

# 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 Parts 302, 317, 319, 330, 731,  
754, and 920**

**RIN 3206-A000**

### Fair Chance To Compete for Jobs

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing to amend rules pertaining to when, during the hiring process, a hiring agency can request information typically collected during a background investigation from an applicant for Federal employment. In addition, OPM is proposing new regulations to establish the requirement for the timing of collection of criminal history information and for governing complaint procedures under which an applicant for a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency in reference to the timing of collection of criminal history information. Finally, the regulations will outline adverse action procedures that will apply when it is alleged that an agency employee has violated the requirements and appeal procedures that will be available from a determination by OPM adverse to the Federal employee. OPM is proposing these changes to implement the Fair Chance to Compete for Jobs Act of 2019 (Fair Chance Act). With some exceptions, the Fair Chance Act prohibits Federal agencies and Federal contractors acting on their behalf from requesting that an applicant for Federal employment disclose criminal history record information before the agency makes a conditional offer of employment to that applicant. The Fair Chance Act identifies some positions to which the prohibition shall not apply and requires OPM to issue regulations

identifying additional positions to which the prohibition shall not apply. It also requires OPM to establish complaint procedures under which an applicant for a position in the civil service may submit a complaint, or any other information, relating to compliance with the Fair Chance Act by an employee of an agency, establishes minimum penalties and procedures to be followed before a penalty may be assessed, and requires OPM to establish appeal procedures available in the event of a determination adverse to the Federal employee.

**DATES:** Comments must be received on or before June 27, 2022.

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

**Instructions:** All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked "late," and OPM is not required to consider them in formulating a final decision. Before acting on this proposal, OPM will consider and respond to all comments within the scope of the regulations that we receive on or before the closing date for comments. Changes to this proposal may be made in light of the comments we receive.

**FOR FURTHER INFORMATION CONTACT:** For questions with respect to 5 CFR part 754, contact Timothy Curry by email at [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov) or by telephone at (202) 606-2930. For questions with respect to 5 CFR part 731, contact Lisa Loss by email at [SuiteA@opm.gov](mailto:SuiteA@opm.gov) or by telephone at (202) 606-7017. For questions on all other parts, contact Mike Gilmore by telephone on (202) 606-2429, by fax at (202) 606-4430, by TTY at (202) 418-

3134, or by email at [Michael.Gilmore@opm.gov](mailto:Michael.Gilmore@opm.gov).

### SUPPLEMENTARY INFORMATION:

#### Background

Provisions of the Fair Chance Act were incorporated into the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), which was signed into law by the President on December 20, 2019. The Fair Chance Act places limitations on agency requests for criminal history record information prior to conditional offer of employment. It also requires a complaint process by which applicants for appointment to a position in the civil service may submit a complaint, or any other information, relating to compliance with the requirements of the Fair Chance Act. Furthermore, the Fair Chance Act establishes requirements and procedures regarding penalties for violations.

#### The Existing 'Ban the Box' Rule

On December 1, 2016, OPM issued a final rule at 81 FR 86555, that revised its regulations pertaining to when, during the hiring process, a hiring agency can request information typically collected during a background investigation from an applicant for Federal employment. The changes were to promote compliance with Merit System Principles as well as the goal of the Federal Interagency Reentry Council and the Presidential Memorandum of January 31, 2014, "Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own," otherwise known as "Ban the Box" rules. As noted by OPM when it first promulgated the rule, the intent of the rule was to conform regulatory requirements to what OPM believed was already the predominant agency practice as many agencies already employed the practice of waiting until the later stages of the hiring process to collect criminal history information. OPM does not currently have any data to show whether the revised regulations affected agency hiring processes or were instead, as OPM anticipated, a codification of existing practices.

Currently OPM regulations, 5 CFR parts 330 and 731, prevent agencies, unless an exception is granted by OPM, from making inquiries into an

applicant's criminal or credit history of the sort asked on the Optional Form (OF) 306 titled, Declaration for Federal Employment, 'Background Information' section or other forms used to conduct suitability investigations for Federal employment unless the hiring agency has made a conditional offer of employment to the applicant. The Fair Chance Act contains the same prohibition with respect to criminal history and does not address credit history. The Act has elaborated on the methods of inquiry not permitted and also provides for certain exceptions to the rule. Furthermore, the Fair Chance Act requires OPM, when making additional exceptions, to give due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions.

### **Explanation of OPM's Proposed Rule Under the Fair Chance Act**

#### *1. Restrictions on Preemployment Criminal Inquiries*

OPM is proposing these provisions under section 1122(b)(1) of the Fair Chance Act, under which the Director of OPM "shall issue such regulations as are necessary to carry out chapter 92 of title 5, United States Code (as added by this subtitle)." OPM is also proposing these provisions to implement the requirements of 5 U.S.C. 9202(c)(2), as added by the Fair Chance Act, which requires the OPM Director to issue regulations identifying positions with respect to which the prohibition shall not apply giving due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions, beyond those already identified in the statute.

Unless otherwise required by law, an employee of an agency may not request, in oral or written form (including through the Declaration for Federal Employment (OPM Optional Form 306) or any similar successor form, the USAJOBS internet website, or any other electronic means) that an applicant for an appointment to a position in the civil service disclose criminal history record information regarding the applicant before the appointing authority extends a conditional offer to the applicant. Under the provisions of the Fair Chance Act, this prohibition does not apply under the following circumstances:

- Determinations of eligibility described under clause (i), (ii) or (iii) of 5 U.S.C. 9101(b)(1)(A) *i.e.*, for (i) access to classified information; (ii) assignment to or retention in sensitive national security duties or positions; or (iii)

acceptance or retention in the armed forces; or

- recruitment of a Federal law enforcement officer (defined in 18 U.S.C. 115(c)).

The Fair Chance Act applies to all appointments in the Executive branch; *i.e.*, to appointments in the competitive service, the excepted service, and the Senior Executive Service (SES). Therefore, OPM is proposing to: (1) Revise the provisions in 5 CFR part 330, subpart M, which currently implements the Ban the Box rules for the competitive service, by removing the reference to criminal history so that the Fair Chance Act can be implemented for all types of appointments in a newly created part 920; (2) preserve the existing Ban the Box rules restricting pre-employment credit inquiries for appointments in the competitive service; and (3) amend part 731 to incorporate the exceptions to this provision as established by law and to refer agencies to the newly created part 920 for guidance on other types of positions for which the prohibition under the Act for collecting criminal history information will not apply. For the convenience of the reader, we are placing these provisions in the newly created part 920 rather than repeat the provisions in parts 302, Employment in the Excepted Service; 317, Employment in the Senior Executive Service; 319, Employment in Senior-Level and Scientific and Professional Positions; 330, and 731. OPM is also proposing to amend parts 302, 317, and 319 to include a reference as a reminder that these types of positions are subject to the provisions of the Fair Chance Act found in chapter 92 of title 5, U.S.C and 5 CFR part 920.

The regulations explain that agencies may request exceptions from OPM on a case-by-case basis. OPM will consider exceptions based on legitimate, job/ position-related reasons, giving due consideration to requests for positions with specific job-related duties. Exceptions previously granted to agencies by OPM pursuant to 5 CFR part 330 subpart M (*i.e.*, the Ban the Box provisions) continue to be valid.

The proposed rule will continue to permit agencies to make an objection, pass-over request, or suitability determination on the basis of criminal or credit history record information only after the applicant's qualifications for the position being filled have been fairly assessed and the hiring agency has made a conditional offer of employment to the applicant.

#### *2. Complaint, Adverse Action, and Appeal Procedures*

Under section 9203, the Act requires the Director of OPM to establish and publish procedures under which an applicant for an appointment to a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee with 5 U.S.C. 9202. Under the provisions of section 9204, the Act further establishes minimum requirements regarding penalties for violations of the Act and provides that such penalties may be entered only after notice to the Federal employee accused and an opportunity for a hearing on the record (thereby, indirectly, establishing minimum procedural requirements before an adverse determination can be made). Finally, the Act requires the Director of OPM, by rule, to establish procedures providing for an appeal from any adverse action taken under section 9204 by no later than 30 days after the date of the action. The Act further notes in section 9205 that an adverse action taken under the Act shall not be subject to the procedures under chapter 75 of title 5 or, except as provided for the appeal process established under the Act, be subject to appeal or judicial review. Therefore, OPM is proposing new regulations governing complaint procedures under which an applicant for a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency with section 9202 of title 5, and adverse action and appeal procedures for alleged violations of section 9202 of title 5.

#### *3. Section-by-Section Analysis*

##### *Part 302*

OPM is proposing to add § 302.107 to subpart A to incorporate the requirements of the Fair Chance Act. Proposed § 302.107 addresses when inquiries into an applicant's criminal history may be made and circumstances under which exceptions may be requested and considered by OPM.

##### *Part 317*

OPM is proposing to add § 317.202 to subpart B to incorporate the requirements of the Fair Chance Act. Proposed § 317.202 addresses when inquiries into an applicant's criminal and credit history may be made and circumstances under which exceptions may be requested and considered by OPM.

##### *Part 319*

OPM is proposing to add § 319.106 to subpart A to incorporate the

requirements of the Fair Chance Act. Proposed § 319.106 addresses when inquiries into an applicant's criminal and credit history may be made and circumstances under which exceptions may be requested and considered by OPM.

#### Part 330

The Fair Chance Act does not specifically address the timing of suitability inquiries into a job applicant's credit history. Nevertheless, the Presidential Memorandum of January 31, 2014, addresses this topic, and is still in effect. As a result, OPM's revision of § 330.1300 retains the prohibition on making inquiries into a job applicant's credit history and removes any reference to criminal history as that prohibition will be addressed in part 920.

#### Part 731

The Fair Chance Act does not specifically address the timing of suitability inquiries into a job applicant's credit history. Nevertheless, the Presidential Memorandum of January 31, 2014, addresses this topic, and is still in effect. As a result, OPM's revision of § 731.103(d)(1) retains the prohibition on making inquiries into a job applicant's credit history and updates the reference to the prohibition relating to criminal history as reflected in the new part 920, which incorporates the requirements of the Fair Chance Act and addresses the circumstances under which exceptions may be requested and considered by OPM.

#### Part 754

##### Subpart A—Complaint Procedures

The Fair Chance Act directs OPM to establish and publish procedures under which an applicant for an appointment to a position in the civil service may submit a complaint, or any other information, regarding compliance with 5 U.S.C. 9202. Based on these unique requirements, OPM is proposing to add a new 5 CFR part 754 to implement the complaint procedure requirements of the Fair Chance Act. This new proposed rule falls under subpart A of 5 CFR part 754 as "Complaint Procedures." The Fair Chance Act does not provide job applicants the ability to use any existing statutory or regulatory complaint procedures that may be available for other employment related complaints, such as the U.S. Office of Special Counsel, which investigates prohibited personnel practices. Thus, there currently is no regulatory framework for the complaint process for job applicants to allege violations of the nature described in the Fair Chance Act. The

Fair Chance Act is also silent on who investigates complaints.

Under 5 U.S.C. 9203(2), the Director of OPM "shall . . . establish and publish procedures under which an applicant for an appointment to a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency with section 9202," and section 1122(b)(1) of the Fair Chance Act, reprinted at 5 U.S.C. 9201 note, requires the Director to "issue such regulations as are necessary to carry out" this and the other requirements of chapter 92. More generally under 5 U.S.C. 1103(a)(5)(A), the Director is authorized to execute, administer, and enforce this and any other provision of civil service law. Under these authorities we are prescribing a complaint procedure under which an applicant will initially file a complaint, or any other information, and if applicable, supporting material with the employing agency, which will transmit the material to OPM.

