

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–AL90

Suitability

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing proposed regulations to assist agencies in carrying out new requirements to reinvestigate individuals in public trust positions under Executive Order 13488, *Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust*, to ensure their continued employment is appropriate. This proposed rule would implement the suitability reinvestigation provisions of E.O. 13488.

DATES: Comments must be received on or before January 4, 2010.

ADDRESSES: You may submit comments, identified by “3206–AL90,” using either of the following methods: *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking. *All Mail:* Ana Mazzi, Deputy Associate Director, Center for Workforce Relations and Accountability Policy, U.S. Office of Personnel Management, Room 7H28, 1900 E Street, NW., Washington, DC 20415–8200.

FOR FURTHER INFORMATION CONTACT: Lisa McGlasson, Senior Advisor, U.S. Office of Personnel Management, Center for Workforce Relations and Accountability Policy, 1900 E St., NW., Room 7H28, Washington, DC 20415–4000; fax to 202–606–2613; e-mail to CWRAP@opm.gov.

SUPPLEMENTARY INFORMATION:

Background

On January 16, 2009, President George W. Bush signed Executive Order 13488, which provides that individuals in public trust positions shall be subject to reinvestigation under standards determined by the Director of the Office of Personnel Management (OPM) to ensure their continued employment is appropriate. The order provides that the standards issued by OPM shall include the frequency of reinvestigations. E.O. 13488 is distinct from but complements E.O. 13467, concerning alignment, to the extent possible, of security and suitability standards.

Public Trust Positions

Public trust positions are those covered by 5 CFR part 731 which an agency head, under 5 CFR 731.106, has designated at a moderate or high risk level, based on the position's potential for adverse impact on the efficiency or integrity of the service. Such positions may 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, or access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain. Designation of public trust positions and their risk level is made by agencies following OPM guidance and taking into account the specific duties of each position.

Frequency of Reinvestigations

While a reinvestigation typically will be more limited than the initial investigation, that reinvestigation must occur frequently if agencies are to carry out the purpose of the Executive order—to ensure that continued employment of persons in public trust positions remains appropriate. Accordingly, the proposed rule would require, at 5 CFR 731.106(d)(1), that a person occupying a public trust position be reinvestigated at least once every five years. Contingent on future investigative and resource capacities, OPM supplementary guidance will adjust investigative frequencies within this 5-year period based on the level of trust (*i.e.*, either moderate or high risk) associated with a person's position. We specifically solicit comment on whether a periodic reinvestigation cycle of 5 or fewer years is appropriate, considering the risk

posed by employment in public trust positions, and the availability of investigative and adjudicative resources. We will consider comments on this proposed rule and consult with affected agencies in developing supplemental guidance on investigative frequency.

At 5 CFR 731.106(d)(2), the proposed rule would provide that an investigation or reevaluation to determine a person's initial or continued eligibility for access to classified information, which is conducted at an equal or higher level than required for their public trust reinvestigation, satisfies the 5-year reinvestigation requirement for that person. The agency is not required to conduct an additional investigation in such circumstances, and the completed security clearance investigation restarts the 5-year schedule (or other schedule as future guidance might require) for a new public trust reinvestigation.

Assessments Resulting From Reinvestigations

The regulation at 5 CFR 731.106(f) would be modified to more clearly reflect the broader authority and obligation of agencies to make decisions following investigations. The current language provides that a completed investigation must result in a “determination” by the agency. As discussed below, an agency's decision on a reinvestigation of an employee in a public trust position will rarely be a *suitability* determination that results in a suitability action under this part. Thus, the potentially misleading word “determination” would be replaced with the word “assessment.”

As currently provided at 5 CFR 731.106(f), a person's employment status will determine the applicable agency authority and procedures to be followed in any action taken based on the results of the reinvestigation. In most circumstances, the subject of a reinvestigation will have been employed by their agency for more than one year and, under those circumstances, only OPM could make a suitability determination and take a *suitability* action under very limited circumstances. As provided under 5 CFR 731.105(d), OPM could take a suitability action based on (1) a material, intentional false statement, or deception or fraud in examination or appointment; (2) refusal to furnish testimony; or (3) a statutory or

regulatory bar that prevents the lawful employment of the person. However, conduct that surfaces during a reinvestigation (for example, off-duty criminal conduct) could form the basis for an adverse action under 5 CFR part 752.

Consistent with the changes made to 5 CFR 731.106, the reporting requirements under 5 CFR 731.206 would be modified to require agencies to report any decisions and actions taken as a result of a background investigation or reinvestigation. Here, the “level” of investigation is replaced by the “level or nature” of the investigation as a reporting obligation, to be consistent with E.O. 13488. The actual information reported is unchanged. Section 731.206 of title 5, Code of Federal Regulations, also would be clarified to reflect current practice that agencies follow in reporting the completion dates of background investigations. This is important, since the public trust position reinvestigation schedule is tied to the completion date of a relevant investigation.

Technical Amendment

OPM proposes a technical amendment to the Authorities for this part to reflect the President’s signing of Executive Order 13488 on January 16, 2009, which authorizes the Director of OPM to issue regulations and guidance implementing the order.

Regulatory Flexibility Act

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

E.O. 12866, Regulatory Review

This proposed rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

E.O. 13132

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

E.O. 12988—Civil Justice Reform

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

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 5 CFR Part 731

Administrative practices and procedures, Government employees. Office of Personnel Management.

John Berry,
Director.

Accordingly, OPM proposes to amend part 731, title 5, Code of Federal Regulations, as follows:

PART 731—SUITABILITY

Subpart A—Scope

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

Authority: 5 U.S.C. 1302, 3301, 7301; E.O. 10577, E.O. 13467, E.O. 13488, 3 CFR, 1954–1958 Comp., p. 218, as amended, 5 CFR, parts 1, 2 and 5.

2. In § 731.106, revise paragraphs (d) and (f) to read as follows:

§ 731.106 Designation of public trust positions and investigative requirements.

* * * * *

(d) *Reinvestigation requirements.*

(1) Agencies must ensure that reinvestigations are conducted and an assessment made regarding continued employment of persons occupying public trust positions at least once every 5 years. The nature of these reinvestigations and any additional requirements concerning their frequency will be established in supplemental guidance issued by OPM.

(2) If, prior to the next required reinvestigation, a separate investigation (or reevaluation) is conducted to determine a person’s eligibility (or continued eligibility) for access to

classified information or as a result of a change in risk level as provided in § 731.106(e), and that investigation is conducted at an equal or higher level than is required for a public trust reinvestigation, a new reinvestigation is not required. Such a completed investigation restarts the cycle for a public trust reinvestigation for that person.

* * * * *

(f) *Completed investigations.* Any suitability investigation (or reinvestigation) completed by an agency under paragraphs (d) and (e) of this section must result in an assessment by the employing agency of whether the findings of the investigation would justify an action against the employee, under this part or under some other authority, such as 5 CFR 752. § 731.103 addresses whether an action is available under this part, and whether the matter must be referred to OPM for debarment consideration.

3. Revise § 731.206 to read as follows:

§ 731.206 Reporting requirements.

Agencies must report to OPM the level or nature, result, and completion date of each background investigation or reinvestigation, each agency decision based on such investigation or reinvestigation, and any personnel action taken based on such investigation or reinvestigation, as required in OPM issuances.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1025; Directorate Identifier 2009–CE–055–AD]

RIN 2120–AA64

Airworthiness Directives; Extra Flugzeugproduktions- und Vertriebs-GmbH Models EA–300/200 and EA–300/L Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct