguard

against arbitrary and capricious agency action is being taken away in favor of “inconsistent and ad-hoc decision-making.” Pointing to the CSRA, the union said, “Put simply, jettisoning progressive discipline, confusing the use of comparator evidence, and discouraging tables of penalties, creates an improper bias toward the most drastic penalty an agency thinks it can get away with.” This national union asserted such a “rule of severity” is not only counterproductive and likely to lead to a greater number of penalty reversals, it is also contrary to the text, structure, and purpose of the CSRA. The national union stated that the proposed regulations upset this balance and asserted that OPM’s claim that “[p]rogressive discipline and tables of penalties are inimical to good management principles” is nothing more than a cheap soundbite. This national union insisted that it is not based on sound analysis or solid evidence and stated that the proposed regulations should therefore be abandoned.

The fourth national union stated that the rule will have the “perverse effect” of encouraging agencies to terminate an employee even where there are no prior disciplinary issues and regardless of the seriousness of the infraction at issue. The union went on to say that such results would erode the public trust in Federal agencies and devalue the contributions of hard-working Federal employees. This national union stated that the Federal government invests considerable time and money in training Federal employees, and the notion that a supervisor could decide to fire an employee over a minor transgression and give a written reprimand for the same transgression to another employee is antithetical to the principles of an unbiased and fair civil service system.

In addition to the comments discussed above that were submitted individually by labor organizations, we received a letter signed by seven national unions as well as

comments via a template letter from members of one of the undersigned unions. They discussed that progressive discipline is the “law of the land” and deemed it weakened by the proposed rule. The commenters further stated that the proposed rule does nothing but weaken protections for Federal employees in an effort to circumvent the “efficiency of the service” standard. Also, the commenters opined that the proposed changes cannot change an agency’s obligation to determine an appropriate penalty in accordance with *Douglas v. Veterans Administration*, 5 MSPR 280 (MSPB 1981). The commenters stated the proposed change will lead to confusion and the unjustified punishment of Federal workers, not to mention disparate treatment. One of the union members added that progressive discipline is fair and allows employees a chance to improve their performance without fear of losing their livelihood. The commenter went on to say that progressive discipline prevents favoritism, nepotism and the “good ole boy” networks from forming and flourishing in Federal agencies. The commenter is concerned that rules such as this will deter “young and new talent” from applying for Federal jobs and drive existing workers to the private sector.

Via a different template letter, several members of another national union also interpreted the proposed rule to mean that progressive discipline is abolished. The commenters expressed concern that the regulatory changes will lead to widely varying, incoherent, and discriminatory discipline for similarly situated employees. One of the commenters self-identified as a union steward and asked that their workload is lightened, not increased.

In addition, a national union objected to the proposed rule regarding progressive discipline on the basis that a standard of “tolerable limits of reasonableness” is less clear

and may result in various interpretations by supervisory personnel even within the same department of an agency. The union expressed concern that “mandating” that the threshold for review be at a less clear standard invites workplace chaos in which inconsistent penalties and unfair discipline is administered without the opportunity for it to be corrected.

An organization disagreed with the rule because in their view it flies in the face of proportionate discipline, due process and fairness. The organization commented that the regulation is contrary to statutory authority in 5 U.S.C. 7513 and established case law. They stated that eliminating progressive discipline and the consideration of mitigating factors would essentially eliminate the “for cause” standard and turn Federal employees into “at will” employees. The organization observed that this is the type of drastic action that would undo, impermissibly, the dictates of title 5 and interpretive case law, and is the type of action that can only be taken by Congress.

An organization opposed the proposed rule to the extent that it “undercuts” progressive discipline. The organization stated that progressive discipline is a wise approach and asserted that a supervisor can deviate from the guidelines of progressive discipline in certain situations if they have a reasoned explanation for doing so.

Additional commenters expressed concern about potential negative consequences of discouraging progressive discipline, calling it a poor stewardship of tax dollars, contrary to the public interest and a lead up to disparate treatment and retaliation. Some commenters worry that agencies will impose discipline arbitrarily, up to and including removal, for any offense with no obligation to first correct employee behavior. Commenters advocated that agencies give employees an opportunity to be made aware of

and correct behavior before being suspended or terminated, including calling it improper to do otherwise. Even a commenter who acknowledged that the rule changes could be beneficial expressed concern that managers are being given “more power” to remove employees without just cause. One asserted that this is a clear violation of the CSRA.

We will not make changes to the final rule based on these comments. The final rule does not eliminate progressive discipline. Rather, the regulatory language makes clear that an agency “is not required” to use progressive discipline under this subpart. In fact, progressive discipline has never been required by law or OPM regulations. It is not the “law of the land” as asserted by one commenter. Notwithstanding a number of comments submitted, the clarifying language in the amended regulations does not set aside or discard progressive discipline but it does, consistent with the Principles for Accountability in the Federal Workforce contained in Section 2 of E.O. 13839, emphasize that penalties for misconduct should be tailored to specific facts and circumstances, that a more stringent penalty may be appropriate if warranted based on those facts and circumstances, and that a singular focus on whether an agency had followed progressive discipline to the detriment of a more comprehensive fact-based, contextual assessment does not serve to promote accountability nor an effective or efficient government. The regulatory changes emphasize principles and policies contained in E.O. 13839 but are also supported by well-established legal authority: that the penalty for an instance of misconduct should be tailored to the facts and circumstances; an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness; employees should be treated equitably; and conduct that justifies discipline of one employee at one time does not

necessarily justify similar discipline of a different employee at a different time. Concerns expressed by commenters that the “bounds of tolerable reasonableness” is insufficiently clear appear to take issue with the state of the law, not OPM’s rule which simply incorporates the appropriate legal standard. The rule is also consistent with the efficiency of the service standard for imposing discipline contained in the CSRA notwithstanding assertions that it circumvents this standard. While commenters argued that the changes weaken agency flexibility, reliance upon the efficiency of the service standard, like reliance upon the bounds of tolerable reasonableness in the context of penalty selection in fact provides necessary flexibility to encompass the range of facts and circumstances associated with each individual adverse action. Agencies remained constrained by law to select penalties that conform to these legal requirements and any such penalty remains subject to challenge based on alleged failure to do so. This is undisturbed by the revised rule. Whether or not agencies choose to adopt further, internal constraints beyond these legal standards is purely discretionary, and OPM reminding agencies of this fact does not direct agencies to issue nor otherwise encourage more stringent penalties than are warranted given specific facts and circumstances.

Federal employees will continue to enjoy the protections enshrined in law, including notice, a right to reply, a final written decision, and a post-decision review when an agency proposes to deprive them of constitutionally protected interests in their employment. Although we have made changes to the regulations, due process and other legal protections are preserved as required by Congress.

Regarding a commenter’s criticism that there is a need to look at disciplinary actions before they are taken, the rule does not change the requirement for disciplinary

actions to be reviewed under the current regulatory requirements. The existing regulations at §§ 752.203 and 752.404 require that the employee must be provided an opportunity to provide an answer orally and in writing. The agency must consider any answer provided by the employee in making its decision. Moreover, for appealable adverse actions, § 752.404 provides that the agency must designate a deciding official to hear the oral answer who has authority to make or recommend a final decision on the proposed adverse action. Thus, further review of an agency proposed action is required before a decision to take any administrative action.

Regarding the assertion that the regulations cannot be used to circumvent required assessment of the *Douglas* factors, OPM would emphasize that there is no effort to evade any such legal requirement. *Douglas* itself states that the Board will not mitigate a penalty unless it is beyond the bounds of tolerable reasonableness. This permits, but does not require, agencies to impose the maximum reasonable penalty. OPM's regulations on progressive discipline are manifestly in accord with longstanding decisional law. Moreover, the analysis pursuant to *Douglas* that each deciding official must make provides a means of promoting fairness and discouraging the type of subjectivity and disproportionality which some commenters allege the new rule promotes. Meanwhile, the *Douglas* factors ensure consideration of all relevant factors that may impact a penalty determination, consistent with the language of E.O. 13839 and this rule. This includes consideration of whether an employee engaged in previous misconduct or did not engage in previous misconduct. While again, OPM is not seeking to prevent agencies from imposing less than the maximum reasonable penalty with this rule, and the exercise of sole and exclusive discretion is reposed in agencies, not OPM, considerations such as

this, carefully weighed alongside numerous other relevant considerations such as the severity of the misconduct and any potential mitigating circumstances provide a carefully calibrated assessment of penalty that should not be superseded by singular reliance on progressive discipline which may artificially constrain a more comprehensive analysis.

One union noted that the proposed regulations will prevent agencies from engaging in any collective bargaining negotiations that allow for progressive discipline. They asserted that the regulations are contrary to the intent and purpose of the Federal Service Labor-Management Relations Statute (the Statute). The union stated an agency's policy on disciplinary structure directly affects an employee's conditions of employment and is the exact condition that Congress intended to be collectively bargained. While recognizing OPM's authority to issue regulations in the area of Federal labor relations, the union added that OPM may not "dilute the value of employees' statutory right to collectively bargain." The union further stated the regulations should not be implemented because they would "diminish the core elements of collective bargaining by reducing negotiations over primary conditions of employment," including discipline.

We agree that Federal employees have a statutory right to collectively bargain over their conditions of employment. However, there are certain exceptions outlined in the Statute, including a prohibition on substantively bargaining over management rights as outlined in 5 U.S.C. 7106(a). This includes management's statutory right to suspend, remove, reduce in grade or pay, or otherwise discipline employees. Accordingly, bargaining proposals that would mandate a specific penalty under certain circumstances or which mandate the use of progressive discipline and tables of penalties impermissibly interfere with the exercise of a statutory management right to discipline employees. In

clarifying that a proposed penalty is at the sole and exclusive discretion of the proposing official, and the penalty decision is at the sole and exclusive discretion of the deciding official (subject to appellate or other review procedures prescribed by law), the rule further elaborates on what is already established by law, management's inherent and non-negotiable right to utilize its discretion in this area, it does not enhance those rights nor diminish bargaining rights in this area.

Some commenters focused especially on OPM's adoption by regulation of the standard applied by MSPB in *Douglas* to removals, suspensions and demotions, including suspensions of fewer than 15 days. Specifically, the final rule adopts the requirement to propose and impose a penalty that is within the bounds of tolerable reasonableness. An organization discussed that while OPM may issue regulations regarding the procedures to be followed in adverse actions, an action against any employee may only be taken "for such cause as will promote the efficiency of the service," 5 U.S.C. 7513(a). Citing *Douglas* itself and other case law, the organization described as a basic principle of civil service disciplinary action that the penalty must be reasonable in light of the charges and that the penalty not be grossly disproportionate to the offense. The commenter noted that "efficiency of the service" is colloquially referred to as the "nexus" requirement which requires the agency to establish a "clear and direct relationship demonstrated between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest promoting the efficiency of the service."

The organization objected also to the consideration of "all prior misconduct." The organization argued that existing case law allows the deciding official to evaluate

whether or not prior misconduct should be used as an aggravating or mitigating factor, whereas the regulatory change appears to “require” the deciding official to use the prior discipline as an aggravating factor against the employee. They stated that it would be “patently illogical” for potentially unrelated misconduct from years or decades ago to be considered when determining a penalty for a current instance of misconduct.

OPM notes that the amended regulation is intended to ensure that the deciding official has the discretion to consider any past incident of misconduct that is relevant and applicable while making a penalty determination, consistent with law. To that end, OPM will amend the regulation to clarify that agencies should consider all *applicable* prior misconduct when taking an action under this subpart.

A national union declared that OPM is not empowered to “regulate away” the *Douglas* factors. The union stated that the proposed rule would improperly result in an override of MSPB's longstanding determination of what should be considered in assessing potential employee discipline. In particular, the union believes the proposed rule is at odds with progressive discipline considerations in *Douglas* factors 1, 3, 9 and 12, and penalty consistency considerations in *Douglas* factors 6 and 7.

In addition, an agency commented that OPM only explicitly discussed certain *Douglas* factors, thereby giving the impression that agencies should only prioritize consideration of these factors over those not mentioned. The agency added that “relevant factors” is undefined and vague. The agency recommends that OPM clarify its intention, so agencies and adjudicators have a clear understanding of what standards to apply by either including explicit references to all the factors or making a reference to *Douglas* itself.

OPM disagrees with the commenters and will not make any revisions based on these comments. As explicitly described in the proposed rule, the standard for action under this subpart remains unchanged. Specifically, the final rule at §§ 752.202, 752.403, and 752.603 adopts the requirement to propose and impose a penalty that is within the bounds of tolerable reasonableness and make it clear that this standard applies not only to those actions taken under 5 U.S.C. 7513 and 7543 but apply as well to those taken under 5 U.S.C. 7503. As to the criticism that the proposed rule does not observe the efficiency of the service standard and the nexus requirement, §§ 752.202, 752.403, and 752.603 includes: the penalty for an instance of misconduct should be tailored to the facts and circumstances; an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness; employees should be treated equitably; and conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time.

OPM understands and reiterates that agencies continue to be responsible for ensuring that discipline is fair and reasonable, including applying the *Douglas* factors. It is unnecessary to list all the *Douglas* factors in the regulations, but this should not be interpreted to place focus on some more than others. The proposed rule is not at odds with the *Douglas* factors. Factors such as the seriousness of the misconduct and the clarity of notice remain unchanged. The consistency of penalty with a table of penalties would only be applicable if an agency has adopted a table of penalties. This *Douglas* factor, however, does not in any way require or compel an agency to adopt one (though again, there is nothing in the rule that precludes an agency from doing so). Regarding an

employee's past disciplinary record, the rule incorporates the consideration of all applicable prior misconduct. The rule does not require an agency to consider all applicable prior discipline but gives agencies the discretion to do so. With regard to the consistency of penalty with other employees who have engaged in the same or similar conduct, while the rule incorporates the current legal standard, which informs this analysis, it does nothing to alter the *Douglas* factor itself. Similarly, the *Douglas* factor addressing the adequacy of alternative sanctions to deter conduct remains unaltered, and in fact, this consideration provides a further safeguard against the subjective and disproportionate penalties some commenters allege will result from the changes to the regulation. If a penalty is disproportionate to the misconduct or unreasonable, the agency risks having the penalty mitigated or reversed. For these reasons, we urge managers to exercise thoughtful and careful judgment in applying the broad flexibility and discretion they are granted in addressing misconduct and making penalty determinations.

We received many submissions that included significant objections to OPM's discussion of the risks of tables of penalties in the Supplementary Information section of the proposed rule. Again, as with progressive discipline, many commenters, including three national unions, had the mistaken impression that the rule somehow eliminated tables of penalties. They expressed concern that the amended regulations will remove transparency and accountability; create an environment of fear, distrust, and resentment; and empower deciding officials to mete out discipline arbitrarily, disparately, and inequitably. The unions advocated for use of tables of penalties, believing that they ensure that discipline is dispensed fairly and employees are treated equitably; provide

support to employees by helping them recognize if a penalty is disproportionate to an infraction; and support supervisors by providing readily available and clear guidance.