To be acceptable for processing by OPM, the complaint, or any other information, and supporting material must be accompanied by a report of investigation. However, the only investigative authority in the Fair Chance Act is in section 9204(a), under which the Director of OPM must determine whether a violation has occurred "after notice and an opportunity for a hearing on the record." This language encompasses adverse action procedures, as described in greater detail below, but it also encompasses the predicate fact-finding needed for OPM to either initiate an adverse action based on a complaint, dismiss the complaint, or require additional fact finding. Accordingly, OPM has determined that, under the proposed rule, subject to certain limitations and requirements, the best approach is for OPM to delegate to agencies its authority under 5 U.S.C. 9204(a) to investigate a complaint, or any other information, while reserving to OPM the authority under section 9204(a) to provide notice of a proposed adverse action and an opportunity to respond to the charges.<sup>1</sup>

Under 5 U.S.C. 1104(a) and (b), OPM may delegate, in whole or in part, any personnel management function vested

<sup>1</sup> This delegation of investigative authority is not possible when the alleged violator is an administrative law judge (ALJ) for whom an adverse action is governed by the procedures in 5 U.S.C. 7521. Such actions require formal adjudication under the Administrative Procedure Act, under which fact-finding by an agency head or an ALJ "constitutes the exclusive record for decision." 5 U.S.C. 556(b), (e).

in or delegated to the Director and establish standards and oversight programs as necessary. In addition, under 5 CFR parts 5 and 10, OPM has responsibility to oversee the Federal personnel system and agency compliance with merit system principles and supporting laws, rules, regulations, Executive Orders, and OPM standards. OPM may set forth policies, procedures, standards, and supplementary guidance for the implementation of this part in OPM issuances. This includes, but is not limited to, procedures and guidance related to agency obligations to report to OPM actions taken to investigate any complaints filed by an applicant regarding an agency's compliance with 5 U.S.C. 9202 and adverse actions taken at the direction of OPM for non-compliance with 5 U.S.C. 9202. Therefore, OPM believes that with appropriate OPM guidance and oversight, agencies can investigate violations of Fair Chance Act requirements in a fair and impartial manner. OPM will then notify the agency employee of negative findings, provide an opportunity for the employee to be heard, and render a decision on the final record.

##### Section 754.101 Coverage

Subpart A applies to "a complaint, or any other information," submitted by an applicant for an appointment to a position in the civil service relating to compliance with 5 U.S.C. 9202. Regarding "any other information," it is conceivable that an applicant may ask a question or raise a concern about non-compliance with section 9202 without knowledge of an agency's specific complaint procedures. Agency procedures must address how to conduct outreach when an applicant initiates contact about a complaint.

The proposed rule describes who may utilize the agency complaint procedures described in § 754.102. Specifically, the complaint procedures are available to an applicant as the term applicant is defined in proposed § 920.101, which means a person who has applied to an agency under its procedures for accepting applications consistent with governmentwide regulations, as applicable.

Section 754.101 includes definitions that track the definitions in part 920, as described in greater detail below.

##### Section 754.102 Agency Complaint Process

OPM was informed by other existing complaint procedures in establishing the processes required by the Fair Chance Act. OPM believes that

establishing a process which is similar to other successful and effective processes will facilitate implementation of the Fair Chance Act complaint process in covered agencies as agencies are already familiar with these similar processes.

As noted above, within guidelines established by OPM and subject to OPM oversight, the proposed rule assigns to each agency covered by the Fair Chance Act regulations the responsibility to receive complaints, or any other information, and any applicable supporting material. Further, consistent with these OPM guidelines and oversight, the proposed rule delegates to each agency OPM's responsibility to conduct an investigation of the written complaint, or any other information, regarding compliance with 5 U.S.C. 9202. Agencies then would have responsibility to provide OPM the applicant's written complaint or any other information, along with supporting material and the results of the agency's investigation, so OPM may determine any further actions, such as additional investigative fact-finding or appropriate penalties, regarding violations of the Fair Chance Act requirements.

OPM believes there is ample precedent for agencies to establish internal procedures for receipt and investigation of employment-related complaints against the agency and to accomplish these tasks in a fair and impartial manner. For example, Federal employees may request their agency conduct a review of the classification of the employee's position and may appeal the classification decision to the agency under rules established by OPM. Another example concerns the responsibility of agencies to establish programs to promote equal opportunity and to identify and eliminate discriminatory practices and policies. This includes the responsibility to provide for the prompt, fair, and impartial processing of Equal Employment Opportunity (EEO) complaints under rules established by the Equal Employment Opportunity Commission (EEOC). These examples have helped inform OPM of successful procedures that can be modeled in establishing the processes required by the Fair Chance Act.

The proposed rule directs covered agencies to establish a complaint process within 90 days of the effective date of the final rule that allows an applicant to file a complaint, or submit any other information, within 30 calendar days of the date of the alleged non-compliance with 5 U.S.C. 9202 by an employee of the covered agency. The

proposed rule further directs covered agencies to extend this time limit when the applicant shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the non-compliance with section 9202 occurred, to consider a reasonable accommodation of a disability, or for other proper and adequate reasons considered by the agency. OPM believes this provides applicants sufficient time to submit a complaint, or any other information, and is comparable to time limits for filing other types of employment-related complaints. It also provides an opportunity for the applicant to submit a complaint or any other information after 30 days if the applicant's rights to do so were not properly publicized. This highlights why it will be critical for agencies to widely publicize information regarding the complaint process to job applicants. The information must appear in agency job announcements. In addition to placing this information in job announcements, agencies should consider placing this information on agency websites/portals soliciting applications for those positions that do not require a posting on USAJOBS, such as excepted service positions. Finally, as noted above, the proposed rule requires that covered agencies conduct outreach about its complaint procedures, when an applicant initiates contact about an alleged violation.

The proposed rule requires covered agencies to investigate any complaint, or any other information, regarding compliance with section 9202. It notes that in order to carry out this function in an impartial manner, the same agency official(s) responsible for executing and advising on the recruitment action may not also be responsible for managing, advising, or overseeing the agency complaint process. Agencies otherwise have discretion to determine responsibility for investigating complaints, or any other information, under this process.

The proposed rule requires agencies to develop an impartial and appropriate factual record sufficient for OPM to make findings on the complaint. In other words, the record should allow a reasonable fact finder to draw conclusions as to whether non-compliance with section 9202 occurred. Agencies otherwise have discretion to determine the appropriate fact-finding methods to carry out this responsibility.

The proposed rule requires the agency to delegate sufficient authority to the investigator to secure the production, from agency employees and contractors

of documentary evidence and testimonial evidence needed to report on and investigate the complaint. While agencies may have less control over the applicant's cooperation, applicants have an incentive to cooperate. If an agency notifies OPM that an applicant has refused to produce documentary or testimonial evidence sought during the investigation, OPM may direct the agency to suspend the investigation; or if the investigation continues despite an applicant's failure to participate, OPM may make an adverse inference or, in appropriate circumstances, dismiss the complaint.

In addition, the proposed rule requires the agency to complete the investigation within 60 calendar days of the filing of the complaint. Due to the narrow scope of section 9202, OPM believes that 60 calendar days is sufficient time to complete a thorough investigation.

The proposed rule requires the agency to provide OPM an administrative report on the investigation of a complaint within 30 calendar days of completing the investigation. This report should include all necessary information for OPM to make a determination on whether non-compliance with section 9202 occurred. The report should include the applicant's written complaint, or any other information submitted by the applicant, the agency's factual findings, a complete copy of all information gathered during the investigation, and any other information the agency believes OPM should consider. OPM may request the agency provide additional information as necessary. After review, OPM will notify the agency and the subject(s) of the complaint in writing of OPM's findings regarding the complaint, including any decision to initiate adverse action proceedings under 5 CFR part 754, subpart B, or to dismiss the complaint.

Agencies exercise authority under this section by delegation from OPM and must adhere to the OPM requirements for receipt and investigation of complaints or any other information, as stated in this section as well as any OPM issuances. Agencies must also implement policies and procedures and maintain records demonstrating that they employ reasonable methods to ensure adherence to the Fair Chance Act and OPM regulations and any subsequent issuances. OPM retains the exclusive authority to determine the sufficiency of an agency's complaint process, including the sufficiency of the investigation. OPM may direct further action if OPM determines it necessary for its adjudication of the complaint or

any other information submitted regarding an allegation of non-compliance with section 9202.

#### Section 754.103 Applicant Representatives

The proposed language in this section provides that the applicant may select a representative of their choice to assist throughout the complaint process. It further notes that an agency may disallow an applicant's representative when the individual's activities as a representative would cause a conflict of interest or position, when the applicant designates an agency employee who cannot be released from their official duties because of the priority needs of the Government, or when the applicant designates an agency employee whose release would give rise to unreasonable costs to the Government. This is comparable to requirements and restrictions on representatives that are provided for in OPM regulations on classification appeals. OPM believes this is appropriate and fair for the applicant when balanced against the business and mission needs of the agency.

#### Subpart B—Adverse Actions

The Fair Chance Act does not require compliance with any existing statutory or regulatory adverse action procedures which are available for other conduct-related matters. Section 9204 prescribes certain penalties to be imposed by OPM for each violation of 5 U.S.C. 9202 and requires notice and an opportunity for a hearing on the record by OPM for any employee alleged to have committed a violation of section 9202. Section 9205 further notes that the procedures of chapter 75 of title 5, United States Code, are not applicable and that appeal or judicial review are not applicable except as provided under procedures established by the Director of OPM. Based on these unique requirements, OPM is proposing to add subpart B, Adverse Actions, under the new 5 CFR part 754, to implement a new adverse action and appeals process related to violations of the Fair Chance Act.

While implementing the requirements of the Fair Chance Act, we have also been mindful of the need to provide procedures that we are confident would provide for due process. Those include, at a minimum, a meaningful opportunity—before a decision is made on an adverse action—for an individual to know the charges and penalty and present a defense. In addition, in light of the case law available in relation to chapter 75 proceedings, we have concluded that it is prudent to provide for the ability to appeal the adverse

action of a suspension for 15 days or more before an impartial adjudicator, a procedural right that would be available with respect to analogous penalties in a chapter 75 adverse action proceeding. The following sections identify the requirements proposed for this new subpart and briefly describe the purpose of each requirement.

#### Section 754.201 Coverage

This section describes which actions and employees are covered by the new adverse action procedures established by OPM and defines key terms used in the subpart. Employees of agencies as defined in section 920.101 are subject to the adverse action procedures established in this subpart.

This section also defines the terms “day,” “suspension,” “civil penalty,” and “Director.” The term “day” is consistent with how OPM defines this term in adverse action rules under 5 CFR part 752. The term “suspension” is similar to how OPM defines it under part 752 but modified for purposes of aligning it with the requirements of the Fair Chance Act. OPM believes it is appropriate to use similar definitions for the Fair Chance Act adverse action procedures to facilitate a common understanding of these terms. The term “civil penalty” is intended to clarify that this penalty is a form of monetary penalty on a covered agency employee which is separate and distinct from a suspension without pay. Finally, the term “Director” is consistent with how OPM defines it in other regulations promulgated by OPM. OPM believes this is consistent with the Director's statutory authority and otherwise will facilitate an effective process that allows the Director to timely respond to complaints from across the entire Executive Branch.

#### Section 754.202 Penalty Determination

This section describes the specific penalties OPM may direct an agency to process when an agency employee has been found to have violated section 9202 of the Act. The Act specifies certain penalties for violations of the Act including written warnings, suspensions without pay, and civil penalties of various amounts depending on the violation. The Act provides that these actions are not subject to the procedures under chapter 75 of title 5, United States Code but under procedures established by OPM. Notably, the range of penalties includes some forms of penalty that are not enumerated under the “adverse actions” provisions found in chapter 75 of title 5, United States Code (written warnings, civil penalties), and another form of

penalty that *is* found in chapter 75 and requires procedures set out in subchapter II of chapter 75 (suspensions of 15 days or more).

Since penalties of written warnings, suspensions without pay, and civil monetary penalties may be taken across multiple Federal agencies utilizing various systems and internal processes, the proposed rule specifies that the employing agency can be directed by OPM to (1) issue the employee a written warning; (2) process a suspension; and (3) collect a civil penalty after OPM determines a violation of section 9202 has occurred. This is comparable to OPM directing employing agencies to process actions taken by OPM, such as removal actions for suitability.

OPM proposes that the employing agency will collect a civil penalty and remit it to the Treasury, for deposit in the Treasury. OPM invites public comment on the method for collecting and remitting civil penalties.

OPM proposes that the employing agency must carry out the Director's order to suspend the employee as soon as practicable. This is consistent with the practice for suspensions under chapter 75. However, OPM proposes that if the Director orders a civil penalty, the penalty cannot be collected and remitted until the conclusion of any appeal to the Merit Systems Protection Board. This is consistent with 5 U.S.C. 1215(a)(3)(A), under which the Office of Special Counsel can pursue a civil penalty as a disciplinary action, but the penalty cannot be collected until the Board's proceedings have concluded. Deferring the collection of a civil penalty until resolution of the Board appeal will limit the possibility of having to collect civil penalties and then refund them if OPM's action is not sustained. OPM will track and monitor agencies' processing of OPM's orders by establishing new legal authority codes and remark codes to identify that the adverse actions are taken under 5 U.S.C. 9202. OPM's *Guide to Processing Personnel Actions* will be updated to reflect the new codes.

#### Section 754.203 Procedures

The proposed rule establishes the procedures to be utilized for actions taken under this subpart. The procedures in the subpart are similar, but not identical, to the adverse action procedures found at 5 CFR part 752. There are some very unique differences. For example, a written warning issued under this section is an adverse action and is subject to the same procedures and retention period as any other records of adverse actions.

