



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 731

RIN: 3206-AO97

Suitability Action Appeals

AGENCY: Office of Personnel Management.

ACTION: Proposed Rule with request for comments

SUMMARY: The Office of Personnel Management (OPM) is proposing amendments to the review process for suitability actions. The purpose of the proposed rule is to streamline suitability action appeals procedures, thereby improving the efficiency, rigor and timeliness by which OPM and agencies resolve challenges to suitability actions and ensure the integrity and efficiency of the service.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

Where possible, please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. Comments received after the close of the comment period will be marked “late,” and OPM is not required to consider them in formulating a final decision. If you cannot submit comments electronically, please contact the individual listed in the further information section.

The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <https://www.regulations.gov> without change, including any personal identifiers or contact information.

As required by 5 U.S.C. 553(b)(4), a summary of this rule may be found in the docket for this rulemaking at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For questions, contact Mr. Joe Knouff, Suitability Executive Agent Programs, by email at SuitEA@opm.gov or by phone at (202) 599-0090.

SUPPLEMENTARY INFORMATION:

Authority and Background

Congress has long granted the President authority to ensure that those employed in the competitive service¹ or career appointments to the Senior Executive Service (SES) are suitable for Federal employment. When OPM or an agency with delegated authority determines an individual is not suitable for employment in the competitive service or career SES, OPM or the agency takes a suitability action to protect the integrity or promote the efficiency of the service. The suitability standards and procedures are implemented under the authority of 5 U.S.C. 3301, 3302, and 7301. Historically, the President delegated to OPM and its predecessor, the Civil Service Commission, the authority to prescribe both qualification standards and suitability standards, and to conduct both examinations of applicants' qualifications and investigations of their suitability for appointment and continuing employment. See 5 U.S.C. 1104(a)(1). These standards and procedures are implemented through OPM's regulations at Title 5, Code of Federal Regulations part 731 (5 CFR part 731), which include procedures governing suitability actions and the general process for appealing a suitability action.

Suitability standards and procedures play a key role in protecting the Federal government against potential risks posed by those entrusted to work for it. Every day, America's adversaries seek to undermine the effective performance of government functions and the confidentiality of

¹ For the purposes of the Suitability and Fitness regulation at 5 CFR part 731, "competitive service or career SES refers to a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the SES. See 5 CFR 731.101(a).

sensitive government information. Employees who are untrustworthy or unvetted pose a threat to the effective performance of agency missions, workplace safety, and data security. Successive presidential administrations spanning almost 20 years have emphasized the importance of enhanced risk management of the Federal government's trusted workforce through efforts at modernizing processes to ensure only trusted individuals enter and remain in the Federal workforce. In May 2018, the OPM Director and the Director of National Intelligence, in their respective roles as Suitability and Credentialing Executive Agent and Security Executive Agent, launched the Trusted Workforce 2.0 initiative, a key goal of which is to provide vetting processes that enable the government to continuously vet the Federal workforce to ensure they remain suitable or fit for service over time. The Trusted Workforce 2.0 initiative recognizes that as the technologies and tactics used by America's adversaries evolve, so must the government's approach to ensuring its workforce remains trusted. Modernizing suitability procedures that allow the government to quickly resolve any risks discovered in the Federal workforce is crucial to supporting this long-standing goal to better protect the Federal government's critical missions.

Suitability and fitness determinations examine "character or conduct that may have an adverse impact on the integrity or efficiency of the service," such as criminal or dishonest conduct, and deception or fraud in examination or appointment. 5 CFR 731.101, 731.201, 731.202. The objective of the suitability and fitness adjudicator is to establish a reasonable expectation that employment or continued employment of an individual either would or would not protect the integrity or promote the efficiency of the service. 5 CFR 731.201. When there is evidence that the individual's employment would not protect the integrity or promote the efficiency of the service, the individual may be found unsuitable or unfit. If the suitability determination is unfavorable, the adjudicator must then determine what "suitability action" is appropriate. See § 731.203(a). OPM's regulations define a "suitability action" to include "[c]ancellation of eligibility," "[r]emoval," "[c]ancellation of reinstatement eligibility," and "[d]ebarment." See § 731.101(a).

This rule proposes to return the venue to hear suitability action appeals from the Merit System Protection Board (MSPB) to OPM, thereby honoring congressional intent and streamlining the suitability action and appeals process in a manner that results in savings to agency operational costs and the American public, while also providing due process and more expeditiously arriving at resolutions that protect the integrity and promote the efficiency of the service. OPM is proposing to no longer permit individuals in any status, whether an applicant, appointee, or employee, as those terms are defined in 5 CFR 731.101(a), to appeal suitability actions to the MSPB. At the same time, OPM proposes to introduce new procedures by which an individual may appeal a suitability action to OPM.

OPM recently proposed separate changes to subparts A, B, C, and D of 5 CFR part 731. See 90 FR 23467 (June 3, 2025). The proposed changes in this present rulemaking are limited to subpart E of this part and are separate and distinct from the changes proposed in the June 2025 Suitability and Fitness Notice of Proposed Rulemaking (June NPRM) at 90 FR 23467. The June NPRM addresses updates to the specific factors used to evaluate an individual's suitability or fitness for Federal service, as directed by E.O. 14210 of February 11, 2025, *Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative*, (see 90 FR 9669, Feb. 14, 2025) and OPM's and agencies' delegated authority to take suitability actions based on post-appointment conduct as directed by Presidential Memorandum on March 20, 2025, *Strengthening the Suitability and Fitness of the Federal Workforce*, (see 90 FR 13683, Mar. 25, 2025). This present rule is limited to appeals of suitability actions. The appeal processes proposed in this rule would operate independently of the changes proposed in the June NPRM and could serve in an appeal of a suitability action irrespective of how OPM ultimately completes the June NPRM.

In proposing to discontinue MSPB appeals for suitability actions, OPM has considered that judicial and legislative history demonstrates clear congressional intent to exclude suitability actions from standard civil service Chapter 75 procedures—including MSPB appeals. In the

early 2010s, two decisions involving individuals in the competitive service limited agencies’ ability to mitigate risk through suitability actions by forcing actions based on post-appointment conduct to proceed through Chapter 75 procedures. First, in 2011 the MSPB decided in *Scott v. OPM* (116 M.S.P.R. 356 (2011), modified by 117 M.S.P.R. 467 (2012)) that suitability actions could not be taken for post-appointment conduct. Then, in 2015, the Federal Circuit held in *Archuleta v. Hopper* (786 F.3d 1340 (Fed. Cir. 2015)) suitability-based removals were subject to Chapter 75 adverse action procedures. Congress almost immediately repudiated this interpretation of Chapter 75 by the courts and clarified that suitability authority is separate and distinct from Chapter 75 removal authority. Specifically, in 2015, Congress added 5 U.S.C. 7512(F) to clarify that “a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service”² is not within the scope of Chapter 75 (and thus statutory MSPB jurisdiction). This clarifying addition was part of a larger package of reforms in the Fiscal Year 2015 National Defense Authorization Act (FY 2015 NDAA) designed to improve the speed and effectiveness of government personnel security, suitability, and credentialing reviews. These reforms were heavily influenced by Congress’ response to tragic, potentially avoidable events had the government had more robust personnel vetting processes. Following the Washington Navy Yard shooting in September 2013, which saw 12 individuals lose their lives, Congress held hearings examining necessary improvements to vetting processes highlighted by this event and other high-profile leaks of information (e.g., Wikileaks), and crafted legislation to improve the government’s ability to protect against risk posed by trusted insiders. For example, the same section of the FY 2015 NDAA that added language to clarify that suitability actions were not within the scope of Chapter 75 also directed action to develop strategies and capabilities to enable real-time, risk managed personnel vetting decisions, increase access to criminal history

² National Defense Authorization Act (NDAA) for Fiscal Year 2016, Pub. L. 114-92, div. A, title X, §1086(f)(9), Nov. 25, 2015, 129 Stat. 1010.

information when determining an individual's suitability or fitness for employment, and improve insider threat detection and prevention. In passing this amendment, Congress improved the Government's ability to mitigate risk by rectifying a situation created by the courts, which had subjected suitability actions to the process dictated by Chapter 75. The FY 2015 NDAA returned the ability for suitability actions to follow a more streamlined process than Chapter 75.

MSPB has nonetheless continued to exercise jurisdiction over suitability appeals, as OPM's regulations in 5 CFR part 731, subpart E, authorize MSPB appeals of suitability actions. These regulations pre-date the FY 2015 NDAA amendments clarifying that suitability actions are not subject to Chapter 75 requirements. Under 5 U.S.C. 1204(a) the MSPB can adjudicate matters that are placed within its jurisdiction by any law, rule, or regulation. So, while the law does not require that MSPB hear appeals of suitability actions, OPM regulations continue to do so.

Removing MSPB appeals of suitability actions from OPM's regulations would remove the MSPB's jurisdiction to hear such appeals. Individuals against whom suitability actions are proposed will continue to be able to rely on the procedural protections OPM provides in its suitability regulations at 5 CFR part 731, subparts C and D. When OPM or an agency makes an unfavorable suitability determination and takes a suitability action, individuals would have further protections in the form of an appeal to OPM provided in the proposed revisions to subpart E, described below. Accordingly, suitability actions that remove an appointee or employee will not constitute at-will dismissal.

OPM has also considered that MSPB procedures add considerable complexity and delay arriving at a final resolution for both appellants and agencies. When appealing to the MSPB, employees have a statutory right to a hearing when the matter is within its jurisdiction.³ And before reaching a hearing, MSPB regulations allow the parties to engage in discovery.⁴ On top of

³ 5 U.S.C. 7701(a).

⁴ 5 CFR 1201.71 - 1201.75.

these procedures, the MSPB process includes multiple levels of appeal. An employee or applicant can appeal an administrative judge's initial ruling to the full MSPB, and then to the U.S. Court of Appeals for the Federal Circuit. See 5 CFR part 1201. This process of successive, duplicative appeals can take years, wasting valuable time and resources.

OPM believes that removing suitability appeals from MSPB will result in faster resolution for individuals and agencies. In MSPB's Annual Performance Reports for Fiscal Years (FY) 2022 through 2024,⁵ the average case processing time for initial appeals alone is 109 days. This does not include situations where additional time is needed for a decision by the Board is required to provide resolution, discussed below. It should also be noted that during this time period when MSPB averaged 109 days to process initial appeals, 69% of all appeals filed were dismissed, and of those remaining appeals not dismissed, 57% ended in settlement. During this same period, the MSPB decided an average of 4,186 cases per year, where suitability appeals represented an average of only 1.2% of all cases. Although only a small fraction of the total cases, suitability appeals are blended with the overall workload of the MSPB, which subjects these appeals to the same processing timelines as all other case types. By removing suitability appeals from MSPB, these suitability appeals would reach resolution more quickly because OPM's suitability office would have no other types of appeals to process and compete for attention.

OPM has also considered the negative impact MSPB's recent history of a lack of quorum has on providing individuals and agencies with prompt resolution of appeals. Between January 7, 2017, and March 3, 2022, and for the better part of 2025, MSPB lacked a quorum, which prevented it from reviewing cases and resulted in a considerable backlog.⁶ During the 2017 to 2022 period when MSPB lacked a quorum, OPM had 14 appeals of its suitability actions

⁵ MSPB's Annual Reports can be found on MSPB's website at https://www.mspb.gov/about/annualreport_archive.htm.

⁶ U.S. Merit Sys. Prot. Bd., "Frequently Asked Questions about the Lack of Quorum Period and Restoration of the Full Board" (Apr. 9, 2025), https://www.mspb.gov/FAQs_Absence_of_Board_Quorum_4-9-25.pdf

impacted, where the individuals and agencies involved in the actions waited an average of 5 years and 7 months between the time OPM took its suitability action and the date the Board rendered a decision. This situation leaves individuals and agencies in limbo for far too long. MSPB itself cannot rectify this recurring problem, as the cause of the lack of a quorum stems from the Senate's failure to confirm nominees to the MSPB in a timely manner. The executive branch lacks any meaningful control over this process, and therefore prudent governance requires the executive to minimize disruption to personnel operations caused by loss of a quorum at MSPB. Moving appeals of suitability actions from MSPB to OPM will ensure the executive branch retains control and flexibility to allocate resources to avoid extensive delays or backlogs that would deprive individuals and agencies of timely resolution. It also leverages OPM's expertise in promulgating and interpreting suitability regulations as well as its expertise in adjudicating suitability matters. Housing suitability action appeals within the agency with historical expertise in suitability matters will promote consistency, efficiency, and regularity of decision-making regarding suitability action appeals. While individuals may lack some procedural mechanisms if appeals are transferred to OPM as proposed in this rule, OPM believes streamlining the process will not have a consequential impact upon the substantive outcomes of the appeals, while improving the efficiency and consistency of the process.

In proposing to remove competitive service and career SES suitability appeals from MSPB, OPM also considered that it is possible that the complexity, time, and cost of defending suitability actions at MSPB coupled with the high rate of settlements that result from such appeals may discourage agencies from pursuing suitability actions to mitigate risk when an action is warranted. From FY 2018 through 2024⁷, 71% of MSPB appeals of suitability actions that were not initially dismissed resulted in a settlement. In the context of a suitability appeal, all settlements result in a reduction of penalties and almost always involve reducing the period of

⁷ MSPB's Annual Reports for FY 2018 through FY 2024 can be found on MSPB's website at https://www.mspb.gov/about/annualreport_archive.htm.

debarment. The high rate of settlements has at least two potential consequences. First, the debarment period set in a suitability action serves the purpose of both protecting the integrity and efficiency of the service and affording a sufficient period for the debarred individual to demonstrate rehabilitation. Shortening this period exposes the government to increased risk and also allows individuals to re-enter Federal service before sufficient time has passed to allow for them to demonstrate rehabilitation. Second, the resulting reduction in penalties may further discourage agencies from viewing the effort in taking an action as a worthwhile endeavor.

Although OPM is proposing to remove the availability of an appeal of a suitability action to the MSPB, OPM does not propose in this rule to change any of the suitability actions procedures. Those procedures include the following elements, which are also unchanged by the proposals in the June NPRM: written, advanced notice outlining the charges, an opportunity for the respondent to review the materials relied upon in proposing the action, an opportunity for the individual to respond in writing and provide written evidence, and the opportunity for the respondent to be represented by a representative of the respondent's choice.

OPM's recognition that providing a regulatory right to appeal suitability actions to the MSPB creates inefficiencies and makes agencies less likely to take a suitability action even when such an action is warranted is not new. In April 1991, OPM established an OPM Review Panel (the Review Panel) as a venue to offer individuals an opportunity for an independent review of an unfavorable suitability determination. 56 FR 18650 (April 23, 1991). OPM had hoped that the creation of the Review Panel would afford individuals an appropriate level of protection in response to unfavorable suitability determinations and actions while also decreasing costs, providing appellants with a streamlined resolution to their cases, and cutting down on the number of appeals taken in suitability cases to the MSPB. OPM did not, however, remove the regulatory right for appeal to the MSPB from 5 CFR part 731. In the April 1991 interim regulation, OPM also took away agencies' prior option to determine whether to suspend individuals or retain them in a pay status pending adjudication of their appeals to the MSPB.

OPM required agencies to retain individuals in a pay status pending the decision of the Review Panel. Agencies could only execute a 5 CFR part 731 removal action after the Review Panel affirmed an agency decision.

In September 1994, OPM abolished the Review Panel. 94 FR 22918 (September 16, 1994). While the Review Panel effectively provided independent suitability determination reviews, its implementation did not achieve the goals that motivated its creation. Experience showed that many appellants to the Review Panel still proceeded with appeals to the MSPB after the Review Panel's review and decision. OPM now recognizes that streamlining the resolution of suitability determinations requires eliminating MSPB review, not simply providing for separate OPM review.

Based on the inefficiency of allowing suitability appeals to be heard by the MSPB and lessons learned in OPM's prior Review Panel, OPM is proposing to introduce an OPM appeal process to replace the MSPB appeal process for both OPM and agency suitability actions. The OPM appeal process will provide individuals an opportunity for an independent review in a manner that values protections for individuals subject to unfavorable suitability determinations alongside the need to employ efficient and effective processes to ensure applicants, appointees, and employees are suitable for employment and that their conduct protects the integrity and promotes the efficiency of the service. Today, OPM's suitability functions take place in an Office that is split into two separate program areas. This structure ensures that today, suitability adjudicative staff involved in making suitability determinations and taking suitability actions are kept separate and distinct from another group of senior suitability adjudicative staff responsible for supporting OPM on appeals of suitability actions to the MSPB, with both sides reporting through separate supervisory chains of command. Under the proposed OPM appeal process, OPM will retain this structure to maintain decisional and supervisory independence between staff that make suitability determinations and take suitability actions from those that decide appeals of suitability determinations and actions.

