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5-66-P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 731

[Docket ID: OPM-2025-0007]

RIN: 3206-AO84

Suitability and Fitness

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is amending the Federal Government personnel vetting adjudicative processes for determining suitability and taking suitability actions. The final rule will improve the efficiency, rigor, and timeliness by which OPM and agencies vet individuals for risk to the integrity and efficiency of the service and make clear that individuals who engage in serious misconduct while employed in Federal service are subject to the same suitability procedures and actions as applicants for employment. It also ensures that suitability determinations and actions are applied consistently with Merit System Principles.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

SUPPLEMENTARY INFORMATION:

I. Executive Summary

OPM is issuing a final rule to improve the efficiency, rigor, and timeliness by which OPM and agencies vet individuals for risk to the integrity and efficiency of the service. In June 2025, OPM proposed updates to 5 CFR part 731 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* (90 FR 9669, Feb. 14, 2025). See 90 FR 23467 (June 3, 2025). OPM also proposed updates to OPM's and agencies' delegated authority to take suitability actions on post-appointment conduct as directed by the March 20, 2025, Presidential Memorandum *Strengthening the Suitability and Fitness of the Federal Workforce* (90 FR 13683, Mar. 25, 2025). This final rule amends 5 CFR part 731, subparts A, B, C, and D, to update the specific factors and OPM's and agencies' delegated authority to take suitability actions on post-appointment conduct.

II. Authority and Background

Congress has long charged the President with ensuring that those employed in the competitive service are suitable for Federal employment. In 1871, Congress directed the President to "prescribe such regulations for the admission of persons into the civil service … as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to … character"; appoint individuals to investigate applicants' suitability for Federal employment; and "establish regulations for the conduct of [employees] in the civil service." 1 Rev. Stat. 313, § 1753 (1875) (enacted Mar. 3, 1871). Today, 5 U.S.C. 3301 and 7301 provide similarly that "[t]he President may … prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service," "ascertain the fitness of applicants as to… character," and "prescribe regulations for the conduct of employees in the executive branch."

Historically, the President has delegated to OPM and its predecessor, the Civil Service Commission, the authority to prescribe both qualification standards and suitability standards, and to conduct both examinations of applicants' qualifications and investigations of suitability for appointment and continuing employment. See 5 U.S.C. 1104(a)(1). The President charged OPM with, among other duties: (1) "establish[ing] standards with respect to… suitability… which

applicants must meet to be admitted to or rated in examinations"; (2) "[i]nvestigating… the suitability… of applicants for positions in the competitive service"; (3) "requir[ing] appointments to be made subject to investigation to enable the [Director] to determine, after appointment, that the requirements of law or the Civil Service Rules and Regulations have been met"; and (4) instructing an agency "to remove" an employee found to be "disqualified for Federal employment." E.O. 10577 (Nov. 22, 1954) (codified, in relevant part, as amended, at 5 CFR 2.1(a), 5.2(a), 5.3(a)(1), 5.3(b)); *see also* 5 U.S.C. 1103(a)(5) (the Director's responsibility for "executing, administering, and enforcing" these Civil Service Rules); 5 U.S.C. 1104(a)(1) (the President's authority to "delegate, in whole or in part, [his] personnel management functions" to OPM); 5 U.S.C. 3302 (the President's authority to "prescribe rules governing the competitive service").

Part 731 of title 5, Code of Federal Regulations, establishes and maintains OPM's policies and procedures governing suitability and fitness investigations and adjudications, including the procedures for taking suitability actions and the general process for appealing a suitability action. 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. 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). OPM may also be subject to these regulations in its capacity as an agency.

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 and promote the efficiency of the service. When there is a reasonable expectation employment would not do so, the individual should be found unsuitable or unfit.

This expectation is established when an adverse nexus or connection can be shown between the character or conduct in question and the integrity of the service or the individual's capacity and fitness for employment or continued employment.

These interests and objectives apply equally to applicants for employment and current Federal employees, regardless of the employment status as an "appointee" or "employee" as those terms are defined in § 731.101. Current Federal employees, no less than applicants, must remain suitable for Federal employment. Employees who engage in serious misconduct while in the Federal service are equally as unsuitable for Federal employment as applicants who engaged in serious misconduct before applying for Federal employment.

The statutory authorities that direct the President, and by presidential delegation OPM, to take suitability actions apply to employees, not just job applicants. *See* 5 U.S.C. 7301 ("The President may prescribe regulations for the conduct of employees in the executive branch."). Consistent with this broad grant of statutory authority, it has long been presidential and executive branch policy to assess post-appointment conduct to determine an individual's ongoing suitability or fitness to remain in their position and OPM has, under part 731 and implementing guidance, required agencies to make suitability determinations based on post-appointment conduct. *See, e.g.,* 76 FR 69601 (Nov. 9, 2011) and 89 FR 102675 (Dec. 18, 2024) (discussing 5 CFR 731.106(d)).

OPM regulations have long applied suitability criteria to both Federal employees and applicants. Under part 731 and implementing guidance, OPM has required agencies to make suitability determinations based on post-appointment conduct. OPM has established in its regulations that "OPM may take a suitability action under this part against an employee" of an agency and direct that agency to remove the employee based on the suitability factors set forth in 5 CFR part 731, subpart B. These factors are as follows: material, intentional false statement, deception, or fraud, in examination or appointment; a statutory or regulatory bar that prevents the individual's lawful employment; and/or, knowing and willful engagement in acts or activities

designed to overthrow the U.S. Government by illegal or unconstitutional means. 5 CFR 731.203(e). Another factor, refusal to furnish testimony as required by 5 CFR 5.4, was a basis for OPM to take a suitability action against an employee and was in place from 1996 until January 2025, when OPM removed this factor from the suitability factors. *See* 61 FR 394 (Jan. 5, 1996) and 89 FR 102675 (Dec. 18, 2024). OPM regulations have further allowed OPM to consider "[t]he nature of the position for which the person is applying or in which the person is employed" in applying the suitability criteria, making clear that suitability actions might apply to incumbent employees, whether in an appointee or employee status as defined in 5 CFR 731.101, as well as applicants. 5 CFR 731.202(c).

Successive presidential administrations have emphasized that suitability determinations apply not only to applicants and appointees to competitive service or career SES positions but also to employees in such positions. E.O. 13488, Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust, (74 FR 4111, Jan. 16, 2009) issued in relevant part under 5 U.S.C. 7301, established a uniform, governmentwide requirement for public trust suitability reinvestigations to ensure persons in public trust positions remain suitable for continued employment.

In January 2017, E.O. 13764 (82 FR 8115, Jan. 23, 2017) amended the Civil Service Rules, E.O. 13488, and E.O. 13467, and established continuous vetting for all positions subject to personnel vetting, including positions subject to OPM's suitability regulations. Continuous vetting refers to the process of "reviewing the background of a covered individual at any time to determine whether that individual continues to meet applicable requirements." Sec. 1.3, E.O. 13467, as amended by E.O. 13764. A "covered individual" is "a person who performs, or who seeks to perform, work for or on behalf of the executive branch." *Id.* In the context of suitability for employment, continuous vetting is used to determine if an individual remains suitable for a position over time.

E.O. 13764 also amended the Civil Service Rules at 5 CFR 5.2(a) to permit the OPM Director to require appointments be made subject to investigation so that the OPM Director can determine, post-appointment, that Civil Service Rules and regulations have been met. E.O. 13764 clarified Civil Service Rule 5.3 to specify that the OPM Director could instruct an agency to remove an employee when the Director finds that the employee is unsuitable. 5 CFR 5.3(a)(1).

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 to transform workforce vetting by employing a modernized and more efficient process for ensuring that only trusted individuals enter and remain in the Federal workforce. A key goal of the initiative is to provide vetting processes that enable each individual's vetting status to be continuously up to date. Since its launch, the initiative has enabled the enrollment into continuous vetting of more than 4 million individuals serving the Government in national security sensitive positions, including sensitive competitive service and career SES positions, and enrollment is underway for those serving in nonsensitive public trust positions.

OPM has established in its regulations that OPM itself may take a suitability action against an employee in the competitive service or the career Senior Executive Service and direct the employing agency to remove the employee based on a narrow set of its suitability factors in 5 CFR part 731, subpart B. OPM regularly takes suitability actions against such employees based on material, intentional false statement or deception, or fraud, in examination or appointment. OPM has not redelegated to agencies the authority to take suitability actions against employees, even when the conduct occurred prior to employment. OPM requires agencies to refer to OPM cases where there has been evidence of such conduct and, should OPM decide to take a suitability action, OPM directs the agency to remove the employee. OPM also requires agencies to refer cases involving knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force.

Although OPM has required agencies to make suitability *determinations* regarding employees based on post-appointment conduct, OPM has not permitted agencies to take suitability *actions* when the determination is unfavorable. Further, since the Merit Systems Protection Board's (MSPB) decision in *Scott v. OPM* in 2011 (116 M.S.P.R. 356 (2011), modified by 117 M.S.P.R. 467 (2012)), which held that suitability actions cannot be taken for post-appointment conduct, OPM has not itself taken suitability actions regarding employees, regardless of employment status as an "appointee" or "employee" per 5 CFR 731.101, for post-appointment conduct. OPM has recognized, however, in its regulations, that an agency may employ other authorities available to the agency when an employee's post-appointment conduct renders the employee unsuitable for continued employment in the position, such as Chapter 75 actions. Agencies have reported frustration with not being able to take the next logical step, a suitability action, after finding an employee unsuitable for continued employment.

After *Scott*, Congress specifically legislated that agencies need not proceed through Chapter 75 procedures when taking suitability actions. OPM's regulations have long defined a "suitability action" to include "[c]ancellation of eligibility," "[r]emoval," "[c]ancellation of reinstatement eligibility," and "[d]ebarment." 5 CFR 731.203. In 2015, Congress amended 5 U.S.C. 7512 to exclude "a suitability action taken by [OPM] under regulations prescribed by [OPM], subject to the rules prescribed by the President under this title for the administration of the competitive service" from the scope of actions subject to Chapter 75 procedures. 5 U.S.C. 7512(F); *see also* Pub. L. 114-92, Div. A, Title X, § 1086(f)(9), Nov. 25, 2015, 129 Stat. 1010. This legislation functionally overruled a Federal Circuit case (*Archuleta v. Hopper,* 786 F.3d 1340 (Fed. Cir. 2015)), which construed title 5 to subject suitability-based removals to Chapter 75 procedures.

In *Hopper*, OPM argued that suitability-based removals derived from a separate statutory authority than Chapter 75 removals—that is, the presidential authority to regulate employee conduct implies authority to remove employees who violate those regulations, and the President

had delegated that authority to OPM. *Hopper*, 786 F.3d at 1348–49. The Federal Circuit in *Hopper* rejected OPM's position. *Id*. But Congress, in adding 5 U.S.C. 7512(F), repudiated *Hopper* and excluded "a suitability action taken by [OPM] under regulations prescribed by [OPM], subject to the rules prescribed by the President under this title for the administration of the competitive service" from the scope of Chapter 75. Congress thus expressly recognized the validity of suitability-based removals from the Federal service and that this authority is separate and distinct from Chapter 75 removal authority.

In addition to congressional action, presidential actions since *Scott* have further established OPM's authority to take suitability actions for post-appointment conduct against appointees and employees in competitive and career SES positions, although OPM has not done so. Notably, in *Scott*, a key element of the Board's rationale for deciding OPM could not take suitability actions for post-appointment conduct was that, while "it may be that the President could, pursuant to 5 U.S.C. § 7301, issue an Executive Order authorizing OPM to make suitability determinations and take or direct suitability actions based on post-admission or post-appointment conduct ... , the President has not issued such an order."

President Trump has now issued such an order, in the Presidential Memorandum *Strengthening the Suitability and Fitness of the Federal Workforce*, issued March 20, 2025 ("the Presidential Memorandum"). 90 FR 13683 (Mar. 25, 2025). President Trump further directed that the OPM Director "propose regulations, consistent with applicable law, amending Part 731 of title 5, Code of Federal Regulations, to account for the delegation" and "to implement appropriate rules and procedures regarding suitability determinations and suitability actions based on post-appointment conduct."

Despite the clear intent from both Congress and the President—stretching over decades now—that agencies should not rely on Chapter 75 procedures to address post-appointment conduct covered by the factors described in 5 CFR 731.202(b), today agencies still largely must rely on Chapter 75 procedures to remove employees who engage in serious misconduct. This

means that, illogically, the Government has far greater ability to bar someone from Federal employment who has committed a serious crime or misconduct in the past than it does to remove someone who *engages in the exact same behavior as a Federal employee*. This arbitrary state of affairs limits the tools available to the Government to ensure the efficiency and integrity of the Federal service.

OPM therefore is conforming its regulations to meet the requirements of the Presidential Memorandum and rectifying this irrational gap in the part 731 regulations. Specifically, the rule satisfies the President's direction in the Presidential Memorandum to "implement appropriate rules and procedures regarding suitability determinations and suitability actions based on post-appointment conduct." It also ensures that implementation of continuous vetting as required by E.O. 13467, as amended, as part of the Trusted Workforce 2.0 initiative, is done in an efficient and effective manner. Under this rule, when continuous vetting uncovers information that results in a determination that an individual employed in the competitive service or career Senior Executive Service is no longer suitable for service, the situation can be remedied by the next logical step: a suitability action.

This rulemaking also implements Sec. 3(d) of E.O. 14210 of February 11, 2025, *Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative*, which specifies several additional suitability criteria. 90 FR 9669 (Feb. 11, 2025). E.O. 14210 directed the OPM Director to initiate a rulemaking that would propose to include four additional suitability criteria: "failure to comply with generally applicable legal obligations, including timely filing of tax returns"; "failure to comply with any provision that would preclude regular Federal service, including citizenship requirements"; "refusal to certify compliance with any applicable nondisclosure obligations, consistent with 5 U.S.C. 2302(b)(13), and failure to adhere to those compliance obligations in the course of Federal employment"; and "theft or misuse of Government resources and equipment, or negligent loss of material Government resources and equipment." OPM proposed these new factors in its Notice of Proposed

Rulemaking "Suitability and Fitness" 90 FR 23467. The final disposition of these new factors is described in the following sections. OPM and agencies must still base suitability determinations on the presence or absence of one or more of the specific factors in 5 CFR 731.202(b) while considering the additional considerations in § 731.202(c) to the extent they are deemed pertinent. The application of the additional considerations ensures suitability determinations are made case-by-case based upon the nature of the conduct, and the conduct's potential impact on the individual's ability to protect the integrity or promote the efficiency of the Federal service.

III. Digest of Public Comments

In response to the proposed rule, OPM received 1,479 comments[1] during the 45-day public comment period from multiple individuals, multiple labor organizations, and a professional organization representing employment law lawyers. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments on the rule change were mixed, with some expressing support, others expressing opposition, and many comments that were outside the scope of the rulemaking. The comments are summarized below, including suggestions for revisions that OPM considered and either adopted, adopted in part, or declined, along with OPM's supporting rationale.

The first section below addresses general or overarching comments. The sections that follow address comments related to specific aspects of OPM's proposed revisions. The discussion of these comments is grouped by topic.

III.A General and Out-of-Scope Comments

OPM received many comments in response to its proposed rulemaking that were either extremely broad in nature or related to matters that were outside the scope of the proposed rule. A summary of these comments follows.

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[1] Comments filed in response to this rulemaking are available at *https://www.regulations.gov/docket/OPM-2025-0007.*

Summarizing general comments first, some commenters offered support for the regulatory changes, expressing appreciation for expanded OPM oversight and intentions to unify and modernize Federal personnel vetting. Supporters were optimistic the changes will address fraud, waste, abuse, mismanagement, lack of accountability and enforcement, perceptions of immunity, and long disciplinary proceedings incurred at the expense of the taxpayer. Supporters believed conduct and ethical standards should be high and applicable to all Federal employees. Several agencies commented that the rulemaking will enhance their ability to manage risk and make on-going efforts to implement continuous vetting more effective. See, e.g., comments from U.S. Department of Homeland Security and Department of Education.

General comments in opposition included basic expression of displeasure with the proposed rule without specifying any reasons why, and many others characterized the rule as an attack on the civil service without further explanation. Multiple commenters in opposition also expressed concern that OPM's proposed changes related to post-appointment conduct suitability actions would alter how agencies handle employee performance concerns. Unless directly related to a specific factor used to evaluate an individual's suitability, conduct considered as the basis for a suitability determination does not generally include the inability to perform. Nothing in OPM's rule changes the authorities under which performance matters are handled.

Included in comments in opposition to the rule were many comments that addressed topics that were outside the scope of the proposed rule. These out-of-scope comments touched on many different topics. OPM is not addressing comments on topics that are outside the scope of this rule. The topics commenters brought up that were outside the scope of this rule include the Notice of Proposed Rulemaking, *Improving Performance, Accountability and Responsiveness in the Civil Service*, the *Merit Hiring Plan* initiative, the sale and management of Federal public lands, the rehiring of park rangers, reductions in force, and activities of the Department of Government Efficiency.

Some out-of-scope comments did address the proposed changes in the rule more directly; however, they digressed into topics not covered or impacted by the proposed changes. For example, a large number of comments claimed that the proposed rule would eliminate an individual's right to appeal a suitability action to the MSPB. OPM proposed no changes in this rule that would change appeal rights for suitability actions found in 5 CFR 731 subpart E. Other commenters recommended that OPM revise which types of positions (e.g., competitive service, excepted service, contractor) are subject to suitability determinations and actions, with some recommending adding types of positions to be subject to suitability and others recommending eliminating some types. OPM proposed no changes to, and has limited authority to change, the types of positions subject to suitability determinations and actions and these comments are therefore out-of-scope. Additional out-of-scope topics included requests to define terms or questioning the underlying need for pre-appointment suitability investigations. The definitions suggested were not relevant to this rulemaking, and OPM did not propose any changes to pre-appointment suitability investigations in this rulemaking.

Several commenters objected to continuous vetting, incorrectly assuming that it was a new process OPM was proposing to add. Continuous vetting requirements already exist in 5 CFR part 731, and OPM proposed no changes to these requirements. As such, comments opposing continuous vetting are outside the scope of this rule.

III.B Topical Analysis

In the following sections, we address the public comments related to the specific topics of the regulation to which each comment applied.

III.B.1 Suitability Factors

Historically, 5 CFR part 731 identified the limited circumstances in which OPM could take a suitability action against an employee, which were based on a subset of the suitability factors considered in evaluating an applicant or appointee's character and conduct, and only when the conduct was connected to the individual's examination, application, or appointment. In

the proposed rulemaking, OPM explained, "[b]ecause employees who engage in serious misconduct while in the Federal service should not remain in Federal service, OPM should not limit its ability to take action to a limited subset of factors." See 90 FR 23467, page 23470. OPM received several comments claiming that OPM is broadly expanding the suitability factors that apply to employees from a mere subset of the factors in § 731.202(b). Additionally, commenters suggested that OPM's proposal would allow OPM to arbitrarily decide which factors apply, and when. See Comment 1055[2], as an example. OPM seeks to dispel this misconception.

While OPM is amending the specific factors used when making suitability determinations and taking suitability actions, and incorporating criteria as directed in E.O. 14210, OPM disagrees with the contention that historically only a subset of factors were relevant to evaluating whether employees' character and conduct made them suitable for the Federal workforce, or that under these new regulations OPM is at liberty to decide if or when factors apply. OPM has long required agencies to assess information bearing on an individual's continued suitability, including information that falls outside the factors necessitating a referral to OPM. Historically, when employee conduct raised suitability concerns, agencies addressed the matter under other available authorities. The changes in this rule do not suggest that previously, certain suitability factors were irrelevant to evaluating employees; rather, the changes address the authority and process for resolving such issues when conduct justifies a suitability action.

As an example, previously, if an employee engaged in criminal conduct, the agency was expected to assess the conduct and relevance to the individual's suitability for continued employment, but neither the agency nor OPM could take a suitability action based on the criminal conduct, absent related conduct that did warrant an OPM referral (e.g., material,

[2] Comments cited are available in the docket for this rulemaking and can be accessed at *https://www.regulations.gov/comment/OPM-2025-0007-nnnn,* where "nnnn" is the comment number. Note that the number must be four digits, so insert preceding zeroes as appropriate.

intentional false statement, or deception or fraud, in examination or appointment). If the agency determined actionable misconduct was present, it had to take an administrative action under its own authority such as 5 CFR 752. Essentially, OPM's ability to take a suitability action was limited to a subset of the factors, but the necessity for the agency to measure conduct against all factors and take appropriate punitive action was not. This rule broadens OPM's and agencies' authorities to take suitability actions against employees and appointees. However, conduct associated with all suitability factors is, and has always been, relevant, regardless of the authority available in different circumstances, to address the misconduct.

As discussed in III.A., comments related to existing suitability factors to which OPM has proposed no changes are outside the scope of this rulemaking. Some comments raised concerns that the meaning of the newly proposed factors is too vague. To address these concerns, the following discussion will cover each proposed change to the factors.

First, OPM proposed amending § 731.202(b)(1) to add examples to the existing factor for misconduct or negligence in employment that may be committed by current or former employees. The proposed additions read:

(i) Theft or misuse of Government resources and equipment, or negligent loss of material Government resources and equipment during employment with, or on behalf of, the Federal Government or a state, territorial, or local government;

(ii) Refusal to certify compliance with any applicable non-disclosure obligations consistent with 5 U.S.C. 2302(b)(13) and failure to adhere to those compliance obligations in the course of Federal employment; and

(iii) Refusal to furnish testimony as required by § 5.4 of this chapter.

Numerous public responses questioned what type of conduct would be captured under these examples. See Comment 571 for an example. In general, this factor relates to conduct involving questionable judgment, unreliability, dishonesty, or unwillingness to follow rules or regulations in the context of employment. This factor does not include performance (or inability

to perform) concerns, failure to complete training, or other qualification issues as long as such concerns are not related to misconduct or negligence.

With regard to the first proposed example, § 731.202(b)(1)(i), some commenters requested OPM provide additional definitions or criteria for words such as “theft”, “misuse”, “negligent”, “material”, and others. See Comment 812 for an example. OPM does not agree that these words are vague or need further definition, as they are all commonly understood terms of which OPM is not proposing any novel uses. Commenters also requested that OPM set specific criteria or thresholds for each type of conduct covered by this example. Again, OPM does not agree that any thresholds need to be established, and notes that doing so would amount to an almost impossible task of identifying potentially endless possible scenarios. The suitability adjudication process involves an examination of the evidence and takes into consideration the unique circumstances for each individual case.

For the second proposed example related to compliance with non-disclosure obligations at § 731.202(b)(1)(ii), commenters raised concerns requesting OPM better describe the conduct intended for consideration under this example and expressed concerns that the proposed language did not account for whistleblower protections. See Comment 969 for an example of concerns raised. Federal employees and contractors are subject to longstanding legal and ethical obligations to safeguard nonpublic information obtained through their official duties. These obligations arise under multiple authorities, including the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635), as well as statutes such as the Privacy Act of 1974. Together, these requirements reflect the expectation that those working for or on behalf of the Federal Government will handle official Government information responsibly and refrain from disclosing nonpublic information without authorization or through unauthorized channels and, when required as a condition of employment, will express their commitment to abiding by these obligations in writing. OPM notes that the proposed language did also account for whistleblower protections by including “consistent with 5 U.S.C. 2302(b)(13)” and that

commenters expressing this concern seemingly overlooked this language, which requires a specific statement notifying employees of their rights, obligations, or liabilities relating to classified information, communications to Congress, whistleblowing to an Inspector General, or any other whistleblower protection. OPM has proposed a new form that agencies could elect to use to establish a non-disclosure agreement with individuals (91 FR 31478, May 27, 2026). OPM expects the form to help employees understand their responsibilities with respect to release of information obtained through their official duties and allows them to certify that they understand their obligations and agree to comply with them.

For the third example of misconduct or negligence in employment proposed at § 731.202(b)(1)(iii), OPM has determined not to pursue adding this proposed example to the regulation. As discussed previously, the third example related to § 5.4 of this chapter was included in § 731.202(b) before when OPM had authority to take suitability actions against employees based on pre-appointment conduct. OPM received many comments opposed to reintroducing this former standalone factor as an example of misconduct or negligence in employment. See Comment 1063 for an example. OPM disagrees with comments suggesting the language is vague or that inclusion would violate individuals' constitutional rights. Nevertheless, even though OPM now has authority to take suitability actions against appointees and employees for post-appointment conduct, the population most likely to engage in the conduct described in the proposed example, OPM has concluded that the alternative mechanisms for agencies to address such conduct that supported removal of this factor remain. OPM is removing this example from § 731.202(b)(1) in the final rule.

The next factor proposed by OPM at § 731.202(b) was § 731.202(b)(5), which read, "Knowing and willful failure to comply with generally applicable legal obligations, including timely filing of tax returns." Numerous comments criticized the language as vague, questioned the meaning of "generally applicable legal obligations," and expressed concern that, as written, the factor did not consider nuances in tax compliance. See Comments 326 and 039 as examples.

OPM also received several comments expressing concern that this factor may be difficult to apply consistently, emphasizing the definition of "knowing and willful" is unclear. See Comments 1277 and 1401 as examples. OPM appreciates these comments and the opportunity to provide further clarity surrounding this factor, to include clarifying the distinction between the types of conduct that would be considered under this factor from conduct that would be considered under the existing criminal conduct factor. In response to the comments on this proposed factor, OPM is revising this factor to read, "Failure to comply with financial obligations or generally applicable civil legal obligations, such as timely filing of tax returns." This revised language more precisely reflects the intent of the original proposed factor.

OPM has determined that including an intent requirement in the text of the factor is unnecessary and may create inconsistency and avoidable administrative complexity. Suitability and fitness adjudications already require a case-by-case assessment of the nature and seriousness of the conduct, the circumstances surrounding the conduct, and other pertinent considerations under § 731.202(c). Accordingly, an adjudicator may consider whether the individual acted knowingly, willfully, inadvertently, reasonably, or with mitigating circumstances as part of the overall adjudicative analysis. Removing "knowing and willful" from the factor does not prevent consideration of intent; rather, it avoids making intent a threshold element that must be separately established before the factor may be considered.

Prior to proposing this new factor, conduct related to financial responsibility or civil legal obligations was addressed under the existing factor for dishonest conduct. The expectation of fiscal responsibility and compliance with civil legal obligations, including tax compliance, is not new to suitability adjudications. This factor is focused on deliberate noncompliance with significant obligations, not on financial hardship itself. Adjudicators must distinguish deliberate disregard of an obligation from inadvertent error, inability to pay, or noncompliance resulting from circumstances beyond the individual's control. For example, serious medical issues, job loss, or other extenuating circumstances may cause financial distress without reflecting

intentional irresponsibility. The suitability adjudication process accounts for this nuance, and underscores the relevance of materiality, by evaluating financial concerns in the context of the additional considerations found at § 731.202(c), including the circumstances surrounding the conduct, its seriousness and recency, contributing societal conditions, and rehabilitation or efforts toward rehabilitation. OPM believes that creating a separate factor for this conduct will help adjudicators focus on whether the individual failed to comply with a material obligation, rather than treating financial difficulty as synonymous with dishonesty.

Another area of concern on this proposed factor raised by multiple commenters was the inclusion of language related to timely filing of tax returns. Commenters noted that not all unfiled tax returns are associated with unpaid taxes. Comment 039. An individual could even be due a refund for a tax overpayment on an unfiled return. Commenters also voiced concern that with the addition of this factor, tax compliance issues that would typically result in modest IRS penalties could be used as the potential basis for removal and debarment from Federal employment, a much harsher penalty than that imposed by the IRS. See Comment 015. OPM acknowledges that there may be no penalty imposed by the IRS for an unfiled return when taxes are not owed; however, the absence of a penalty does not negate the civil obligation to timely file a tax return. Additionally, when an individual has unpaid taxes, as discussed previously, the conduct would be evaluated in the context of the additional considerations at § 731.202(c). The assessment would include evaluating the circumstances surrounding the conduct, and efforts toward rehabilitation such as entering into repayment plans.

Finally, many commenters expressed concern over the types of legal obligations that may be considered under this factor and that it could create overlaps with conduct considered under the criminal conduct factor. See Comment 474 for an example. OPM appreciates these comments and has revised the final language as noted above. The revisions clarify this factor is scoped to *civil* legal obligations and ensures there is a clear distinction between the type of conduct considered under this factor versus under the criminal conduct factor. A civil legal

obligation is a duty imposed by law that requires a person or entity to do something (or refrain from doing something) in relation to another person or entity under civil law, as opposed to criminal law. In many scenarios, there is a nexus between financial duties and civil legal obligations. In addition to debts owed to the U.S. Government, other examples of where civil legal obligations may arise include, but are not limited to, contracts, torts, and statutes. Examples of such obligations may include: performing according to a business contract; making required payments under a loan and/or not defaulting on a loan; or court orders or judgments requiring payment of child support, alimony, or other repayment orders.

The next factor with a proposed change is the existing factor related to alcohol use at § 731.202(b)(7). OPM proposed no changes to the type of conduct considered under this factor or the description of the specific considerations to be applied when using it. OPM only proposed to remove the words "applicant or appointee" from the factor to clarify to agencies that it may be applied to all individuals regardless of employment status. OPM received many comments related to this factor; however, they did not address the specific nature of the proposed change and are therefore considered outside the scope of this rulemaking. See Comment 538 for an example. These comments did draw attention to the fact that in the proposed regulatory text for § 731.202(b)(7), the words "applicant or appointee" were only removed in the first instance while being erroneously retained at the end of the factor. OPM appreciates commenters drawing attention to this error and is revising the text for this factor to read as follows: Excessive alcohol use, without evidence of rehabilitation, of a nature and duration that suggests the individual would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the individual or others.

The final proposed factor that received comment was the factor proposed at § 731.202(b)(6) concerning failure to comply with any provision that would preclude Federal service. The original proposed language read, "Failure to comply with any provision that would preclude Federal service, including citizenship or nationality requirements." In reviewing

comments, OPM determined both this factor, and the existing factor, "Any statutory or regulatory bar that prevents the lawful employment of the individual in the position in question," lead to the same conclusion – the individual is not suitable for employment due to conduct or conditions that disqualify him or her from lawful employment. Feedback from commenters also acknowledged this overlap. See Comment 528. If OPM kept both the existing and new factors separate, in most instances, an individual's failure to meet a provision of law would need to be considered under both factors, and articulating the differences between the two in an adjudication would have been overly complicated due to similarities. OPM has decided to combine these two factors into a single factor to clearly convey the intent, eliminate confusion, and sufficiently cover impediments to lawful employment. The combined factor reads: "Any statutory or regulatory bar or any other provision of law, regulation, Executive order, or other binding legal authority that prevents the lawful employment of the individual in the position in question, such as citizenship or nationality requirements."

Some commenters focused on the references to citizenship and nationality requirements, believing that persons lawfully admitted to the United States for permanent residence and seeking U.S. citizenship are eligible for Federal employment based on the definition of "protected individual" in 8 U.S.C. 1324b(a)(3)(B). See Comment 029. This law explains the prohibition of discrimination based on national origin or citizenship status. While the definition of protected individuals in this law includes aliens who are lawfully admitted for permanent residence, certain aliens admitted for temporary residence, and certain refugees and asylees, 8 U.S.C. 1324b(a)(2)(C) includes an exception for discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government. As explained in Executive Order 11935, an individual cannot be admitted to competitive examination or given an appointment in the competitive

service unless he or she is a citizen or national of the United States. In exceptional circumstances, including temporary appointments, a foreign national may be appointed to positions in the competitive service when necessary to promote the efficiency of the service, as described in 5 CFR § 316.601, unless the appointment is prohibited by statute. Some statutes governing agencies and positions, such as national security positions, mandate U.S. citizenship by law. As such, OPM believes the reference to citizenship and nationality requirements is appropriate and will retain the examples.

III.B.2 OPM's Proposal for Post-Appointment Conduct-Based Suitability Actions

OPM proposed changes to §§ 731.103, 731.105, 731.106, 731.203, and 731.301 to exercise its authority to make final suitability determinations and take suitability actions under part 731 in any case involving an employee in the competitive service or in a career appointment to a position in the Senior Executive Service. OPM proposed that it would retain sole jurisdiction to make these final suitability determinations and take suitability actions in any case involving an employee for post-appointment conduct. Although OPM proposed to retain sole jurisdiction to make final suitability determinations and take suitability actions in these cases, OPM proposed that it would only make such determinations and take such actions after an agency has identified post-appointment conduct that appears to warrant an unfavorable suitability determination and has referred the matter to OPM.

Comments in response to OPM's proposed changes to implement post-appointment conduct-based suitability determinations and actions were numerous and addressed many different sub-topics related to this proposal. These sub-topics are addressed in the discussion that follows.

III.B.2.a Lack of Authority

Numerous comments claimed that OPM lacks authority to take 5 CFR part 731 suitability actions based on post-appointment conduct for employees in the competitive service or career Senior Executive Service, and that doing so would constitute an unlawful overreach of its

statutory and delegated authorities. See Comment 1393 for an example of such comments. OPM disagrees with this assessment of its authorities. As noted above in section II, Authority and Background, Congress has directed the President to prescribe regulations for the conduct of employees in the executive branch and authorized him to delegate his authority over personnel management functions. Specifically, the President has delegated to OPM the authority to prescribe suitability standards and to conduct investigations of suitability for appointment and continuing employment.

OPM's authority to require agencies to assess employees' post-appointment conduct to determine their ongoing suitability to remain in their positions is not new and this rulemaking proposed no substantive changes to this long-standing requirement. *See*, *e.g.*, 76 FR 69601 (Nov. 9, 2011) and 89 FR 102675 (Dec. 18, 2024) (discussing 5 CFR 731.106(d)). The proposed change primarily addresses how agencies should resolve situations when their assessment of an employee's post-appointment conduct appears to warrant an unfavorable suitability determination. Although it is true that, since the MSPB's decision in *Scott v. OPM*, noted above, OPM has not taken suitability actions against employees for post-appointment conduct, this does not mean that OPM lacks authority to do so. Quite the contrary, OPM's proposal to make final suitability determinations and take suitability actions against employees based on post-appointment conduct aligns OPM's regulations and the suitability process with congressional and presidential intent to manage risk in the civil service.

Many of the commenters questioning OPM's authority to make final suitability determinations and take suitability actions for post-appointment conduct claimed that employee misconduct must be addressed under Chapter 75 procedures and that OPM has no authority to remove an employee for post-appointment misconduct under suitability. See Comment 1373 for an example. OPM disagrees and finds this viewpoint to represent a misunderstanding of congressional intent related to suitability actions. As noted above, 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"[3] is not within the scope of Chapter 75. 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 in place. Following the Washington Navy Yard shooting in September 2013, when a trusted insider tragically killed 12 individuals at a Government facility, Congress held hearings examining necessary improvements to vetting processes highlighted by this event and other high-profile leaks of information (*e.g.*, the unauthorized disclosure and subsequent public release of classified U.S. Government information leaked by Edward Snowden to the media[4]), 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 excluded suitability actions from 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 information when determining an individual's suitability or fitness for employment, and improve insider threat detection and prevention. In passing this amendment, Congress meant to improve the Government's ability to mitigate risk by clarifying that suitability actions were never intended to follow Chapter 75 procedures.

In addition to congressional interest and action to improve the Government's ability to mitigate risk posed by employees whose post-appointment conduct renders them unsuitable, as noted above, the President has now delegated this authority to OPM. Through issuance of the

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[3] National Defense Authorization Act (NDAA) for Fiscal Year 2016, Pub. L. 11492, div. A, title X, §1086(f)(9), Nov. 25, 2015, 129 Stat.1010.
[4] See https://www.congress.gov/event/113th-congress/house-event/LC1115/text.

Presidential Memorandum *Strengthening the Suitability and Fitness of the Federal Workforce* (90 FR 13683, Mar. 25, 2025), President Trump delegated authority to the OPM Director to make final suitability determinations and take suitability actions regarding employees in the executive branch based on post-appointment conduct.

Some comments portrayed OPM's position that it could take suitability actions based on post-appointment conduct as new and potentially politically motivated. See Comment 160 for an example. While the President's delegation of this authority to OPM is recent, OPM's position that such actions are under its authority is not new. In fact, in *Scott v. OPM*, OPM's position was that its authorities included the authority to take a suitability action based on post-appointment conduct. OPM notes that it argued that position when OPM was under leadership of an Administration representing a different political party than the current Administration. OPM therefore disagrees with characterizations of this policy as new or politically motivated.

Some commenters claimed that OPM lacks authority to take post-appointment conduct suitability actions for persons in career appointments to the SES. OPM disagrees. Although section 7543 does not include language akin to section 7512(F), Congress adopted subsection (F) to reverse an incorrect judicial interpretation of section 7512 and specified that subsection (F) was a clarification of congressional intent. Pub. L. 114-92, div. A, title X, sec. 1086(f)(9) (129 Stat. 1010) (identifying the amendment under the heading "Clarification regarding adverse actions").

OPM does not interpret 5 U.S.C. 7543 to displace the President's and OPM's separate suitability authority when OPM acts under regulations prescribed under 5 U.S.C. 3301 and 7301 and the Civil Service Rules. Section 7543 governs actions covered by subchapter V of chapter 75. A suitability action under part 731 is taken under separate suitability authority, is subject to the procedures in this part, and is limited by the requirements of § 731.202 and the procedural protections in subpart C. OPM recognizes the SES-specific statutory scheme and therefore retains sole jurisdiction over any such action involving a career SES employee.

III.B.2.b Sufficiency of Chapter 75 Procedures

Generally, many commenters expressed a preference for current Chapter 75 procedures over OPM's proposal to make final suitability determinations and take suitability actions for employee post-appointment conduct. One commenter recommended OPM add consideration of what are commonly referred to as the "Douglas factors," referring to a set of factors prescribed by the Merit Systems Protection Board for determining the appropriateness of penalties under Chapter 75, to the suitability determination process. See Comment 1053. OPM disagrees with the recommendation. The suitability determination process already provides a similar approach to evaluating conduct using additional considerations at § 731.202(c). The commenter's recommendation attempts to misapply a non-suitability process to suitability procedures and offers no explanation for how the additional considerations at § 731.202(c), which are already part of the suitability process, would fail to provide protections similar to the "Douglas factors."

Many comments argued that OPM's proposal to make final suitability determinations and take suitability actions for employee post-appointment conduct is unnecessary because current Chapter 75 procedures provide an effective mechanism for agencies to address employee misconduct. See Comment 1373 for an example. OPM disagrees. First, OPM's proposed changes are necessary to bring suitability procedures in alignment with congressional intent and to carry out the President's directive in the March 20, 2025, Presidential Memorandum. Second, post-appointment conduct-based suitability actions provide a more effective tool for protecting the integrity and efficiency of the service from employee misconduct. A key distinction between Chapter 75 procedures and suitability actions is that suitability actions allow OPM to impose a rehabilitative governmentwide debarment from any position in the competitive service or appointment to the career SES for a period of up to three years. The ability to impose such a debarment better protects the integrity and efficiency of the service by preventing an employee who has engaged in serious misconduct from immediately re-entering the competitive service or career SES at another agency, a feature not found in Chapter 75 actions.

Another feature that makes OPM's proposal to take post-appointment conduct-based suitability actions more effective than Chapter 75 procedures relates to proposed updates to § 731.105(a)(1) that received comments. In § 731.105(a)(1), OPM proposed amendments to clarify that its authority to complete a suitability action continues when an employee, as defined in § 731.101, separates from employment. Several commenters stated that it appears inefficient to pursue a suitability action after an individual has withdrawn an application, an agency has withdrawn an offer of employment, or an appointee or employee has separated from employment. See Comment 487 for an example. OPM notes in response that the authority to complete a suitability action in the case of an applicant, appointee, or employee is not a change from current authorities in § 731.105(a)(1). OPM's proposed change simply clarifies that the distinction between an appointee or employee does not matter with respect to OPM's authority to complete an action after the individual has separated from employment. OPM disagrees, however, that it would be inefficient to complete a suitability action against an individual after he or she has separated. This is a key feature of suitability actions that make them more effective at managing risk than Chapter 75 actions. Under Chapter 75, an employee facing an action because of serious misconduct can escape being held accountable for his or her conduct by resigning or transferring to a new agency. OPM's ability to complete a suitability action and impose a governmentwide debarment in these situations provides better protection for all of Government by holding employees accountable and preventing someone who engages in serious misconduct from being held accountable by simply resigning or transferring to a new agency. This same approach is used presently in suitability actions to ensure that an individual whose conduct makes him or her unsuitable for Federal employment cannot avoid accountability and attempt to bounce from agency to agency. Applying this same principle to post-appointment conduct suitability actions fills this gap in the Chapter 75 process.

These considerations result in OPM concluding that the proposal to make post-appointment conduct-based suitability determinations and take suitability actions is necessary

because current Chapter 75 procedures fall short. If an individual has engaged in serious misconduct that would result in a determination he or she is unsuitable for employment, posing a risk to either the efficiency or integrity of the service, the Government's ability to pursue an action and the penalty it may impose should not be determined by when the misconduct took place – either pre-appointment or post-appointment. Prior to this rulemaking, if the misconduct took place post-appointment, a trusted insider had more opportunity to avoid being held accountable for his or her conduct and even if held accountable, faced a lesser penalty than an individual who engaged in misconduct prior to Government service. Several agencies submitted comments directly on this point, indicating that Chapter 75 procedures are overly complex and often result in agencies choosing not to act and allowing unsuitable individuals to remain employed. See, for example, comments from Department of Homeland Security and Department of Education. Governmentwide, the Merit Principles Survey reports that only 41 percent of supervisors are confident they could remove an employee who committed serious misconduct.[5] This rulemaking addresses this gap. Suitability actions based on post-appointment conduct provide a better tool for holding Federal employees accountable for serious misconduct, ensuring Federal employees maintain high standards of integrity, conduct, and concern for the public interest.

III.B.2.c Agency Input in Post-Appointment Conduct Actions

OPM's proposal to retain sole jurisdiction for final suitability determinations and suitability actions for employee cases involving post-appointment conduct received several comments expressing concern that agencies would be better positioned to make these determinations and take any necessary suitability actions because they would be most familiar with the individual and his or her conduct, duties, and any unique circumstances. These

[5] *See* Merit Sys. Prot. Bd., Remedying Unacceptable Employee Performance in the Federal Civil Service at 6 (June 18, 2019), https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf.

commenters raised two primary concerns related to agency discretion: first, that OPM would act against another agency's employee without any input from the agency; and second, that the requirement to refer employee post-appointment conduct cases to OPM deprives agencies of their discretion to manage their personnel and resolve personnel matters under their own authorities. See Comments 067 and 452 for examples.

OPM recognizes that agencies are uniquely positioned to identify situations where an employee's conduct may warrant an unfavorable suitability determination and suitability action. This is why in § 731.105(b) and (d) OPM proposed a limit on its authority to take a post-appointment conduct suitability action against appointees or employees. OPM proposed that it would only make final suitability determinations and take suitability actions based on post-appointment conduct if the employing agency first made a proper and sufficient referral to OPM. The referral would include sufficient details of the facts of the conduct and circumstances, obtained via a background investigation or from internal agency records or information. This limitation on OPM's authority ensures that the employing agency retains autonomy and discretion in identifying those situations where an individual's conduct appears to warrant an unfavorable suitability determination. The agency will have the benefit of relying on its unique knowledge of the individual and the circumstances surrounding the conduct when evaluating it against the specific factors at § 731.202(b). This was the intent of the proposed language in § 731.103(b) that makes the employing agency responsible for assessing whether the employee's conduct would appear to warrant an unfavorable suitability determination.

Next, OPM notes that any impression that the proposed updates to 5 CFR part 731 would preclude an agency from discretionary authority to act on misconduct was a misunderstanding of the proposed rule. There is nothing in the proposed rulemaking that prohibits an agency from pursuing a disciplinary matter against an employee using Chapter 75 procedures or any other authority available to it. Agencies may still resolve disciplinary matters under Chapter 75 procedures. OPM acknowledges that not all post-appointment misconduct would warrant an

unfavorable suitability determination and that agencies may prefer to resolve misconduct matters using an alternative authority. Under the proposed rule, agencies retain this discretion to identify when the level of misconduct would appear to warrant an unfavorable suitability determination and refer those matters to OPM for potential action. To further clarify that agencies retain discretion to resolve employee misconduct under alternative authorities, OPM in this final rule has clarified in §§ 731.103(b) and (g), 731.105(e), and 731.106(d) that agencies ***may*** make a referral to OPM when an employee's post-appointment conduct appears to warrant an unfavorable suitability determination for OPM to review and potentially take a suitability action.

When proposing in § 731.103(g) that OPM would retain sole jurisdiction to make a final suitability determination and take an action under this part in any case involving an employee for post-appointment conduct, OPM did not intend to prohibit agencies from acting on post-appointment conduct under another authority in situations where OPM decides not to pursue a suitability action after receiving an agency referral. OPM intended only to retain sole jurisdiction to take a suitability action in any case involving an employee for misconduct. OPM has clarified this intent by revising § 731.103(g) to state simply that it retains sole jurisdiction to take a suitability action in any case involving an employee for misconduct. In the event OPM were to decide not to make an unfavorable determination and take a suitability action based on an agency referral, this would not preclude an agency from pursuing an action under another authority for the same conduct. An OPM decision not to make an unfavorable determination and take a suitability action does not imply OPM finds the individual suitable. It is only a decision by OPM based on its review of the information available not to exercise its jurisdiction to make a determination and take an action under this part.

Most of the commenters who raised these concerns recommended that OPM instead delegate to agencies the authority to make final suitability determinations and take suitability actions in employee cases involving post-appointment conduct. See Comment 473 for an example. OPM notes that in the case of an appointee, in § 731.105(a), OPM proposed that both

OPM or an agency acting under delegated authority could take a suitability action based on post-appointment conduct, with the limitation noted above that OPM would only take such an action on an appointee if the employing agency first made a referral to OPM. OPM has determined to retain sole jurisdiction over suitability actions for employees based on post-appointment conduct to ensure governmentwide uniformity in the application of this now explicitly expressed delegated authority from the President. As noted above, a suitability action includes the possibility of a debarment from positions at a specific agency or governmentwide, both representing significant consequences not included in Chapter 75 actions. Of note, § 731.205(a) limits debarment by agencies to positions within that agency, whereas OPM can debar the individual from examination for, and appointment to, the competitive service and career appointment in the Senior Executive Service, i.e., governmentwide. See § 731.204. As such, OPM has determined that in cases of post-appointment conduct suitability actions against employees it is most prudent to retain sole authority for this responsibility during the initial implementation. While it is true, as pointed out by some commenters, that the process of agencies reviewing cases and then referring them for a secondary review by OPM may introduce some duplication, OPM finds this preferable because it ensures uniformity and consistency in decisions. See Comment 1045. Additionally, agencies will not proceed through the suitability action procedures, and therefore the amount of duplicated effort should be minimal. After initial implementation of suitability actions based on post-appointment conduct OPM may revisit this decision later to assess whether agencies should be delegated authority to take such actions.

Some commenters recommending that OPM delegate authority for post-appointment conduct suitability actions to agencies raised concerns over whether OPM could manage the potential increased workload associated with agency referrals for these actions. See Comment 473. These commenters noted that under the current processes for pre-appointment conduct suitability actions, OPM timelines on processing agency referrals can vary and sometimes appear protracted. While OPM acknowledges these concerns, OPM believes these commenters have

overlooked a crucial distinguishing characteristic of the work required to process a pre-appointment conduct action versus a post-appointment conduct action. For pre-appointment conduct referrals made by agencies to OPM, OPM must almost always further investigate the matter to obtain evidence substantiating the conduct. This involves obtaining evidence from sources outside of the Federal Government and adds days of processing time waiting for external sources to reply with information. In contemplating the nature of conduct most likely to result in a post-appointment conduct suitability referral from an agency, OPM believes that the evidence substantiating the conduct will already be available at the employing agency, thus greatly reducing any need for OPM to obtain additional evidence. OPM will require agency referrals to contain fully developed evidence relating to the post-appointment conduct. By mostly eliminating the need for OPM to conduct additional investigation upon receipt of the referral, OPM believes that the total labor hours and calendar days needed to process these actions will be shorter than those for pre-appointment conduct suitability actions.

Finally, one commenter raised a concern that agencies may face confusion on how to proceed when an individual newly appointed to a competitive service or career Senior Executive Service position and subject to investigation has already converted to an employee in another competitive service or career Senior Executive Service appointment. Comment 574. The commenter provided the example of an individual who is promoted from a non-supervisory competitive service position to a supervisory competitive service position and serves a new period of probation as a supervisor. It is OPM's intent that only OPM have authority to take a suitability action in the case of an individual who meets, or has met, the definition of an employee under 5 CFR 731.101. OPM has clarified § 731.103(a) to state that in a case involving an appointee where the individual has converted to an *employee* in a prior competitive service or career Senior Executive Service appointment, agency heads will consider the individual to be an employee and may make a proper and sufficient referral to OPM if the employee's conduct appears to warrant an unfavorable suitability determination.

III.B.2.d Political Patronage

Many commenters expressed concern that OPM's proposal to make final suitability determinations and take suitability actions based on post-appointment conduct would introduce political patronage and undermine the civil service merit system, recreating a "spoils" system, in violation of the Pendleton Act of 1883 and the Civil Service Reform Act of 1978 (CSRA). See Comment 104 for an example. In addition, many commenters suggested the rule would conflict with the Hatch Act by encouraging partisan political activities of Federal employees. See Comment 218 for an example.

This rulemaking will not undermine merit-based hiring practices, nor will it undermine the prohibition of civil service employees from using their positions for political purposes. The significant number of responses reflecting these concerns warrants emphasis that suitability determinations and actions are not subject to, nor do they have any bearing on, partisan political activities or coercion. Further, contrary to one commenter's concern that individuals seeking to work or working in the Federal civil service would be required to disclose their voting history and any political party preferences, this is simply not true. Comment 1189. Applicants, appointees, and employees are not asked about their voting patterns or political preferences during any personnel vetting process, except for the unique circumstance of voting in a foreign election when under consideration for eligibility for a national security sensitive position or eligibility for access to classified information. Nothing in OPM's rulemaking changes this. Any consideration of partisan political preferences in suitability procedures remains unlawful under the Merit Systems Principles codified at 5 U.S.C. 2301, and this rule does not alter those protections in any manner. In fact, it strengthens the application of Merit Systems Principles by providing a mechanism to ensure that "[a]ll employees" will "maintain high standards of integrity, conduct, and concern for the public interest." 5 U.S.C. 2301(b)(4).

To further clarify this point, OPM has inserted a new § 731.102(c) stating expressly that suitability determinations and actions must be applied consistent with the Merit Systems

Principles set forth in 5 U.S.C. 2301 and the prohibition against unlawful employment practices set forth in 5 U.S.C. 2302(b). This new provision underscores that determining an individual's suitability for Federal service is based on whether an individual's identifiable character and conduct may have an adverse impact on the integrity or efficiency of the service—not partisan political considerations. In making this assessment, OPM or an agency must base its suitability determination on the presence or absence of one or more of the specific factors in § 731.202(b) – again, not based on politics.

In this context, OPM considers its proposal to retain sole jurisdiction over suitability actions for employees based on post-appointment conduct to provide additional protections for employees (in addition to the express protections that OPM is reinforcing via the new § 731.102(c)). As noted above, the employee's agency must first identify misconduct that appears to warrant an unfavorable determination and then it may refer the matter to OPM. If referred to OPM, staff at OPM will review the evidence, assess the misconduct against the specific factors at § 731.202(b), and make a final determination. This referral process creates a degree of separation between the employing agency and the final authority to take a suitability action, allowing for an objective review of the evidence presented by the employing agency and eliminating the concerns raised by commenters related to politicization of the suitability process. Finally, this rulemaking supports the spirit of the CSRA by improving Government operations and productivity through removal of individuals who no longer support the integrity and efficiency of the service.

OPM notes that the proposed language in § 731.103(a) did state that the head of an agency would make post-appointment conduct referrals to OPM, and this language may have contributed to commenters who read the proposed rule believing the suitability determinations would be predominantly made by political appointees. OPM recognizes that within an appointee's or employee's agency it is unlikely the head of an agency will be directly involved in making a referral to OPM, as this function is typically carried out by staff delegated this duty

within the agency. As such, to add clarity to this point, OPM will add language to §§ 731.103(b) and 731.105(b) and (d) making it clear that the referral from the agency may be made by the agency head or one or more people the agency head designates.

Some commenters reacted to the requirement for agencies to send referrals to OPM as a new process that appears vague. See Comment 156. OPM notes that the requirement for agencies to refer suitability cases to OPM has existed for decades and is not new. OPM provides clear instructions to agencies on submitting referrals in supplemental guidance issued under § 731.102(b). OPM makes this guidance available to the public on its website.