One of the unions claimed to see in the proposed rule a bias toward removal that is “inconsistent with due process and unjustified.” In support of its position, the union quoted a 2018 U.S. Government Accountability Office (GAO) report as saying that “tables of penalties—a list of recommended disciplinary actions for various types of misconduct—though not required by statute, case law, or OPM regulations, nor used by all agencies, can help ensure the appropriateness and consistency of a penalty in relation to an infraction.” The union added that GAO reported that penalty tables can help ensure the disciplinary process is aligned with merit principles by making the process more transparent, reduce arbitrary or capricious penalties and provide guidance to supervisors. The union claimed that OPM’s citation to *Nazelrod v. Department of Justice*, 43 F.3d 663 (Fed. Cir. 1994) is “nonsensical” and added that this will not change the requirement that an agency must prove all the elements of a charged offense. The union goes on to cite *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) to make its point that an employee against whom an action has been proposed is entitled to notice and an opportunity to be heard before the action may become final.

Another national union commented that the regulatory changes weaken rules that forbid disparate treatment for similarly situated employees. In the union’s view, tables of penalties help ensure equitable treatment and guard against discrimination, retribution and favoritism. Two unions asserted that agencies with whom they work typically allow supervisors to assess the situation and use their discretion in determining what action is

appropriate rather than using penalty tables blindly or rigidly. The unions urged OPM to withdraw or reject the proposed rule and consider alternative approaches.

Via a template letter, several members of a national union observed that the proposed rule discourages tables of penalties. The commenters expressed concern that the regulatory changes will lead to widely varying, incoherent, and discriminatory discipline for similarly situated employees, regardless of whether the same or different supervisors are involved. They expressed a strong belief that penalties should be the same or similar for similar offenses and dispensed of any idea that identical or similar offenses could lead to disparate discipline as inherently inequitable or invalid. One of the commenters added that in the absence of set penalties, sanctions for like violations will be unequal and invite litigation and tie up agency resources. Others added that the changes are unnecessary and put employees at the mercy of supervisors. Another self-identified as a retiree and called the regulatory changes “unAmerican.”

An agency commented, drawing upon its own experience, that the benefits of a table of penalties have outweighed the cons. The agency listed as benefits helping supervisors and employees recognize what constitutes misconduct, deterring employees from engaging in misconduct, and giving all supervisors and employees a general understanding of the type and level of disciplinary consequences that can arise from committing misconduct. The agency stated that its table has always been used as advisory guidance, and it requires supervisors to provide an explanation if they want to exceed the table of penalties.

Another agency argued that, when tables of penalties are used properly as guidance, the unique facts of each case are taken into consideration. The agency notes

that one of the *Douglas* factors is the consideration of the agency's table of penalties, if any, and thus it is contemplated that such information would be weighed in conjunction with the other factors outlined in *Douglas*. The agency recommends that OPM either delete this discussion from the Supplementary Information or significantly revise it to stress, as a best practice, that tables of penalties, if used, should serve as a guide for disciplinary penalty determinations, and "that offenses contained in such a table of penalties should be written broadly enough to address unique offenses or misconduct that may have not been contemplated in offense."

After expressing general support for incorporation of the *Douglas* factor analysis into the regulations, an organization commented that the proposed rule is contradictory in that it states the importance of *Douglas*, but "undercuts" *Douglas* factor 7, "consistency of the penalty with any applicable agency table of penalties." The organization described tables of penalties as valuable tools that provide a measure of uniformity; help avoid real or perceived favoritism, disparate treatment, and discrimination; and reduce the risk of litigation. The organization is concerned in particular that there will be an increase in disparate treatment complaints before the EEOC and MSPB. According to the organization, its membership has observed that most penalty tables make clear that, in certain situations, a supervisor can deviate from the guidelines if there is a reasoned explanation for doing so. This sentiment was shared by another organization that disputed that agencies adhere to tables of penalties in a formulaic manner, as stated by OPM in the proposed rule.

One commenter wrote that the proposed rule does not acknowledge any advantages or benefits of progressive discipline or tables of penalties. The commenter

suggested that the final rule should state that an agency may choose to but is not required to use progressive discipline. Another commenter referred to cumulative infractions as typically leading to escalating enforcement actions, which the commenter described as fair. The person went on to express that “[t]his EO,” which we understood to mean E.O. 13839, will allow Federal employees to be removed for nearly any perceived infraction and stated not to allow the Executive Order to be passed. Yet another commenter raised the concern that while it does make sense to take disciplinary action for performance reasons or misconduct, there should be “levels” on which actions are taken. The commenter also stated that any “offense should be looked at before taking any action” because disgruntled employees could be that way due to poor management. One person noted that managers actually make more and worse choices than bargaining unit staff but are not held accountable. Another person characterized the revised regulations as demoralizing to the Federal workforce and expressed concern that they will produce a Government that is “fearful, cautious, and incapable of making bold decisions” rather than the “resourceful, creative, and effective” Government that we need.

Finally, a management association disagreed with OPM that agencies can address misconduct appropriately without a table of penalties, though the association did agree that nothing surpasses a manager’s judgment and independent thinking when determining the best way to handle their team.

The Supplementary Information in the proposed rule identified pitfalls agencies may encounter when basing disciplinary decisions on a table of penalties. The Supplementary Information reminded agencies that penalty consideration requires an individual assessment of all relevant facts and circumstances. To promote efficiency and

accountability, OPM is encouraging agencies to afford their managers the flexibility to take actions that are proportional to an offense but further the mission of the agency and promote effective stewardship. The existence of tables of penalties may create confusion for supervisors who believe that only the misconduct explicitly identified in the table can be addressed through a chapter 75 process. Inappropriate reliance on a table of penalties or progressive discipline can prevent management from taking an adverse action that would promote the efficiency of the service and survive judicial scrutiny. Chapter 75 does not only apply to misconduct. It applies to any action an agency may take to promote the efficiency of the service, including unacceptable performance and certain furloughs. Further, there is no way to define the infinite permutations, combinations and variations of possible misconduct through preconceived labels. Many types of misconduct or behavior that must be dealt with to promote the efficiency of the service fall in the gaps between offenses listed in tables of penalties. And some of these labeled charges require an agency to meet an elevated standard of proof, such as intent, whereas behavior warranting discipline may be merely negligent or careless or unintentional. Further, someone charged with a certain type of misconduct not enumerated in the table of penalties may argue that he was not on notice that what he did was wrong. Tables of penalties are rigid, inflexible documents that may cause valid adverse actions to be overturned. Further, they promote mechanistic decision-making, which is contrary to OPM's policy that proposing and deciding officials exercise independent judgment in every case according to its particular facts and circumstances in leveling the charge and the appropriate penalty.

With respect to the GAO report, OPM notes that the report does not explain how having a table of penalties will help an agency prevent misconduct or respond to it. The mere existence of a table of penalties does not necessarily serve as a warning to employees or compel supervisors to carry out more disciplinary actions for the conduct identified in the table. If anything, it is as likely to de-emphasize constructive early intervention in favor of a more punitive approach that focuses only on the offenses covered by the table. It may also be read or understood to induce or worse, require, managers in some cases to impose a lesser penalty where a greater penalty is warranted. The GAO report references some of OPM's concerns about tables of penalties, but there is no serious discussion of the disadvantages of a table of penalties, which we believe are important in assessing their value. It is vital for effective workforce management consistent with the CSRA and the merit system principles that supervisors use independent judgement, take appropriate steps in gathering facts and conduct a thorough analysis to decide the appropriate penalty in individual cases.

