

Proposed Rules

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 731

RIN 3206-AC19

Suitability

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is proposing changes to the rule on personnel suitability which OPM previously issued as a proposed rule for comments. OPM has received and considered public comments and is now publishing for comment proposed changes. The proposed rule addresses many of the concerns expressed, incorporates many of the suggestions received, and makes additional changes because of policy revisions and the abolishment of the Federal Personnel Manual (FPM). OPM will issue final regulations after review of the comments received on this proposed rule.

DATES: Comments must be submitted on or before March 1, 1999.

ADDRESSES: Send written comments to: Richard A. Ferris, Associate Director, Investigations Service, room 5416, U.S. Office of Personnel Management, 1900 E Street, NW, Washington, DC 20415-4000, fax: 202-606-2390, e-mail: raferris@opm.gov.

FOR FURTHER INFORMATION CONTACT: Thomas DelPozzo, (724) 794-5612.

SUPPLEMENTARY INFORMATION: OPM promulgated the proposed final suitability regulations with a request for comments in the **Federal Register** (61 FR 394, Jan. 5, 1996). Comments were received from 19 sources, including Federal agencies, individuals, and public interest organizations. Because of changes made in certain parts of these rules, we are seeking additional comments. Those who responded to the January 5, 1996, publication need not submit their comments again. Those

responses will continue to be considered. Additionally, when part 731 was previously published, proposed changes to parts 732 and 736 were published at the same time. Those parts are still under consideration and individuals who commented on those parts need not respond to this publication. Those comments are still being considered. The following summarizes the principal comments and suggestions received and proposed actions to be taken, as well as information added because of the abolishment of the FPM or changes made because of policy revisions.

Part 731

Organization

Some subparts and sections were moved, added or removed for clarification purposes (only one section—§ 731.203—Due Process—was removed, but the information was moved to § 731.103), as follows:

Subpart A—Scope

Sec.

- 731.101 Purpose.
- 731.102 Implementation.
- 731.103 Delegation to agencies.
- 731.104 Appointments subject to investigation.
- 731.105 Jurisdiction.
- 731.106 Designation of public trust positions and investigative requirements.

Subpart B—Suitability Determinations

- 731.201 Standard.
- 731.202 Criteria.
- 731.203 Actions by OPM and other agencies.
- 731.204 Debarment by OPM.
- 731.205 Debarment by agencies.

Subpart C—Suitability Action Procedures

- 731.301 Scope.
- 731.302 Notice of proposed action.
- 731.303 Answer.
- 731.304 Decision.

Subpart D—Appeal to the Merit Systems Protection Board

- 731.401 Appeal to the Merit Systems Protection Board.

Subpart E—Savings Provision

- 731.601 Savings provision.

Section 731.101 Purpose

Agencies asked a number of questions about when to apply the regulations (*i.e.*, Excepted Service employees with or without intentional falsification, non-probationary employees, reinvestigated employees, employees with investigations initiated or completed

after the first year). No changes were made in this section (§ 731.101 currently explains part 731 is used to make suitability determinations for employment in positions in the competitive service or for career appointment in the Senior Executive Service). However, clarifications were added at various other points (*e.g.*, §§ 731.104 and 731.105 address investigation time frames, and § 731.106 addresses reinvestigations).

Language in the former Basic Federal Personnel Manual also stated that “Heads of agencies, at their discretion, may apply all or part of these requirements (in part 731) for employment or continued employment in positions outside the competitive service.” This clarification will be included in supplemental guidance.

In response to agencies’ requests, some definitions were added. Other definitions will be included in supplemental guidance.

Section 731.102 Implementation

With the increased delegation of responsibilities to agencies, clarification was added to point out the consequences of not carrying out responsibilities according to OPM regulations (*i.e.*, revocation of delegation).

Section 731.103 Delegation to Agencies

One commenter felt the regulations should incorporate the guidance an agency will need to implement 5 CFR part 731, rather than issuing separate guidance. Because the CFR is a general body of regulatory laws governing practices and procedures, the detailed guidance/instructions will be issued separately. This guidance will allow agencies flexibility in carrying out the regulations and opportunity to develop their own internal procedures. OPM intends to issue this supplemental guidance as soon as possible after the regulations are finalized.