In removing the right to appeal to MSPB currently provided in subpart E, OPM is proposing to revise subpart E to establish the following appeal procedures:

- Individuals applying to or occupying competitive service or career Senior Executive Service positions who have been found unsuitable by an agency, to include OPM when acting as an agency, and have been subject to a suitability action may file an appeal with OPM and may present evidence and supporting documentation as to why they believe the underlying determination of unsuitability was incorrect. Individuals will have the right to represent themselves or designate a representative.
- Appeal requests will be adjudicated by OPM personnel who have received training that complies with national training standards for suitability adjudicators. This training will ensure that those entrusted with adjudicating appeals are qualified to review agency suitability determinations and actions.
- In conducting its review of an agency determination and action, OPM will review the written record of the case, the agency decision, and the request for review. OPM will affirm the agency's decision if the action, findings, and conclusions are supported by a preponderance of the evidence, where *preponderance of the evidence* means evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that the agency's conclusions are more likely to be true than untrue.
- When OPM determines the written record is insufficiently developed to decide the appeal due to disputes involving one or more material facts, OPM will: 1) hold a hearing to evaluate witness credibility to resolve any issue(s) of material fact, 2) conduct an additional investigation, or 3) reverse or vacate the responsible agency's decision, in whole or in part.
- At the conclusion of its review, OPM will prepare a written initial decision affirming, reversing, or affirming with modifications an agency's decision.
- Upon request from either party to the dispute, OPM may reopen and reconsider at its discretion an initial decision.

- There would be no further administrative review or appeal from OPM’s final decision.

Under the proposed suitability action appeal procedures, OPM will only review the underlying determination that the individual is unsuitable for Federal employment. The review will focus on the evidence in the record and whether it supports a finding that the individual’s conduct demonstrates his or her employment would not protect the integrity or promote the efficiency of the service. Individuals who believe that they have been discriminated against or subjected to a prohibited personnel practice could raise these arguments and present evidence insomuch as it is relevant to the suitability determination; however, the submission and consideration of any such arguments or evidence would not be considered a legal claim for redress by OPM, and any decision by OPM would be limited to the suitability determination. OPM’s decision would not constitute a decision on presence or absence of discrimination or a prohibited personnel practice. Individuals would need to pursue such legal claims in accordance with statutes and regulations governing such claims, for instance following the procedures for filing a claim of discrimination under Equal Employment Opportunity Commission (EEOC) regulations. The EEOC’s mixed cases regulation at 29 CFR 1614.302 would not apply. While OPM is best positioned to review suitability determinations and actions, these other entities have experience and regulatory authority to review claims that an agency action was based on underlying discrimination or another prohibited personnel practice.

Section-by-Section Analysis

Subpart E – Suitability Action Appeals

OPM is proposing to revise subpart E in its entirety. Subpart E would be renamed Suitability Action Appeals. As discussed above, OPM’s purpose in proposing these changes is to streamline, and thereby speed up, the final decision-making process; and, to that end, OPM’s proposed amendments would no longer permit individuals to appeal suitability actions to the MSPB. As is the case today, either at OPM or an agency, suitability determinations and actions will be proposed by a suitability adjudicator, individuals will have an opportunity to respond,

and, after the opportunity to respond, a separate suitability adjudicator who was not involved previously in the decision to propose the action will make the decision. Permitting an appeal to MSPB – where actions follow complex litigation practices and those that are not dismissed most often end in settlements and where the recent history of extended periods with a lack of a quorum causes extensive delays and prevents timely resolution of appeals – is ineffective at protecting the integrity and promoting the efficiency of the service through suitability actions. At the same time, to provide individuals with the protection of a secondary independent review, OPM proposes to institute an OPM suitability action appeals process to allow individuals to request a review of an agency’s unfavorable suitability determination. This would include OPM determinations when OPM is acting as an agency. It would also include, if the June NPRM is finalized as proposed, OPM determinations made in suitability actions against employees based on post-appointment conduct. Throughout the following analysis, the term “agency” refers to both OPM suitability determinations and actions and those by other agencies.

731.501 Right to appeal

OPM is proposing to establish an OPM suitability action appeals process. Individuals against whom an agency has taken a suitability action may appeal to OPM and request that OPM review the agency determination that an individual is unsuitable for employment in the competitive service or career Senior Executive Service. Under the proposed procedures, an applicant, appointee, or employee in the competitive service or career Senior Executive Service who has been subject to a suitability action may appeal an agency’s underlying decision that he or she is unsuitable for Federal employment based on the specific factors found at 5 CFR 731.202(b). OPM proposes that an individual may also file an appeal when challenging whether an agency followed proper suitability action procedures as outlined in subparts C and D of part 731. OPM proposes that unfavorable suitability determinations that do not result in a suitability action as defined at 5 CFR 731.101(b) cannot be appealed under this subpart. OPM proposes to make the appeal procedures in this subpart the sole and exclusive means of appealing suitability

actions. These procedures would not, however, preclude an individual filing an administrative complaint, appeal, or other matter within another forum, as applicable (e.g., claims of discrimination or a prohibited personnel practice).

731.502 Procedures for submitting appeals

OPM proposes to require individuals who wish to file an appeal to do so using OPM's electronic filing system within 30 calendar days of the effective date of the suitability action. OPM anticipates that it will have an e-filing system in place prior to the effective date of a final rule. OPM would not review untimely requests unless the individual demonstrates good cause for the untimely filing. The appellant would bear the burden of proof to demonstrate that an appeal filing is timely as well as demonstrating that the action taken against the individual falls within OPM's jurisdiction under this part. In evaluating whether an appellant has demonstrated good cause for an untimely filing of the appeal, OPM will apply the approach taken by the Merit Systems Protection Board in *Alonzo v. Department of the Air Force*, 4 MSPB 262, 4 M.S.P.R. 180 (1980). In *Alonzo*, the Board established a non-exhaustive set of factors for determining whether an employee establishes good cause for the untimely filing of an appeal. These factors will allow OPM to consider a variety of circumstances using well-established law.

731.503 Form and content of suitability action appeals and agency response

OPM proposes requiring an appellant to provide identifying information and a statement of the basis of the appeal, along with any supporting documentation the appellant deems relevant to the review. When an appellant files a timely appeal, OPM proposes that the agency that took the suitability action must submit the agency's response within 30 calendar days. OPM proposes allowing an appellant to file a reply to an agency response, but the reply would be limited to addressing only the factual and legal issues raised by the agency in response to the initial appeal.

731.504 Appellant representatives

OPM proposes individuals may represent themselves or designate a representative, provided that, if the representative is a Federal employee, he or she may not perform such

representational functions while in a duty status (including while on official time under 5 U.S.C. 7131), and also may not claim agency reimbursement for any expenses incurred while performing such representational functions. Additionally, OPM proposes that OPM may, in its sole and exclusive discretion, disallow an appellant's choice of a representative if the representative is an employee of the agency or OPM and that employee's representation would result in a conflict of interest or position; that employee cannot be released from his or her official duties because of the priority business needs of the agency; or it would give rise to unreasonable costs to the Government.

731.505 Adjudication of appeals

OPM proposes to introduce protections to ensure that OPM personnel assigned to adjudicate appeals are free from conflicts of interest. As discussed in the Authority and Background section, the OPM staff taking suitability actions will be kept in a separate work unit and report through a different supervisory chain than those employees responsible for processing and deciding appeals. OPM also proposes to require all personnel adjudicating appeals to have received training that complies with national training standards for suitability adjudicators. Requiring this training will ensure those adjudicating appeals are qualified to review OPM and agency suitability determinations and actions. OPM proposes that, in applying a standard of review, it will affirm the agency's decision if the action, findings, and conclusions are supported by a preponderance of the evidence. OPM proposes that when it determines the written record is insufficiently developed to decide the appeal due to disputes involving one or more material facts, OPM will: 1) hold a hearing to evaluate witness credibility to resolve any issues of material fact, 2) conduct an additional investigation, or 3) reverse or vacate the responsible agency's decision, in whole or in part.

OPM proposes that appellants will receive relief including any back pay, interest, and reasonable attorney fees consistent with subpart H of part 550 of this chapter when the appellant is the prevailing party. See 5 CFR 550 subpart H. OPM proposes that, when the appellant is the

prevailing party, an agency's request for reopening and reconsideration of OPM's initial decision will not stay any requirement to provide relief unless OPM issues a specific order staying such relief. However, when the relief includes payment of back pay, interest, or attorney fees, those payments are not payable until the decision is a final decision in accordance with § 731.509.

731.506 Sanctions and protective orders

OPM proposes to prevent harassing communications by the parties via a cease-and-desist directive and penalties for failing to follow a directive from OPM. Specifically, the proposed language would authorize OPM to direct any party to cease-and-desist harassing communications, or communications which could reasonably be foreseen to lead to harassment, with or about any individual. This authority is proposed to be exercised *sua sponte* or at the request of a party. The section further proposes to provide several penalties upon a party failing to comply with such a directive, including drawing all inferences against the noncompliant party, prohibiting the noncompliant party from introducing evidence, or eliminating consideration of any filings or submissions of the noncompliant party.

MSPB procedures, while providing for protective orders, are inadequate to protect Federal employees from threats and harassment. While MSPB permits a party to petition the board for a protective order, it cannot, *sua sponte*, bind a party to a protective order without a motion. Instead, MSPB relies primarily on mutual consent of the parties, which allows for significant abuse by bad actors. The failure to preemptively issue an order provides ample opportunity to those who would channel unwarranted attention, harassing messages, and threats to Federal employees, who neither sought nor deserve public attention, merely for fulfilling their responsibilities. This failure should be corrected to protect rank and file Federal employees seeking to serve the public interest. However, unfortunately, to date, MSPB has proven itself unwilling to take necessary steps to protect Federal employees from threats and harassment. As such, OPM believes it would be prudent and provide much needed protection for Federal

employees to adjudicate these appeals by issuing cease-and-desist directives, with strict consequences for failure to comply.

731.507 Reopening and reconsideration of an initial decision

Under the proposed rule, OPM would, at its sole discretion, be able to reopen and reconsider an initial decision issued under this subpart upon a request from either party to a dispute. The appellant, the appellant's representative, or the agency would have 30 calendar days from the issuance of the initial decision to request reopening and reconsideration. In any case that is reopened and reconsidered, OPM would be able to 1) issue a decision that decides the case; 2) require the parties to submit arguments and evidence; or 3) take any other action necessary for final disposition of the case. OPM would have authority to affirm, reverse, modify, or vacate the initial decision, in whole or in part.

731.508 Review by the OPM Director

In proposed § 731.508, OPM reserves the Director's right, at his or her discretion and *sua sponte*, to reopen and reconsider any decision OPM has issued provided the decision has not yet become final. OPM views this appellate process as necessary to ensure that the Director can supervise adjudicators sufficiently to avoid any serious constitutional concerns from having subordinate officials wield executive authority. Under Article II, the Constitution vests the executive power in the President who must rely upon subordinates to exercise his authority. Adjudicators assigned to adjudicate appeals under this proposed rule exert significant authority that must be properly supervised by a principal officer appointed by the President with Senate consent to avoid a constitutional problem. *See United States v. Arthrex, Inc.*, 594 U.S. 1 (2021).

731.509 Final Decision

OPM proposes that the initial decision will become the final decision of OPM if neither party requests reopening and reconsideration from OPM within 30 calendar days from the date of the initial decision. A decision upon reopening and reconsideration will become OPM's final decision if the Director does not reopen a decision upon reconsideration within 30 calendar days

from the date of the reopen and reconsideration decision. A decision by the Director will be the final decision of the agency and is effective upon the date of issuance.

Expected Impact of This Proposed Rule

1. Statement of Need

This rule is needed to streamline suitability action appeals procedures, thereby improving the efficiency, rigor, and timeliness by which OPM and agencies resolve challenges to suitability actions and ensure the integrity and efficiency of the service. The rule fosters greater process efficiency by eliminating appeals to the MSPB for suitability actions while bolstering the procedures by which an individual against whom a suitability action is being taken can appeal. These changes are expected to reduce time and costs while promoting an impartial and effective suitability process that produces sound decisions. This rule also returns control over the timely processing of suitability action appeals to the executive branch, eliminating delays caused by the Senate's failure to confirm Board members at the MSPB. This rule also brings the suitability appeals procedures into compliance with congressional intent, where suitability actions are excluded from standard Chapter 75 procedures, which include appeal rights to the MSPB. Eliminating appeals to the MSPB for suitability actions and providing a process free from extensive delays and backlogs may also increase the likelihood that agencies will act when warranted to protect the integrity and promote the efficiency of the service, rather than the status quo where agencies' decisions to act could potentially be influenced by the prospect of a protracted process that does not provide timely resolution. Although this intangible benefit cannot be quantified, a greater willingness by agencies to hold individuals accountable for misconduct that compromises the efficiency or integrity of the service improves the overall service Americans receive from their Government. On balance, these changes will result in savings to agency operational costs and the American public, while also providing due process and more expeditiously arriving at a resolution that protects the integrity and promotes the efficiency of the service.

2. Impact

Applicants, appointees, and employees in the competitive service, in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and in the career Senior Executive Service would be impacted by the changes proposed in this rule. These are the only categories of individuals currently subject to suitability actions. OPM anticipates that this proposal would allow these individuals to reach final resolution of a suitability action faster, while still providing due process.

OPM would also be impacted by the proposed changes as OPM would be responsible for operating the OPM suitability action appeal process. Some of this impact would be offset by elimination of OPM adjudicator and attorney responsibilities currently associated with preparing materials and defending the Government's position when respondents appeal OPM's decisions to the MSPB, as that avenue of appeal would no longer be afforded.

3. Costs

The costs associated with this rulemaking could vary depending on the outcome of the June NPRM. If finalized as proposed, the June NPRM would result in additional cost impacts should the changes proposed in this present rulemaking also finalize as proposed. As such, although the proposed changes in this present rulemaking are separate and distinct from the changes proposed in the June NPRM, the cost analysis below addresses the potential impacts if both rulemakings are finalized as proposed.

One-time Implementation Cost

This proposed rule will affect the operations of most Federal agencies in the Executive branch—ranging from cabinet-level departments to small independent agencies. To comply with the regulatory changes in this proposed rule, affected agencies will need to review the rule and update their policies and procedures. For this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2025 for GS-14, step 5, from the Washington, DC, locality pay table (\$161,486 annual locality rate and \$77.38 hourly locality

rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$154.76 per hour. We estimate that, in the first year following publication of the final rule, the effort to update policies and procedures will require an average of 80 hours of work by employees with an average hourly cost of \$154.76. This effort would result in estimated costs in the first year of implementation of approximately \$12,400 per agency, and about \$1 million in total Government-wide.

Recurring Costs

After determining one-time implementation costs, OPM assessed recurring cost impacts. This total cost impact is determined by calculating two elements: first, cost savings at agencies, OPM, and MSPB from eliminating suitability action appeals to MSPB; and second, costs for agencies and OPM to process suitability action appeals through the proposed OPM appeals process. The difference between cost savings from eliminating labor hours expended on suitability action appeals at MSPB and the new costs for processing these appeals with OPM is the overall cost impact. The assessment looks first at the cost impact of this proposed rule standing alone. It then assesses the combined impact if both this proposed rule and the June NPRM both finalize as proposed.

a. Cost Impacts Solely from Eliminating MSPB Suitability Appeals

1. Agency/OPM Savings: Eliminating MSPB appeals for suitability actions will reduce costs at both OPM and agencies, eliminating the need for OPM and agencies to prepare for and participate in MSPB proceedings for suitability actions. OPM estimates that, in the current framework, MSPB hears approximately 63 initial suitability appeals per year, on average, according to its annual reports for 2018 – 2024.⁸ OPM acknowledges that not all appeals reach a hearing. Based on MSPB’s annual reports from 2018 – 2024, an average of 86% of suitability

⁸ MSPB’s Annual Reports for FY 2018 through FY 2024 can be found on MSPB’s website at https://www.mspb.gov/about/annualreport_archive.htm.

appeals were either dismissed or settled, meaning, on average, 54 of the 63 initial suitability appeals per year would only proceed through part of the process, with 9 appeals requiring the full investment of time to defend an action through a hearing. The proposed rule would eliminate the costs for both agency and OPM suitability staff and attorneys who support MSPB appeals.

OPM routinely supports appeals of its suitability actions at MSPB, and as such, understands the nature of its staff that support these appeals and the labor hours required. For the purpose of this analysis, OPM assumes that agency staff performing similar duties supporting appeals of agency suitability actions to MSPB are at the same grade level as OPM's staff and that they spend the same average amount of time supporting each appeal. OPM also notes that, although OPM and agency suitability staff and attorneys would have offsetting new costs to support appeals to OPM in the new proposed process, only the cost savings attributable to eliminating the need to support appeals to MSPB is calculated in this section. The new costs that offset some savings are calculated in a section that follows.