We reiterate that the creation and use of a table of penalties is not required by statute, case law or OPM regulation. These regulations do not prohibit an agency from establishing a table of penalties, though OPM strongly advises against their use. However, once an agency establishes a table of penalties, it will have to live with the consequences of a document containing mechanistic and perhaps arbitrarily-selected labels, possibly issued years or even decades earlier at a safe remove from the realities and variety of day-to-day life in the Federal workplace. For that reason, the amendments emphasize that the penalty for an instance of misconduct should be tailored to the facts and circumstances, in lieu of any formulaic and rigid penalty determination. The final

rule states that employees should be treated equitably and that an agency should consider appropriate comparators as the agency evaluates a potential disciplinary action, as well as other relevant factors including an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

With respect to appropriate comparators, as stated in the proposed rule, conduct that justifies discipline of one employee at one time by a particular deciding official does not necessarily justify the same or a similar disciplinary decision for a different employee at a different time. For this reason, we have decided to incorporate the *Miskill* test. The language in the proposed rule reflected important language in *Miskill v. Social Security Administration*, 863 F.3d 1379 (2017), that a comparator is an employee that “was in the same work unit, with the same supervisor, and was subjected to the same standards governing discipline.” As explained in detail below and in response to many commenters, including national unions, who objected to the definition of comparator in the proposed rule, OPM has modified the final rule to clarify that appropriate comparators are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct.

A management association lauded the Government-wide application of *Miskill* and clarification of the standard for comparators. However, other commenters expressed that the adoption of *Miskill* narrows the scope of comparators in a manner that will make it difficult for employees to demonstrate inequitable discipline or abuse of discretion and easy for managers to engage in arbitrary and capricious conduct. Some, including a national union, went so far as to say that OPM misinterpreted and misapplied *Miskill*. The union argued that in *Miskill*, the court merely applied existing law and did not make

any material change to the evaluation of agency penalties nor adopt any manner of new test or bright line rule. The union stated that the amended regulation is not responsive to the issue of disparate penalties and will lead to confusion and an increase in arbitrary and capricious agency conduct. An individual commenter stated that incorporating *Miskill* into the regulations assumes that the case overrules *Lewis v. Department of Veterans Affairs*, which it does not. (We interpret this as a citation to 113 M.S.P.R. 657, 660 (2010).)

Another national union claimed that there is no legal support for such a narrow assessment of comparators. In the union's view, comparators serve as a safeguard against unfair and arbitrary discipline. The union is deeply concerned that their members will be improperly disciplined, with minimal avenue for recourse. The union advocated for use of comparators in helping supervisors administer penalties that align with the offense, with allowances for supervisors to use their discretion to deviate from the suggested penalty when necessary. An organization asserted that OPM is making a limited, mechanical analysis of comparators. The organization's commenter stated that this approach ignores significant realities of disciplinary actions, agency organizational structures, and actual comparators. As an example, the organization offered a scenario in which two employees with different supervisors are together involved in one instance of misconduct and receive different penalties. The organization asserted that these two individuals would not qualify as comparators under the OPM regulations and would be unable to challenge their penalties as disparate, which undermines the basic principles of fairness that undergird the merit system principles. The organization also opined that certain charges – “low level charges, AWOL [absence without leave], failure to follow

instructions, etc.” – should receive the same punishment regardless of the supervisor, whereas more egregious conduct may require “a deeper analysis.” The organization added that the regulatory amendments will allow two supervisors with differing opinions of discipline to issue disparate penalties to similarly situated employees for similar misconduct.

In a similar scenario, one commenter posited that narrowing the scope of comparators also means that employees in different work units would be operating under vastly different sets of conduct rules and expectations, which does not foster the efficiency and effectiveness of Government. In addition, the commenter stated that a consistent set of rules for the workforce and a consistent “conduct of code” and discipline facilitates managers’ jobs and helps protect them from perceptions of unfairness, favoritism and discrimination.

An agency commented that OPM should specify that appropriate comparators have also engaged in the same or similar offense. The agency stated that this is unclear in the current wording. The agency’s commenter added that including a definition of appropriate comparators in the regulation is limiting and recommended deleting the last sentence.

After considering the comments on this regulation, OPM provides the following assessment and amplification of the philosophy and approach underlying this regulatory change.

First, as we have previously said regarding progressive discipline and tables of penalties, each action stands on its own footing and demands careful consideration of

facts, circumstances, and, as one commenter wrote, context and nuance. It is the proposing and deciding official who are conferred the authority and charged with the responsibility to make these careful assessments. Second, no proposing or deciding official should be forced into a decisional straitjacket based on what others in comparable situations have done in the past. These prior decisions are not a binding set of precedent, and a different assessment is not a deviation from settled principle imposing a burden of explanation. However, the officials should explain their reasoning, which implicitly or explicitly will distinguish their principled reasoning from that of previous proposals and outcomes. If previous proposals and decisions were to serve as a body of precedent, it logically follows that current proposing and deciding officials would be in many cases constrained or impeded from expressing an accurate assessment (or view) on the matter at hand. Proposing and deciding officials are not administrative agencies or courts. Rather, they are executive branch management officials, responsible for managing their own workforce.

Further, mechanistic subservience to what has occurred before could bind a new agency official to penalties that he or she believes to have been too harsh as well as, in some cases, too lenient. Those commenters who have written that this regulation would in some way deprive employees of something of value that they had before overlook that what occurred before not only might have been of little value to an employee against whom an adverse action was taken, but also might have caused them to be disadvantaged or harmed by rote obedience to what was done earlier.

That said, as the agency endowed with authority conferred by Congress and the President to make personnel policy through notice-and-comment regulation, and after

having reviewed and considered the comments and decisional law to date, OPM decided to change the proposed regulatory text. The better approach is to change the proposed regulatory language to recognize that the decisions of similarly situated agency officials might be useful to a current decisionmaker, though not constraining. Accordingly, we are modifying the regulation somewhat to read “Appropriate comparators ‘primarily’ are individuals in the same work unit” We are also adding language to clarify that proposing and deciding officials are not bound by previous decisions, but should consider them, as the proposing and deciding officials, in their sole and exclusive discretion. This approach is consistent with current decisional law set forth recently in *Miskill*, an outgrowth of earlier decisions. OPM does not intend to and is not upending existing decisional law but is filling a regulatory void in exercise of its policy and legal authority. We are placing the focus where most appropriate. Here, it is management officials who bear the burden of managing their workforce and who are solely accountable to their superiors and agency heads for effectiveness, efficiency, productivity and the morale of their work unit. Along with this responsibility, they must be allowed to choose to implement a different approach from predecessors or peers to achieve that goal. The rule in no way detracts from the rights of or harms employees against whom an adverse action is initiated.

A commenter discussed the 2018 GAO report in reference to guidance for agencies on penalty determination. According to the commenter, GAO reported that Federal agencies formally discipline approximately 17,000 employees annually. The commenter stated that agency officials interviewed by GAO reported that they were unfamiliar with the disciplinary process, had inadequate training, or received inadequate

support from human resource offices. GAO recommended improved guidance to supervisors and human relations staff along with improved quality of data on misconduct.

Note that OPM provides guidance to agencies through its accountability toolkit, which includes some of the key practices and lessons learned discussed in the GAO report. OPM frequently communicates these strategies and approaches to the Federal community through the OPM website and ongoing outreach to agencies. As discussed above, on October 10, 2019, OPM issued a memorandum to agencies entitled “Guidance on Progressive Discipline and Tables of Penalties.” Regarding data on misconduct, it is not feasible to collect instances of misconduct at an enterprise level given the array of potential types of misconduct that may form the basis for management action. While common types of misconduct exist, such as time-and-attendance infractions, many unique types of misconduct cannot be placed into easily identifiable categories. Instead, agencies should address the unique aspects of each instance of misconduct and tailor discipline to the specific situation. Moreover, Section 6 of E.O. 13839 requires agencies to report the frequency or timeliness with which various types of penalties for misconduct are imposed (e.g., how many written reprimands, how many adverse actions broken down by type, including removals, suspensions, and reductions in grade or pay, removals, and how many suspensions). OPM believes that agencies will find value in collecting such data by providing each agency an enterprise-wide view of employee accountability.