Comment was received from agencies regarding the hardship that delegation of applicant and appointee suitability adjudication authority would create from a staffing/training standpoint. Several wondered if they could redelegate or contract out their suitability adjudication responsibility. Although training may be needed, we believe the staffing implications for

agencies will be negligible. OPM will continue to adjudicate material falsification cases, and debarment cases when referred to OPM by an agency, which should encompass most of the adverse adjudication workload. The major benefit of delegating applicant suitability authority to agencies is that they no longer will have to refer all competitive examining applications with admitted suitability issues to OPM for suitability review.

One agency indicated contracting out adjudication decisions is currently prohibited. With OPM's Investigations Service privatization effort, OPM has contracted much of its adjudicative case processing, with close OPM oversight. However, OPM has retained all decision making responsibility, which it views as an inherently governmental function. Any agency contracting of OPM delegated suitability adjudication would be subject to OPM approval to ensure the agency retains the responsibility for all adjudicative decisions and develops a sufficient oversight program.

Agencies' delegated suitability authority under part 731 procedures is limited to applicant and appointee cases. Only OPM will adjudicate employee cases under part 731 procedures, since OPM is retaining authority for adjudicating material falsification cases, and material falsification is the most commonly used suitability factor in employee cases. An agency will have to use another authority such as part 752, if appropriate, to take action against an employee for reasons that could also form the basis for a part 731 suitability action. Agencies may also take action under other authorities, if appropriate, in appointee cases. Allowing agencies to use existing authorities, as appropriate, will provide them with more flexibility—i.e., part 315 is a more expedited procedure, and part 752 allows actions other than removal (although no debarment actions may be included using these authorities).

A few commenters opposed OPM's decision to retain jurisdiction over falsification cases; they felt it was cumbersome and not necessary. It was argued agencies are in a better position to adjudicate falsification cases involving their employees than OPM, since OPM is removed from and not familiar with the employee. However, it is precisely for this reason that OPM has decided to retain this authority. OPM will continue to adjudicate falsification cases across agency lines, and then take the appropriate action (removal and extended debarment from all competitive service positions) when an appointment is obtained fraudulently.

This also is consistent with OPM's role in protecting the Merit System and reflects the position that performance in a position obtained through fraud is irrelevant.

In agreement with agency comments that, because of law or regulation they could not be delegated, OPM also retained jurisdiction in "refusal to furnish testimony" cases, and those cases involving 30 percent or more Compensable Disability Preference veterans.

In § 731.103(b) agencies are given the option of referring a case with suitability issues to OPM when a general, across agency lines debarment appears warranted, or adjudicating the case themselves. OPM will require that agencies conduct a sufficient level of investigation to resolve potentially serious suitability issues and determine if OPM debarment is warranted. The agency will need to coordinate with OPM before referring any cases. OPM will issue additional guidance to agencies to show what issues would warrant referral, i.e., support a general debarment or a nexus debarment from general classifications of jobs across agency lines (e.g., all law enforcement positions). OPM adjudication will be at OPM's discretion.

To respond to concerns about when a suitability determination is needed, § 731.103(d) was added. The guidance is consistent with OPM Investigations Service's Federal Investigations Notice 95-1, issued January 19, 1995, and available from OPM's Investigations Service, which instructed agencies to determine qualifications and whether the person was in reach of selection before considering suitability matters.

The section previously entitled "Due Process" (§ 731.203) was included in this section as paragraph (e) for clarification of delegated responsibilities.

Some commenters wanted the regulations to authorize consideration of confidential information when making a suitability determination. Clarification was added to § 731.103(e)(3) explaining the proper use of confidential information in a suitability decision, i.e., the confidential information can be used as lead information and in interrogatories if the identity of the source is not compromised in any way. Fairness requires that only non-confidential information be used as a basis for an adverse action. Additionally, confidential information cannot normally be disclosed in administrative or judicial forums.