III.B.2.e Due Process Concerns

A large number of commenters opposed OPM's proposal to introduce post-appointment conduct-based suitability actions to the suitability and fitness regulations because of concerns that allowing such actions would strip employees of due process rights. The concerns surrounding the topic of due process varied. Some commenters claimed that employees would have no due process rights under the proposed rule. Others misunderstood proposed changes at 5 CFR 731.304(b) and 731.404(b). Finally, some opposed the proposal for post-appointment conduct suitability actions because they believe suitability action procedures do not provide sufficient due process when compared to the due process afforded to individuals for Chapter 75 actions. For examples, see Comments 038, 025, and 017, respectively.

OPM disagrees with commenters who claimed that individuals subject to a post-appointment conduct suitability action would have no due process under OPM's proposed rule. For this claim to be true it would require 5 CFR part 731 to provide no procedures to protect for fairness and impartiality prior to the Government taking a suitability action. This is simply false. The suitability regulations provide several procedural safeguards. The first procedural protection is the limitation placed on OPM and agencies regarding the type of conduct that can be considered when determining an individual's suitability. Section 731.202(a) requires that OPM or an agency must base its suitability determination on the presence or absence of one or more of

the specific factors in § 731.202(b). In the event OPM or an agency makes an unfavorable determination, subparts C and D of 5 CFR part 731 provide the following procedural protections:

- Notification in writing of the proposed action, including the specific reasons for the proposed action;
- The right to review the materials OPM or the agency relied upon to reach the unfavorable determination;
- The right to respond to the proposed action in writing;
- The right to representation; and,
- Notification in writing of the decision regarding the final suitability action.

When OPM or an agency takes a suitability action at the end of this process, individuals subject to a suitability action also have the right to appeal the action as described in 5 CFR part 731, subpart E. OPM notes that it proposed no changes to the right to appeal a suitability action contained in subpart E in this rulemaking. Many of the commenters who claimed there was no due process for suitability actions under the proposed rulemaking also claimed there was no right to appeal a suitability action. This claim is also wholly false.

Many commenters voicing concern about due process focused on language contained in the proposed paragraphs at 5 CFR 731.304(b) and 731.404(b) that states the employing agency of an appointee or employee subject to a suitability action requiring removal must remove the individual from its rolls within 5 workdays from the final decision. See Comment 579 as an example. These commenters appear to have read this language out of context and to have misunderstood OPM's proposed changes to these sections. The requirement to remove an appointee or employee subject to a suitability action within 5 workdays from the final decision was not a proposed change from the existing requirements in §§ 731.304 and 731.404. Commenters claimed that under OPM's proposed rule an agency could discover an appointee or employee's misconduct and the individual could be subject to a suitability action and removed 5 workdays later with no due process. These commenters appear to have failed to understand that

the requirement for removal from the rolls after the final decision included in §§ 731.304 and 731.404 comes after the suitability actions procedures contained in §§ 731.301-303 or 731.401-403, namely, the procedures described in the preceding paragraph.

One commenter did note that existing language at 5 CFR 731.304 and 731.404 at the time of the proposed changes included a requirement that when notifying an individual in writing of a final decision, the notification must include informing the individual of the right to appeal an unfavorable decision in accordance with subpart E of this part. See Comment 937. The commenter noticed that the requirement to notify individuals of the right to appeal was absent from the proposed §§ 731.304(a) and (b) and 731.404(a) and (b) and recommended it be restored. OPM agrees that a requirement to include notification of the right to appeal should be included in the suitability action procedures. The omission was inadvertent, and OPM has included it in the final rule at §§ 731.304(b) and 731.404(b).

The proposed changes at §§ 731.304 and 731.404 instead were intended to clarify decision-making authority for suitability actions and to require independence in decision-making. Specifically, in § 731.304 OPM proposed to clarify that the OPM Director, or designee, will make the final decision regarding a suitability action. When the OPM Director delegates such decision-making, the OPM employee authorized to make the decision would be required to be appropriately independent from the employee who made the suitability determination and proposed the action. For example, the employee adjudicating the suitability determination (i.e., proposing a suitability action) may not participate in discussions with or advise the OPM official authorized to make the final suitability decision. OPM also proposed to prohibit ex parte communication with the OPM official authorized to make the final decision, applying procedural protections akin to those provided by 5 U.S.C. 554(d). Although 5 U.S.C. 554 and 557 do not apply to suitability actions, OPM believes that the type of legal protections provided by those procedures are appropriate for suitability actions, given the potential significant consequences. In § 731.404 OPM proposed to amend the process by which a final decision on a suitability

action is made by an agency, in cases where agencies are permitted to take suitability actions. OPM proposed that the agency head, or designee, will make the final decision regarding a suitability action. OPM proposed the same requirements for independence in decision-making and prohibiting ex parte communication.

Some commenters raised concerns about the regulation placing final decision authority in the OPM Director or an agency head and instead recommended that OPM revise the regulations to require decisions be made by lower-level career civil servants. OPM views this decision process as necessary to ensure that the OPM Director or agency head can supervise adjudicators sufficiently to avoid the constitutional concerns that vesting subordinate officials with final executive authority would engender. Article II of the Constitution vests the executive power in the President, who must rely upon subordinates to exercise his authority. The Supreme Court has held that only principal officers who are appointed by the President with Senate consent can make unreviewable decisions for the executive branch. See *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021). Adjudicators assigned to make suitability determinations under this rule exert significant authority and thus, under *Arthrex*, must be properly supervised by a principal officer (such as the OPM Director). For that reason, OPM is not adopting the recommendation made by some commenters that the regulations be amended to require suitability determinations be made only by career Federal staff. See Comment 009. Finally, one commenter recommended that OPM require deciding officials be individuals who have no intention of leaving Federal service within one year of making the final decision. Comment 528. OPM also is not accepting this recommendation as it would be impractical to implement: there is no existing mechanism by which the agencies could reliably predict when an employee may decide to leave Federal service.

OPM did receive one comment related to the requirement to remove an appointee or employee within 5 workdays from the final decision when the suitability action includes removal under a post-appointment conduct suitability action. The commenter highlighted that in the context of post-appointment conduct suitability actions, there is a much higher likelihood that an

appointee or employee subject to a suitability action may be working for the Government outside of the United States or a United States territory. Comment 030. The commenter noted that it may be impractical in these instances for an employing agency to remove an individual from its rolls within 5 workdays due to the potential need for additional planning to transition the individual out of the workforce. Although OPM appreciates this comment, OPM does not believe any change to the requirement is required. In these situations, the agency will have ample advance notice of a potential unfavorable suitability determination and action to allow for planning for the individual's removal and transition out of the workforce. Notably, in cases involving post-appointment conduct, it will be the agency that first identifies the conduct that may warrant an unfavorable determination and then refers the matter to OPM and the agency also receives notice in the event OPM proposes to take a suitability action. While OPM agrees that any post-appointment conduct suitability action on an appointee or employee working outside of the U.S. or a U.S. territory will require careful planning by the employing agency, OPM does not believe the need for such planning should delay the Government's ability to protect the integrity and efficiency of the service by removing the individual promptly.

As noted, the final concern commenters raised related to OPM's proposal to include post-appointment conduct suitability actions in the regulation is that employees subject to a post-appointment conduct suitability action would receive diminished due process compared to what individuals receive under Chapter 75. While OPM acknowledges that there are differences in procedures between adverse action procedures under Chapter 75 and suitability actions procedures, to include differences in the scope of reviews, OPM disagrees that its proposal to allow for suitability actions based on post-appointment conduct would diminish the individuals' due process rights. Due process is simply the right to the process, or procedures, due to the individual based on the action taken. OPM has not proposed any changes that would diminish the process an individual receives under the suitability action procedures. The only proposed changes to the suitability actions procedures are the additional requirements for independence in

decision-making and the prohibition against ex parte communications noted above. Individuals, whether applicants, appointees, or employees, will receive the same due process they receive today for suitability actions based on pre-appointment conduct, to include appeal rights contained in 5 CFR part 731, subpart E. It is true that some suitability actions for post-appointment misconduct may be actions that would have previously been processed under Chapter 75. In these instances, the process an individual receives may be different than what the individual would have received under Chapter 75. The individual will still, though, receive the process that is due under 5 CFR part 731. Prior to this rulemaking, OPM is unaware of any substantial claims that individuals were not afforded sufficient due process in suitability actions when taking such actions under 5 CFR part 731 against applicants, appointees, or employees based on pre-appointment conduct, even when such actions required removal. OPM disagrees that individuals subject to a suitability action based on post-appointment conduct suffer diminished due process, because they will experience the same process that has been due for suitability actions previously with no substantial change. To strengthen due process protections, in the Final Rule, OPM is expanding the restrictions on ex parte communications in § 731.304(a) and § 731.404(a) to ensure that the official authorized to make the final decision may not consult with, receive advice from, or communicate with the employee who proposed the suitability action concerning the merits of the proposed action, except on notice to the respondent and as part of the record.

III.B.3 Reporting to Governmentwide Systems

OPM proposed amendments to this regulation clarifying that suitability determinations and actions taken based on an internal agency investigation fall under the scope of determinations and actions already required to be reported into the Central Verification System or its successor as part of continuous vetting. Several commenters raised concerns that incorrectly interpreted the amendments to expand suitability reporting requirements and potentially raise new privacy concerns. See Comment 017 as an example. This is a misreading

and misunderstanding of existing requirements. Commenters suggested the rule fails to specify adequate safeguards concerning data accuracy, security, necessity, and permissible use, and recommend stringent compliance standards to avoid liability. These matters are outside the scope of 5 CFR part 731 and are instead addressed, as required by the Privacy Act of 1974, in the System of Records Notice (SORN) covering these records. The Central Verification System or any successor system is operated by the Department of War (DoW) and is covered by the DoW's Personnel Vetting Records System. The SORN for this system may be found at 83 FR 52420.

OPM received one request seeking a method for agencies to report suitability actions on uninvestigated applicants in the Central Verification System, or its successor. See Comment 004. OPM proposed no changes to reporting suitability actions on uninvestigated applicants but may consider this concern as part of future personnel vetting reform efforts.

III.B.4 Continuous Vetting

OPM received many comments that incorrectly believed that OPM's proposed rule was establishing a new requirement for continuous vetting. The requirement for individuals covered by the 5 CFR part 731 to be subjected to continuous vetting existed within the rule prior to OPM's proposed rule and OPM proposed no changes to this requirement. As such, these comments are considered outside the scope of this rulemaking. OPM did propose clarifying language at § 731.106(d)(1) to identify where requirements for handling internal agency information in the context of continuous vetting may be found. One commenter expressed concerns with the reference to "internal agency sources" and asked for clarification on what kind of internal agency information would be deemed credible. See Comment 960. The commenter worried that hearsay or gossip might be considered as evidence for a suitability determination and action. A suitability action must be supported by preponderant evidence, that is, the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. OPM proposed no changes that would alter the way evidence is evaluated in the suitability adjudication process. The

language identified by the commenter serves only to point agencies to requirements for handling internal agency information in continuous vetting.

One commenter raised questions of the need for post-appointment conduct suitability actions to help implement the Trusted Workforce 2.0 initiative and continuous vetting. See Comment 1065. The commenter referenced a Government Accountability Office (GAO) May 9, 2025, report (https://www.gao.gov/assets/gao-25-107325.pdf) of a qualitative survey it conducted with some agencies on their perceptions of improved risk management delivered by the initiative at the time of the report. The commenter focused on the report's finding that, while most agencies reported some improvement in risk management, the improvement was not yet substantial. The commenter questioned whether a need for post-appointment conduct suitability actions truly exists if the reform initiative has not yet had a significant governmentwide impact on risk management. OPM disagrees with the commenter's conclusions. OPM acknowledges that the Trusted Workforce 2.0 initiative launched in 2018; however, the reliance on that date by the commenter fails to acknowledge that the initial stages of reform focused on eliminating a backlog of investigations, securing vulnerable IT systems, and establishing a new vetting policy framework. At this time, enrollment of the Federal workforce into continuous vetting is still underway for individuals occupying positions that are non-sensitive, meaning not involving national security duties. The true benefit of post-appointment conduct suitability actions will be realized as continuous vetting identifies concerning post-appointment conduct. Establishing post-appointment conduct suitability actions now positions the Government to fully protect the integrity and efficiency of the service through suitability actions once continuous vetting is fully implemented.

III.B.5 References to Probationer Authorities

OPM received comments related to its proposal to remove references to 5 CFR part 315 throughout the rule. One of the comments on this topic failed to properly understand the references to part 315, believing they applied to reductions in force, which is found in part 351.

See Comment 1402. Another comment described OPM's proposal to remove the reference as premature before E.O. 14284 has been fully implemented. See Comment 415. OPM has completed the rulemaking required by E.O. 14284. (90 FR 26727, June 24, 2025). Commenters appear to have misunderstood the prior inclusion of the reference in the context of the rule. See, e.g., Comment 474. The rule previously only referenced 5 CFR part 315 as an example of non-suitability authorities an agency may use to take an action. The inclusion or exclusion of the reference in the rule has no impact on authorities related to probationary status for Federal employment nor does it impact the types of positions subject to suitability. As such, OPM finds it prudent to remove the reference to 5 CFR part 315 as an example of an authority under which an agency may take an action pursuant to E.O. 14284.

III.B.6 Training Standards

OPM received comments on its proposal at § 731.202(d) to require persons responsible for suitability screening, review, or making suitability determinations under this part to be trained in accordance with national training standards for suitability adjudicators issued in supplemental issuances, as described in § 731.102(b). The comments collectively questioned when the training standards would be developed, how agencies would obtain training for staff, the timeline for requiring compliance with new training standards, and costs associated. See Comment 1053 for an example. National training standards for suitability adjudicators and the requirement for persons performing suitability adjudication-related duties to be trained in accordance with these standards have existed since August 2012 when first established by supplemental issuance in accordance with § 731.102(b). OPM provides governmentwide training that complies with these standards to agency staff under existing interagency agreements covered by existing budgets. OPM is adding this requirement in the final rule to move the requirement from supplemental issuance to regulation, formalizing the existing requirement. OPM has not adjusted the cost impact as the establishment of this previously existing requirement in the rule will not impact costs at agencies.

III.B.7 Length of Comment Period/Extension Request

OPM received several comments that the comment period afforded for comment on the proposed rule violated the Administrative Procedure Act (APA). See Comment 028 for an example. They argued that the comment period following the proposed rule, which extended to July 18, 2025, was unlawfully short, in violation of the APA. The commenters based this argument on multiple sources—first, the APA's mandate that an “opportunity to participate” on proposed rules be provided following a notice of proposed rulemaking; second, E.O.s 12866 and 13563, which specify that comment periods should “generally” be at least 60 days; and, third, the Supreme Court's holding in *Perez* v. *Mortgage Bankers Association,* 575 U.S. 92 (2015), and related caselaw, which generally stipulate that the same procedures be used to amend a rule as were used to enact that rule.

Respectfully, OPM rejects the argument that the comment period was inadequate as a matter of law or policy. As multiple appellate courts have held, a 30-day comment period is generally the minimum needed to comply with the APA.[6] In *Chamber of Commerce of United States* v. *U.S. Securities and Exchange Commission,* the Fifth Circuit upheld a 45-day comment period against the charge that it was legally insufficient.[7] It simply is not the case that the APA requires longer than 45 days for the public to provide comment.

The commenters’ reliance on E.O.s 12866 and 13563 is similarly misplaced. E.O.s 12866 and 13563 only specify that comment periods should “generally” be at least 60 days. The policy rationale is that stakeholders should have adequate opportunity to meaningfully participate in the notice-and-comment process. Concerning the present rulemaking, OPM received over one

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[6] *See Chamber of Com. of the U.S.* v. *U.S. Sec. & Exch. Comm'n,* 85 F.4th 760, 779 (5th Cir. 2023) (“. . . the APA generally requires only a minimum thirty-day comment period.”); *see also Riverbend Farms, Inc.* v. *Madigan,* 958 F.2d 1479, 1484 (9th Cir. 1992) (“Although the APA mandates no minimum comment period, some window of time, usually thirty days or more, is . . . allowed for interested parties to comment.”); *Nat'l Lifeline Ass'n* v. *Fed. Commc'ns Comm'n,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (“When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.”).

[7] 85 F.4th at 779-80.

thousand four hundred distinct comments, offering nuanced perspectives on virtually every aspect of the proposed rule. Factually, it cannot be said that the comment period was insufficient to allow for meaningful feedback on the proposed rule given the voluminous feedback that OPM did receive.[8] In its proposed rule, OPM decided that a 30-day comment period would be adequate. However, at the request of commenters, OPM extended the comment period for an additional fifteen days. (90 FR 29512, July 3, 2025).

Accordingly, the 45-day comment period provided by OPM, which included a 15-day extension from the usual APA-required minimum at commenters' request, provided a reasonable opportunity for public comment.

Further, nothing in *Perez* stands for the proposition that the length of comment periods to initially promulgate and then amend a regulation must be identical. OPM promulgated 5 CFR part 731 through notice and comment rulemaking and is amending it through the same procedures. This comports fully with *Perez*.

III.B.8 Hiring and/or Retention

Many commenters expressed concerns that OPM's proposal to make final suitability determinations and take suitability actions based on post-appointment conduct and to modify several of the specific factors at § 731.202(b) would dissuade qualified individuals from attempting to join the Federal workforce and prompt attrition among experienced staff. The commenters provided several different reasons they believe the proposed changes will negatively impact hiring and retention. See Comments 042, 060, and 1054 for examples.

OPM disagrees that its rule will negatively impact retention or morale. Many of these negative comments appear to be based on an incorrect understanding of OPM's proposal.

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[8] OPM additionally notes that the present rulemaking largely implements an authority that was contemplated by the Merit Systems Protection Board in *Scott v. OPM* in 2011 *(116 M.S.P.R. 356 (2011)*. The Presidential Memorandum *Strengthening the Suitability and Fitness of the Federal Workforce* delegating authority to OPM for post-appointment conduct suitability actions was also issued in March 2025, several months before OPM's proposed rule. Thus, the relevant concepts are not new. Consequently, OPM does not believe extending the comment period by 14 additional days would have meaningfully enhanced the public's ability to comment on the proposed rule.

Commenters cited the elimination of appeal rights and a five-day removal period with no opportunity to respond as negatively impacting employee morale. As discussed in section III.B.2.e, Due Process Concerns, these reasons reflect a fundamental misunderstanding of OPM's proposals and thus this final rule. Some commenters also imply that a very large number of employees will be removed under this rule. OPM notes that, while it estimates a portion of actions taken under Chapter 75 will be taken as suitability actions in the future, OPM did not estimate a significant increase in the number of individuals that would be removed whether under Chapter 75 or suitability actions. A proper understanding of revisions to this regulation should not deter qualified applicants from seeking Federal employment or discourage Federal employees from maintaining their positions. In fact, OPM expects the shift in post-appointment suitability actions to improve the integrity of, and public confidence in, the Federal workforce. OPM also notes that the failure to address unsuitable conduct by agency employees can create a toxic work environment that itself harms recruitment and retention. The audit of the Federal Deposit Insurance Corporation, which revealed longstanding and gross abuses of authority by senior leaders which were rarely addressed, is a recent example of this phenomenon.[9] The audit noted employees would quit or move within the agency rather than endure abusive behavior.[10] OPM believes that post-appointment suitability actions will improve the integrity of the Federal workforce and thereby make agency employment more attractive to prospective employees.

OPM acknowledges commenters' concerns that some applicants may perceive post-appointment suitability actions as increasing the risks associated with Federal employment. However, OPM notes that this rulemaking is being implemented alongside broader governmentwide efforts to strengthen merit-based recruitment and hiring, including

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[9] Joon H. Kim, Jennifer K. Park, and Abena Mainoo, "Report for the Special Review Committee of the Board of Directors of the Federal Deposit Insurance Corporation," April 2024, https://www.fdic.gov/sites/default/files/2024-05/cleary-report-to-fdic-src.pdf.

[10] *See, e.g., id*. at 69.

implementation of OPM's Merit Hiring Plan.[11] These initiatives are designed to attract highly qualified candidates and improve the applicant experience. OPM therefore does not agree that this final rule will deter qualified individuals from seeking Federal employment. Rather, OPM believes that maintaining appropriate standards of suitability and conduct supports public confidence in the Federal workforce while remaining fully consistent with ongoing efforts to recruit and retain talented employees.

III.B.9 Miscellaneous

OPM received individual or small sets of comments on several other miscellaneous topics. One commenter recommended that OPM amend § 731.202 to include a provision that suitability determinations and actions must be applied consistent with 5 U.S.C. 2302(b), which establishes prohibited personnel practices. OPM agrees with this comment and is adding a new § 731.102(c) that provides that suitability determinations and actions must be applied consistent with the Merit Systems Principles set forth in 5 U.S.C. 2301 and with 5 U.S.C. 2302(b), setting forth prohibited personnel practices. OPM also is revising the Authority citations for part 731 to reflect this addition.

OPM received no comments on the proposed changes to the definitions at § 731.101 and is adopting them as proposed.

III.B.10 Implementation

Some commenters requested OPM provide guidance on how this rule will be implemented. See Comment 1319 for an example. This rulemaking is prospective starting at the effective date. That means that agencies cannot apply the updated language in the specific factors at § 731.202(b) when proposing or taking an action until the effective date of this rule. Similarly, agencies cannot make referrals to OPM for consideration of post-appointment conduct suitability actions until the effective date of this rule. Post-appointment conduct occurring prior

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[11] OPM-Executive Office of the President (EOP) joint memorandum, "Merit Hiring Plan" (May 29, 2025), https://www.chcoc.gov/content/merit-hiring-plan.

to the effective date of this rule but that is referred to OPM on or after the effective date may be considered for a suitability action by OPM consistent with applicable law. Finally, conduct that was previously known by an agency at the time it made a favorable suitability determination may not be used as the sole basis for a post-appointment conduct suitability action against an appointee or employee.

IV. Expected Impact of This Rule

IV.A Statement of Need

This rule is needed to improve the efficiency, rigor, and timeliness by which OPM and agencies vet individuals for risk to the integrity and efficiency of the service. An agency currently must rely on the protracted Chapter 75 process when the agency identifies conduct that poses risk to the efficiency and integrity of the service. Agencies and managers report frustration with not being able to take a suitability action after finding an employee unsuitable for continued employment. Agencies reported they often decline to act because the Chapter 75 process is perceived as too difficult, leaving unsuitable employees in the workplace. Allowing employees who engage in gross—and at times criminal—misconduct to remain in their positions undermines the integrity of the Federal service.

This final rule also brings suitability processes into alignment with presidential direction and congressional intent. The suitability factors that are being introduced by this rulemaking are needed to emphasize that individuals serving for, or on behalf of, the Government are expected to comply with legal and ethical obligations. Specifying these factors in the regulations will provide greater clarity to agencies as well as to applicants and employees as to the types of conduct by which an individual may be found unsuitable.

IV.B Impact

This rule permits OPM to take suitability actions for post-appointment conduct on specified positions, revises suitability action procedures, and incorporates additional suitability criteria used in making suitability determinations and taking suitability actions. 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 will be impacted by these changes. Applicants, appointees, and employees in the excepted service will be impacted by changes incorporating new factors at § 731.202(b) as these factors are required to be used as the minimum standards of fitness for excepted service positions. Contractors and nonappropriated fund employees will also be impacted by the updated factors, as agencies must exercise due regard to the minimum fitness standards in 5 CFR part 731 and supplemental guidance for these populations as well.

OPM will also be impacted by the proposed changes as the final rule will increase the number of suitability actions OPM will be required to conduct. OPM anticipates the impact to MSPB to be neutral. Any removal action on an employee for post-appointment conduct currently processed under Chapter 75 that results in an appeal to MSPB and might be processed instead as a suitability action will still likely result in an appeal to MSPB. OPM assumes an individual willing to appeal a Chapter 75 action to MSPB would be equally willing to appeal a suitability action to MSPB. OPM acknowledges that it proposed to move the venue for suitability action appeals from the MSPB to OPM in the rulemaking *Suitability Action Appeals*. See 91 FR 5352 (February 6, 2026). Any impacts of that proposed change would, if adopted, be addressed in a final rule in that rulemaking.

Commenter 939 suggested that OPM's acknowledgement that the number of MSPB appeals will not meaningfully change is a tacit admission that this rule will not change the number of removals. The commenter also asserted that implementing new processes would "create disruption with no real benefit." Id.

OPM disagrees. OPM made no admission nor gave any estimate on the total number of removals, whether stemming from Chapter 75 or suitability actions, that would result from its rulemaking. OPM simply presented the rationale for why it believes this rule will have a neutral impact on MSPB. In fact, OPM believes there are many types of adverse actions taken under

Chapter 75 today that do not result in removals, such as suspensions for more than 14 days, reductions in grade, or reductions in pay, that could potentially result in a post-appointment conduct suitability action under this final rule. Because the authority to take a suitability action for the types of misconduct that result in non-removal Chapter 75 actions is new, there is insufficient data to permit OPM to reliably predict how many of those non-removal Chapter 75 actions may become removals under suitability. For that reason, OPM did not attempt to quantify how many non-removals under Chapter 75 may become removals under suitability. Additionally, many of those non-removal actions under Chapter 75 still result in appeal rights to the MSPB. Even if OPM had attempted to quantify the number of net new removals resulting from this rule, the impact on MSPB would still be neutral: an appeal to MSPB of a suspension for more than 14 days that changes to an appeal of a suitability action still counts as a single appeal to MSPB. As such, OPM disagrees with the commenter's conclusion that OPM claimed there would be no more removals with this final rule or that there would be no benefit from the rule.

Commenter 939 also suggested that the rule would not change how quickly removals can be effected as demonstrated by OPM's admission that the number of MSPB appeals would not significantly change. OPM is not certain how the commenter reached the conclusion that the speed with which an agency could effectuate a removal would be unchanged simply because the number of MSPB appeals would not meaningfully change. OPM continues to believe that the suitability action process run by OPM is faster compared to adverse action processes at agencies. There are only four potential suitability actions, whereas adverse actions under Chapter 75 come with a multitude of various possible penalties an agency must debate internally and compare to its table of penalties, if applicable. These successive reviews and deliberations take time and slow down the process. Moreover, permitting OPM to take suitability actions against employees for post-appointment conduct, consistent with the President's direction, will allow agencies to

address risk to the integrity or efficiency of the service with the process designed to protect the Government from such risk: suitability actions.