The proposed rule specifies that the proposed action is made by the Director or Director's designee in order to implement the statutory requirements found in the Fair Chance Act. Since the Director is now required to make determinations involving employees in numerous agencies across the Executive Branch, the proposed rule provides that the Director may designate OPM officials to act on their behalf.

The proposed rule does provide for procedural rights appropriate to the situation: (1) A meaningful opportunity—before a decision is made on an adverse action—for an individual to know the charges and penalty and present a defense, with representation; and (2) the ability to appeal the adverse action of a suspension of 15 days or more before an impartial adjudicator. This is similar to what is found in 5 CFR part 752.

The proposed rule provides for a 30-day notice of any proposed action under this subpart. While notices of this length are typically only required for suspensions greater than 14 days under OPM's adverse action rules at 5 CFR part 752, OPM believes it is appropriate to propose a 30-day notice for any actions proposed under this subpart due to the unique nature of this process. OPM will have to notify employees who are located and employed in other Federal agencies, not just at OPM. In light of these requirements, OPM believes a 30-day notice for all proposed actions will facilitate an effective process by allowing all parties involved to be timely notified and to effectively respond to the proposed action.

The Fair Chance Act requires “notice and an opportunity for a hearing on the record” when OPM proposes an action and before OPM renders any decision. OPM proposes to fulfill this requirement by providing a notice of proposed action, an opportunity to review the material relied upon, an opportunity to respond orally and/or in writing to the notice of proposed action to the Director of OPM (or designee), and a decision by the Director of OPM (or delegated designee), to be followed by an appeal to the Merit Systems Protection Board (MSPB) if the action taken is a suspension of 15 days or longer. This comports with (and, at least at the lower end of the penalty range, exceeds) the 5th Amendment due process requirements for suspension of a tenured public employee. *See Gilbert v. Homar*, 520 U.S. 924, 929, 930, 933 (1997).

Except as described below, a hearing before an administrative law judge (ALJ) under the Administrative Procedure Act (APA) is not required. OPM notes that

the term “notice and an opportunity for a hearing on the record” frequently invokes formal hearing procedures under the APA, 5 U.S.C. 554(a), 556–557. *See, e.g., Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748 (6th Cir. 2004). An exception in section 554(a)(2) applies, however, “to the extent there is involved . . . the selection or tenure of an employee.” The phrase “there is involved” is broad, encompassing proceedings that implicate employee selection or tenure even if that subject matter is not the direct focus of the adjudication. Likewise, the APA's legislative history shows that the phrase “selection or tenure” in 5 U.S.C. 554(a)(2) is to be construed broadly, since “the selection and control of public personnel has been traditionally regarded as a largely discretionary function which, if to be overturned, should be done by separate legislation.” S. Rep. No. 79–758, at 16 (1945); *see also Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986).

The proposed rule provides that the employee's agency must give the employee who is in an active duty status a reasonable amount of official time to review the material relied on to support OPM's proposed action, to prepare and present an answer orally and in writing, and to secure affidavits. OPM may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the employee's answer, within such time as would be reasonable, but not less than 7 days. The proposed rule provides that the OPM Director may designate an official who has authority to make or recommend a final decision on the proposed adverse action, hear the employee's oral answer, and consider any written response.

An employee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from their official position would give rise to unreasonable costs or whose priority work assignments preclude their release.

Whereas the hearing obligation for non-ALJs will be fulfilled by the procedures described above, OPM believes it is appropriate to provide a hearing opportunity before taking an adverse action against an ALJ. The exception in 5 U.S.C. 554(a)(2) does not apply to “a[n] administrative law judge appointed under section 3105 of this

title.” Likewise, 5 U.S.C. 559 provides that a subsequent statute—such as the Fair Chance Act—“may not be held to supersede or modify” 5 U.S.C. 7521, governing the formal APA hearing rights of ALJs facing a suspension, “except to the extent that it does so *expressly*” (emphasis supplied). Finally, 5 U.S.C. 7521(b) includes a list of those statutes under which an action otherwise covered by 5 U.S.C. 7521(b) is excepted. Congress did not include the Fair Chance Act in the list of exceptions.

Since 5 U.S.C. 9205(b)(1) generally makes procedures under “chapter 75” inapplicable to adverse actions taken under the Fair Chance Act, without “expressly” superseding or modifying 5 U.S.C. 7521, the APA permits no deviation from the procedures in 5 U.S.C. 7521, when the alleged violator is an incumbent ALJ appointed under 5 U.S.C. 3105.

Accordingly, OPM proposes that if the employee alleged to have violated section 9202 is an ALJ appointed under section 3105, before OPM takes the proposed action the ALJ should have an opportunity for a hearing before the Merit Systems Protection Board and the Board should establish and determine whether good cause exists. Under 5 U.S.C. 1305, the proceeding must be governed by the regulations of the Board, not those of OPM.<sup>2</sup>

Finally, the proposed rule provides that only the reasons specified in the notice of proposed action and any answer the employee or the employee's representative, or both, made to the designated official may be considered in deciding on the proposed action. In the case of ALJs, OPM must await the MSPB's good cause determination. The decision notice must specify in writing the reasons for the decision and advise the employee of any appeal rights. This facilitates satisfaction of minimum procedural rights.

#### Section 754.204 Appeal Rights

The Fair Chance Act does not specify any appeal rights for penalties enacted for violations of the Act other than any

<sup>2</sup> We note that the penalty for a first offense of the Fair Chance Act under 5 U.S.C. 9204(a)(1) is a mere “warning,” which is not an offense listed in 5 U.S.C. 7521; while the penalty for a subsequent offense may include a “suspension,” which is specifically covered by 5 U.S.C. 7521(b)(2). Likewise a “civil penalty” for a fourth or subsequent violation is not an offense listed in section 7521. Yet 5 U.S.C. 554(a)(2) requires a formal hearing regardless of whether or not the penalty against the ALJ is listed in section 7521, and OPM sees no practicable way to establish two separate formal hearing programs for offenses resulting in a penalty not listed in 5 U.S.C. 7521 (a “warning” or a “civil penalty”) and for offenses resulting in a penalty listed in 5 U.S.C. 7521 (a “suspension”).

appeal rights established by OPM. Under 5 U.S.C. 1103(a)(5), OPM has the broad authority to execute, administer, and enforce civil service rules and regulations. Therefore, pursuant to its statutory authority, as well as the President's delegation of his authority, OPM does have statutory authority to create the right of appeal to the Merit Systems Protection Board (MSPB) by regulation where appropriate. The Merit Systems Protection Board, in turn, has the responsibility to "hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under . . . law, rule, or regulation," and an employee may appeal to the Board "from any action which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. 1204(a)(1), 7701(a) (emphasis supplied). Both the U.S. Court of Appeals for the Federal Circuit and the Board have consistently affirmed the principle that the Board's enabling statute gives it appellate jurisdiction over actions that are made appealable to the Board by OPM regulation; and that where an appeal is solely by regulation, the regulation circumscribes the scope of the appeal. See *Roberto v. Dep't of the Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006); *Folio v. Dep't of Homeland Sec.*, 402 F.3d 1350, 1355 (Fed. Cir. 2005); *Dowd v. United States*, 713 F.2d 720, 722–23 (Fed. Cir. 1983); *Gaxiola v. Dep't of the Air Force*, 6 M.S.P.R. 515, 519 (1981). For example, a probationer has certain rights of appeal only as conferred by OPM regulation. OPM is prescribing an MSPB appeal right for adverse actions of 15 days or longer and for civil penalties taken under the Fair Chance Act as described below, when the alleged violator is an employee other than an ALJ.

For forms of misconduct not covered by the Fair Chance Act, written warnings and suspensions of 14 days or less do not have appeal rights to the MSPB. This was an intentional choice on Congress's part in passing the Civil Service Reform Act (CSRA). This scheme balances the interests of Federal employees with the needs of "sound and efficient administration." See *United States v. Fausto*, 484 U.S. 439, 445 (1988). Prudently, the more serious the personnel action, the more robust are the remedies afforded. For example, "Chapter 75 of the Act governs adverse actions taken against employees for the 'efficiency of the service,' which includes action . . . based on misconduct." *Fausto*, at 446. Employees facing a "major adverse action" are entitled to MSPB review, and, if the decision is adverse, subsequent appeal

to the MSPB's reviewing court, the U.S. Court of Appeals for the Federal Circuit. *Id.* at 447. A covered employee facing only a "minor adverse personnel action"—that is, a relatively short suspension—is entitled to less robust remedies, *id.* at 450: Namely, advance written notice, a reasonable time to respond, the right to be represented by an attorney, and a timely written decision, but not the right to full review by the MSPB and appeal to the Federal Circuit. 5 U.S.C. 7503(b).

For these reasons, OPM believes such appeal rights should not be conferred for written warnings and suspensions of 14 days or less taken under this subpart. This promotes efficiency and avoids creating inconsistencies on when appeal rights are provided for similar penalties on different types of misconduct. Moreover, for a short suspension under the Fair Chance Act, as for a short suspension under chapter 75, the procedures we propose—advance notice, an opportunity to review the material relied upon, and an opportunity for a written submission and an oral hearing before an OPM official, prior to any final action—are fair and adequate, without the need for an additional level of appeal to the MSPB.

Conversely, OPM has concluded that it would be appropriate to provide MSPB appeal rights for suspensions of more than 14 days under this subpart or any decision to impose a civil penalty. This facilitates a consistent approach to appeal rights for suspensions taken under the Fair Chance Act and under chapter 75. The agency will process any action at OPM's direction. Thus, there is no separate right of appeal to the agency from the decision. Any appeal to the MSPB will be against OPM and not against both OPM and the employee's agency.

The Board will have the authority to reverse OPM's action if the charges are not proved by preponderant evidence. If the Board finds that OPM has proved at least one specification of the charge by preponderant evidence, the Board must sustain the action. The Fair Chance Act does not incorporate the requirement in 5 U.S.C. 7503(a) and 7513(a) that an adverse action shall be "for such cause as will promote the efficiency of the service." Accordingly, there is no requirement for OPM to prove a nexus between the employee's conduct and service efficiency, and the Board cannot mitigate the penalty.<sup>3</sup>

<sup>3</sup> In addition, a Fair Chance Act appeal is not a category of appeal for which the Board inherited the Civil Service Commission's penalty mitigation authority upon its establishment in 1978. See

OPM reads 5 U.S.C. 9205(b) as permitting the Director to decide which adverse actions are subject to appeal and which are not. Because the adverse action is ordered by OPM and only processed by the employing agency, there is no right to file an administrative grievance or contractual negotiated grievance for the adverse action under a negotiated grievance procedure. OPM, not the employing agency, orders the action under the Fair Chance Act. OPM is not a party in an agency's administrative grievance procedures, and OPM is not the subject of a collective bargaining agreement between an agency and an exclusive bargaining representative for that agency.<sup>4</sup> Therefore, an agency cannot overrule OPM's decision; the agency is merely processing an action taken by OPM. OPM invites public comment on whether a grievance procedure of some kind should be provided for short suspensions, and on how it would work considering that employing agencies lack discretion when OPM orders an adverse action.

#### Section 754.205 Agency Records

This section outlines what OPM and the covered agency must maintain copies of, and their obligation under the Privacy Act.

#### Part 920

OPM is proposing to regulate the provisions of the Fair Chance Act in 5 CFR part 920 because these provisions apply to positions in the excepted, Senior Executive, and competitive services. For the convenience of the reader, we are placing them in one location rather than repeat the provisions in parts 302, 317, 319, and 330, respectively. We also note that some agencies may have positions that are exempt from part 302 but not exempt from the provisions of the Fair Chance Act. Likewise, agencies may have positions akin to those in the SES, but which operate outside the provisions of part 317. Placing these rules in a common location not tied specifically to title 5 excepted service or SES rules will help mitigate any confusion as to their applicability governmentwide.

*Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 292–94 (1981). Likewise, where, as in 5 U.S.C. 9205(a), Congress authorizes OPM to prescribe appellate procedures by regulation, OPM has latitude to prescribe the scope of the Board's jurisdiction. See *Folio*, 402 F.3d at 1355.

<sup>4</sup> In addition, an adverse action under the Fair Chance Act is not an action within the meaning of 5 U.S.C. 7512, so there can be no election of remedies under 5 U.S.C. 7121(e)(1).

## Subpart A

Proposed subpart A, of part 920 General Provisions, contains general provisions that are applicable to the timing of criminal history inquiries. Proposed section 920.101 contains definitions necessary for the administration of this part.

Proposed § 920.102 explains which positions are covered by this part and which positions may be excluded. Section 920.102(a) makes clear that positions in the competitive service, excepted service, and SES in executive agencies as well as positions in the United States Postal Service and the Postal Regulatory Commission are covered by this part. Section 920.102(b) states that for purposes of this part an exempt position is any position for which a hiring agency is required by statute to make inquiries into an applicant's criminal history prior to extending an offer of employment to the applicant.