Commenters wanted to limit the appeal rights given to probationary employees under part 731. If the agency

takes an action under part 731, it must follow the procedures and provide the appeal rights stated in this part. Part 315, covering probationers, contains more limited appeal rights and may also be used.

Sections 731.104 Appointments Subject to Investigation, and 731.105 Jurisdiction

Commenters suggested clarifying jurisdiction. The language in the previous regulation dealing with jurisdiction discussed appointments "subject to investigation," which was confusing, and created problems for agencies. Commenters felt the 1 year subject to investigation requirement was the time frame for initiating and completing investigations. The 1 year period is used to determine jurisdiction (OPM or the employing agency) and is not an investigative restriction. We made revisions to part 731 to clarify this topic, adding definitions under § 731.101(b) and using separate sections to differentiate between "subject to investigation" (§ 731.104) and "jurisdiction" (§ 731.105).

Section 731.106 Designation of Public Trust Positions and Investigative Requirements

Commenters, fearing inconsistencies between agencies, recommended retaining definitions for risk level designations. OPM has done so, and will also issue a model agencies may use to determine risk in supplemental guidance.

A commenter recommended adding to the definition of "high risk public trust" any position that regularly involves access to information concerning law enforcement, including criminal investigations. "Access to sensitive but unclassified information" and "law enforcement duties" are already included in the definition; agencies may also use the "other duties demanding a high degree of public trust" category to meet their individual needs.

Some agencies felt they should be given authority to determine the level of investigation needed for a particular position. OPM will provide supplemental guidance which will include minimum standards for government-wide consistency but allow some flexibility regarding investigative requirements. Agencies will need to consider both the level of public trust and position sensitivity to ensure the appropriate level of investigation is conducted as required by parts 731 and 732.

OPM's reinvestigation requirement for public trust positions was eliminated from the published proposed

regulations. Commenters opposed this removal, believing reinvestigations to be a necessary and valuable tool for their use in ensuring the public trust. While OPM finds no explicit statutory authority on which to base an OPM requirement that agencies conduct public trust reinvestigations, agencies may rely on other appropriate authority to require that certain positions be subject to periodic reinvestigations. We reference some other authorities in this section. Agencies may also promulgate their own regulations to require reinvestigations for certain public trust positions if they have no other existing authority.

Commenters requested clarification regarding reinvestigation requirements when a person moves from a lower to higher risk position. This was done in § 731.106(e).

Section 731.201 Standard

Proposed regulation had added "other appropriate actions" as being possible, in addition to removals, in suitability cases. One agency wanted "other appropriate actions" identified. OPM decided to remove this wording. OPM will be making debarment and removal decisions only, and if agencies want to take other actions, such as a suspension, there are other authorities they can use when appropriate (i.e., part 752).

The phrase "protect the integrity * * * of the service" was added. This clarifies that an important facet of the suitability standard is the integrity of the Merit System and fair and open competition for positions.

A commenter felt § 731.201 requires an adverse suitability determination on every unsuccessful candidate and asked if "federal employment" was used in the narrow or broadest sense. We added clarifying and limiting language to subpart A, particularly at § 731.103(d), to address this concern. The "Delegation Examining Operations Handbook" lists a number of reasons an eligible may be eliminated from consideration. Suitability is only one of these reasons. The Handbook also recommends suitability review be done in the hiring phase. OPM will be issuing further clarification regarding the suitability adjudication process in supplemental guidance.

Section 731.202 Criteria

Language was deleted from the general criteria of § 731.202(a) and from the suitability factors in § 731.202(b)(1) and (2). Nexus language is contained in § 731.201.

Language was returned to § 731.202(c) to give an adjudicative agency

discretion as to when to apply the additional considerations.

A commenter felt the additional consideration "circumstances surrounding the conduct" covers the consideration of "societal conditions" which could then be removed. This was not changed because the factors address two separate areas of consideration that could impact the final decision. Our supplemental guidance will elaborate on all the additional considerations.

Section 731.203 Actions by OPM and Other Agencies

§ 731.203(a) was revised to eliminate confusion over "subject to investigation" language and to be consistent with other similar revisions.

OPM's authority to cancel reinstatement eligibility was added in § 731.203(b) to ensure OPM's authority to do so is clear and contained in regulation and to further distinguish available OPM actions from agency actions.

Wording was added to § 731.203(c) so agencies will understand they may use other authorities in lieu of an action under part 731.

We will clarify, in supplemental guidance, the procedures an agency should follow when releasing a copy of the "materials relied upon" referred to in § 731.203(e) when the action is based on an OPM investigation.

Section 731.204 Debarment by OPM

OPM has revised the regulations and delegated authority to agencies for limited debarments. This section distinguishes OPM's debarment authority and procedures from those delegated to agencies, which are addressed in § 731.205.

Section 731.204(b) was revised to reflect OPM's authority to take a subsequent debarment action after expiration of a prior period of debarment, but eliminates the requirement that OPM redetermine every debarred individual's suitability. This change also takes into consideration that, with delegated applicant suitability authority, agencies can adjudicate applicant cases when they have been previously debarred by OPM and the debarment has expired. The agency may favorably adjudicate at that point, refer for OPM review, or take their own debarment action. Unless new issues are present, a new general debarment action by OPM would normally not be warranted. The agency will be alerted to prior OPM debarments if reported by the subject on the OF 306 and/or SF 85P/86, or during the agency's Suitability/Security Investigations Index (SII) check, and

may use its delegated suitability authority to determine if the person is suitable for the specific position sought.

Section 731.205 Debarment by Agencies

Since agencies would be making agency nexus adverse suitability decisions, OPM also delegates to them authority to take a limited debarment action, for a period not to exceed one year, and only for positions within that agency. This will prevent a person found unsuitable by an agency from immediately refiling an application for the same or other positions in the agency and ensure the agency does not have to make multiple suitability determinations in connection with the same individual.

Since agency debarment authority is limited to applicants or appointees under part 731, the lack of agency authority to debar employees should prompt agencies to request investigations and adjudicate on a more timely basis when a person is first appointed. Also, if an employee is removed by an agency under part 752 and reapplies for a position in the agency, OPM or the agency may adjudicate suitability under part 731 as a separate action.

The agency will be responsible for taking appropriate action if it determines a person has applied or been appointed while under agency debarment. "Appropriate actions" could include rating additional applications ineligible, removing an appointee, or referring the matter to OPM for general debarment.

Section 731.302 Notice of Proposed Action

A commenter said the notice fails to advise the individual of his constitutional right to representation. The regulation does not prevent an individual from retaining counsel to assist in preparing a response to a proposed action if so desired, and specifically mentions representation in § 731.303. Also, if a person appeals a suitability determination to MSPB, 5 CFR 1201.31 states the appellant may be represented in any matter related to the appeal.

Commenters questioned the efficiency of the requirement that the notice of proposed action be mailed to both the duty station and last known address. We have changed the wording to allow OPM or the agency to decide the most effective and efficient method of delivery, to include mailings to both locations, if necessary, to ensure a timely delivery.

Section 731.302(c) was added to show a requirement specific to OPM.

Section 731.303 Answer

Because only OPM will be adjudicating employee cases under part 731 procedures (where an opportunity for an oral response is provided), we removed reference to the agency.

Section 731.304 Decision

Commenters questioned the need to retain an appointee or employee 30 days after OPM directs removal. We have eliminated this requirement. We now require that the agency effect OPM's directed removal action within 5 work days of receipt of our decision to allow agencies time to process the removal action.

Section 731.401 Appeal to the Merit Systems Protection Board

A provision was added regarding MSPB modification of debarments. In cases where the MSPB does not sustain all the reasons for an OPM or agency debarment action and, as a result, determines the length of debarment may be inappropriate, the case would be returned to OPM or the agency to determine the debarment length warranted for the issues sustained.

A commenter felt the agency option to either retain in a pay status pending appeal of an OPM directed removal, or remove, would be based on the level of agency support an appointee or employee enjoys, thereby creating two disparate classes. This concern is eliminated by our revision to § 731.304.

Reference to an OPM directed suspension was inappropriate here, and deleted, as discussed previously.

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

I certify that this rule will not have significant economic impact on a substantial number of small entities because it affects only Federal applicants, employees and agencies.

List of Subjects in 5 CFR Part 731

Administrative practice and procedure, Government employees.

Office of Personnel Management.

Janice R. Lachance,
Director.

Accordingly, the Office of Personnel Management proposes to amend 5 CFR part 731 as follows:

Part 731 is revised to read as follows:

PART 731—SUITABILITY

Subpart A—Scope

Sec.

731.101 Purpose.

731.102 Implementation.

731.103 Delegation to agencies.

731.104 Appointments subject to investigation.

731.105 Jurisdiction.

731.106 Designation of public trust positions and investigative requirements.

Subpart B—Suitability Determinations

731.201 Standard.

731.202 Criteria.

731.203 Actions by OPM and other agencies.

731.204 Debarment by OPM.

731.205 Debarment by agencies.

Subpart C—Suitability Action Procedures

731.301 Scope.

731.302 Notice of proposed action.

731.303 Answer.

731.304 Decision.

Subpart D—Appeal to the Merit Systems Protection Board

731.401 Appeal to the Merit Systems Protection Board.

Subpart E—Savings Provision

731.501 Savings provision.

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

Subpart A—Scope

§ 731.101 Purpose.

(a) The purpose of this part is to establish criteria and procedures for making determinations of suitability for employment in positions in the competitive service and for career appointment in the Senior Executive Service (hereinafter in this part, “competitive service”) pursuant to 5 U.S.C. 3301 and E.O. 10577 (3 CFR, 1954–1958 Comp., p. 218). Section 3301 of title 5, United States Code, directs consideration of “age, health, character, knowledge, and ability for the employment sought.” E.O. 10577 directs OPM to examine “suitability” for competitive Federal employment. This part concerns only determinations of “suitability” based on an individual's character or conduct that may impact the integrity or efficiency of the service. Determinations made under this part are distinct from determinations of eligibility for assignment to, or retention in, sensitive national security positions made under E.O. 10450 (3 CFR, 1949–1953 Comp., p. 936), E.O. 12968 or similar authorities.

(b) Definitions. In this part:

Applicant. A person being considered for employment.

Appointee. A person who has entered on duty and is in the first year of a subject to investigation appointment (as defined in § 731.104).

Employee. A person who has completed the first year of a subject to investigation appointment.

Material, intentional false statement is one that is capable of influencing, or has a natural tendency to affect, an official decision. The test for materiality thus does not rest on whether an agency actually relied on the false statement.

§ 731.102 Implementation.

(a) An investigation conducted for the purpose of determining suitability under this part may not be used for any other purpose except as provided in a Privacy Act system of records notice published by the agency conducting the investigation.

(b) Under OMB Circular No. A–130 Revised, issued February 8, 1996, the Director of OPM is to establish personnel security policies for Federal personnel associated with the design, operation, or use of Federal automated information systems. Agencies are to implement and maintain a program to ensure that adequate security is provided for all automated information systems. Agency programs should be consistent with government-wide policies and procedures issued by OPM. The Computer Security Act of 1987 (Pub. L. 100–235) provides additional requirements for Federal automated information systems.

(c) Policies, procedures, criteria, and guidance for the implementation of this part shall be set forth in issuances of the OPM. Agencies exercising authority under this part by delegation from OPM shall conform to such policies, procedures, criteria, and guidance. Failure to do so may result in revocation by OPM of an agency's delegation to adjudicate suitability under this part.

§ 731.103 Delegation to agencies.