Moreover, the final rule at § 752.202 (f) adds language stating that a suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may

be appropriate under applicable facts. An agency suggested adding “more” before “appropriate” in the first sentence of § 752.202(f). The agency stated that as written, the language could be read as requiring removal even if suspension would be more appropriate.

OPM disagrees and will not adopt the recommended revision. The language is clear as written. The penalty for an instance of misconduct should be tailored to the facts and circumstances of each case. If the facts and circumstances of a case warrant removal, an agency should not substitute a suspension. We emphasize again that there is no substitute for managers thinking independently and carefully about each incident as it arises, and, as appropriate, proposing or deciding the best penalty to fit the circumstances.

Section 752.203 Procedures

Section 752.203(b) discusses the requirements for a proposal notice issued under this subpart. This section provides that the notice of proposed action must state the specific reason(s) for the proposed action and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The final rule includes language that the notice must also provide detailed information with respect to any right to appeal the action pursuant to Pub. L. 115-91 section 1097(b)(2)(A); specifically, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement within Pub. L. 115-91 section 1097(b)(2)(A), which mandates that this information be included in any proposal notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

In relation to this provision of the proposed rule, OPM received several comments. A national union recommended that OPM revise § 752.203(b) to add “and any other material relevant to the action” to the end of the sentence requiring that agencies inform the employee of his or her right to review the material relied upon to support the reasons for action given in the notice. To support its recommendation, the union gave an example of a scenario wherein there are conflicting witness statements in an investigative report and the agency provides only the statements that it relied upon to propose action. The union believes that in such a scenario, the agency should be obligated to provide all witness statements, including those not relied upon to propose the action. The union’s recommended change does not conform to the statute, which requires only that agencies provide employees with materials relied upon to support the action upon request.

A management association provided comments explaining that one of their members agrees with including more detailed information with respect to appeal rights. The commenting manager cited the benefits to an employee becoming aware of available options before the decision letter thus enabling them to seek legal counsel at an early stage if necessary.

As noted above in § 752.103, an agency raised a concern about including appeal rights information in the notice of proposed action. The agency suggested that OPM revise the second sentence of § 752.203(b) to read “...provides, pursuant to section 1097(b)(2)(A) of Public Law 115-91, notice of any right to appeal...” OPM will not accept the suggested change but will offer some clarification.

The requirement to provide the appeal rights information at the proposal notice stage is a statutory requirement under section 1097(b)(2)(A) of Pub. L. 115-91. Part 752 is amended in part to effectuate the statute, which requires that a notice of proposed action under subparts B, D and F include detailed information about any right to appeal any action upheld, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This regulatory change does not confer on an employee a right to seek redress at the proposal stage that an employee did not have previously. As the above-referenced commenter notes, this information may assist employees with regard to decisions such as whether he or she may want to seek representation. While there are specific circumstances where there may be a cause of action at the proposal stage, such as when an employee alleges that a proposed action constitutes retaliation for previous whistleblower activity, an employee would generally not have a colorable claim under any of the venues discussed in the appeal rights section unless and until a decision was issued that conferred such rights on the employee.

OPM would further clarify that the appeal rights language included at the proposal stage specifically relating to choice of forum and limitations related to an employee's choice of forum will vary depending on circumstances, the nature of a claim and the type of employee. Appeal rights may include but are not be limited to filing an Equal Employment Opportunity complaint with the Equal Employment Opportunity Commission; a prohibited personnel practice complaint with the U.S. Office of Special Counsel (OSC); a grievance under a negotiated grievance procedure; or an appeal with the Merit Systems Protection Board. Each process has different requirements and

standards that must be satisfied. Meanwhile, the extent to which a choice of venue may preclude subsequent pursuit of a claim in a different venue will be determined by a statutory patchwork that includes 5 U.S.C. 7121 and 5 U.S.C. 7702.

OPM does not view the addition of procedural appeal rights language in the regulation to constitute a requirement to provide substantive legal guidance at the proposal stage or to serve as a substitute for the advice from an employee's representative. Given this, as well as the divergent circumstances and individualized nature of any particular adverse action, agencies are encouraged and advised to consult closely with their agency counsel to develop the best course of action for implementation of this requirement. Employees are encouraged to consult with their representatives to determine the best options available to them at the proposal and/or decision stage if an employee believes that an agency has taken an action which triggers the right to file a complaint, an appeal or a grievance.

Finally, the language in § 752.203(h) establishes the same requirement that is detailed in the final rule changes at § 432.108, Settlement agreements. See discussion in § 432.108.

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

This subpart addresses the procedural requirements for removals, suspensions for more than 14 days, including indefinite suspensions, reductions in grade, reductions in pay, and furloughs of 30 days or less for covered employees.

Section 752.401 Coverage

Pursuant to the creation of subpart A within the final rule, § 752.401(b)(14) reflects an exclusion for actions taken under 5 U.S.C. 7515.

Section 752.401(c) identifies employees covered by this subpart. The final rule at § 752.401(c)(2) updates coverage to include an employee in the competitive service who is not serving a probationary or trial period under an initial appointment or, except as provided in section 1599e of title 10, United States Code, who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. This language has been updated to align with 5 U.S.C. 7511(a)(1)(A)(ii).

Section 752.402 Definitions

The final rule includes a definition for the term “business day.” This addition is necessary to implement the 15-business day decision period described in E.O. 13839.

Section 752.403 Standard for action and penalty determination

As with the rule changes finalized for § 752.202, the standard for action under this subpart remains unchanged and incorporates a penalty determination based on the principles of E.O. 13839.

One commenter recommended changing § 752.403(d) to add to the end “Differences in penalties between similarly situated employees must depend on specific factual difference between those employees. To the greatest extent practicable, agencies must document and explain these differences in the record to defend against later allegations of disparate penalties.” In support of his position, the commenter cites *Lewis v. Department of Veterans Affairs*, 111 M.S.P.R. 388, 391 (2009) and quotes the decision whereby an agency must prove a legitimate reason for the difference in treatment by a

preponderance of evidence if an employee raises an allegation of disparate penalties in comparison to specified employees. OPM will not adopt the recommended change as it is unnecessary. Please see discussion in § 752.202 for further details.

The final rule at § 752.403 also adds paragraph (f) which states that a suspension or a reduction in pay or grade should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

A management association concurred with OPM that a demotion or suspension should not be substituted for removal when removal is appropriate. The association reasoned that such a substitution will not fix the underlying problem. As the association did not recommend any changes, none will be made based on this comment.

An agency suggested adding “more” before “appropriate” in the first sentence of 752.403(f). The agency stated that as written, the language could be read as requiring removal even if suspension would be more appropriate. For the reasons discussed in § 752.202, OPM will not adopt the revision.

Section 752.404 Procedures

Section 752.404(b) discusses the requirements for a notice of proposed action issued under this subpart. In particular, § 752.404(b)(1) provides that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under this subpart to the 30 days prescribed in 5 U.S.C. 7513(b)(1). Any notice period greater than 30 days must be reported to OPM.

In reference to § 752.404(b)(1) regarding notice periods, a national union stated that “OPM cannot unilaterally take a negotiable topic off the bargaining table, as this subsection would do.” We disagree. In fact, the Statute recognizes situations where bargaining would not extend to matters that are the subject of Federal law or Government-wide rule or regulation; see 5 U.S.C. 7117(a)(1). And while commenters may disagree, as a matter of policy, with the subjects the President has determined are sufficiently important for inclusion in an Executive Order and Federal regulation, it is well established that the President has the authority to make this determination and that OPM regulations issued pursuant to this authority constitute Government-wide rules under Section 7117(a)(1) for the purpose of foreclosing bargaining. *See NTEU v. FLRA*, 30 F.3d 1510, 1514-16 (D.C. Cir. 1994).