Suitability staff support appeals to MSPB by spending approximately 20 hours preparing packages for attorneys and processing materials relied upon. This work occurs prior to any decision to dismiss or settle an appeal, and therefore the cost is calculated accounting for all 63 appeals. The average salary rate of OPM's suitability personnel performing this work is at the 2025 rate for a GS-13, step 5. Although OPM's suitability personnel are not primarily located in Washington, DC, OPM elects to use the Washington, DC pay locality for this analysis to make its costs representative of agency costs. The 2025 Washington, DC locality rate for a GS-13, step 5 is \$136,658 annually and \$65.48 hourly. OPM assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of \$130.96, for an annual cost savings from suitability staff of approximately \$165,000. As noted, OPM assumes the average time spent by agency suitability staff on each appeal and the average salary is the same as OPM's suitability staff. The required investment of time for attorneys varies depending on the disposition type of the appeal – dismissed, settled, or decided after hearing. For appeals that

proceed through a hearing, approximately 9 per year governmentwide, OPM attorneys spend approximately 100 hours reviewing evidence, preparing submissions, and arguing each appeal before MSPB. For appeals that are dismissed or settled, an average of 54 per year governmentwide, OPM estimates OPM attorneys still spend 50 hours reviewing evidence, preparing submissions, and negotiating settlement agreements. OPM again assumes a similar level of effort by agencies' attorneys and therefore uses these estimates of attorney costs as representative for the entire 63 initial suitability appeals received by the MSPB annually. The average salary rate of attorneys performing this work at OPM is at the 2025 rate for a GS-14, step 5, from the Washington, DC, locality pay table (\$161,486 annual locality rate and \$77.38 hourly locality rate). OPM assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of \$154.76. OPM again assumes an equivalent cost of labor for agencies' attorneys. Accounting for the difference in hours required based on the outcome of the appeal, OPM estimates annual savings from reduced attorney time of approximately \$554,000. Taking savings for suitability staff time and attorney time together, the total annual cost savings would be \$719,000.

2. MSPB's Savings from Reduced Suitability Appeals Workload: There would also be cost savings at MSPB due to its reduced workload resulting from the proposed rule. OPM again acknowledges that not all appeals result in hearings. Using the above estimates for annual suitability appeals (63), OPM estimates that MSPB would avoid processing 54 appeals that are dismissed or settled and avoid processing another 9 that proceed through a full hearing. OPM assumes initial MSPB decisions are decided by MSPB administrative judges who are paid at the Washington, DC locality rate for a GS-15, step 5 level, with an hourly cost of \$182.04 once adjusted for the true cost of labor. For appeals that proceed through a full hearing, OPM assumes the administrative judges will spend 20 hours processing the appeal, including issuing their decision. For appeals that are dismissed or settled, OPM assumes the administrative judges will spend 12 hours reviewing filings, coordinating settlement discussions, and finalizing

settlement agreements. This implies that MSPB will save \$150,000 in total annually by not processing suitability action appeals. OPM acknowledges that there will likely be additional cost savings for MSPB related to MSPB administrative staff hours supporting MSPB's appeals processing. OPM does not have sufficient information to estimate these additional savings accurately, and as such, OPM welcomes any comments on potential additional cost savings impacts. Combined with the annual savings at OPM and agencies, the total estimated annual savings before cost offsets are \$869,000.

3. Costs of Operating New OPM Suitability Actions Appeals Process: Operating the OPM suitability actions appeals process will cause OPM to experience increased costs. Above, OPM identified that agencies and OPM would realize savings from its suitability staff and attorneys no longer needing to support suitability action appeals at MSPB. OPM and agencies would experience offsetting costs to support suitability action appeals in OPM's new proposed appeals process. The costs of OPM's proposed appeals process is comprised of four parts: first, the time required by suitability staff at the agency responsible for the action (responsible agency) to prepare its response file for the appeal; second, the time required by OPM's suitability appeals staff to review and decide appeals; third, the cost to hold credibility hearings; and fourth, the cost to OPM's appeal staff to process requests to reopen and reconsider initial decisions.

For the first cost component, OPM's proposed appeals process would still require OPM and agency suitability staff to support these appeals by compiling agency response files. OPM assumes this would be a fully offsetting cost. OPM assumes the 20 hours per appeal saved by suitability staff described above, which came with a cost savings of \$165,000, would need to be redirected in full to supporting appeals to OPM's proposed process, and therefore the \$165,000 savings described above would result in an offsetting \$165,000 cost to support OPM's proposed process, for a net cost of \$0. This work by OPM and agency staff represents the work done by those responsible for taking the suitability actions in defending the action on appeal, separate from OPM staff that would review appeal requests.

For the second cost component that consists of OPM's review of the appeal packages, whether an appeal of an agency action or an OPM action, OPM intends to have a separate cadre of staff who review the appeals and make recommendations to an OPM official for an initial decision. That official would review the file and recommendation and issue the initial decision. OPM estimates its personnel who will review the appeals to make a recommendation will spend 10 hours reviewing each appeal and making a recommendation. OPM assumes an average salary rate of the appeal review personnel at the 2025 rate for a GS-13, step 5, from the Washington, DC locality pay table (\$136,658 annual locality rate and \$65.48 hourly locality rate). OPM assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of \$130.96. OPM assumes the OPM official reviewing the recommendation and issuing the initial decision will spend 3 hours per appeal. OPM assumes an average salary rate of the official performing this work at the 2025 rate for a GS-14, step 5, from the Washington, DC locality pay table (\$161,486 annual locality rate and \$77.38 hourly locality rate). OPM assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of \$154.76. To determine the number of appeal requests OPM would process per year, OPM assumes that the 63 initial suitability appeal cases (noted above) that would avoid going to the MSPB under this proposed rule would be submitted to OPM instead.

For the third cost component, agencies and OPM will incur costs when OPM determines a credibility hearing is necessary to resolve a dispute concerning a material fact that cannot be resolved solely based on the written record. To determine the cost of credibility hearings, OPM assumes that costs for the hearings will come from the following areas: an administrative judge to preside over the hearing; the OPM official deciding the appeal to prepare for and attend the hearing and incorporate the findings of the hearing into the decision; attorneys for the responsible agency to review the file, prepare for the hearing, and participate in the hearing; suitability staff or other staff from the responsible agency to provide materials and support to agency attorneys and participate in the hearing, potentially as a witness; and costs for

transcribing the hearings. OPM assumes 6 hours of time for an administrative judge performing this work at the Washington, DC locality rate for a GS-15, step 5 level, with an hourly cost of \$182.04 once adjusted for the true cost of labor. OPM assumes 10 hours of time for the GS-14 OPM deciding official at the same \$154.76 hourly rate noted previously for this work. OPM assumes 20 hours of attorney time for the responsible agency's attorney performing this work at the 2025 rate for a GS-14, step 5, from the Washington, DC locality pay table (\$161,486 annual locality rate and \$77.38 hourly locality rate). OPM assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of \$154.76. OPM assumes 15 hours for the responsible agency's suitability staff or other staff performing this work at the 2025 rate for a GS-13, step 5, from the Washington, DC locality pay table (\$136,658 annual locality rate and \$65.48 hourly locality rate). OPM assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of \$130.96. OPM assumes a cost of \$2,500 to procure transcription services for each hearing.

For the fourth cost component, OPM will incur costs to process requests to reopen and reconsider initial decisions. OPM assumes that for each request granted, a different GS-13 reviewer will spend 3 hours reviewing the case and making a new recommendation, and that either the same or a different GS-14 deciding official will spend another 2 hours on each request.

Taking together all four cost components to calculate average costs across the 63 suitability appeals per year, OPM's proposed suitability appeals processes based on current-day levels of suitability appeals would cost agencies and OPM approximately \$294,000 annually. OPM anticipates its current staffing levels will support handling this new workload.

b. Potential Additional Cost Impacts of OPM's June NPRM:

As described earlier, on June 3, 2025, OPM proposed changes to subparts A, B, C, and D of part 731. Most notably, the proposed changes would allow agencies and/or OPM to take suitability actions against appointees and employees based on post-appointment conduct. As described in the June NPRM, if the changes proposed in that rulemaking finalize as proposed,

some post-appointment misconduct actions that are currently processed under Chapter 75 procedures may be processed as suitability actions under 5 CFR part 731. The key impact of the proposed changes in the June NPRM on this current rulemaking is that an increase in the number of suitability actions taken per year could have a direct effect on the number of suitability action appeals diverted from MSPB to OPM, thereby significantly changing the volume of suitability actions appeals per year from the current 63 per year received by MSPB. To account for this potential impact on the costs associated with the current proposal to move suitability actions appeals from MSPB to OPM, the following cost analysis estimates the additional savings and any offsetting costs in the event the volume of suitability actions increases as a result of the proposed changes to take suitability actions based on post-appointment conduct.

1. Agency Savings from Fewer Adverse Action Appeals to MSPB: In the June NPRM, OPM estimated that, if the rule finalizes as proposed, approximately 1,226 removal actions presently taken by agencies under Chapter 75 could be referred to OPM for suitability actions instead. From FY 2021 to FY 2025, OPM found that its own suitability actions were appealed to the MSPB at a rate of 20.8%. OPM assumes that removal actions for misconduct that could be processed as suitability actions if the June NPRM finalizes as proposed are appealed at a similar rate. This would result in an average of 255 appeals per year that shift from being adverse action appeals to suitability action appeals.. Under the changes proposed by this current rulemaking, those suitability action appeals would not be appealable to the MSPB, as they would come to OPM instead. This means an average of 255 MSPB initial appeal cases could be avoided. OPM acknowledged above that not all appeals reach a hearing and accounts for this in its calculation of the costs agencies and OPM would avoid by no longer defending these appeals at the MSPB. Above, based on MSPB's present day processing of suitability appeals, it was determined that suitability appeals are dismissed or settled at a rate of 86%. Applying this same rate to the potential 255 adverse appeals avoided, on average, 219 of the 255 initial adverse action appeals avoided would only proceed through part of the process, with 36 appeals requiring the full

investment of time to defend an action through a hearing. Regardless of whether an appeal is dismissed or settled, OPM assumes that agencies' HR personnel spend at least 80 hours preparing for MSPB adverse action appeals. OPM assumes an average salary rate of agencies' supervisory and HR personnel performing this work at the 2025 rate for a GS-15, step 5, from the Washington, DC locality pay table (\$189,950 annual locality rate and \$91.02 hourly locality rate). OPM assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of \$182.04, with a total staff savings of \$3.7 million. OPM assumes agency attorneys spend a further 100 hours reviewing evidence, preparing submissions, and arguing each of the 36 appeals that go through a hearing. As noted previously, OPM assumes the average time spent by agency counsel on each appeal and the average salary is the same as OPM's counsel that handles suitability appeals. For appeals that are dismissed or settled, an average of 219 per year, OPM estimates attorneys still spend 50 hours reviewing evidence, preparing submissions, and negotiating settlement agreements. OPM assumes an average salary rate of agencies' attorneys performing this work at the 2025 rate for a GS-14, step 5, from the Washington, DC, locality pay table (\$161,486 annual locality rate and \$77.38 hourly locality rate). OPM assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of \$154.76, and a total savings in attorneys costs of \$2.2 million. Taken together, the total annual cost savings to agencies would be roughly \$6 million.

2. MSPB's Savings from Reduced Adverse Action Appeals Workload: There would also be cost savings at MSPB due to its reduced workload resulting from avoiding 255 initial appeals that would be processed with OPM as suitability action appeals instead of adverse action appeals at MSPB. OPM again acknowledges that not all appeals result in hearings. Using the above estimates, OPM estimates that MSPB would avoid processing 219 appeals that are dismissed or settled and avoid processing another 36 that proceed through a full hearing. OPM again assumes initial MSPB decisions will be decided by MSPB administrative judges who are paid at the GS-15, step 5 level, with an hourly cost of \$182.04. For appeals that proceed through a full hearing,

OPM assumes they will spend 20 hours conducting each hearing and preparing their decision. For appeals that are dismissed or settled, OPM assumes they will spend 12 hours reviewing filings, coordinating settlement discussions, and finalizing settlement agreements. This implies that MSPB will save \$609,000 yearly by avoiding processing adverse actions appeals that would be processed instead by OPM as suitability actions appeals. OPM again acknowledges that there will likely be additional cost savings for MSPB related to MSPB administrative staff hours supporting MSPB's appeals processing. OPM again does not have sufficient information to estimate these additional savings accurately, and as such, OPM welcomes any comments on potential additional cost savings impacts. Combined with the annual savings at OPM and agencies, the total estimated annual savings before cost offsets is \$6.6 million.

3. Additional Costs for OPM Suitability Actions Appeals Process: An increase of 255 suitability action appeals resulting from current adverse actions removals being processed as suitability actions would increase OPM's costs to operate its suitability actions appeals process. OPM assumes that the same four cost components used to calculate the cost of its proposed suitability appeals would apply, with only an adjustment to the volume of suitability appeals processed. Therefore, OPM applies the same assumptions for the rate of pay of staff at agencies and OPM performing the work that makes up the four cost components and the number of hours required for each part of the process as described in section a. of Recurring Costs. Taking together all four cost components and averaging out costs across the potential additional 255 suitability appeals per year, OPM's proposed suitability appeals processes would cost agencies and OPM approximately \$1.2 million annually. OPM anticipates that its current adjudicatory personnel could assume the preparatory work to compile agency response files and respond to information requests for appeals of OPM's own suitability actions. For the work described of reviewing appeals and making recommendations for initial appeal decisions, OPM anticipates that it would likely need to increase the number of resources to handle the new workload if the June NPRM finalizes as proposed and the estimated 255 adverse actions appeals become

suitability actions appeals. OPM estimates it would likely need 2 additional personnel at the 2025 rate for a GS-13, step 5, from the Washington, DC locality pay table as described above.

c. Total Cost Impact:

There are two potential total cost impacts considered. The first total cost impact is restricted solely to the proposal in this present rulemaking to move the venue for appeals of suitability actions for the competitive service and career SES from MSPB to OPM. Taking into account cost savings from avoiding the costs of appeals to MSPB and new costs associated with the proposed OPM suitability action appeal process, assuming the volume of suitability action appeals remains consistent with current levels reported in MSPB's Annual Reports, the proposed changes would result in an annual cost savings to the government of approximately \$574,000.

Then, there are the additional total cost implications if both the present rulemaking and the June NPRM finalize as proposed. Taking into account both decreases and increases in levels of effort associated with the potential for an increased volume of suitability action appeals stemming from the June NPRM, the result would be an additional annual savings for the government of \$5.4 million.. Combined with the annual savings associated with this current proposed rule based on present day levels of suitability actions (\$574,000), OPM estimates an annual net savings of \$5.9 million should both the present proposed rulemaking and the June NPRM finalize as proposed. These recurrent annual savings are separate from the one-time implementation costs of approximately \$990,464 OPM anticipates resulting from this current proposed rulemaking.

OPM notes that its estimates do not include any costs (or savings) to individuals due to changes in rates of representation. OPM requests comment on these effects, as well as other impacts of the rule.

4. Benefits

The expected benefits of the proposed rule are to foster greater process efficiency by eliminating appeals to the MSPB for suitability actions while bolstering the procedures by which

an individual against whom a suitability action is being taken can appeal that action and unfavorable suitability determination. These changes are expected to reduce time and costs while promoting an impartial and effective suitability process that produces sound decisions and removes unsuitable individuals from the Federal service. This rule will also provide the executive branch with more control over its ability to process suitability appeals in a timely manner by removing the process' dependency on the Senate confirming MSPB board members. This rule also brings the suitability appeals procedures into compliance with congressional intent, where suitability actions are excluded from standard Chapter 75 procedures, which include appeal rights to the MSPB. On balance, these changes will result in savings to agency operational costs and the American public, while also providing due process and more expeditiously arriving at a resolution that protects the integrity and promotes the efficiency of the service.

5. Alternatives

OPM could decide to retain the existing procedures by which individuals against whom a suitability action is taken may appeal the action to the MSPB; however, the streamlining of the final decision process is expected to result in greater efficiency than is currently borne out in the process by which individuals may appeal suitability actions to the MSPB. It is also expected to produce decisions that better protect the integrity and efficiency of the Federal service.

Another alternative is that OPM could attempt to implement an OPM suitability appeals process that still allows individuals to appeal to the MSPB after first passing through the OPM process. Upon reviewing the prior failings of the OPM Review Panel in the 1990s, OPM believes that, even with adjustments, any process that still affords appeals to the MSPB would be cost prohibitive upon implementation and delay resolution of appeals beyond what is seen today.

Severability

OPM proposes that, if any of the provisions of this proposed rule as finalized is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be

severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances. For example, if a court were to invalidate any portions of this proposed rule as finalized removing appeal procedures, the other portions of the rule—including the portions providing that suitability appeals must be electronically filed with OPM—would independently remain workable and valuable. In enforcing civil service protections and merit system principles, OPM will comply with all applicable legal requirements.

Regulatory Compliance

1. Regulatory Review

OPM has examined the impact of this rule as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for rules with effects of \$100 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a “significant regulatory action” under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563. This proposed rule is expected to be an Executive Order 14192 deregulatory action.

2. Regulatory Flexibility Act

The Director of OPM certifies that this rule will not have a significant economic impact on a substantial number of small entities because this rule will apply only to Federal agencies and individuals.

3. 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.

4. Civil Justice Reform

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

5. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or tribal governments in the aggregate, or on the private sector, in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately \$206 million. This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

6. Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

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

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

Additional information regarding these collections of information – including all current supporting materials – can be found at <https://www.reginfo.gov/public/do/PRAMain> by using the search function to enter either the title of the collection or the OMB Control Number. Data gathered through these information collections fall under the following system of record notice: Personnel Vetting Records System, DUSDI 02-DoD (83 FR 52420).