(a) OPM delegates to the heads of agencies limited authority for adjudicating suitability in cases involving applicants for and appointees to competitive service positions in the agency (including limited, agency-specific debarment authority under § 731.205). OPM retains jurisdiction in all competitive service cases involving evidence of material, intentional false statement or deception or fraud in examination or appointment. Agencies must refer these cases to OPM for adjudication, or contact OPM for prior approval if the agency wants to take action under its own authority (5 CFR part 315 or 5 CFR part 752). Also, this delegation does not include cases

involving refusal to furnish testimony as required by § 5.4 of this chapter, or passover requests involving preference eligibles who are 30 percent or more compensably disabled which must be referred to OPM for adjudication, as provided under Pub. L. 95-454.

(b) Any adjudication by an agency acting under delegated authority from OPM which indicates that a general, across agency lines debarment by OPM under § 731.204(a) may be an appropriate action should be referred to OPM for debarment consideration if not favorably adjudicated by the agency. Referral should be made prior to any proposed action, but after sufficient resolution of the suitability issue(s) through subject contact or investigation to determine if a general debarment period appears warranted.

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

(d) Before making any applicant suitability determination, the agency should first ensure the applicant is eligible for the position, among the best qualified, and/or within reach of selection. Because suitability issues may not be disclosed until late in the application/appointment process, only the best qualified should require a suitability determination, with appropriate procedures followed and appeal rights provided, if suitability issues would form the only basis for elimination from further consideration.

(e) When an agency, exercising authority under this part by delegation from OPM, makes an adjudicative decision under this part, or changes a tentative favorable placement decision to an unfavorable decision, based on an OPM report of investigation or upon an investigation conducted pursuant to OPM-delegated authority, the agency should:

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

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

(3) Consider all available information in reaching its final decision, except information furnished by a non-corroborated confidential source. Information furnished by a non-corroborated confidential source can

only be used for limited purposes, such as lead information or in interrogatories to a subject if the identity of the source is not compromised in any way. An adverse suitability decision may not be based on such information; and

(4) Keep any record of the agency action as required by OPM in its supplemental guidance.

(f) Paragraph (a) of this section notwithstanding, OPM may exercise its jurisdiction under this part in any case when it, in its discretion, deems necessary.

(g) Any applicant or appointee who is found unsuitable by any agency acting under delegated authority from OPM under this part may appeal the adverse suitability decision to the Merit Systems Protection Board under the Board's regulations.

§ 731.104 Appointments subject to investigation.

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

(1) Promotions;

(2) Demotions;

(3) Reassignment;

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

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

(6) Transfer, provided the individual has served continuously for at least 1 year in a position subject to investigation.

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

§ 731.105 Jurisdiction.

(a) OPM may take a suitability action under this part against an applicant or appointee based on any of the criteria of § 731.202;

(b) 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 subject to the agency limitations prescribed in § 731.103;

(c) OPM may take a suitability action under this part against an employee only in cases involving material, intentional false statement or deception or fraud in examination or appointment, or refusal to furnish testimony as required by § 5.4 of this chapter, or statutory or regulatory bar.

(d) An agency may not take a suitability action against an employee under this part; rather, it may take a suitability action against an employee to promote the efficiency of the service under the authority and following the procedures of part 752 of this chapter.

§ 731.106 Designation of public trust positions and investigative requirements.

(a) *Risk designation.* Agency heads shall designate every competitive service position within the agency at a high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency and integrity of the service. OPM will provide an example of a risk designation system for agency use in supplemental guidance.

(b) *Public trust positions.* Positions at the high or moderate risk levels would normally be designated as "Public Trust" positions. Such positions would involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities, or other duties demanding a significant degree of public trust; and positions involving access to or operation or control of sensitive but unclassified information or financial records, with a significant risk for causing damage or realizing personal gain.

(c) *Investigative requirements.* Persons receiving an appointment made subject to investigation under this part shall undergo a background investigation. Minimum investigative requirements correlating to risk levels will be established in supplemental guidance provided by OPM. Investigations must be initiated before appointment or, at most, within 14 calendar days of placement in the position.

(d) *Suitability reinvestigations.* Agencies, relying on authorities such as the Computer Security Act of 1987 and OMB Circular No. A-130 Revised (issued February 8, 1996), may require incumbents of certain public trust positions to undergo periodic reinvestigations. The appropriate level of any reinvestigation will be determined by the agency, but may be

based on supplemental guidance provided by OPM.