Focusing solely on the benefits of the rulemaking tied to streamlining processes and reducing costs fails to account for the rule's positive impact on the rigor of vetting processes and risk mitigation. Using suitability actions when an employee has engaged in serious misconduct instances will achieve better risk protection than Chapter 75 procedures because if the employee's conduct warrants an action, it always results in removal, instead of a lesser penalty. Suitability actions also allow for debarments to prevent individuals from immediately re-entering Federal service in a competitive service position with another agency.

Although not quantified in the analysis, debarments also deliver agencies cost savings by avoiding the costs associated with managing individuals who bounce from agency to agency with a track record of misconduct that would make them unsuitable for Federal service. The intangible benefits of holding the workforce accountable with suitability actions for serious post-appointment misconduct and not permitting individuals to avoid consequences by simply resigning or transferring agencies will provide better protection of the integrity and efficiency of the service than is currently afforded under Chapter 75 procedures. As discussed throughout this rule, OPM is unpersuaded that these changes will not have a positive impact on the efficiency and integrity of the service. OPM expects this rule to reduce time and costs while promoting an impartial and effective suitability process that produces sound decisions, adding rigor to vetting processes.

IV.C Costs

One commenter expressed concerns with OPM's impact and cost analysis, stating that the analysis did not appear to meet the requirements of OMB Circular A-4 and therefore fails to justify the rulemaking. See comment 1065. OPM disagrees. Agencies, working with the White House, have a great deal of discretion in assessing impacts and costs based on the facts of the

situation. As courts have repeatedly held, "executive orders are not judicially enforceable."[12] That is, as a general matter, executive orders and other White House guidance on the regulatory process bind executive agencies only as a matter of the internal management of the executive branch. Thus, several Federal courts have specifically held that there is no legal requirement that agencies comply with the requirements specified in E.O. 12866 and related guidance.[13]

One-time Implementation Cost: This rule will affect the operations of most Federal agencies in the Executive branch—ranging from cabinet-level departments to small independent agencies. To comply with the regulatory changes in this 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 is the rate in 2026 for GS-14, step 5, from the Washington, DC, locality pay table ($163,104 annual locality rate and $78.15 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 $156.30 per hour. We estimate that, in the first year following publication of the final rule, the effort to update policies and procedures will require an average of 250 hours of work by employees with an average hourly cost of $156.30. This effort will result in estimated costs in the first year of implementation of about $39,075 per agency, and about $3.1 million in total governmentwide.

Savings from Fewer Chapter 75 Removals: In permitting OPM to take suitability actions for post-appointment conduct, OPM anticipates a decreased level of effort for agencies as they will refer employee cases to OPM for suitability action rather than pursue Chapter 75 removals. In fiscal years 2022 and 2023, an average of 2,452 Federal employees were removed under

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[12] S*ierra Club* v. *U.S. Dep't of Energy,* 134 F.4th 568, 573 (D.C. Cir. 2025) (citing *Marin Audubon Soc'y* v. *Fed. Aviation Admin.,* 121 F.4th 902, 913 (D.C. Cir. 2024)); *see also Chen Zhou Chai* v. *Carroll,* 48 F.3d 1331, 1338-39 (4th Cir. 1995) (no private right of action to enforce executive order unless issued pursuant to a statutory mandate or delegation by Congress).

[13] *Nat'l Mining Ass'n* v. *United Steel Workers,* 985 F.3d 1309, 1326-27 (11th Cir. 2021) (holding that E.O. 12866 and E.O. 13563 specifically are not judicially enforceable); *Miller* v. *Garland,* 674 F.Supp.3d 296, 307 (E.D. Va. 2023), *appeal dismissed,* No. 23-1604, 2024 WL 4973474 (4th Cir. July 30, 2024) (holding that E.O. 12866 is not judicial enforceable).

Chapter 75, or Chapter 75 equivalent, procedures for post-appointment misconduct.[14] OPM estimates that approximately 50 percent, or 1,226, of these Chapter 75, or Chapter 75 equivalent, removal actions presently taken by agencies could be referred to OPM for suitability actions instead. Some commenters questioned OPM's estimate or speculated whether additional employees would be subject to suitability determinations and actions, while others noted that the net estimated savings could increase or decrease depending on the accuracy of this estimate and portrayed the estimate as arbitrary. See Comments 156, 533, and 1393 for examples. This rule does not change the types of positions subject to suitability determinations and actions. Positions subject to suitability determinations and actions will continue to be those in the competitive service, in the excepted service where the incumbent can be noncompetitively converted to the competitive service, or a career appointment to a position in the SES. As such, OPM disagrees with commenters portraying the estimate as illogical or arbitrary. Moreover, the commenters appear to fail to appreciate that OPM is providing only an estimate to demonstrate that its rule provides an opportunity for cost savings. OPM acknowledges that the extent to which agencies adopt the opportunity to refer cases to OPM for removal under suitability will ultimately determine the amount of cost savings realized. If a higher percentage of removals move from being taken under Chapter 75 to being taken under suitability, the cost savings will increase. If a lower percentage of removals move from being taken under Chapter 75 to being taken under suitability, the cost savings will decrease. The estimate serves simply to demonstrate the magnitude of potential savings. OPM also believes that because Chapter 75, or Chapter 75 equivalent, removals generally involve such serious conduct that the individual would fairly likely also be unsuitable, it is possible that the estimate of 50% is conservative. OPM believes,

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[14] This data comes from OPM's Enterprise Human Resources Integration Program's (EHRI) Data Warehouse and is analyzed using nature of action codes for terminations to identify Chapter 75 removals for misconduct. Certain data from EHRI is available to the public in summarized form on Federal Workforce Data, accessible at https://data.opm.gov/. However, complete raw data from EHRI is not available due to concerns about identifying employees at the individual level.

therefore, that estimating 50% of employees subject to Chapter 75, or Chapter 75 equivalent, removals would be individuals who were also subject to suitability is fair and fully logical.

Another commenter who took issue with OPM's estimates of potential increased workload for OPM referenced a number of potential suitability actions that were not substantiated by any source and also suggested, without any basis, that each suitability case be required to be reviewed by three suitability staff members. See Comment 462. OPM is not adjusting its cost estimate based on these comments. The average number of collective hours for supervisory and HR personnel to take a Chapter 75 action is 600 hours. The cost analysis assumes an average salary rate of Federal supervisors and senior HR personnel performing this work at the 2026 rate for a GS-15, step 5, from the Washington, DC, locality pay table ($191,850 annual locality rate and $91.93 hourly locality rate). OPM received some comments questioning the use of the Washington, DC locality for personnel performing these functions. See Comment 533. Commenters noted that Federal employees are stationed across the country. OPM acknowledges that some personnel performing these functions may be outside of the Washington, DC locality; however, at present most Federal agencies are headquartered in the Washington, DC locality. These actions require several layers of approval that most often involve personnel at the agency headquarters. OPM assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of $183.86. While a portion of the 600 hours would still fall to the agency to establish a fulsome referral to OPM for a suitability action, OPM anticipates that referring the matter to OPM for a suitability action would relieve the agencies of at least thirty percent of the work involved in taking a Chapter 75 action, prior to appeals. This implies total savings of $33,095 per case and a total annual savings of $40.6 million.

Some commenters questioned the assumption that agencies would save at least thirty percent of the work involved in taking a Chapter 75 action, prior to appeals. See Comment 156 for an example. Agencies will still be required to develop and prepare the evidence of conduct

believed to warrant an unfavorable suitability determination prior to making a referral to OPM. Once a referral is made, the agencies will be relieved of the requirements, for example, to draft, review, and approve a proposed action, review and respond to any response by the employee, and draft, review, and approve a final decision. Based on OPM's own experience, OPM believes that the labor hours required for these activities represent at least thirty percent, or approximately 180 hours, of the total estimated hours for agencies to process a Chapter 75 action, prior to appeals.

Cost Increase to Handle Agency Post-Appointment Conduct Referrals: OPM would likely need to increase the number of resources to handle the new workload from agencies' referrals for suitability determinations and actions on employees based on post-appointment conduct. Even if some agency referrals for determinations and actions on employees for post-appointment conduct do not result in a suitability action, OPM estimates it would likely need eighteen additional adjudicators performing the work at the 2026 rate for a GS-13, step 5, from the Pittsburgh, PA locality pay table ($124,720 annual locality rate and $59.76 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 $119.52 and a collective annual cost of $4.5 million for all eighteen additional employees. OPM received comments questioning the grade level and locality assumptions used for this estimate, as well as questioning whether 18 additional staff would be sufficient to handle the increased workload. See Comments 533, 004, and 938 for examples. OPM used the GS-13 grade level for its assumption because this is the grade level of OPM suitability adjudications staff currently processing suitability actions. OPM used the Pittsburgh, PA locality for its analysis because that is the primary location of OPM's suitability adjudications staff. OPM is not altering these assumptions in its analysis. In calculating the number of additional staff needed, OPM used information on the amount of labor hours needed by staff to process a suitability action along with the estimated increased number of suitability actions to determine the equivalent full-time-equivalent staff it would need. OPM appreciates the recommendations

in Comment 938 to consider adding staff at a lower grade level, where possible, and will take this into consideration in refining its staffing plan to accommodate this new workload. OPM agrees with comments that the rate of agencies' adoption of the opportunity to submit post-appointment conduct suitability referrals could alter OPM's staffing needs. See, e.g., Comment 473. OPM does not, however, believe those concerns warrant instead delegating authority for post-appointment conduct suitability actions to agencies, as recommended by commenters. As previously explained in section III.B.2.c, Agency Input in Post-Appointment Conduct Actions, OPM believes that retaining this authority will allow for the most impartial process that protects individuals and ensures consistency in implementation across the Federal Government.

Taking into account both decreases and increases in levels of effort associated with the proposed rule, on balance OPM anticipates one-time implementation costs of approximately $3.1 million and recurring annual net cost savings governmentwide of approximately $36.1 million.

IV.D Benefits

The expected benefits of the rule are that OPM and agencies will be able to more efficiently and appropriately vet individuals for risk to the integrity and efficiency of the service. More expeditious removal of individuals found to negatively impact the integrity or efficiency of the service will reduce risks posed by such individuals as well as costs to agencies, allowing them to spend resources on mission services rather than administrative processes. In addition, providing the option for a suitability action for post-employment conduct when an employee has engaged in serious misconduct instances will achieve better risk protection than Chapter 75 procedures because it will allow the Government to pursue debarment. Debarments prevent individuals from immediately re-entering Federal service in a competitive service position with another agency, holding individuals more accountable for misconduct and preventing them from avoiding consequences by simply resigning or transferring agencies. Post-appointment conduct suitability actions will provide better protection of the integrity and efficiency of the service than is currently afforded under Chapter 75 procedures and adds rigor to vetting processes.

In addition, OPM believes that the final rule will reinforce Merit Systems Principles, in at least two ways. *First*, the rule change creates a new § 731.102(c) which expressly states that suitability determinations and actions must be applied consistent with the Merit Systems Principles set forth in 5 U.S.C. 2301 and the prohibition against unlawful personnel practices in 5 U.S.C. 2302(b). *Second*, the rule change reinforces Merit Systems Principle 4, "[a]ll employees should maintain high standards of integrity, conduct, and concern for the public interest," by providing a mechanism to swiftly remove employees who fail to uphold baseline standards of integrity, conduct, and concern for the public interest.

IV.E Alternatives

OPM must comply with the direction of E.O. 14210 and the Presidential Memorandum, as described in section II, Authority and Background, to establish specific suitability factors and to take suitability actions on employees when warranted and referred by agencies based on post-appointment conduct. OPM could have delegated to agencies the authority to take suitability actions against employees for post-appointment conduct. However, at this time, OPM believes reserving jurisdiction for these actions for itself will provide for governmentwide consistency in decision-making. OPM may at a later time determine to delegate this authority to the heads of agencies. See discussion in section III.B.2.c., Agency Input in Post-Appointment Conduct Actions.

For the updates to the suitability factors, OPM could have elected to establish each new criterion from E.O. 14210 as its own separate suitability factor under 5 CFR 731.202(b). The current suitability factors employ a hierarchical approach where the factors establish broad categories of conduct or behavior where discrete examples of such conduct may then fit within the general categories. For example, the criminal conduct factor establishes a broad category under which a wide range of criminal behavior may be considered, regardless of whether the conduct resulted in an arrest or conviction. Therefore, where appropriate, OPM believes adding some of the new suitability criteria required by E.O. 14210 as examples of conduct under an

existing factor will be more intuitive and easier for agency suitability staff to apply in making suitability determinations.

Many commenters recommended that OPM work to improve training for Federal supervisors and HR offices on using Chapter 75 processes and suggested that doing so would eliminate the need to introduce post-appointment conduct suitability actions. See Comment 1042 for an example. OPM disagrees that such training would deliver the same benefits as gained from this rule. As noted, post-appointment conduct suitability actions provide for better protection against risk by allowing the Government to complete actions even after an individual resigns or withdraws an application and also prevents immediate re-entry through debarment. Additional training on Chapter 75 actions would not close these gaps or deliver the same benefits as this rule.

V. Severability

If any of the provisions of this final rule is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances. For example, if a court were to invalidate any portions of this final rule revising the suitability factors, the other portions of the rule—including the portions providing that OPM may make suitability determinations for post-appointment conduct—would independently remain workable and valuable.

VI. Regulatory Compliance

VI.A 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.

This rule is considered an Executive Order 14192 deregulatory action. We estimate that this rule generates $30.3 million in annualized cost savings at a 7% discount rate, discounted relative to year 2024, over a perpetual time horizon.