The final rule also includes the requirement that the notice must provide detailed information with respect to any right to appeal the action pursuant to Pub. L. 115-91 section 1097(b)(2)(A); specifically, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement in Pub. L. 115-91 section 1097(b)(2)(A), which mandates that this information be included in any proposal notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

As noted above, an agency voiced concern about including appeal rights information in the notice of proposed action. The agency recommended modifying § 752.404(b)(1) to read “The notice must further include, pursuant to section 1097(b)(2)(A)

of Public Law 155-91, detailed information with respect to any right to appeal” For the reasons discussed above in § 752.203, OPM will not accept the suggested change.

The final rule at § 752.404(b)(3)(iv) also discusses the provisions of 5 U.S.C. 6329b, the Administrative Leave Act of 2016, related to placing an employee in a paid non-duty status during the advance notice period. An agency stated that the rule is silent on an agency’s authorization to use administrative leave for the duration of the notice period (i.e., 30 days), which would be in excess of the 10 days per year limitation under 5 U.S.C. 6329a. The agency asked for clarification on the authority by which agencies may or may not use administrative leave for the duration of the notice period until notice leave regulations are implemented.

Until OPM has published the final regulation for 5 U.S.C. 6329b and after the conclusion of the agency implementation period, in those rare circumstances where the agency determines that the employee’s continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, an agency will continue to have as an alternative the ability to place an employee in a paid non-duty status for such time to effect the action. Thereafter, an agency may use the provisions of 5 U.S.C. 6329b as applicable.

An individual commented that the rule appears to be incorrect in stating that an agency may place an employee in a notice leave status “after conclusion of the agency implementation period.” The commenter stated that the subpart needs to be modified to reflect “investigative leave.” We note that the rule addresses the notice of proposed action, which would be subsequent to the investigation. Investigative leave would be an

inappropriate status during the notice period. The “implementation period” refers to the statutory requirement that agencies, not later than 270 calendar days after the publication date of OPM regulations effectuating 5 U.S.C. 6329b, must revise and implement the internal policies of the agency to meet the notice leave requirements. See 5 U.S.C. 6329b(h)(2).

Finally, the final rule at § 752.404(g) discusses the requirements for an agency decision issued under this subpart. Specifically, the final rule at § 752.404(g)(3) includes new language that, to the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee’s opportunity to respond to reflect a key principle of E.O. 13839.

An agency expressed support for the timely handling of adverse actions and added that the regulatory amendments will discourage unreasonable delays for both employees and supervisors. The agency cautioned that human resources staffs will need to have sufficient resources to assist supervisors in meeting the 15-business day limit. The agency recommended that OPM clarify in the final rule what will happen in the event an agency does not comply with the time limitation set by the rule as well as the consequence for the employee and/or manager that does not meet the deadline. OPM concurs that the regulatory changes will discourage unreasonable delays. OPM believes the recommended modification is unnecessary. The regulatory amendment states that agencies are to issue decisions on proposed removals within 15 business days, to the extent practicable. The purpose of the change is to facilitate an agency’s ability to resolve adverse actions in a timely manner. To the extent an agency fails to exercise its

authority to act promptly, the agency risks retaining a subpar or unfit employee longer than necessary.

Two national unions objected to limiting advance notice of an adverse action to 30 days. One of the unions objected further to requiring agencies to report to OPM the number of adverse actions for which employees receive written notice in excess of 30 days. Claiming that the requirements are unsupported by facts and counterproductive, the union stated that the regulations will hinder the efficient resolution of cases prior to litigation by curtailing the time in which an agency and employee might reach an alternative resolution. The union called for the limitation to be withdrawn. The other union asserted that due process violations could result if agencies rush the time to respond or give an employee too little time to respond in such circumstances as voluminous materials to review or a personal emergency. The union asserted the limited time frame for an employee to respond to a proposed disciplinary action is contrary to the due process protections of the Constitution. Citing *Loudermill* and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999), the union noted that an employee must be given a meaningful opportunity to respond and invoke the discretion of the deciding official.

In addition, an organization discussed the various tasks such as securing counsel, drafting affidavits and interviewing witnesses that may impact an employee's ability or time to respond to a proposed action. The organization expressed concern that limiting the written notice of an adverse action to the 30 days prescribed in 5 U.S.C. 7513(b)(1) in turn limits the opportunity for identification of evidence and rushes management into hasty decisions. The organization objected to a cap on the response period or a limit on

an agency's discretion to extend the notice period or implement the adverse action. The organization believes that agencies should retain discretion to go beyond 30 days for a decision when requested by the employee for good reason. The organization added that the existing system works satisfactorily, and agencies are not prejudiced given that they are in control of the length of any extension.

OPM will not make any revisions based on these comments. The regulatory changes effectuate the principles and requirements of E.O. 13839, including swift and appropriate action when addressing misconduct. These changes facilitate timely resolution of adverse actions while preserving employee rights provided under the law.

Section 752.407 Settlement agreements

The language in this section establishes the same requirement that is detailed in the final rule changes at § 432.108, Settlement agreements. See discussion regarding § 432.108 above.

Subpart F—Regulatory Requirements for Taking Adverse Actions Under the Senior Executive Service

This subpart addresses the procedural requirements for suspensions for more than 14 days and removals from the civil service as set forth in 5 U.S.C. 7542.

A management association commented that it does not see much difference between SES and the rest of the workforce in this situation. OPM will not adopt any revisions based on this comment as none were requested.

Section 752.601 Coverage

Pursuant to the creation of subpart A within the final rule, § 752.601(b)(2) reflects an exclusion for actions taken under 5 U.S.C. 7515.

Section 752.602 Definitions

The final rule includes a definition for the term “business day.” This addition is necessary to implement the 15-business day decision period described in E.O. 13839.

Section 752.603 Standard for action and penalty determination

As with the final rule changes for §§ 752.202 and 752.403, the standard for action under this subpart remains unchanged and incorporates a penalty determination based on the principles of E.O. 13839. In addition, the proposed rule at § 752.603 adds paragraph (f) which states that a suspension or a reduction in pay or grade should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

Please see discussion in §§ 752.202 and 752.403.

Section 752.604 Procedures

Section 752.604(b) discusses the requirements for a notice of proposed action issued under this subpart. We have revised the language in this subpart to be consistent with the advance notice period for general schedule employees. Specifically, § 752.604(b)(1) provides that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under this subpart to the 30 days prescribed in 5 U.S.C. 7543(b)(1). Any notice period greater than 30 days must be reported to OPM.

The final rule also includes additional language that the notice must provide detailed information with respect to any right to appeal the action pursuant to Pub. L. 115-91 section 1097(b)(2)(A); specifically, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement within Pub. L. 115-91 section 1097(b)(2)(A), which mandates that this information be included in any proposal notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

As previously discussed, an agency recommended modifying the regulatory language regarding advance notice of appeal rights information at the proposal stage. Specifically, the agency recommended changing § 752.604(b)(1) to read “The notice must further include, pursuant to section 1097(b)(2)(A) of Public Law 115-91, detailed information with respect to any right to appeal” For the reasons discussed in § 752.203, OPM will not adopt the recommendation.

The final rule at § 752.604(b)(2)(iv) also discusses the provisions of 5 U.S.C. 6329b, the Administrative Leave Act of 2016, related to placing an employee in a paid non-duty status during the advance notice period. However, as noted above, until OPM has published the final regulation for 5 U.S.C. 6329b, and after conclusion of the agency implementation period, in those rare circumstances where the agency determines that the employee’s continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, an agency will continue to have as an alternative the ability to place an employee in a paid, nonduty status for such time to

effect the action. Thereafter, an agency may use the provisions of 5 U.S.C. 6329b as applicable.