(e) *Risk level changes.* If the risk level of the position itself is changed (e.g., the individual moves from a low risk to a moderate or high risk position) the incumbent may remain in the position, but any upgrade reinvestigation required by the agency for the new risk level should be initiated within 14 calendar days after the new designation is final.

Subpart B—Suitability Determinations

§ 731.201 Standard.

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

§ 731.202 Criteria.

(a) *General.* In determining whether its action will protect the integrity or promote the efficiency of the service, OPM, or an agency to which OPM has delegated authority, shall make its determination on the basis of the specific factors which follow, with appropriate consideration given to the additional considerations outlined in paragraph (c) of this section.

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

- (1) Misconduct or negligence in employment;
- (2) Criminal or dishonest conduct;
- (3) Material, intentional false statement or deception or fraud in examination or appointment;
- (4) Refusal to furnish testimony as required by § 5.4 of this chapter;
- (5) Alcohol abuse of a nature and duration which suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of others;
- (6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of substantial rehabilitation;
- (7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force;
- (8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

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

following additional considerations to the extent they deem them pertinent to the individual case:

- (1) The nature of the position for which the person is applying or in which the person is employed;
- (2) The nature and seriousness of the conduct;
- (3) The circumstances surrounding the conduct;
- (4) The recency of the conduct;
- (5) The age of the person involved at the time of the conduct;
- (6) Contributing societal conditions; and
- (7) The absence or presence of rehabilitation or efforts toward rehabilitation.

§ 731.203 Actions by OPM and other agencies.

(a) An applicant may be denied employment or an appointee may be removed 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(a).

(b) OPM may require that an employee be removed on the basis of a material, intentional false statement, or deception or fraud in examination or appointment; or refusal to furnish testimony; or a statutory or regulatory bar. OPM may also cancel any reinstatement eligibility obtained as a result of false statement, deception or fraud in the examination or appointment process.

(c) An action to remove an appointee or employee for suitability reasons under this part is not an action under parts 752 or 315 of this chapter, but agencies may use their authority under and follow the procedures of parts 752 or 315, as appropriate, in lieu of taking the action under this part 731.

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

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

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

§ 731.204 Debarment by OPM.

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

(b) On expiration of a period of debarment, OPM or an agency may redetermine a person's suitability for appointment in accordance with the procedures of this part.

(c) OPM, in its sole discretion, determines the duration of any period of debarment imposed under this section.

§ 731.205 Debarment by agencies.

(a) Subject to the provisions of § 731.103, when an agency finds an applicant or appointee unsuitable for reasons listed in § 731.202, the agency may deny that person examination for, and appointment to, all, or specific, competitive service positions within the agency for a period of not more than 1 year from the date of determination of unsuitability.

(b) On expiration of a period of agency debarment, the agency may redetermine a person's suitability for appointment by the agency, in accordance with the procedures of this part.

(c) The agency is responsible for enforcing the period of debarment and taking appropriate action should the individual apply or be inappropriately appointed during the debarment period. This does not limit OPM's ability to exercise jurisdiction and take an action if it deems appropriate.

(d) The agency, in its sole discretion, determines the duration of any period of debarment imposed under this section.

Subpart C—Suitability Action Procedures

§ 731.301 Scope.

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

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

§ 731.302 Notice of proposed action.

(a) OPM or the agency having delegated authority from OPM under this part shall notify the applicant, appointee, or employee (hereinafter, the "respondent") in writing of the

proposed action and of the charges against the respondent. The notice shall state the reasons, specifically and in detail, for the proposed action. The notice shall also state that the respondent has the right to answer this notice in writing. If the respondent is an employee, the notice shall further state that the employee may also make an oral answer, as specified in § 731.303(a). The notice shall further inform the respondent of the time limits for response as well as the address to which such response should be made.