The Fair Chance Act defines which agencies are covered by the Act. This definition includes an Executive Agency as such term is defined in 5 U.S.C. 105; the United States Postal Service and the Postal Regulatory Commission; and the Executive Office of the President. An "Executive agency" is defined in 5 U.S.C. 105 to mean an Executive Department under 5 U.S.C. 101, a Government corporation under 5 U.S.C. 103, and an independent establishment under 5 U.S.C. 104 (including the Government Accountability Office). Therefore, coverage of the Fair Chance Act is broad.

The definition of an "executive agency" in 5 U.S.C. 105 does not specifically include a "military department" as defined in 5 U.S.C. 102: Namely, the Department of the Army, the Department of the Navy, or the Department of the Air Force. OPM construes the Fair Chance Act to cover the military departments as well as the Department of Defense in which they reside, and proposes to include the military departments in the definition of a "agency." Absent an expression of congressional intent to the contrary, because military departments are part of the Department of Defense, they are subject to those Civil Service laws that apply to an "executive agency" within the meaning of 5 U.S.C. 105. See *White v. Dep't of the Army*, 115 M.S.P.R. 664, 668 (2011). Yet "[t]he organizational history of the Department of Defense indicates that the military service departments were intended to function—at least, with respect to personnel matters—with the independence that generally

characterizes executive departments outside the Department of Defense, rather than the limited kind of independence that generally characterizes organizations within those departments." *Pervez v. Dep't of Navy*, 193 F.3d 1371, 1373 (Fed. Cir. 1999 (quoting *Francis v. Dep't of the Navy*, 53 M.S.P.R. 545, 549 (1992))). Thus, because of the military departments' "treatment as separate agencies for personnel purposes," *Pervez*, 193 F.3d at 1374, OPM's proposed rule defines the military departments as separate "agencies" for purposes of complying with the Fair Chance Act.

While the coverage of Executive departments in 5 U.S.C. 101 is straightforward enough, 5 U.S.C. 9202(1) makes no specific exceptions for subdivisions of Executive departments which have their own statutory personnel authorities. Prominent examples include the Veterans Health Administration within the Department of Veterans Affairs, the Federal Aviation Administration within the Department of Transportation, the Transportation Security Administration within the Department of Homeland Security, and the intelligence components of the Department of Defense. We welcome comment on whether any statute establishing an alternative personnel system for a subdivision of a department or agency creates an exception from 5 U.S.C. 9202(1), notwithstanding the Fair Chance Act's later date of enactment.

The Fair Chance Act covers "Government corporations" and "independent establishments" as defined in 5 U.S.C. 103 and 104, and OPM must include them, generally, as covered "agencies" in our proposed rule. We note that these definitions have been broadly construed to cover a number of entities that have historically operated outside of the title 5 personnel system. Under 5 U.S.C. 103, "'Government corporation' means a corporation owned or controlled by the Government of the United States," and this text has been construed to include both corporations wholly owned by the U.S. Government, and mixed-ownership corporations under U.S. Government control, as specified in 31 U.S.C. 9101(2) and (3). See *Snead v. Pension Benefit Guar. Corp.*, 74 M.S.P.R. 501, 503 (1997); *Dockery v. Fed. Deposit Ins. Corp.*, 64 M.S.P.R. 458, 461–62 (1984). In light of this broad construction, we are soliciting comment on whether the authorizing statute of any Government corporation operates to make an exception from 5 U.S.C. 9202(1)'s coverage, notwithstanding the Fair Chance Act's later date of enactment.

The term "independent establishment" is defined in 5 U.S.C. 104 as "an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment." The term has been construed broadly to cover independent, free-standing establishments with their own structure, or entities that have been created by statute or executive order and are not privately owned or privately controlled. *Applicability of the Fed. Vacancies Reform Act to Vacancies at the Int'l Monetary Fund and the World Bank*, 24 Op. O.L.C. 58, 65–66 (2000); *Hereford v. Tenn. Valley Auth.*, 88 M.S.P.R. 201, 205–206 (2001). There is no specific exception in 5 U.S.C. 104 for independent regulatory agencies or commissions as defined in 44 U.S.C. 3502(5), or for free-standing agencies that largely operate outside of the title 5 personnel system. Accordingly, we are soliciting comment on whether the authorizing statute of any independent establishment operates to make an exception from 5 U.S.C. 9202(1)'s coverage, notwithstanding the Fair Chance Act's later date of enactment.

Finally, 5 U.S.C. 9202(1)(B) expressly extends OPM's rulemaking and enforcement power under the Fair Chance Act to "the Executive Office of the President." We construe this language as applying to an application for any competitive service position within the Executive Office of the President (EOP), consistent with OPM's broad legal authority over competitive service employment. Under 5 U.S.C. 3302 and 1104(a)(1), the President may "prescribe rules governing the competitive service" and "delegate . . . authority for personnel management functions" to OPM. The President has prescribed Civil Service Rules I and V, as codified in parts 1 and 5 of Title 5, Code of Federal Regulations. These rules state that for "all positions in the competitive service and . . . all incumbents of such positions," OPM "may secure effective implementation of the civil service laws, rules, and regulations" by "[e]valuating the effectiveness of . . . agency compliance with and enforcement of applicable laws, rules, regulations and office directives" and "[i]nvestigating, or directing an agency to investigate and report on, apparent violations of applicable laws, rules, regulations, or directives requiring corrective action, found in the course of an evaluation." 5 CFR 1.1, 5.2(b), (c). Following OPM's report of an evaluation or investigation, "[w]henver the Director issues specific

instructions as to separation or other corrective action with regard to an employee, including cancellation of a personnel action, the head of the agency concerned shall comply with the Director's instructions;" and OPM "shall promulgate and enforce regulations necessary to carry out" these requirements. 5 CFR 5.1, 5.3(b).

In 5 U.S.C. 1103(a)(5)(A) and 1303(1), Congress has charged OPM with "executing, administering, and enforcing" these civil service rules and "investigat[ing] and report[ing] on matters concerning . . . the enforcement and effect" of these rules. These provisions do not restrict OPM's oversight authority over positions and employees in the competitive service based on where they are placed in the Executive branch. Thus, it would be consistent with preexisting authority for OPM to order a penalty under the Fair Chance Act as a corrective action, following an investigation and an adverse action proceeding, if an EOP employee is found to have made a prohibited inquiry to an applicant for a competitive service position.

However, OPM's oversight authority is more limited with respect to positions and employees in the excepted service. We do not believe Congress intended to subject applications for positions outside of the competitive service in every component of the Executive Office of the President to OPM's regulatory and enforcement jurisdiction under the Fair Chance Act, considering the established principle that some, but not all, EOP components are "independent establishments" of the Executive branch within the meaning of 5 U.S.C. 104, and thus within 5 U.S.C. 105's definition of an "executive agency" subject to regular title 5 employment rules.

The term "independent establishment" in 5 U.S.C. 104 has been construed to cover those free-standing components of the EOP which have their own structure and unity, such as the Office of Management and Budget; but to exclude from its coverage components of informal or *ad hoc* nature, *i.e.*, working groups or task forces. *See Applicability of the Fed. Vacancies Reform Act*, 24 Op. O.L.C. at 65–66, 67. The term has also been held to exclude those EOP components which are not "independent establishments" by operation of other laws. *See Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995) (noting the exclusion of the Executive Residence).<sup>5</sup>

<sup>5</sup> We note that there is also substantial case law on when an EOP component is a covered "agency" within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. 552(f)(2). This case law did not

Thus OPM's proposed rule does not extend to applications for positions outside of the competitive service in these components of the Executive Office of the President.

In addition, the Act defines the terms "appointing authority," "conditional offer," and "criminal history record information." An "appointing authority" is an employee in the executive branch of the Government of the United States that has authority to make appointments to positions in the civil service. "Conditional offer" means an offer of employment in a position in the civil service that is conditioned upon the results of a criminal history inquiry. The term "criminal history record information" has the meaning given the term in section 5 U.S.C. 9101(a), except as provided in subparagraphs (B) and (C) of section 9201. Subparagraph (B) states that criminal history record information includes any information described in the first sentence of section 9101(a)(2) that has been sealed or expunged pursuant to law. Subparagraph (C) states that criminal history record information includes information collected by a criminal justice agency, relating to an act or alleged act of juvenile delinquency, that is analogous to criminal history record information (including such information that has been sealed or expunged pursuant to law). OPM incorporates these definitions without additional interpretation, as they are clear on their face.

The Fair Chance Act uses the term "employee," which is defined in 5 U.S.C. 2105; but effectively modifies the definition by including, in its coverage, the United States Postal Service and the Postal Regulatory Commission, which would otherwise be excluded from the definition by operation of 5 U.S.C. 2105(e). Accordingly, we are adding the following definition to proposed § 920.101: "Employee means an 'employee' as defined in 5 U.S.C. 2105, and an employee of the United States Postal Service or the Postal Regulatory Commission."

guide us in construing whether an EOP component is an "agency" within the meaning of the Fair Chance Act. This is because, despite facial similarities between 5 U.S.C. 105 and 5 U.S.C. 552(f)(2), the test of whether an EOP component is covered by the FOIA derives from the FOIA's unique legislative history, rather than from its text. *See Kissinger v. Reporter's Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Citizens for Responsibility and Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009). OPM has no reason to believe that Congress intended the same considerations to govern EOP's coverage under the FOIA and EOP's coverage under the Fair Chance Act.

As described in greater detail below, we are defining "political appointment" as an appointment by the President without Senate confirmation (except those appointed under 5 CFR 213.3102(c)) because these are not positions of a confidential or policy determining character; an appointment to a position compensated under the Executive Schedule (5 U.S.C. 5312 through 5316); an appointment of a White House Fellow to be assigned as an assistant to a top-level Federal officer (5 CFR 213.3102(z)); a schedule C appointment (5 CFR 213.3301, 213.3302); a noncareer, limited term, or limited emergency Senior Executive Service appointment (5 CFR part 317, subpart F); an appointee to serve in a political capacity under agency-specific authority; and a provisional political appointment. This definition lists the different types of political appointing authorities found in regulation and statute.

Finally, we are defining an "applicant" as a person who has actually applied to an agency under its procedures for accepting applications. This definition resolves a textual ambiguity in 5 U.S.C. 9202(a). It makes clear that the Fair Chance Act's remedies are only for persons who have actually applied for Federal jobs, not for persons who, for example, are merely considering applying for a job, have saved a resume in an on-line applicant interface such as USAJOBS but have not yet submitted it in response to a job opportunity announcement, or have attended a recruiting event but have not yet formally applied for a vacancy. We note that for USAJOBS announcements, 5 CFR 330.104 requires agencies to notify applicants of how to submit an application and how the receipt of an application will be documented.

#### Subpart B

Proposed subpart B addresses when inquiries into an applicant's criminal history may be made. Proposed § 920.201 regulates this aspect of the Fair Chance Act. Proposed paragraph (a) states that an agency cannot request an applicant's criminal history information orally or in written form, prior to giving a conditional offer of employment. This includes the following points in the recruitment and hiring process: (1) Initial application, through a job opportunity announcement on USAJOBS, or through any recruitment/public notification such as on the agency's website/social media, etc.; (2) after an agency receives an initial application through its back-end system, through shared service providers/recruiters/contractors, or orally or via

email and other forms of electronic notification; and (3) prior to, during, or after a job interview. This prohibition applies to agency personnel, shared service providers, contractors involved in the agency's recruitment and hiring process, automated systems (specific to the agency or governmentwide), etc.

Proposed paragraph (b) tracks the requirements of 5 U.S.C. 9202(b) and (c)(1). It allows agencies to make inquiries into a job applicant's criminal history, prior to making a conditional job offer to that applicant, if doing so is otherwise required by law, if the position requires a determination of eligibility for access to classified information or employment in a sensitive position, or eligibility for acceptance or retention in the armed forces (as described in 5 U.S.C. 9101(b)(1)(A)(i), (ii), or (iii)), or if it is a Federal law enforcement officer position (as defined in section 115(c) of title 18). We are clarifying that for this purpose a "sensitive position" is one that been so designated under the Position Designation System issued by OPM and the Office of Director of National Intelligence, which describes in greater detail agency requirements for designating positions that could bring about a material adverse effect on the national security. This conforms to our regulations governing sensitive positions in 5 CFR 1400.201.

The reference in the Fair Chance Act to a position requiring a determination of eligibility for acceptance or retention in the armed forces is ambiguous. By its terms the Fair Chance Act applies only to applicants for "an appointment to a position in the civil service," not for acceptance into the armed forces. We construe this provision as relating to those positions in the civil service where the applicant is required to maintain military membership as a condition of civilian Federal employment, *i.e.*, a dual-status military technician position. Our proposed rule incorporates this interpretation.

The Fair Chance Act applies to applicants to positions in the "civil service," which, under 5 U.S.C. 2101(1), extends to "all appointive positions" in the executive branch. Proposed paragraph (b) makes an exception for applicants for political appointments, since political appointees provide confidential, policy-determining, or policy-advocating functions on behalf of the President or presidentially-appointed agency heads, and serve as personal advisors and representatives to the President and other senior administration officials. Pre-employment criminal history screening may be required for these positions

prior to a conditional offer of employment, because of the utmost trust and discretion required in these positions and the potential for adverse publicity associated with unfit applicants. OPM is not making an exception for applicants to positions requiring appointment by the President with the advice and consent of the Senate. The Fair Chance Act already excludes such positions because a "conditional offer" is never extended for these positions under 5 U.S.C. 9202(a); rather, the individual is nominated and then confirmed.

Proposed paragraph (b) also describes other circumstances for which OPM may grant exceptions in response to a request from a hiring agency. OPM may grant exceptions on a case-by-case basis only when an agency demonstrates specific job-related reasons why the agency needs to evaluate an applicant's criminal history for a position prior to making a conditional offer giving due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions.

Proposed paragraph (c) adds the requirement to notify applicants of the prohibition in job opportunity announcements and on agency websites/portals for positions that do not require a posting on USAJOBS, such as excepted service positions, in addition to information about its complaint process as required by part 754 of this chapter.

Proposed § 920.202 defines what constitutes a violation of the Fair Chance Act and the prohibition in proposed § 920.201. Proposed paragraph (a) defines a violation as any oral or written request from criminal history information prior to a conditional job offer. Proposed paragraph (b) explains that a violation occurs when a prohibited inquiry is made by agency personnel, including when they act through shared service providers, contractors involved in the agency's recruitment/hiring process, or automated systems (specific to the agency or governmentwide).

This section also outlines several situations in which a violation could occur. An agency cannot request criminal history information upon the initial application, through a job opportunity announcement on USAJOBS, or through any recruitment/public notification such as on the agency's website/social media. An agency also cannot request this information after an agency receives an initial application through its back-end system, through shared service providers/recruiters/contractors, or

orally or via email and other forms of electronic notification prior to giving the conditional offer. Additionally, the agency cannot request the information verbally prior to, during, or after a job interview prior to giving a conditional offer.

Proposed paragraph (c) provides that when a prohibited request, announcement, or communication is publicly posted or simultaneously distributed to multiple applicants, it constitutes a single violation. This resolves an ambiguity in the language of 5 U.S.C. 9202(a) and prevents the absurd and unintended outcome of thousands of violations and complaints arising from a single job opportunity announcement on USAJOBS.

Proposed paragraph (d) explains that any violation as defined in paragraph (a) is subject to the complaint and penalty procedures in part 754 of this chapter.

## Expected Impact of This Proposed Rule

### A. Statement of Need

OPM is issuing this proposed rule to implement the provisions of the Fair Chance Act found in Chapter 92 of title 5, United States Code. This statute prohibits Federal agencies and Federal contractors from requesting that applicants for employment disclose criminal history record information before the agency makes a conditional offer of employment to that employee. The Fair Chance Act identifies some positions to which the prohibition shall not apply and requires OPM to issue regulations identifying additional positions to which the prohibition shall not apply. It also requires OPM to establish complaint procedures under which an applicant for a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency with the Fair Chance Act, and adverse action and appeal procedures when it has been determined that a Federal employee has violated the Fair Chance Act. OPM is implementing these statutory requirements in the least burdensome way it can while still effectuating the congressional purposes of the Fair Chance Act.

### B. Impact

The proposed rule allows job applicants to present their qualifications and abilities for assessment and be considered based on their merits without the specter of a criminal record during the selection process. Employment of people with criminal records is the single most important

influence on reducing re-offending.<sup>6</sup> The impact to communities and society includes reducing criminal justice costs, crime victimization costs, and the costs of incarceration to the reoffenders and their families.<sup>7</sup> Another significant impact of the proposed rule is that the Federal government, as the nation's largest employer and a model employer, will demonstrate an example of fair hiring practices by removing unnecessary barriers for people with records who desire to join the Federal workforce.

OPM believes there is significant value in being able to demonstrate the effect of these proposed regulations on both Federal agencies and formerly incarcerated individuals. As noted earlier, however, OPM currently does not have and is not aware of any data to show what impact, if any, OPM's existing "Ban the Box" rules have had on agency hiring processes. Therefore, OPM invites comments regarding any hiring data agencies may have that demonstrate the effect of either OPM's prior regulations or the potential impact of these proposed rules. This includes ways that these proposed rules may impact the size of applicant pools for positions not previously covered by OPM's regulation, including positions in the excepted service as well as positions in the United States Postal Service and the Postal Regulatory Commission.

### C. Regulatory Alternatives

OPM's implementing regulations are required by statute and cannot be avoided. In the proposed regulations for part 754, OPM fleshes out procedures for receiving and investigating complaints, or any other information, as well as procedural and appeal rights for an agency employee alleged to have violated section 9202. The statute establishes the agencies and employees covered by proposed 5 CFR part 754, available penalties that can be imposed for an employee found to have violated section 9202, and the 30-day timeframe for appealing an adverse action.

First, OPM considered the option of receiving complaints, and any other information, directly from applicants and conducting its own outreach and investigative fact-finding, as appropriate to the nature of the applicant's submission. However, OPM believes there is ample precedent for agencies to establish internal procedures for receipt

and investigation of employment-related complaints against the agency and to accomplish these tasks in a fair and impartial manner. Therefore, we have laid out an approach that we believe is minimally burdensome for agencies. Subject to OPM guidelines and oversight, the proposed rule assigns to each agency covered by the Fair Chance Act regulations the responsibility to receive complaints, or any other information, and any applicable supporting material. Further, the proposed rule delegates to each agency OPM's responsibility to conduct an investigation of the complaint, or any other information, regarding compliance with 5 U.S.C. 9202. OPM believes that establishing a process which is similar to other successful and effective processes will facilitate implementation of the Fair Chance Act complaint process in covered agencies as agencies are already familiar with these similar processes. While the proposed rule provides parameters to guide agencies and facilitate governmentwide consistency, the assignment and delegation to agencies reduces the need for what would be more extensive regulations if OPM were directly receiving and investigating complaints, and other information, related to an alleged violation of section 9202.

Regarding the procedures for adverse actions, the statute requires notice and an opportunity for a hearing on the record by OPM for any employee alleged to have committed a violation of section 9202. Section 9205 further notes that the procedures of chapter 75 of title 5, United States Code, are not applicable and that appeal or judicial review are not applicable except as provided under procedures established by the Director of OPM. Because chapter 75 procedures are not available, it is necessary for OPM to propose an alternative to implement the unique procedural and appeal elements of the Fair Chance Act. In developing proposed procedures, OPM considered the benefits of adapting the adverse action procedures found at 5 CFR part 752 rather than another approach. Adapting the part 752 procedures affords agencies the benefit of familiarity, facilitates ease of transfer in knowledge and skills to the new regulations, and reduces the need for more extensive or complex regulations.

### D. Costs

Costs Related to Parts 302, 317, 319, 330, 731 and 920—Restrictions on Preemployment Criminal Inquiries Prior to Conditional Offer

This rule will affect the operations of over 80 Federal agencies—ranging from

cabinet-level departments to small independent agencies. This rule expands the prohibition on making inquiries into an applicant's criminal background prior to a conditional offer of employment. The prohibition currently applies to positions in the competitive service. The proposed rule would expand this prohibition to include agencies with positions in the excepted service and the Senior Executive Service. There are approximately 20 agencies in the Executive Branch that are fully in the excepted service that will be impacted by this rule. We estimate that this rule will require individuals employed by these agencies to develop policies and procedures to implement the rule when making appointments. For the purpose of this cost analysis, with regard to parts 302, 317, 319, 330, 731, and 920, the assumed average salary rate of Federal employees performing this work will be the rate in 2022 for GS-14, step 5, from the Washington, DC, locality pay table (\$143,064 annual locality rate and \$68.55 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 \$137.10 per hour.

In order to comply with the regulatory changes in this proposed rule, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first year following publication of the final rule, this will require an average of 250 hours of work by employees with an average hourly cost of \$137.10. This would result in estimated costs in that first year of implementation of about \$34,275 per agency, and about \$2,742,000 in total governmentwide. We do not believe this rule will substantially increase the ongoing administrative costs to agencies (including the administrative costs of administering the program and hiring and training new staff).

Costs Related to Part 754—Complaint Procedures, Adverse Actions, and Appeals for Criminal History Inquiries Prior to Conditional Offer

Regarding the implementation of the regulatory requirements in proposed part 754, in the event of a complaint by an applicant, agencies will incur labor costs associated with the investigation into the complaint and OPM will incur labor costs associated with reviewing the results of the investigation and reaching a determination which could include issuing a notice of proposed action to the subject of the complaint, considering any response, and making a

<sup>6</sup> National Employment Law Project, "The Business Case: Becoming a Fair-Chance Employer" (June 2016).

<sup>7</sup> U.S. Department of Labor, "Reducing Recidivism and Increasing Opportunity" (June 2018).

final determination. In the event OPM directs the employing agency to take an action as a result of a founded complaint, OPM would incur labor costs in responding to and/or defending any appeal by the subject of the complaint to the Merit Systems Protection Board.

In order to estimate the costs to implement the proposed regulatory requirements in part 754 for complaint procedures, adverse actions, and appeals, OPM made certain assumptions and considered that some costs may vary depending on agency size and the extent to which an agency is able to leverage existing policies, practices, and procedures. For this cost analysis, the assumed staffing for Federal employees performing the work required by the regulations in part 754 is one executive; one GS-14, step 5; a GS-15, step 5; and one GS-7, step 5 in the Washington, DC, locality area. The 2022 basic rate of pay for an executive at an agency with a certified SES performance appraisal system ranges from \$135,468 to \$203,700 annually, for an average of \$169,584 per year or \$81.26 per hour. For General Schedule employees in the Washington, DC, locality area, the 2022 pay table rates are \$168,282 annually and \$80.63 hourly for GS-15, step 5; \$143,064 annually and \$68.55 for GS-14, step 5, and \$57,393 annually and \$27.50 hourly for GS-7, step 5. 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 assumed hourly labor costs of \$162.51 for an executive; \$161.27 for a GS-15, step 5; \$137.10 for a GS-14, step 5; and \$55 for a GS-7, step 5.

As to overall complaint procedures, program implementation and oversight, OPM assumes it will incur certain upfront costs and then ongoing costs. For example, the establishment of new processing codes requires one-time updates to OPM's databases and personnel action processing handbook. After the issuance of any final rule effecting part 754, OPM may develop additional materials related to its implementation. This includes, but is not limited to, procedures and guidance related to agency obligations to report to OPM actions taken to investigation any complaints filed by an applicant regarding an agency's compliance with 5 U.S.C. 9902 and adverse actions taken at the direction of OPM for non-compliance with 5 U.S.C. 9202. OPM estimates that the cost for its implementation and oversight in the first year will be \$30,370.00 and \$3,687.04 on average in subsequent years.

OPM estimates that it will cost each agency \$21,319.04 in the first year to establish an internal policy for handling alleged violations of 5 U.S.C. 9202. We assume that larger agencies advertise more vacancies and are therefore likely to receive a greater number of complaints. We estimate the annual cost of complaint intake and investigation for large agencies to be \$172,746.00 (based on an average of 30 complaints per large agency); medium size agencies \$115,164.00 (for 20 complaints); and small size agencies \$57,582.00 (for 10 complaints). The total estimated cost for agencies to receive and investigate complaints is \$345,492.00 annually, which averages to \$5,758.20 per complaint.

For agency outreach regarding any other information that may potentially be an attempt to file a complaint for an alleged violation of 5 U.S.C. 9202, OPM again assumes that larger agencies advertise more vacancies and are therefore likely to experience a greater number of such instances. We estimate that large agencies on average may conduct 30 instances of outreach and incur \$8,226.00 for the total number of instances. Medium size agencies may conduct outreach for 20 instances and incur \$5,484.00 total. Small agencies may conduct outreach for 10 instances and incur \$2,742.00 total. The total estimated annual cost of agency outreach is \$16,452.00 and the average cost of agency outreach is \$274.20 per instance.