VI.B 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 affects suitability and fitness regulations which apply primarily to Federal agencies and employees. Although some Federal contractors may be small entities, the nature of the changes in this rulemaking are not expected to result in economic impacts to non-agency entities.

VI.C 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 E.O. 13132, it is determined that this rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

VI.D Civil Justice Reform

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

VI.E 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.

VI.F 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.

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. Data gathered through these information collections fall under the system of records notice (SORN) Personnel Vetting Records System, DUSDI 02-DoD (83 FR 52420 and 83 FR 52317).

OPM’s system of records titled CENTRAL-9, Personnel Investigations Records (81 FR 70191), previously covered both background investigation records and suitability adjudication records. OPM has transferred the background investigation mission and associated records to DCSA (now under DUSDI 02-DoD). Because the personnel investigations records are no longer maintained in OPM/CENTRAL-9, OPM is renaming CENTRAL-9 “OPM Suitability Adjudications Files” and is modifying it to reflect the changes in this rulemaking. (See 91 FR 38737 for more information.)

In addition, individual agencies should each have a SORN that covers the agency adjudication and referral records. Agencies should evaluate whether the agency-specific SORNs must be updated to permit sharing information with OPM for suitability referrals, OPM suitability adjudications, debarment consideration, reporting to the Central Verification System or successor systems, and any related appeal.

List of Subjects in 5 CFR Part 731

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

Signing Statement

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.

Office of Personnel Management

Jerson Matias

Federal Register Liaison

Accordingly, for the reasons stated in the preamble, OPM amends part 731 of title 5, Code of Federal Regulations as follows:

PART 731—SUITABILITY AND FITNESS

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

Authority: 5 U.S.C. 1302, 2301, 2302, 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. E.O. 14210, 90 FR 9669. Presidential Memorandum of January 31, 2014, 3 CFR, 2014 Comp., p. 340. Presidential Memorandum of March 20, 2025, 90 FR 13683. 5 CFR parts 1, 2, 5, and 6.

Subpart A—Scope

2. Amend § 731.101 by

a. Revising the section heading; and

b. In paragraph (a), revising the definitions for “Competitive service or career Senior Executive Service” and “Core duty”.

The revisions read as follows:

§ 731.101 Definitions and purpose.

(a) * * *

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

* * * * *

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

* * * * *

3. Amend § 731.102 by adding paragraph (c) to read as follows:

§ 731.102 Implementation

* * * * *

(c) Suitability determinations and actions under this part must be applied consistent with both the Merit Systems Principles set forth in 5 U.S.C. 2301 and with 5 U.S.C. 2302(b), which sets forth prohibited personnel practices.

4. Amend § 731.103 by:

a. Revising paragraph (a);

b. Redesignating paragraphs (b) through (f) as paragraphs (c) through (g);

c. Adding new paragraph (b); and

d. Revising newly redesignated paragraphs (c) and (g).

The addition and revisions read as follows:

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

(a) Subject to the limitations and requirements of paragraphs (c), (e), and (g) of this section, OPM delegates to the head of an agency authority for making a suitability determination and taking a suitability action (including limited, agency-specific debarments under § 731.205) in a case involving an *applicant* or *appointee*. In a case involving an *appointee* where the individual has converted to an *employee* in a prior competitive service or career Senior Executive Service appointment, agency heads must consider the individual to be an *employee*.

(b) In a case involving an *employee*, the head of the employee's employing agency, or designee, may, in its sole and exclusive discretion, make a proper and sufficient referral to OPM, as specified in OPM issuances as described in § 731.102(b), if the employee's conduct appears to warrant an unfavorable suitability determination.

(c) When an agency, acting under delegated authority from OPM, determines that a governmentwide debarment by OPM under § 731.204(a) may be an appropriate action, whether

on an applicant, appointee, or employee, it must refer the case to OPM for debarment consideration. An agency must make a referral, but only after sufficient resolution of the suitability issue(s) to determine if a governmentwide debarment appears warranted.

* * * * *

(g) OPM retains sole jurisdiction to make a final suitability determination and take an action under this part in any case where there is evidence that there has been a material, intentional false statement, or deception or fraud, in examination or appointment. OPM also retains sole jurisdiction to make a final suitability determination and take an action under this part in any case when there is evidence that there has been knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force. An agency must refer these cases to OPM for suitability determinations and suitability actions under this authority. OPM also retains sole jurisdiction to take a suitability action under this part in any case involving an employee for post-appointment conduct. Although no prior approval is needed, notification to OPM is required if the agency wants to take, or has taken, action under its own authority (such as 5 CFR part 359 or 752) in cases involving conduct fitting within any of these factors or involving an employee for post-appointment conduct. In addition, except as limited by § 731.105(d), OPM may, in its discretion, exercise its jurisdiction under this part in any case it deems necessary regardless of whether the agency may adjudicate under another authority.

5. Amend § 731.104 by revising paragraph (c)(2)(i) to read as follows:

§ 731.104 Investigation and reciprocity requirements

* * * * *

(c) * * *

(2) * * *

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

* * * * *

6. Revise § 731.105 to read as follows:

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

(a) OPM or an agency acting under delegated authority may take a suitability action in connection with any application for, or appointment to, the competitive service or career Senior Executive Service. In the case of an appointee, OPM or an agency may consider conduct occurring prior to the appointment or occurring post-appointment to serve as the basis for the action.

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

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

(b) OPM may take a suitability action under this part against an *applicant* or *appointee* based on the criteria in § 731.202. When the basis for the action is post-appointment conduct, OPM may take a suitability action against an appointee only when there is a proper and sufficient referral by the head of the appointee's employing agency, or designee.

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

(d) Only OPM may take a suitability action under this part against an *employee* in the competitive service or career Senior Executive Service based on the criteria of § 731.202. When the basis for the action is post-appointment conduct, OPM may take a suitability action against

an employee only when there is a proper and sufficient referral by the head of the employee's employing agency, or designee.

(e) An agency may not take a suitability action against an *employee* in the competitive service or career Senior Executive Service. If the agency has information that an *employee*'s conduct warrants an unfavorable suitability determination, the head of the agency, or designee, may make a proper and sufficient referral to OPM, as specified in OPM issuances as described in § 731.102(b). OPM will review the referral and may take a suitability action if warranted under this part.

(f) Nothing in this part precludes an agency from taking an adverse action under the procedures and standards of part 752 of this chapter, or from terminating a probationer under the procedures of part 11 or part 359 of this chapter or under agency specific authorities. An agency must notify OPM to the extent required in § 731.103(e) and (g) if it wants to take, or has taken, action under these authorities. OPM retains the right to take a suitability action even in those cases where the agency makes an adjudicative determination under another authority.

7. Amend § 731.106 by revising paragraphs (d)(1) and (f) to read as follows:

§ 731.106 Designation of public trust positions and investigative requirements.

* * * * *

(d) * * *

(1) Individuals occupying positions of employment subject to investigation are also subject to continuous vetting through periodic checks of their background at any time in accordance with standards issued by OPM. Checks must be conducted at regular intervals, based on the type of check and with consideration of position risk and sensitivity. The nature of a continuous vetting check, and any additional requirements and parameters, to include requirements for agencies to consider information related to the individual's conduct available from internal agency sources, are specified in supplemental issuances as described in § 731.102(b). An individual may be subjected to continuous vetting only if they have signed an

authorization for release of information permitting a disclosure for continuous vetting purposes. Continuous vetting for an individual in a public trust position satisfies the requirement for a periodic reinvestigation of an individual in a public trust position as directed in E.O. 13488, as amended. An agency must ensure that each continuous vetting check is conducted and a determination made regarding continued employment. If an agency makes an unfavorable determination based on information from a continuous vetting check on an appointee, the agency may take a suitability action subject to the limitations of § 731.103(c), (e), and (g). If post-appointment conduct discovered in a continuous vetting check on an employee appears to warrant an unfavorable suitability determination, the agency may, in its sole and exclusive discretion, refer the matter to OPM for review and possible suitability action.

* * * * *

(f) *Completed investigations.* An investigation or continuous vetting check under paragraphs (c), (d), and (e) of this section supports a determination by the employing agency of whether the findings of the investigation may require referral to OPM for a potential suitability action or would justify an action by the agency under this part or under another applicable authority, such as part 359 or 752 of this chapter. Sections 731.103 and 731.105 address whether an agency may take an action under this part and whether the agency must refer the matter to OPM for a suitability action including debarment consideration.

* * * * *

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

8. In § 731.202, revise and republish paragraph (b) and add paragraph (d) to read as follows:

§ 731.202 Criteria for making suitability and fitness determinations.

* * * * *

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

(1) Misconduct or negligence in employment. This factor includes:

(i) Theft or misuse of Government resources and equipment, or negligent loss of material Government resources and equipment during employment with, or on behalf of, the Federal Government or a state, territorial, or local government; and

(ii) Refusal to certify compliance with any applicable non-disclosure obligations consistent with 5 U.S.C. 2302(b)(13) and failure to adhere to those compliance obligations in the course of Federal employment.

(2) Criminal conduct.

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

(4) Dishonest conduct.

(5) Failure to comply with financial obligations or generally applicable civil legal obligations, such as timely filing of tax returns.

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

(7) Illegal use of narcotics, drugs, or other controlled substances, without evidence of rehabilitation.

(8) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force.

(9) Violent conduct.

(10) Any statutory or regulatory bar or any other provision of law, regulation, Executive order, or other binding legal authority that prevents the lawful employment of the individual in the position in question, such as citizenship or nationality requirements.

* * * * *

(d) All persons responsible for suitability screening, review, or making suitability determinations under this part must be trained in accordance with national training standards for suitability adjudicators issued in supplemental issuances, as described in § 731.102(b).

9. Amend § 731.203 by revising paragraphs (d), (e), (f), and (g) to read as follows:

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

* * * * *

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

(e) In taking a suitability action against an applicant, appointee, or employee in the competitive service or career Senior Executive Service pursuant to § 731.105(a) and (d) and in accordance with 5 CFR 5.3, OPM may require an agency to execute the action.

(f) OPM may cancel any reinstatement eligibility obtained as a result of a determination based on the criteria of § 731.202.

(g) An action to remove an appointee or employee *for suitability reasons* under this part is not an action under 5 CFR part 11, 359, or 752. Where conduct covered by this part may also form the basis for an action under 5 CFR part 11, 359, or 752, an agency may take the action

under 5 CFR part 11, 359, or 752, as appropriate, instead of under this part. An agency must notify OPM to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities. OPM reserves the right to also take an action under this part.

* * * * *

10. Revise § 731.206 to read as follows:

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

An agency must report to the Central Verification System or its successor the level or nature, result, and completion date of each background investigation, reinvestigation, or enrollment in Continuous Vetting; each agency decision based on such investigation, reinvestigation, or Continuous Vetting; and any personnel action, to include suitability actions, taken based on such investigation, reinvestigation, or Continuous Vetting, as required in supplemental guidance. An agency must also report to the Central Verification System or its successor any suitability determination and action taken based on an internal agency investigation, such as a suitability action taken as a result of an Employee and Labor Relations investigation.

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

11. Revise § 731.301 to read as follows:

§ 731.301 Scope.

This subpart covers OPM-initiated suitability actions against an *applicant, appointee,* or *employee* in the competitive service or career Senior Executive Service and OPM suitability actions against an appointee or employee in the competitive service or career Senior Executive Service for post-appointment conduct when an agency has referred the matter to OPM to take a suitability action.

12. Revise § 731.304 to read as follows:

§ 731.304 Decision.

(a) The OPM Director, or designee, will make the final decision as to whether to take a suitability action. In cases where the Director delegates decision-making authority to subordinate employees, there must be appropriate independence between the OPM employee authorized to propose the suitability action and the employee authorized to make the final decision regarding such suitability action. The OPM official authorized to make the final decision may not consult with, receive advice from, or communicate with the OPM employee who proposed the suitability action concerning the merits of the proposed action, except on notice to the respondent and as part of the record. The OPM official authorized to make the final decision is also prohibited from ex parte communications consistent with the requirements of 5 U.S.C. 557(d).

(b) If the final decision is that a suitability action shall be taken, the OPM Director or designee will instruct the agency to remove the individual or process a different suitability action. The decision regarding the final suitability action must be in writing, be dated, and inform the respondent of the reasons for the decision and that an unfavorable decision may be appealed in accordance with subpart E of this part. If the decision requires removal, the employing agency must remove the appointee or employee from the rolls within 5 workdays of receipt of OPM's final decision.

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

13. Revise § 731.404 to read as follows:

§ 731.404 Decision.

(a) The agency head, or designee, makes the final decision as to whether to take a suitability action. In cases where the agency head delegates decision-making authority to subordinate employees, there must be appropriate independence between the employee authorized to propose the suitability action and the employee authorized to make the final

decision regarding such suitability action. The official authorized to make the final decision may not consult with, receive advice from, or communicate with the employee who proposed the suitability action concerning the merits of the proposed action, except on notice to the respondent and as part of the record. The official authorized to make the final decision is also prohibited from ex parte communications consistent with the requirements of 5 U.S.C. 557(d).

(b) The decision regarding the final action must be in writing, be dated, and inform the respondent of the reasons for the decision and that an unfavorable decision may be appealed in accordance with subpart E of this part. If the decision requires removal, the employing agency must remove the appointee from the rolls within 5 workdays of the agency's decision.

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