(b) The notice of proposed action shall be served upon the respondent by being mailed or hand delivered to the respondent's last known residence, and/or duty station, no less than 30 days prior to the effective date of the proposed action. If the respondent is employed in the competitive service on the date the notice is served, the respondent shall be entitled to be retained in a pay status during the notice period.

(c) In an OPM action, OPM shall send a copy of this notice to any employing agency that is involved.

§ 731.303 Answer.

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

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

§ 731.304 Decision.

The decision shall be in writing, dated, and inform the respondent of the reasons for the decision. In an OPM directed removal, the employing agency shall remove the appointee or employee from the rolls within 5 work days of receipt of OPM's final decision; removals taken by an agency under this part should be effected within 5 work days of their final decision to remove.

The respondent shall also be informed that an adverse decision can be appealed in accordance with subpart D of this part. In OPM actions, OPM shall also notify the respondent's employing agency of its decision.

Subpart D—Appeal to the Merit Systems Protection Board

§ 731.401 Appeal to the Merit Systems Protection Board.

(a) *Appeal to the Merit Systems Protection Board.* An individual who has been found unsuitable for employment may appeal the decision to the Merit Systems Protection Board (the Board). However, the Board may not modify a debarment period. If the Board finds that fewer than all of the charges are supported by a preponderance of the evidence, and affirms the determination of unsuitability, it shall remand the case to OPM or the agency to determine whether the debarment period is still appropriate based on the sustained charges. This subsequent determination by OPM or the agency shall be final without any further appeal to the Board.

(b) *Appeal procedures.* The procedures for filing an appeal with the Board are found at part 1201 of Chapter II of this chapter.

Subpart E—Savings Provision

§ 731.501 Savings provision.

No provision of the regulations in this part shall be applied in such a way as to affect any administrative proceeding pending on (THE EFFECTIVE DATE OF THE FINAL RULE). An administrative proceeding is deemed to be pending from the date of the "notice of proposed action" described in § 731.302.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 47

[Docket Number FV98-358]

Amendments to Rules of Practice Under the Perishable Agricultural Commodities Act (PACA)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Department of Agriculture (USDA) is proposing to amend the Rules of Practice under the Perishable Agricultural Commodities Act (other than formal disciplinary

proceedings). In addition to bringing several sections of the Rules of Practice into compliance with the PACA Amendments of 1995, USDA is proposing numerous additional changes in an effort to enhance customer service.

DATES: Comments must be received by March 1, 1999.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to Charles W. Parrott, Assistant Chief, PACA Branch, Fruit and Vegetable Division, AMS, USDA, Room 2095-So. Bldg., P.O. Box 96456, Washington, DC 20090-6456. Email—charles_w_parrott@usda.gov. All comments should reference the docket number and the date and page number of this issue in the **Federal Register** and will be made available for public inspection in the PACA Branch during regular business hours and posted on the internet at www.ams.usda.gov/fv/paca.htm.

FOR FURTHER INFORMATION CONTACT: Charles W. Parrott, Assistant Chief, PACA Branch, Room 2095-So. Bldg., Fruit and Vegetable Division, AMS, USDA, Washington, D.C. 20250, Phone (202) 720-4180.

SUPPLEMENTARY INFORMATION:

Background

The Perishable Agricultural Commodities Act (PACA or Act) establishes a code of fair trading practices for the marketing of fresh and frozen fruits and vegetables in interstate and foreign commerce. The Act requires that parties fulfill their contractual obligations, and provides a forum where firms that buy and sell fruits and vegetables can settle commercial disputes outside of the civil court system. Under the PACA, these disputes, or reparation complaints, are handled first on an informal basis in an attempt to achieve an amicable settlement between the disputing parties. About 75 percent of all reparation complaints are resolved informally, generally within eight weeks. However, if an informal settlement is not reached, there is a formal complaint procedure available under which USDA's Judicial Officer issues a binding decision in the case. The Rules of Practice applicable to reparation proceedings inform the industry of USDA's procedures and requirements for the handling of informal and formal complaints under the PACA.

Agricultural Marketing Service (AMS) believes that amending the Rules of Practice will enhance customer service by expediting the handling of