Following agency intake, outreach (if applicable), and investigation, OPM is responsible for administering the adverse action procedures as outlined in proposed § 754.203. Based on the estimate for the annual number of complaints that Federal agencies may receive (60 for large, medium, and small agencies combined), OPM estimates that 75%, or 15, of the complaints may result in a finding of a violation of 5 U.S.C. 9202. While OPM will carefully review and consider each investigative file submitted by agencies, OPM expects that only those investigations that result in a finding of a violation will generate a meaningful increase in cost above staff's usual duties and responsibilities. Assuming 15 such cases, the total cost for OPM's administration of the adverse action procedures, including proposing an action, considering any reply, and issuing a decision, is estimated to be \$159,818.40. The average cost for OPM per adverse action is \$10,654.56.

Under the proposed regulation, agencies are responsible for processing any adverse action imposed by OPM. Agencies routinely process suspensions for other forms of misconduct. Thus,

applying those same procedures to adverse actions imposed for violations of 5 U.S.C. 9202 will be a negligible cost for agencies. However, OPM does anticipate some cost for the one-time update to agency processing systems for the new codes established by OPM to identify that the adverse actions are taken under 5 U.S.C. 9202, as well as the establishment of agency procedures for the collection of civil penalties. OPM estimates the costs to agencies in the first year for updating their systems and procedures and processing actions to be \$24,690.04. Thereafter, we estimate that the average cost for an agency to process an adverse action, including any civil penalty, is \$960.50 per action.

The available penalties for violations of 5 U.S.C. 9202 include written warnings and short suspensions (14 days or less) that are not grievable or appealable. Further, an employee's first two violations of section 9202 will result in a penalty no stronger than a seven-day suspension. For only a third or subsequent violation would OPM impose a penalty that may be appealable to the MSPB. While such an appeal to the MSPB is possible, we believe that it will be rare that an employee violates section 9202 three or more times. OPM anticipates that if 15 adverse actions are imposed per year, only one on average will be appealable to the MSPB. We therefore do not believe there will be a measurable impact on MSPB operations and thus, we have not estimated costs for the MSPB.

Because any appeal filed is against OPM and not the employing agency, OPM will be responsible for defending the action. OPM estimates \$11,447.84 to defend an appeal.

The remaining requirements of the proposed part 754 for complaint procedures, adverse actions, and appeals will require minimal costs for OPM or agencies. With respect to informing applicants of the agency's complaint procedures via the agency's public website and in vacancy announcements, the additional cost to agencies will be small. Agencies already provide notice on their public websites and in vacancy announcements about how an applicant can file an EEO complaint. Also, agencies provide information to the public on their external websites about how to file an Inspector General complaint. Thus, an additional notice does not present a significant additional cost. In conclusion, OPM estimates a cost of \$598,141.47 to implement the complaint procedures under the proposed Fair Chance Act regulations in the first year and the recurring cost per year to be \$32,782.34.

## Indirect Costs

We note that OPM's rule, when finalized, may have indirect costs on other entities. Section 1122(d) of the Fair Chance Act amends section 207(d)(2) of the Congressional Accountability Act of 1995 to require the Board of Directors of the Office of Congressional Workplace Rights to promulgate regulations that are "the same" as OPM's "except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section." Section 1122(e) of the Fair Chance Act similarly amends 28 U.S.C. 604(e)(5)(B) to require the Director of the Administrative Office of the U.S. Courts to promulgate regulations that are "the same" as OPM's "except to the extent that the Director . . . may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this subsection." Finally, section 1123(c) of the Fair Chance Act requires the Federal Acquisition Regulation (FAR) Council to amend the FAR "to be consistent with" OPM's regulations "to the maximum extent practicable" and to "include together with such revision an explanation of any substantive modification of the Office of Personnel Management regulations, including an explanation of how such modification will more effectively implement the rights and protections under this section."

Such indirect costs are not quantifiable since sections 1122(d)–(e) and 1123(c) of the Fair Chance Act give the other entities significant leeway to adopt, reject, or modify OPM's regulations with respect to the populations covered by those sections.

## E. Benefits

The Fair Chance Act regulations will help level the playing field for applicants with a criminal history record, contribute to an equitable and diverse Federal workforce, and enhance transparency and accountability in the Federal hiring process. More than 70 million adults in the United States have an arrest or conviction record that can show up on a routine background check for employment. As a result, one in three adults may face serious challenges securing employment in order to provide for their families and

communities.<sup>8</sup> With some exceptions, the Fair Chance Act prohibits Federal employers from requesting that an applicant disclose criminal history record information before the agency makes a conditional offer of employment to that applicant. The proposed regulations provide the opportunity for qualified applicants with records to advance in the hiring process just as a qualified applicant without a criminal history record would advance. Studies show that employment is the single most important factor in reducing recidivism; that people with criminal records are no more likely to be fired for misconduct than people without records; and that they are statistically less likely to quit, which saves employers in turnover costs.<sup>9</sup> Therefore, the regulations benefit not only the Federal government as an employer but also American society as a whole at the family and community levels.

This regulation will support the Administration's priority to advance comprehensive equity. Executive Order 14035 establishes an initiative on diversity, equity, inclusion, and accessibility (DEIA). As part of the DEIA Initiative, a Government-Wide Strategic Plan To Advance Diversity, Equity, and Accessibility In The Federal Workforce was released by OPM in November 2021. This new DEIA strategic plan directs agencies to prioritize a number of efforts to support sustainability and continued improvement on DEIA matters. The proposed rule can help Federal agencies realize the vision of the Federal government as a model employer in the areas of diversity, equity, and inclusion. There is evidence that people of color have less access to basic resources as compared to other segments of the American population. For example, Black women with records are most impacted by the high rate of unemployment for formerly incarcerated people.<sup>10</sup> By removing barriers to fair competition through the Fair Chance Act along with other initiatives, Federal agencies stand to gain a more diverse applicant pool, improve equity in the hiring process, and build or maintain a workforce fully representative of America.

Finally, another benefit of the proposed rule is increased transparency

and accountability in the Federal hiring process. The regulations protect the rights of applicants who believe they have been subjected to a violation of 5 U.S.C. 9202 and holds accountable Federal employees found to have committed such a violation. This regulation should have a deterrent effect on supervisors, managers, and other employees involved in the hiring process to prevent them from engaging in activities that are in violation of the Fair Chance Act.

## F. Request for Comment and Data

In addition to the questions posed in the regulatory analysis and given the limited information on the Federal Government's implementation on Ban the Box, OPM requests comment on the implementation and impacts of Ban the Box efforts in the private sectors. Such information will be useful for better understanding the impact of these regulations on hiring by Federal agencies. The types of information that OPM is interested in include, but are not limited to, the following:

- Based on what the private sector has done, what should OPM, Federal agencies, and the government as a whole hope to accomplish with implementation of these regulations?
- Has your organization's implementation of Ban the Box impacted and aided your organization's diversity, equity, inclusion, and accessibility efforts? If so, how?
- Does your hiring process include any proactive efforts or accommodations related to candidates who have a criminal history record? Have you taken any steps, such as streamlining or revising your application process to address barriers facing candidates who have a criminal history record?
- How many roles does your organization have that are currently open or will be open that can be filled by candidates with criminal history records? How many positions has your organization filled?
- How does your organization measure success with respect to hiring candidates with criminal history records? Do you have data or reports to share?
- To the extent your organization has data regarding the number of employees who have a criminal history record, what has been your experience with respect to those candidates and employee turnover? How does employee turnover for those with criminal history records compare to employee turnover for those without criminal history records?

<sup>8</sup> National Employment Law Project Fact Sheet, FAQ (December 17, 2019).

<sup>9</sup> Lee-Johnson, "Give Job Applicants with Criminal Records a Fair Chance" (September 21, 2020), and Society for Human Resources Management, "2021 Getting Talent Back to Work Report" (May 2021).

<sup>10</sup> National Employment Law Project Fact Sheet, FAQ (December 17, 2019).

- Has Ban the Box increased qualified applicants for hard-to-fill positions? If so, what types of positions?

- OPM recognizes that engaging in efforts to hire candidates with a criminal history record is not only an opportunity to diversify the federal government workforce but is also a chance to forge meaningful connections with job development experts in local communities. How has your organization partnered with local source partners to give you strategic access to talented individuals with criminal history records? What should OPM and federal agencies consider in this area?

- Are there actions that you have taken to better ensure that applicants with criminal history records can succeed once hired? How can OPM ensure federal agencies are ready to receive talented applicants who have criminal history records, once they receive conditional offers of employment?

- Many candidates with criminal history records who are qualified in terms of the skills they possess may not have previous job experience in the role, or may have a lengthy employment gap during a period of incarceration. As your organization recruits for your open roles, how have you focused on identifying candidates who, even though they may not have significant work experience, can demonstrate transferable skills that will make them successful in your organization?

- Some studies<sup>11</sup> suggest implementation of Ban the Box results in lower employment for certain groups. What should OPM and Federal agencies do to avoid these outcomes? Are there other studies to review and consider as part of the federal hiring process for these individuals to mitigate or avoid these outcomes?

- Are there additional ways that the Federal Government can be a model employer with respect to individuals with criminal history records?

#### G. List of Sources

Lee-Johnson, Margie. "Give Job Applicants with Criminal Records a Fair Chance." *Harvard Business Review*, September 21, 2020. <https://hbr.org/2020/09/give-job-applicants-with-criminal-records-a-fair-chance?autocomplete=true>

National Employment Law Project. "FAQ: Fair Chance to Compete for Jobs Act of

2019," December 2019. <https://s27147.pcdn.co/wp-content/uploads/Fact-Sheet-FAQ-Federal-Fair-Chance-Compete-Jobs-Act-2019.pdf>

National Employment Law Project. "The Business Case: Becoming a Fair-Chance Employer," June 2016. <https://s27147.pcdn.co/wp-content/uploads/Business-Case-Fair-Chance-Employment.pdf>

Society for Human Resources Management. "2021 Getting Talent Back to Work Report: A Workplace Survey on Hiring and Working with People with Criminal Records," May 2021. [https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW\\_Report.pdf](https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW_Report.pdf)

U.S. Department of Labor. "Reducing Recidivism and Increasing Opportunity: Benefits and Costs of the RecycleForce Enhanced Transitional Jobs Program," June 2018. [https://www.mdrc.org/sites/default/files/ETJD\\_STED\\_Benefit\\_Cost\\_Technical\\_Supplement\\_508.pdf](https://www.mdrc.org/sites/default/files/ETJD_STED_Benefit_Cost_Technical_Supplement_508.pdf)

#### Executive Orders 13563 and 12866, Regulatory Review

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. In accordance with the provisions of Executive Order 12866, this rule was reviewed by the Office of Management and Budget as a significant, but not economically significant, rule.

#### Regulatory Flexibility Act

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

#### E.O. 13132, Federalism

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

#### E.O. 12988, Civil Justice Reform

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

#### Unfunded Mandates Reform Act of 1995

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

#### Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 *et seq.*) requires rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this rule before its effective date, as required by 5 U.S.C. 801. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule is not a major rule as defined by the CRA (5 U.S.C. 804).

#### Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

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. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

This rule makes reference to an OMB approved collection of information subject to the PRA titled *Declaration for Federal Employment (OF 306)*, OMB Control Number 3206–0182, which has been submitted to OMB for review. This form is completed by applicants who are under consideration for Federal or Federal contract employment and collects information about an applicant's selective service registration, military service, and general background. The information collected on this form is mainly used to determine a person's acceptability for Federal and Federal contract employment, and their retirement status and life insurance enrollment. The information on this form may be used in conducting an investigation to determine a person's suitability or ability to hold a security clearance, and it may be disclosed to authorized officials making similar, subsequent determinations. The OF 306 asks for

<sup>11</sup> See Amanda Agan, Sonja Starr, Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment, *The Quarterly Journal of Economics*, Volume 133, Issue 1, February 2018, Pages 191–235, <https://doi.org/10.1093/qje/qjx028> and Doleac, Jennifer L., and Benjamin Hansen. "The unintended consequences of "ban the box": Statistical discrimination and employment outcomes when criminal histories are hidden." *Journal of Labor Economics* 38.2 (2020): 321–374.

personal identifying data and information about violations of the law, past convictions, imprisonments, probations, parole, military court martial, delinquency on a Federal debt, Selective Service Registration, United States military service, Federal civilian or military retirement benefits received or applied for, and life insurance enrollment.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

*Respondents:* 315,478.

*Total Annual Responses:* 315,478.

*Total Burden Hours:* 78,870.

Interested persons are invited to send comments regarding burden estimates or any other aspect of this collection of information. OPM is soliciting comments to:

1. Evaluate the necessity and utility of the proposed information collection for the proper performance of the agency's functions, including whether the information will have practical utility;

2. evaluate the accuracy of the estimated burden, including the validity of the methodology and assumptions used;

3. enhance the quality, utility, and clarity of the information to be collected; and

4. use automated collection techniques or other forms of information technology to minimize the information collection burden. Submit comments on this collection of information no later than June 27, 2022, through <https://www.regulations.gov> and follow the instructions on the site.