Finally, the final rule at § 752.604(g) discusses the requirements for an agency decision issued under this subpart. Specifically, the final rule at § 752.604(g)(3) includes new language that, to the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond to reflect one of the key principles of E.O. 13839.

Please see also the discussion in §§ 752.203 and 752.404.

Section 752.607 Settlement Agreements

The language in this section establishes the same requirement that is detailed in the final rule changes at §§ 432.108, 752.203 and 752.407. Please see discussion regarding § 432.108 above.

Technical Amendment

This final rule makes “forum” plural in § 752.203(b).

Regulatory Flexibility Act

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

E.O. 13563 and E.O. 12866, Regulatory Review

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental,

public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” under Executive Order 12866.

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because this rule is not significant under 12866.

E.O. 13132, Federalism

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

E.O. 12988, Civil Justice Reform

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

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is

not a ‘rule’ as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

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

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

List of Subjects in 5 CFR Parts 315, 432 and 752

Government employees.

Office of Personnel Management.

Alexys Stanley,
Regulatory Affairs Analyst.

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR parts 315, 432, and 752 as follows:

PART 315-CAREER AND CAREER-CONDITIONAL EMPLOYMENT

1. Revise the authority citation for part 315 to read as follows:

AUTHORITY: 5 U.S.C. 1302, 2301, 2302, 3301, and 3302; E.O. 10577, 3 CFR, 1954-1958 Comp. p. 218, unless otherwise noted; E.O. 13162, and E.O. 13839. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p.111. Sec.

315.606 also issued under E.O. 11219, 3 CFR, 1964-1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473. Sec. 315.708 also issued under E.O.13318, 3 CFR, 2004 Comp. p. 265. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp. p. 229. Subpart I also issued under 5 U.S. C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

Subpart H—Probation on Initial Appointment to a Competitive Position

2. Revise § 315.803(a) to read as follows:

§ 315.803 Agency action during probationary period (general).

(a) The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his or her services during this period if the employee fails to demonstrate fully his or her qualifications for continued employment. The agency must notify its supervisors that an employee's probationary period is ending three months prior to the expiration of an employee's probationary period, and then again one month prior to the expiration of the probationary period, and advise a supervisor to make an affirmative decision regarding an employee's fitness for continued employment or otherwise take appropriate action. For example, if an employee's probationary period ends on August 15, 2020, the agency must notify the employee's supervisor on May 15, 2020, and then again on July 15, 2020. If the 3-month and 1-month dates fall on a holiday or weekend, agencies must provide notification on the last business day before the holiday or weekend.

* * * * *

**PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND
REMOVAL ACTIONS**

3. Revise the authority citation for part 432 to read as follows:

Authority: 5 U.S.C. 4303, 4305.

* * * * *

4. Amend § 432.103 by revising paragraph (g) to read as follows:

§432.103 Definitions.

* * * * *

(g) *Similar positions* mean positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbents could be interchanged without significant training or undue interruption to the work.

* * * * *

5. Revise § 432.104 to read as follows:

§ 432.104 Addressing unacceptable performance.

At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in

grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. The requirement described in 5 U.S.C. 4302(c)(5) refers only to that formal assistance provided during the period wherein an employee is provided with an opportunity to demonstrate acceptable performance, as referenced in 5 U.S.C. 4302(c)(6). The nature of assistance provided is in the sole and exclusive discretion of the agency. No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section.

6. Amend § 432.105 by revising paragraphs (a)(1), (a)(4)(i)(B)(3) and (4) and paragraph (a)(4)(i)(C) to read as follows:

§ 432.105 Proposing and taking action based on unacceptable performance.

(a)* * *

(1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in one or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance. For the purposes of this section, the agency's obligation to provide assistance, under 5 U.S.C. 4302(c)(5), may be discharged through measures, such as supervisory assistance, taken prior to the beginning of the opportunity period in addition to measures taken during the opportunity period. The agency must take some

measures to provide assistance during the opportunity period in order to both comply with section 4302(c)(5) and provide an opportunity to demonstrate acceptable performance under 4302(c)(6).

* * * * *

(4)* * *

(i)* * *

(B)* * *

(3) To consider the employee's answer if an extension to the period for an answer has been granted (e.g., because of the employee's illness or incapacitation);

(4) To consider reasonable accommodation of a disability;

* * * * *

(C) If an agency believes that an extension of the advance notice period is necessary for another reason, it may request prior approval for such extension from the Manager, Employee Accountability, Accountability and Workforce Relations, Employee Services, Office of Personnel Management, 1900 E Street N.W., Washington, DC 20415.

* * * * *

7. Revise § 432.106(b)(1) to read as follows:

§ 432.106 Appeal and grievance rights.

* * * * *

(b) *Grievance rights.* (1) A bargaining unit employee covered under § 432.102(e) who has been removed or reduced in grade under this part may file a grievance under an applicable negotiated grievance procedure if the removal or reduction in grade action

falls within its coverage (i.e., is not excluded by the parties to the collective bargaining agreement) and the employee is:

* * * * *

8. Revise § 432.107(b) to read as follows:

§ 432.107 Agency records.

* * * * *

(b) *When the action is not effected.* As provided at 5 U.S.C. 4303(d), if, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for one year from the date of the advanced written notice provided in accordance with § 432.105(a)(4)(i), any entry or other notation of the unacceptable performance for which the action was proposed shall be removed from any agency record relating to the employee.

9. Add § 432.108 to read as follows:

§ 432.108 Settlement agreements.

(a) *Agreements to alter personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) Corrective action based on discovery of agency error. The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

(c) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To

the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

PART 752—ADVERSE ACTIONS

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

Sec.

752.201 Coverage.

752.202 Standard for action and penalty determination.

752.203 Procedures.

Subpart C [Reserved]

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

Sec.

752.401 Coverage.

752.402 Definitions.

752.403 Standard for action and penalty determination.

752.404 Procedures.

752.405 Appeal and grievance rights.

752.406 Agency records.

752.407 Settlement agreements.

Subpart E [Reserved]

**Subpart F—Regulatory Requirements for Taking Adverse Actions Under the
Senior Executive Service**

Sec.

752.601 Coverage.

752.602 Definitions.

752.603 Standard for action and penalty determination.

752.604 Procedures.

752.605 Appeal rights.

752.606 Agency records.

752.607 Settlement agreements.

10. Revise the authority citation for part 752 to read as follows:

Authority: 5 U.S.C. 7504, 7514, and 7543, Pub. L. 115-91.

11. Add subpart A to part 752 to read as follows:

Subpart A —Discipline of Supervisors Based on Retaliation Against Whistleblowers

Sec.

752.101 Coverage.

752.102 Standard for action and penalty determination.

752.103 Procedures.

752.104 Settlement agreements.

§ 752.101 Coverage.

(a) *Adverse actions covered.* This subpart applies to actions taken under 5 U.S.C. 7515.

(b) *Definitions.* In this subpart —

Agency—

(1) Has the meaning given the term in 5 U.S.C. 2302(a)(2)(C), without regard to whether any other provision of this chapter is applicable to the entity; and

(2) Does not include any entity that is an element of the intelligence community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003).

Business day means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

Day means a calendar day.

Grade means a level of classification under a position classification system.

Insufficient evidence means evidence that fails to meet the substantial evidence standard described in 5 CFR 1201.4(p).

Pay means the rate of basic pay fixed by law or administrative action for the position held by the employee, that is, the rate of pay before any deductions and exclusive of additional pay of any kind.

Prohibited personnel action means taking or failing to take an action in violation of paragraph (8), (9), or (14) of 5 U.S.C. 2302(b) against an employee of an agency.

Supervisor means an employee who would be a supervisor, as defined in 5 U.S.C. 7103(a)(10), if the entity employing the employee was an agency.