In addition, OPM suitability adjudication records currently are covered by the system of record notice (SORN) CENTRAL-9 (81 FR 70191). OPM is reviewing that SORN in light of the changes proposed in this rulemaking and the changes proposed in the June NPRM. OPM will publish any proposed changes to its SORNs in the **Federal Register**. Individual agencies should each have a SORN that covers the agency adjudication records. Agencies may need to evaluate whether the agency-specific SORNs should be updated to include sharing information with OPM as part of the appeals process.

On November 15, 2023, a new information collection, the Personnel Vetting Questionnaire (PVQ), was approved (OMB Control Number 3206-0279). The Defense Counterintelligence and Security Agency (DCSA) is working to implement the new information collection. OPM plans to discontinue the current information collections once the PVQ is operational.

OPM believes this rulemaking does not require any changes in any of these collections.

OPM is creating an e-filing system for use in collecting and maintaining adjudication records for a variety of different existing regulatory provisions. That system would also be used to support this proposal. OPM is publishing a separate notice in the Federal Register requesting OMB approval of a new information collection associated with the e-filing system. OPM is also reviewing its SORNs to determine whether to revise an existing SORN or to create a new SORN for the e-filing system. OPM will publish any proposed changes to its SORNs in the Federal Register.

List of Subjects

5 CFR Part 731

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

The Director of OPM, Scott Kupor, reviewed and approved this document and has authorized the undersigned to electronically sign and submit this document to the Office of the Federal Register for publication.

Dated: January 29, 2026

Office of Personnel Management

Jerson Matias

Federal Register Liaison

Accordingly, for the reasons stated in the preamble, OPM is proposing to amend 5 CFR part 731 as follows:

PART 731—SUITABILITY AND FITNESS

1. The authority citation for part 731 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 7301. E.O. 10577, 19 FR 7521, 3 CFR, 1954-1958

Comp., p. 218, as amended. E.O. 13467, 73 FR 38103, 3 CFR, 2009 Comp., p. 198, as amended. E.O. 13488, 74 FR 4111, 3 CFR, 2010 Comp., p. 189, as amended. E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp. p. 243. Presidential Memorandum of January 31, 2014, 3 CFR, 2014 Comp., p. 340. 5 CFR parts 1, 2, 5, and 6.

Subpart E—[REVISED]

2. Revise Subpart E to read as follows:

Subpart E—Suitability Action Appeals

Sec.

731.501 Right to appeal.

731.502 Procedures for submitting appeals.

731.503 Form and content of suitability action appeals and agency response.

731.504 Appellant representatives.

731.505 Adjudication of appeals.

731.506 Directives and penalties.

731.507 Requests for reconsideration of an initial decision.

731.508 Review by the OPM Director.

731.509 Final decision.

§ 731.501 Right to appeal.

(a) *Right to appeal.* An applicant, appointee, or employee (“appellant”) may appeal to OPM a suitability action taken against the appellant because of an unfavorable suitability determination.

(b) *Appealable issues--(1) Unfavorable suitability determination.* The appellant may contest the determination that he or she is unsuitable for federal employment based on the specific factors found at § 731.202(b) provided that the unfavorable suitability determination resulted in a suitability action as defined at § 731.101(a).

(2) *Improper procedure.* An appellant who has been subject to a suitability action may challenge the failure to provide:

(i) Advance written notice stating the charge(s) and specific reason(s) for the proposed action and notifying the appellant of the right to answer the notice in writing and to review, upon request, the materials relied upon;

(ii) Notice of the right to be represented by a representative chosen by the appellant;

(iii) A minimum of 30 calendar days from the date of the notice of proposed action to file a written response and furnish documentation; or

(iv) A written decision delivered to the appellant that explains the decision and the procedures for appealing the decision.

(c) *Nonappealable issues.* An applicant, appointee, or employee may not appeal an unfavorable suitability determination that does not result in a suitability action as those actions are defined at § 731.101(a).

(d) *Exclusive appeal procedure.* The procedures in this subpart are the sole and exclusive means of appealing a suitability action. These procedures do not preclude an applicant, appointee, or employee from filing an administrative complaint, appeal, or other matter within the jurisdiction of another adjudicatory body (e.g., Equal Employment Opportunity Commission) with that entity.

§ 731.502 Procedures for submitting appeals.

(a) *Filing an appeal.* An applicant, appointee, or employee, or the individual's designated representative acting on his or her behalf, may file the appeal with OPM. An individual seeking to file an appeal or requesting OPM reopen and reconsider a decision under this subpart must utilize the electronic filing system available at {URL TBD}. Absent an exception, OPM will not accept delivery via U.S. mail, commercial delivery service, or electronic mail.

(b) *Time limits.* An appellant may file an appeal within 30 calendar days from the effective date of a suitability action. An appeal is deemed timely when it is electronically filed by 11:59 p.m. Eastern Time on the 30th calendar day after the effective date of the action.

(1) In computing the number of days allowed for filing an appeal, the first day counted is the day after the effective date of the suitability action. In the case of an appointee or employee, the effective date of the action is the date the employing agency effectuates the suitability action, regardless of whether the agency is effectuating its own action or an OPM action. In the case of an applicant, the effective date of the action is the date on the notice of final action. When a notice of final action is served on an applicant by mail, 10 calendar days are added to the date of the notice for the deadline to file an appeal. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date.

(2) If an individual does not file an appeal within the time set by this section, the appeal will be dismissed as untimely filed unless the individual demonstrates good cause for an untimely appeal. The determination of good cause will be in the sole and exclusive discretion of OPM.

(3) The appellant bears the burden to demonstrate, by a preponderance of the evidence, the timeliness of the appeal.

(c) *Jurisdiction.* The appellant bears the burden to demonstrate, by a preponderance of the evidence, that OPM possesses jurisdiction over the appeal. To demonstrate this, the appellant must submit evidence that establishes he or she was subject to a suitability action as an applicant, an appointee, or an employee in the competitive service or the career Senior Executive Service.

(d) *E-filing procedures.*

(1) All parties and their representatives to an appeal or reopen and reconsideration must register as instructed by OPM on its suitability action appeals website using a unique email address.

(2) Registration as an e-filer constitutes consent to accept electronic service of pleadings, evidence, notices, orders, and other documents filed by other e-filers or issued by OPM. No party may electronically file any document with OPM or access an appeal or reconsideration of an appeal unless registered as an e-filer.

(3) All notices, orders, decisions, and other documents issued by OPM, as well as all documents filed by parties, will be made available for viewing and downloading at OPM's electronic filing system. Access to documents is limited to the parties and their representatives who are registered as e-filers in the cases in which they were filed.

(4) All parties and their representatives must follow the instructions on OPM's website for properly filing all pleadings, evidence, and other documents. OPM may issue orders regulating the method and form of submissions and sanctions for noncompliance and may order

any party or authorized individual to cease participation as an e-filer in circumstances that constitute a misuse of the system or a failure to comply with law, rule, regulation, or policy governing the use of a U.S. government information system.

(5) Each e-filer must promptly update their profile in OPM's electronic filing system and notify OPM and other parties of any change in their address, telephone number, or email address by filing a pleading in each pending case with which they are associated. E-filers are responsible for monitoring case activity regularly in OPM's electronic filing system to ensure that they have received all case-related documents.

(6) A party or representative may withdraw their registration as an e-filer pursuant to the requirements posted on OPM's website. Withdrawing registration in OPM's electronic filing system means that, effective upon OPM's processing of a proper withdrawal, pleadings, evidence, orders, and other documents filed by a party or party's representative and OPM will no longer be served on that person electronically and that person will no longer have electronic access to their case records through OPM's electronic filing system. OPM may still process an appeal or request for reconsideration after a party withdraws as an e-filer. Withdrawal as a party or party's representative will not be considered good cause for staying a case. A withdrawal of registration as an e-filer may preclude future re-registering as an e-filer.

(7) OPM, in its sole and exclusive discretion, may exempt a party or representative from registering as an e-filer for good cause. A party or representative must promptly contact OPM as instructed on OPM's website to request an exemption from the e-filing requirements in this subpart. OPM will not find good cause for failing to timely file an appeal or seek reconsideration if the party or representative fails to contact OPM to request an exemption before any deadline to appeal or seek reconsideration.

(8) Documents filed in OPM's electronic filing system are deemed received on the date of the electronic submission.

§ 731.503 Form and content of suitability action appeals and agency response.

(a) *Appeal.* An appeal must be in writing and must contain the appellant's legal name, physical address, mailing address where different from physical address, email address, and phone number and his or her representative, if any. The appeal must also name the agency that took the action the appellant is appealing; state the basis of the appeal; and include any documentation supporting the appellant's appeal.

(b) *Agency response.* Upon receipt of the appeal, OPM will notify the agency responsible for the suitability action (responsible agency) of the presence of the appeal. Unless the OPM adjudicator processing the appeal provides otherwise, the responsible agency must file its response to an appeal within 30 calendar days of notification of the appeal; include all documents contained in the agency record of the action; include a designation of and signature by the authorized agency representative; and any other documents or responses requested by OPM.