A copy of the proposed information collection and the associated instructions is available at [https://www.opm.gov/forms/pdf\\_fill/of0306.pdf](https://www.opm.gov/forms/pdf_fill/of0306.pdf). The systems of record notice for this collection is: <https://www.opm.gov/information-management/privacy-policy/sorn/opm-sorn-govt-1-general-personnel-records.pdf>.

#### **List of Subjects in 5 CFR Part 302, 317, 319, 330, 731, 754, and 920**

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

Office of Personnel Management

**Alexys Stanley,**

*Regulatory Affairs Analyst.*

Accordingly, OPM is proposing to amend chapter I of title 5, Code of Federal Regulations, as follows:

#### **PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE**

■ 1. Revise the authority citation for part 302 to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151, E.O. 10577 (3 CFR 1954–1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.*; § 302.107 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

■ 2. Add § 302.107 to subpart A to read as follows:

##### **§ 302.107 Suitability inquiries regarding criminal history.**

Agency inquiries regarding criminal history must be done in accordance with the requirements under chapter 92 of title 5, U.S. Code and part 920 of this chapter.

#### **PART 317—EMPLOYMENT IN THE SENIOR EXECUTIVE SERVICE**

■ 3. Revise the authority citation for part 317 to read as follows:

**Authority:** 5 U.S.C. 3392, 3393, 3395, 3397, 3592, 3593, 3595, 3596, 8414, and 8421. § 317.202 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

■ 4. Add § 317.202 to subpart B to read as follows:

##### **§ 317.202 Suitability inquiries regarding criminal history.**

Agency inquiries regarding criminal history must be done in accordance with the requirements under chapter 92 of title 5, U.S. Code and part 920 of this chapter.

#### **PART 319—EMPLOYMENT IN THE SENIOR-LEVEL AND SCIENTIFIC AND PROFESSIONAL POSITIONS**

■ 5. Revise the authority citation for part 319 to read as follows:

**Authority:** 5 U.S.C. 1104, 3104, 3324, 3325, 5108, and 5376. § 319.106 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

■ 6. Add § 319.106 to subpart A to read as follows:

##### **§ 319.106 Suitability inquiries regarding criminal history.**

Agency inquiries regarding criminal history must be done in accordance with the requirements under chapter 92

of title 5, U.S. Code and part 920 of this chapter.

#### **PART 330—RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)**

■ 7. Revise the authority citation for part 330 to read as follows:

**Authority:** 5 U.S.C. 1104, 1302, 3301, 3302, 3304, and 3330; E.O. 10577, 3 CFR, 1954–58 Comp., p. 218; Section 330.103 also issued under 5 U.S.C. 3327; Subpart B also issued under 5 U.S.C. 3315 and 8151; Section 330.401 also issued under 5 U.S.C. 3310; Subparts F and G also issued under Presidential Memorandum on Career Transition Assistance for Federal Employees, September 12, 1995; Subpart G also issued under 5 U.S.C. 8337(h) and 8456(b). § 330.1301 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

■ 8. Revise subpart M to read as follows:

##### **Subpart M—Timing of Background Investigations**

##### **§ 330.1300 Timing of suitability inquiries in competitive hiring.**

(a) A hiring agency may not make specific inquiries concerning an applicant's credit background of the sort asked on the OF–306, Declaration for Federal Employment, or other forms used to conduct suitability investigations for Federal employment (*i.e.*, inquiries into an applicant's adverse credit history) unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may make inquiries into an applicant's Selective Service registration, military service, citizenship status, where applicable, or previous work history, prior to making a conditional offer of employment to an applicant.

(b) However, in certain situations, agencies may have a business need to obtain information about the credit background of applicants earlier in the hiring process to determine if they meet the qualifications requirements or are suitable for the position being filled. If so, agencies must request an exception from the Office of Personnel Management in order to determine an applicant's ability to meet qualifications or suitability for Federal employment prior to making a conditional offer of employment to the applicant(s). OPM will grant exceptions only when the agency demonstrates specific job-related reasons why the agency needs to evaluate an applicant's adverse credit history earlier in the process. OPM will consider such factors as, but not limited to, the nature of the position being filled and whether a clean credit history record would be essential to the ability to perform one of the duties of the

position effectively. OPM may also consider positions for which the expense of completing the examination makes it appropriate to review an applicant's credit background at the outset of the process (e.g., a position that requires that an applicant complete a rigorous training regimen and pass an examination based upon the training before their selection can be finalized). A hiring agency must request and receive an OPM-approved exception prior to issuing public notice for a position for which the agency will collect credit background information prior to completion of the assessment process and the making of a conditional offer of employment.

**§ 330.1301 Suitability inquiries regarding criminal history.**

Agency inquiries regarding criminal history must be done in accordance with the requirements under chapter 92 of title 5, U.S. Code and part 920 of this chapter.

**PART 731—SUITABILITY**

■ 9. Revise the authority citation for part 731 to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 7301, 9201–9206; Pub. L. 116–92, sec. 1122(b)(1); E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, as amended; E.O. 13467, 3 CFR, 2009 Comp., p. 198; E.O. 13488, 3 CFR, 2010 Comp., p. 189; 5 CFR, parts 1, 2 and 5; Presidential Memorandum on Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own, January 31, 2014.

■ 10. In § 731.103, revise paragraph (d)(1) to read as follows:

**§ 731.103 Delegation to agencies.**

\* \* \* \* \*

(d) \* \* \*

(1) Except where required by law, a hiring agency may not make specific inquiries concerning an applicant's criminal or credit background in oral or written form (including through the OF-306 or other forms used to conduct suitability investigations for Federal employment, USAJOBS, or any other electronic means) unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may request an exception to the provision for making credit inquiries in advance of a conditional offer in accordance with the provisions in 5 CFR part 330 subpart M. For criminal inquiries prior to a conditional offer, this prohibition does not apply to applicants for positions excepted under 5 CFR 920.201(b). If an agency has a business need to obtain information

about the criminal history of applicants for other positions earlier in the process, they must follow the guidance in part 920 which also addresses the provisions for requesting an exception from the Office of Personnel Management. Agencies may make inquiries into an applicant's Selective Service registration, military service, citizenship status, where applicable, or previous work history, prior to making a conditional offer of employment to an applicant.

■ 11. Add part 754 as to read follows:

**PART 754—COMPLAINT PROCEDURES, ADVERSE ACTIONS, AND APPEALS FOR CRIMINAL HISTORY INQUIRIES PRIOR TO CONDITIONAL OFFER**

**Subpart A—Complaint Procedures**

Sec.

- 754.101 Coverage.
- 754.102 Agency complaint process.
- 754.103 Applicant representatives.

**Subpart B—Adverse Actions**

- 754.201 Coverage.
- 754.202 Penalty determination.
- 754.203 Procedures.
- 754.204 Appeal rights.
- 754.205 Agency records.

**Authority:** 5 U.S.C. 554(a)(2), 1103(a)(5)(A), 1104(a)(2), 9201–9205, and Pub. L. 116–92, sec. 1122(b)(1).

**Subpart A—Complaint Procedures**

**§ 754.101 Coverage.**

(a) *Actions covered.* A complaint, or any other information, submitted by an applicant for an appointment to a civil service position relating to compliance with section 9202 of title 5, United States Code.

(b) *Definitions.* In this subpart, *agency*, *applicant*, *appointing authority*, *conditional offer*, *criminal history record information*, and *employee* have the meanings set forth in 5 CFR 920.101.

**§ 754.102 Agency complaint process.**

(a) *Complaint intake.* (1) Within 90 days of the effective date of this part, each agency must establish and publicize an accessible program for the agency to receive a complaint, or any other information, from an applicant, and any applicable supporting material, relating to the agency's compliance with section 9202 of title 5, United States Code and part 920 of this chapter, in accordance with the guidelines and standards established in this section and the issuances described in paragraph (d)(3) of this section.

(2) An applicant may submit a complaint, or any other information, to an agency within 30 calendar days of the date of the alleged non-compliance

by an employee of an agency with section 9202 of title 5, United States Code.

(3) The agency shall extend the 30 calendar day time limit in paragraph (b) of this section when the applicant shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the non-compliance with 5 U.S.C. 9202 and part 920 of this chapter occurred, to consider a reasonable accommodation of a disability, or for other proper and adequate reasons considered by the agency.

(4) The agency must conduct outreach to inform an applicant of the procedure for submitting a complaint when it has reasonable cause to believe that the applicant is attempting to file a complaint.

(b) *Agency investigation.* (1) Acting under delegated authority from OPM and subject to the limitations and requirements of paragraph (d) of this section, the agency employing the employee against whom the complaint has been filed shall investigate the complaint, unless the employee is an administrative law judge appointed under 5 U.S.C. 3105. To carry out this function in an impartial manner, the same agency official(s) responsible for executing and advising on the recruitment action may not also be responsible for managing, advising, or overseeing the agency complaint process established in this section.

(2) In carrying out its delegated responsibilities under paragraph (b)(1) of this section, the agency shall develop an impartial and appropriate factual record adequate for OPM to make findings on the claims raised by any written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether non-compliance with 5 U.S.C. 9202 and part 920 of this chapter occurred. Agencies have discretion to determine the appropriate fact-finding methods that efficiently and thoroughly address the matters at issue.

(3) The agency must delegate to the investigator sufficient authority to secure the production, from agency employees and contractors, of documentary and testimonial evidence needed to investigate and report on the complaint.

(4) The agency shall complete its investigation within 60 calendar days of the date of the filing of the complaint.

(5) Within 30 calendar days of completing its investigation, the agency shall provide to OPM an administrative report. This report should include the

applicant's complaint, or any other information submitted by the applicant, the agency's factual findings, a complete copy of all information gathered during the investigation, and any other information that the agency believes OPM should consider. The report should be submitted to the Manager, Employee Accountability, Accountability and Workforce Relations, Employee Services, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415.

(c) *OPM adjudication.* (1) At OPM's discretion, OPM may request the agency provide additional information as necessary.

(2) OPM shall notify the agency and the subject(s) of the complaint in writing of its findings regarding the complaint, including any decision to initiate adverse action proceedings.

(d) *OPM oversight.* (1) OPM may revoke an agency's delegation under this section if an agency fails to conform to this section or OPM issuances as described in paragraph (d)(3) of this section.

(2) OPM retains jurisdiction to make final determinations and take actions regarding the receipt and investigation of complaints, or any other information; record-keeping; and reporting related to an allegation of noncompliance with 5 U.S.C. 9202 and part 920 of this chapter. Paragraphs (a) and (b) of this section notwithstanding, OPM may, in its discretion, exercise its jurisdiction under this section in any case it deems necessary.

(3) OPM may set forth policies, procedures, standards, and supplementary guidance for the implementation of this section in OPM issuances.

#### **§ 754.103 Applicant representatives.**

An applicant may select a representative of their choice to assist the applicant during the complaint process. An agency may disallow as an applicant's representative an individual whose activities as a representative would cause a conflict of interest or position; an agency employee who cannot be released from their official duties because of the priority needs of the Government; or an agency employee whose release would give rise to unreasonable costs to the Government.

### **Subpart B—Adverse Actions**

#### **§ 754.201 Coverage.**

(a) *Actions covered.* This subpart applies to actions taken under 5 U.S.C. 9204.

(b) *Employees covered.* This subpart covers an employee of an agency as defined in 5 CFR 920.101.

(c) *Definitions.* In this subpart—  
*Civil penalty* means a monetary penalty imposed on an employee of a covered agency when it has been determined the employee has violated the Fair Chance Act.

*Day* means a calendar day.

*Director* means the Director of OPM or the Director's designee.

*Suspension* means the placing of an employee of a covered agency in a temporary status without duties and pay when it has been determined the employee violated the Fair Chance Act.

#### **§ 754.202 Penalty determination.**

(a) *First violation.* If the Director or Director's designee determines that an employee of an agency has violated 5 U.S.C. 9202 and part 920 of this chapter, the Director or Director's designee, after OPM provides the procedural rights in § 754.203, shall issue to the employee a written warning that includes a description of the violation and the additional penalties that may apply for subsequent violations; and direct the agency to file such warning in the employee's official personnel record file.

(b) *Subsequent violations.* If the Director or Director's designee determines, after OPM provides the procedural rights in § 754.203, that an employee of an agency has committed a subsequent violation of 5 U.S.C. 9202 and part 920 of this chapter, the Director or Director's designee may take the following action:

(1) For a second violation, order a suspension of the employee for a period of not more than 7 days.