Suspension means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

§ 752.102 Standard for action and penalty determination.

(a) Except for actions taken against supervisors covered under subchapter V of title 5, an agency may take an action under this subpart for such cause as will promote the efficiency of the service as described in 5 U.S.C. 7503(a) and 7513(a). For actions taken under this subpart against supervisors covered under subchapter V of title 5, an agency may take an action based on the standard described in 5 U.S.C. 7543(a).

(b) Subject to 5 U.S.C. 1214(f), if the head of the agency in which a supervisor is employed, an administrative law judge, the Merit Systems Protection Board, the Special Counsel, a judge of the United States, or the Inspector General of the agency in which a supervisor is employed has determined that the supervisor committed a prohibited personnel action, the head of the agency in which the supervisor is employed, consistent with the procedures required under this subpart—

(1) For the first prohibited personnel action committed by the supervisor—

(i) Shall propose suspending the supervisor for a period that is not less than 3 days; and

(ii) May propose an additional action determined appropriate by the head of the agency, including a reduction in grade or pay; and

(2) For the second prohibited personnel action committed by the supervisor, shall propose removing the supervisor.

§ 752.103 Procedures.

(a) *Non-delegation.* If the head of an agency is responsible for determining whether a supervisor has committed a prohibited personnel action for purposes of § 752.102(b), the head of the agency may not delegate that responsibility.

(b) *Scope.* An action carried out under this subpart—

(1) Except as provided in paragraph (b)(2) of this section, shall be subject to the same requirements and procedures, including those with respect to an appeal, as an action under 5 U.S.C. 7503, 7513, or 7543; and

(2) Shall not be subject to—

(i) Paragraphs (1) and (2) of 5 U.S.C. 7503(b);

(ii) Paragraphs (1) and (2) of subsection (b) and subsection (c) of 5 U.S.C. 7513; and

(iii) Paragraphs (1) and (2) of subsection (b) and subsection (c) of 5 U.S.C. 7543.

(c) *Notice.* A supervisor against whom an action is proposed to be taken under this subpart is entitled to written notice that—

(1) States the specific reasons for the proposed action;

(2) Informs the supervisor about the right of the supervisor to review the material that is relied on to support the reasons given in the notice for the proposed action; and

(d) *Answer and evidence.* (1) A supervisor who receives notice under paragraph (c) of this section may, not later than 14 days after the date on which

the supervisor receives the notice, submit an answer and furnish evidence in support of that answer.

(2) If, after the end of the 14-day period described in paragraph (d)(1) of this section, a supervisor does not furnish any evidence as described in that clause, or if the head of the agency in which the supervisor is employed determines that the evidence furnished by the supervisor is insufficient, the head of the agency shall carry out the action proposed under § 752.102 (b), as applicable.

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (d)(1) of this section.

§ 752.104 Settlement agreements.

(a) *Agreements to alter official personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, the agency would have the authority, unilaterally or by agreement, to modify an employee's

personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(c) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

12. In § 752.201, revise paragraphs (c)(4) and (5) and add paragraph (c)(6) to read as follows:

§ 752.201 Coverage.

* * * * *

(c)* * *

(4) Of a re-employed annuitant;

(5) Of a National Guard Technician; or

(6) Taken under 5 U.S.C. 7515.

* * * * *

13. In § 752.202, revise the section heading and add paragraphs (c) through (f) to read as follows:

§ 752.202 Standard for action and penalty determination.

* * * * *

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different

employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts.

14. Amend § 752.203 by revising paragraph (b) and by adding paragraph (h) to read as follows:

§ 752.203 Procedures.

* * * * *

(b) *Notice of proposed action.* The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Pub. L. 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

* * * * *

(h) *Settlement agreements.* (1) An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(2) The requirements described in paragraph (h)(1) of this section should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all

events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error.

And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839.

Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(3) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (h)(1) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

15. In § 752.401, revise paragraphs (b)(14) and (15), add paragraphs

(b)(16) and revise paragraph (c)(2) to read as follows:

§ 752.401 Coverage.

* * * * *

(b)* * *

(14) Placement of an employee serving on an intermittent or seasonal basis in a temporary nonduty, nonpay status in accordance with conditions established at the time of appointment;

(15) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation, including a reduction necessary to comply with the amendments made by Public Law 108-411, regarding pay-setting under the General Schedule and Federal Wage System and regulations implementing those amendments; or

(16) An action taken under 5 U.S.C. 7515.

(c)* * *

(2) An employee in the competitive service—

(i) Who is not serving a probationary or trial period under an initial appointment; or

(ii) Except as provided in section 1599e of title 10, United States Code, who has completed one year of current continuous service under other than a temporary appointment limited to one year or less;

* * * * *

16. In § 752.402, add the definition for “Business day” in alphabetical order to read as follows:

§ 752.402 Definitions.

Business day means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

* * * * *

17. In § 752.403, revise the section heading and add paragraphs (c) through (f) to read as follows:

§ 752.403 Standard for action and penalty determination.

* * * * *

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and

responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension or a reduction in grade or pay should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

18. Amend § 752.404 by revising paragraphs (b)(1) and (b)(3)(iv), and adding paragraph (g)(3) to read as follows:

§ 752.404 Procedures.

* * * * *

(b)* * *

(1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. However, to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days

prescribed in section 7513(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management. The notice must state the specific reason(s) for the proposed action and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Pub. L. 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

* * * * *

(3)* * *

(iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action. After publication of regulations for 5 U.S.C. 6329b, and the subsequent agency implementation period in accordance with 5 U.S.C. 6329b, an agency may place the employee in a notice leave status when applicable.

* * * * *

(g)* * *

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (c) of this section.

* * * * *

19. Add § 752.407 to read as follows:

§ 752.407 Settlement agreements.

(a) *Agreements to alter official personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action, should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(c) *Corrective action based on discovery of material information prior to final agency action.* When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee’s personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee’s personnel file or other agency records. The requirements described in paragraph (a) of this section would, however, continue to apply to any accurate information about the employee’s conduct leading up to that proposed action or separation from Federal service.

20. Revise § 752.601(b)(2) to read as follows:

§ 752.601 Coverage.

* * * * *

(b)* * *

(2) This subpart does not apply to actions taken under 5 U.S.C. 1215, 3592, 3595, 7532, or 7515.

* * * * *

21. Amend § 752.602 by adding a definition for “Business day” in alphabetical order to read as follows:

§ 752.602 Definitions.

Business day means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

* * * * *

22. In § 752.603, revise the section heading and add paragraphs (c) through (f) to read as follows:

§ 752.603 Standard for action and penalty determination.

* * * * *

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one

supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension or reduction in grade or pay should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

23. Amend § 752.604 by revising paragraphs (b)(1) and (b)(2)(iv), and adding paragraph (g)(3) to read as follows:

§ 752.604 Procedures.

* * * * *

(b)* * *

(1) An appointee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. However, to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7543(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management. The notice must state the specific reason(s) for the

proposed action, and inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b) (2) (A) of Pub. L. 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(2)* * *

(iv) Placing the appointee in a paid, no duty status for such time as is necessary to effect the action. After publication of regulations for 5 U.S.C. 6329b, and the subsequent agency implementation period in accordance with 5 U.S.C. 6329b, an agency may place the employee in a notice leave status when applicable.

* * * * *

(g)* * *

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (c) of this section.

* * * * *

24. Add §752.607 to read as follows:

§ 752.607 Settlement agreements.

(a) *Agreements to alter official personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian

employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) Corrective action based on discovery of agency error. The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action, should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(c) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency

decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

Billing Code: 6325-39-P

[FR Doc. 2020-20427 Filed: 10/15/2020 8:45 am; Publication Date: 10/16/2020]