(c) *Reply.* Unless the OPM adjudicator provides otherwise, the appellant may file a reply to an agency response to an initial appeal utilizing the electronic filing system within 15 calendar days of the agency response. The reply may only address the factual and legal issues raised by the agency in response to the appeal.

(d) *Inspection of OPM's appellate record.* The parties may inspect OPM's appellate record on request.

(e) *Service of Documents.* The parties will serve on each other copies of any and all information submitted to OPM with respect to an appeal. Such information must be served on all other parties at the same time the information is submitted to OPM and must be accompanied by a certificate of service stating how and when service was made.

(f) *Untimely Filings.* Untimely filings may be accepted upon a party's showing of good cause at the sole and exclusive discretion of OPM.

§ 731.504 Appellant representatives.

An appellant may select a representative of his or her choice to assist in the preparation and presentation of an appeal, provided that the appellant submits his or her designation of representative in writing related to the specific appeal. If the selected representative is a Federal employee, the representative may not perform such representational functions while in a duty status (including while on official time under 5 U.S.C. 7131), nor may the representative claim agency reimbursement for any expenses incurred while performing such representational function. OPM or the responsible agency may, in its sole and exclusive discretion, disallow an appellant's choice of representative when the representative is an employee of the responsible agency or OPM and his or her activities as a representative would cause a conflict of interest or position; that employee cannot be released from his or her official duties because of the priority needs of the Government; or that employee's release would give rise to unreasonable costs to the Government.

§ 731.505 Adjudication of appeals.

(a) *Appeals by applicants and non-OPM appointees or employees.* OPM will assign OPM personnel to adjudicate an appeal under this subpart. However, no OPM employee may be assigned to adjudicate an appeal if the employee has a prior relationship with the appellant. When the suitability action under appeal was taken by an agency other than OPM, the OPM employee assigned to adjudicate the appeal must not have been an employee of the non-OPM agency that is party to the action during the two years prior to the date on which the appeal was filed. When a suitability action taken by OPM is appealed, there must be appropriate independence between the OPM employee assigned to hear the appeal and the OPM employee(s) involved in the decision to take the suitability action. When necessary, OPM may appoint an administrative law judge to adjudicate an appeal.

(b) *Appeals by OPM appointees or employees.* OPM will assign an administrative law judge to adjudicate an appeal under this subpart by an OPM appointee or employee. To insulate the adjudication of its own personnel's appeals from agency involvement, OPM will not disturb

initial decisions in those cases unless a party shows there has been harmful procedural irregularity in the proceedings or that the administrative law judge has made a clear error of law. For these purposes, the term *harmful procedural irregularity* means an irregularity in the application of procedures was likely to have caused the administrative law judge to reach a conclusion different from the one he or she would have reached in the absence or cure of the irregularity.

(c) *Training of personnel assigned to adjudicate appeals.* All OPM employees or administrative law judges assigned by OPM to adjudicate appeals under this subpart must have completed training that complies with national training standards for suitability adjudicators that qualifies them to review OPM and agency suitability determinations and actions.

(d) *Ascertainment of facts.* (1) In the course of adjudicating an appeal, OPM may independently investigate the facts underlying an unfavorable suitability determination by requesting additional written records from the appellant or the responsible agency.

(2) Before conducting an investigation, OPM will inform the appellant and the responsible agency of the investigation and nature of the records requested.

(3) Upon completion of an investigation, OPM will provide the appellant and the responsible agency with a copy of any information obtained through the investigation, and a reasonable opportunity to submit arguments or additional information to support their positions.

(4) When OPM determines the written record is insufficiently developed to decide the appeal due to disputes involving one or more material facts, OPM will:

- (i) Hold a hearing to evaluate witness credibility to resolve any issues of material fact,
- (ii) Conduct an investigation in accordance with paragraphs (1)-(3) of this section, or
- (iii) Reverse or vacate the responsible agency's decision, in whole or part.

(5) OPM will assign an administrative judge to preside over witness credibility hearings held under this paragraph (d).

(e) If a party fails to participate in an investigation or witness credibility hearing pursuant to paragraph (d), OPM may, except when prohibited by law, impose any sanction listed at § 731.506(b)(1)-(3).

(f) *Standard of review.* OPM will base its review of an unfavorable suitability determination and consequent suitability action solely on the written record and, if applicable, any witness credibility hearing conducted pursuant to paragraph (d)(4). OPM will affirm the suitability action if the suitability determination is supported by a preponderance of the evidence.

(g) *Initial decision.* OPM may issue an initial decision that affirms, reverses, modifies, or vacates the unfavorable suitability determination and consequent suitability action, in whole or in part. OPM will notify the appellant and responsible agency in writing of its decision on the appeal.

(h) *Remedies.* (1) If the appellant is the prevailing party, OPM will order relief including correction of the suitability action and any back pay, interest, and reasonable attorney fees consistent with subpart H of part 550 of this chapter. The appellant as a prevailing party is not entitled to compensatory damages or other relief not authorized under 5 U.S.C. 5596(b).

(2) If a party timely requests reopening and reconsideration of an initial decision or the OPM Director reopens and reconsiders an initial decision, the responsible agency must continue to provide ordered relief unless OPM issues an order staying any such relief. No such stay may be ordered that would deprive pay and benefits to the individual while the initial decision is pending reconsideration.

(3) Any back pay, interest, or attorney fees ordered are not payable until the decision is a final decision in accordance with § 731.509.

§ 731.506 Sanctions and protective orders.

(a) *Cease-and desist order.* OPM may issue an order to a party to prevent or to cease-and-desist harassing communications (or communications which could reasonably be foreseen to lead to harassment) with or about any individual, or to prohibit a party from using any

information related to the appeal for any purpose whatsoever unrelated to the adjudication of the appeal. OPM may do this *sua sponte*, or at the request of a party, preemptively or at any juncture in the appeal process. A party requesting OPM to issue a protective order or cease-and-desist order should file such request using the e-filing procedures proscribed at § 731.502(d), and must include a statement of reasons justifying the request, together with any relevant documentary evidence.

(b) *Failure to comply with an OPM order.* When a party to an appeal fails to comply with an order issued under paragraph (a), OPM may, except when prohibited by law:

- (1) Draw all inferences in opposition to the noncompliant party with regard to the appeal in question;
- (2) Prohibit the noncompliant party from introducing evidence, or additional evidence, concerning the appeal, or otherwise relying on the record; or
- (3) Eliminate from consideration any appropriate part of the filings or other submissions of the noncompliant party.

§ 731.507 Requests for reconsideration of an initial decision.

(a) Upon a request from either party to the dispute, OPM may, in its sole and exclusive discretion, reopen and reconsider an initial decision issued under this subpart. A party may request reopening and reconsideration of an initial decision within 30 calendar days from issuance of the initial decision.

(b) The request to reopen and reconsider must be filed using the electronic filing system available at {URL TBD} and must explain how the ground(s) relied on affected the outcome of the case. Any documents or further filings related to a request to reopen and reconsider must be filed at the same time the request is submitted.

(c) Grounds for which OPM may grant a request to reopen and reconsider are:

(1) The initial decision contains an erroneous finding of material facts sufficient to warrant a different outcome;

(2) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The party must explain how the error affected the outcome of the case;

(3) New and material evidence or legal argument is available that, despite the party's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed; or

(4) OPM finds good cause to reopen and reconsider an appeal.

(d) In any appeal that is reopened and reconsidered, OPM may:

(1) Issue a reopened and reconsidered decision ("R&R decision") that affirms, reverses, modifies, or vacates the initial decision, in whole or in part;

(2) Require the parties to submit argument and evidence;

(3) Take any other action necessary for final disposition of the case; and

(4) Issue an order with a date for compliance with the R&R decision.

(e) There is no further right of administrative appeal from the R&R decision.

(f) Untimely filings may be accepted upon a party's showing of good cause at the sole and exclusive discretion of OPM.

§ 731.508 Review by the OPM Director.

The OPM Director may, at his or her discretion, *sua sponte*, reopen and reconsider any appeal in which OPM has issued a decision that has not yet become final.

§ 731.509 Final decision.

(a) The initial decision becomes OPM's final decision if a party does not request OPM to reopen and reconsider the initial decision within 30 calendar days of the date of the initial decision was issued.

(b) A R&R decision pursuant to § 731.507 becomes OPM's final decision if the OPM Director does not reopen the decision pursuant to § 731.508 within 30 calendar days of the date on which the R&R decision was issued.

(c) A decision by the OPM Director pursuant to § 731.508 is OPM's final decision and is effective upon the date of issuance.

(d) There is no right of appeal of OPM's final decision.

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