(2) For a third violation, order a suspension of the employee for a period of more than 7 days.

(3) For a fourth violation—

(i) Order a suspension of the employee for a period of more than 7 days; and

(ii) Order the employee's agency to collect a civil penalty against the employee in an amount that is not more than \$250, and remit the penalty amount to the U.S. Department of Treasury for deposit in the Treasury.

(4) For a fifth violation—

(i) Order a suspension of the employee for a period of more than 7 days; and

(ii) Order the employee's agency to collect a civil penalty against the employee in an amount that is not more than \$500, and remit the penalty amount to the U.S. Department of Treasury for deposit in the Treasury.

(5) For any subsequent violation—

(i) Order a suspension of the employee for a period of more than 7 days; and

(ii) Order the employee's agency to collect a civil penalty against the employee in an amount that is not more than \$1,000, and remit the penalty amount to the U.S. Department of Treasury for deposit in the Treasury.

(c) *Duration of suspension and penalty amount.* The Director or the Director's Designee has discretion to determine the duration of a suspension and the amount of a penalty under this section, subject only to the minimum and maximum durations and amounts specified in this section.

(d) *Agency responsibilities.* An agency shall carry out an order of the Director to suspend an employee, or to collect and remit a civil penalty, pursuant to processing and recordkeeping instructions issued by OPM.

(1) The agency shall carry out the order of the Director to suspend the employee as soon as practicable.

(2) The agency shall carry out the order of the Director to collect and remit a civil penalty as soon as practicable, unless the employee timely appeals the action under § 754.204, in which case the agency shall collect and remit the civil penalty as soon as practicable after the Merit Systems Protection Board issues a final decision sustaining the action.

(e) *Administrative law judges.*

Paragraphs (a) through (d) of this section do not apply if the Director or Director's designee determines that an administrative law judge has violated 5 U.S.C. 9202 and part 920 of this chapter. In any such case the Director or the Director's designee shall file a complaint with the Merit Systems Protection Board proposing an action set forth in 5 U.S.C. 9204 and describing with particularity the facts that support the proposed agency action, and the Board will determine whether the action is for good cause under its regulations in 5 CFR part 1201, subpart D.

#### **§ 754.203 Procedures.**

(a) *Notice of proposed action.* If the Director or Director's designee determines a violation of 5 U.S.C. 9202 and part 920 of this chapter has occurred, an employee against whom action is proposed under this subpart is entitled to at least 30 days' advance written notice. The notice must state the specific reason(s) for the proposed action and inform the employee of their right to review the material which is relied on to support the reasons for action given in the notice before any final decision is made by the Director or Director's designee.

(b) *Employee's answer.* (1) An employee may answer orally and in writing. The employee's agency must

give the employee a reasonable amount of official time to review the material relied on to support OPM's proposed action, to prepare and present an answer orally and in writing, and to secure affidavits, if the employee is in an active duty status. OPM may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the employee's answer, within such time as would be reasonable, but not less than 7 days.

(2) The Director or Director's Designee may designate an Office of Personnel Management official to hear the employee's oral answer, and confer authority on that person to make or recommend a final decision on the proposed adverse action.

(c) *Representation.* An employee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from their official position would give rise to unreasonable costs or whose priority work assignments preclude their release.

(d) *OPM decision.* (1) In arriving at a decision, the Director or the Director's Designee will consider only the complaint, the applicant's supporting material, the agency's administrative file, the reasons specified in the notice of proposed action, and any oral and written answer by the employee or the employee's representative.

(2) The decision notice must specify in writing the reasons for the decision and advise the employee of any appeal rights.

(e) This section does not apply if the Director or Director's designee determines that an administrative law judge has violated 5 U.S.C. 9202 and part 920 of this chapter.

#### **§ 754.204 Appeal rights.**

(a) An employee against whom an action is taken by OPM under § 754.203 may appeal to the Merit Systems Protection Board, under the regulations of the Board, but only to the extent the action concerns suspensions for more than 14 days or combines a suspension and a civil penalty. An appeal must be filed by not later than 30 days after the effective date of the action. The procedures for filing an appeal with the Board are found at 5 CFR part 1201.

(b) If the Board finds that one or more of the charges brought by OPM against the employee is supported by a preponderance of the evidence,

regardless of whether all specifications are sustained, it must affirm OPM's action. The Board may neither review whether the adverse action is for such cause as will promote the efficiency of the service, nor mitigate the duration of a suspension or the amount of a civil penalty ordered under this part.

(c) An appeal against OPM is the exclusive avenue of appeal. The employee has no right to file a separate appeal against the employing agency for processing a personnel action as ordered by OPM under § 754.202.

(d) OPM's action under § 754.202 is not subject to an agency's administrative grievance procedure or a negotiated grievance procedure under a collective bargaining agreement between an exclusive bargaining representative and any agency.

#### **§ 754.205 Agency records.**

The complaint, the applicant's supporting material, the agency's administrative file, the notice of the proposed action, the employee's written reply, if any, any summary or transcript of the employee's oral reply, if any, the notice of decision, and any order to the covered agency effecting the action together with any supporting material, must be maintained in an appropriate system of records under the Privacy Act.

### **PART 920—TIMING OF CRIMINAL HISTORY INQUIRIES**

#### **Subpart A—General Provisions**

Sec.

920.101 Definitions.

920.102 Positions covered by Fair Chance Act regulations.

#### **Subpart B—Timing of Inquiries Regarding Criminal History**

920.201 Limitations on criminal history inquiries.

920.202 Violations.

**Authority:** 5 U.S.C. 1103(a)(5)(A), 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

#### **Subpart A—General Provisions**

##### **§ 920.101 Definitions.**

For the purpose of this part:

*Agency* means—

(1) An Executive agency as such term is defined in 5 U.S.C. 105, including—

(i) An Executive department defined in 5 U.S.C. 101;

(ii) A Government corporation

defined in 5 U.S.C. 103(1); and

(iii) An independent establishment defined in 5 U.S.C. 104, including the Government Accountability Office;

(2) A military department as defined in 5 U.S.C. 102;

(3) The United States Postal Service and the Postal Regulatory Commission; and

(4) Each component of the Executive Office of the President that is an independent establishment, or that has a position in the competitive service, with respect to an applicant for the position.

*Applicant* means a person who has applied to an agency under its procedures for accepting applications consistent with governmentwide regulations, as applicable.

*Appointing authority* means an employee in the executive branch of the Government of the United States that has authority to make appointments to positions in the civil service.

*Conditional offer* means an offer of employment in a position in the civil service that is conditioned upon the results of a criminal history inquiry.

*Criminal history record information*—

(1) Except as provided in paragraphs (2) and (3) of this definition, has the meaning given the term in section 9101(a) of title 5, United States Code;

(2) Includes any information described in the first sentence of section 9101(a)(2) of title 5, United States Code, that has been sealed or expunged pursuant to law; and

(3) Includes information collected by a criminal justice agency, relating to an act or alleged act of juvenile delinquency, that is analogous to criminal history record information (including such information that has been sealed or expunged pursuant to law).

*Employee* means an “employee” as defined in 5 U.S.C. 2105 and an employee of the United States Postal Service or the Postal Regulatory Commission.

*Political appointment* means an appointment by the President without Senate confirmation (except those appointed under 5 CFR 213.3102(c)); an appointment to a position compensated under the Executive Schedule (5 U.S.C. 5312 through 5316); an appointment of a White House Fellow to be assigned as an assistant to a top-level Federal officer (5 CFR 213.3102(z)); a Schedule C appointment (5 CFR 213.3301, 213.3302); a noncareer, limited term, or limited emergency Senior Executive Service appointment (5 CFR part 317, subpart F); an appointee to serve in a political capacity under agency-specific authority; and a provisional political appointment.

##### **§ 920.102 Positions covered by Fair Chance Act regulations.**

(a) *Positions covered.* This part applies to all positions in the competitive service, excepted service, and Senior Executive Service in an agency.

(b) *Exempt positions.* For purposes of this part an exempt position is any position for which a hiring agency is required by statutory authority to make inquiries into an applicant's criminal history prior to extending an offer of employment to the applicant.

### Subpart B—Timing of Inquiries Regarding Criminal History

#### § 920.201 Limitations on criminal history inquiries.

(a) *Applicability.* (1) An employee of an agency may not request, in oral or written form (including through the Declaration for Federal Employment (Office of Personnel Management Optional Form 306) or any similar successor form, the USAJOBS internet website, or any other electronic means) that an applicant for an appointment to a position in the civil service disclose criminal history record information regarding the applicant before the appointing authority extends a conditional offer to the applicant. This includes the following points in the recruitment and hiring process:

- (i) Initial application, through a job opportunity announcement on USAJOBS, or through any recruitment/public notification such as on the agency's website/social media, etc.;
- (ii) After an agency receives an initial application through its back-end system, through shared service providers/recruiters/contractors, or orally or via email and other forms of electronic notification; and
- (iii) Prior to, during, or after a job interview.

(2) This prohibition applies to agency personnel, including when they act through shared service providers, contractors involved in the agency's recruitment and hiring process, or automated systems (specific to the agency or governmentwide).

(b) *Exceptions for certain positions.* (1) The prohibition under paragraph (a) shall not apply with respect to an applicant for an appointment to a position:

- (i) Which is exempt in accordance with § 920.102(b);
- (ii) That requires a determination of eligibility for access to classified information;
- (iii) Has been designated as a sensitive position under the Position Designation System issued by OPM and the Office of Director of National Intelligence, which describes in greater detail agency requirements for designating positions that could bring about a material adverse effect on the national security;
- (iv) Is a dual-status military technician position in which an

applicant or employee is subject to a determination of eligibility for acceptance or retention in the armed forces, in connection with concurrent military membership; or

(v) Is a Federal law enforcement officer position meeting the definition in section 115(c) of title 18, U.S. Code.

(2) The prohibition under this paragraph (a) shall not apply with respect to an applicant for a political appointment.

(3) OPM may grant additional exceptions on a case-by-case basis only when an agency demonstrates specific job-related reasons why the agency needs to evaluate an applicant's criminal history for a position prior to making a conditional offer, giving due consideration to positions that involve transactions with minors, access to sensitive information, or managing financial transactions. OPM will consider such factors as, but not limited to, the nature of the position being filled and whether a clean criminal history record would be essential to the ability to perform one of the duties of the position effectively.

(c) *Notification to applicants.* Each agency must publicize to applicants the prohibition described in paragraph (a) of this section in job opportunity announcements and on agency websites/portals for positions that do not require a posting on USAJOBS, such as excepted service positions, and information on where it has posted its complaint intake process under part 754 of this chapter.

#### § 920.202 Violations.

(a) An agency employee may not request, orally or in writing, information about an applicant's criminal history prior to making a conditional offer of employment to that applicant unless the position is exempted or excepted in accordance with § 920.201(b).

(b) A violation (or prohibited action) as defined in paragraph (a) of this section occurs when agency personnel, shared service providers, or contractors involved in the agency's recruitment and hiring process, either personally or through automated systems (specific to the agency or governmentwide), make oral or written requests prior to giving a conditional offer of employment—

(1) In a job opportunity announcement on USAJOBS or in any recruitment/public notification such as on the agency's website or social media;

(2) In communications sent after an agency receives an initial application, through an agency's talent acquisition system, shared service providers/recruiters/contractors, orally or in

writing (including via email and other forms of electronic notification); or

(3) Prior to, during, or after a job interview or other applicant assessment.

(c) When a prohibited request, announcement, or communication is publicly posted or simultaneously distributed to multiple applicants, it constitutes a single violation.

(d) Any violation as defined in paragraph (a) of this section is subject to the complaint and penalty procedures in part 754 of this chapter.

[FR Doc. 2022–08975 Filed 4–26–22; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA–2022–0434; Airspace Docket No. 19–AAL–69]

RIN 2120–AA66

#### Proposed Amendment of United States Area Navigation (RNAV) Route T–260; Nome, AK

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend United States Area Navigation (RNAV) T-route, T–260 in the vicinity of Nome, AK. The RNAV amendments are necessary due to the planned decommissioning of the Tin City, AK, (TNC) Non-Directional Beacons (NDB)/Distance Measuring Equipment (DME) and the Point Hope, AK, (PHO) NDB. Both NDBs will decommission as part of a large and comprehensive T-route modernization project for the state of Alaska. Although the Tin City, AK, (TNC) NDB will decommission, the co-located Distance Measuring Equipment (DME) will remain for use within the National Airspace System (NAS).

**DATES:** Comments must be received on or before June 13, 2022.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: (800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2022–0434; Airspace Docket No. 19–AAL–69 at the beginning of your comments. You may also submit comments through the internet at <https://www.regulations.gov>.

FAA Order JO 7400.11F, Airspace Designations and Reporting Points, and