

Proposed Rules

Federal Register

Vol. 75, No. 214

Friday, November 5, 2010

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR PART 731

RIN 3206–AL90

Suitability

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

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

DATES: Comments must be received on or before *December 6, 2010*.

ADDRESSES: You may submit comments, identified by RIN number “3206–AL90,” using either of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking.

All Mail: Tom Wachter, Acting Deputy Associate Director, Partnership & Labor Relations, U.S. Office of Personnel Management, Room 7H28, 1900 E Street, NW., Washington, DC 20415–8200.

FOR FURTHER INFORMATION CONTACT: Julie Ohr, U.S. Office of Personnel Management, Partnership & Labor Relations, 1900 E St., NW., Room 7H28, Washington, DC 20415–4000; fax to 202–606–2613; e-mail to PLR@opm.gov.

SUPPLEMENTARY INFORMATION:

Reopening of Comment Period for Proposed Rule

This proposed rule was published on November 3, 2009, at 74 FR 56747, with the comment period ending on January 4, 2010. Several comments received from Federal agencies stated that the commenter was unable to provide an informed recommendation related to the frequency of reinvestigations without specific information regarding the scope of such reinvestigation. This notice is intended to provide additional information relative to the scope of reinvestigations for public trust positions in order to allow for further comment as to reinvestigation frequency. In addition, OPM is revising the text of the proposed rule at 5 CFR 731.106(d)(2) to identify separate investigations that satisfy the public trust reinvestigation requirement to resolve an interpretive ambiguity, and is soliciting additional public comment on the revised text. Both the comments received in response to OPM’s November 3, 2009, **Federal Register** notice, and the comments received in response to this reopening notice related to the frequency of reinvestigation of public trust positions, will be considered in the development of the final rule. OPM is also using this opportunity to propose a technical revision to the authority citation to correct the citation format.

Background

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

Public Trust Positions

Public trust positions are those covered by 5 CFR part 731 which an agency head, under 5 CFR 731.106, has designated at a moderate or high risk level, based on the position’s potential for adverse impact on the efficiency or

integrity of the service. Such positions may involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities, or other duties demanding a significant degree of public trust, or access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain. Designation of public trust positions and their risk level is made by agencies following OPM guidance and taking into account the specific duties of each position.

Frequency of Reinvestigations

While a reinvestigation typically will be more limited than the initial investigation, that reinvestigation must occur frequently if agencies are to carry out the purpose of the Executive order—to ensure that continued employment of persons in public trust positions remains appropriate. Accordingly, the proposed rule would require, at 5 CFR 731.106(d)(1), that a person occupying a public trust position be reinvestigated at least once every 5 years.

Currently, under 5 CFR 731.106(c)(2) and 732.201(a), each position that is designated as a low-, moderate- or high-risk position must also be designated as non-sensitive, noncritical-sensitive, critical-sensitive, or special-sensitive based on the potential that the occupant could materially adversely affect the national security. Although it is possible that the types of investigations performed may change to meet evolving needs, at the writing of this regulatory notice, it is the intent of OPM to conduct reinvestigations for non-sensitive, moderate-risk public trust positions using the NACLC (National Agency Check with Local Agency Check and Credit Check), and non-sensitive, high-risk public trust reinvestigations would be conducted using the PRI (Periodic Reinvestigation). Both of these reinvestigations will be conducted using the Questionnaire for Public Trust Positions (SF–85P) Form. The reinvestigation may be expanded as necessary based upon information discovered during the investigation. Contingent on future investigative and resource capacities, OPM supplementary guidance will adjust investigative frequencies within this 5-year period based on the level of trust (*i.e.*, either moderate or high risk) associated with a person’s position. We

are re-opening the comment period to specifically solicit comment on whether a periodic reinvestigation cycle of 5 or fewer years is appropriate, considering the risk posed by employment in public trust positions, and the availability of investigative and adjudicative resources based on the investigative product used to conduct the reinvestigations. We will consider comments on this proposed rule and consult with affected agencies in developing supplemental guidance on investigative frequency.

E.O. 13488 addresses reinvestigations of occupants of all public trust positions, including those also designated as noncritical-sensitive, critical-sensitive, or special-sensitive under 5 CFR part 732. Certain positions are already subject to national security reinvestigation requirements under 5 CFR 732.203 or under E.O. 12968, as amended. Requiring multiple reinvestigations for the same individual at least every 5 years would be costly and inefficient, and would be inconsistent with the policy expressed in E.O. 13467, which calls for suitability and national security investigations to be aligned “using consistent standards to the extent possible” and for “each successively higher level of investigation * * * [to] build upon, but not duplicate, the ones below it.”

Accordingly, at 5 CFR 731.106(d)(2), the proposed rule would provide that a national security investigation to determine a person's initial or continued eligibility for access to classified information or to hold a sensitive position also satisfies the 5-year public trust reinvestigation requirement for that person, as long as it is conducted at a level equal to or higher than the level required for his or her public trust reinvestigation. The agency is not required to conduct an additional public trust reinvestigation in such circumstances, and the completed national security investigation restarts the 5-year schedule (or other schedule as future guidance might require) for a new public trust reinvestigation. Likewise, a suitability investigation based on a change in risk level as provided in 5 CFR 731.106(e) is sufficient, if conducted at the appropriate level, to satisfy the public trust reinvestigation requirement.

The proposed rule published on November 3, 2009, stated that an investigation for eligibility for access to classified national security information may be sufficient to meet public trust reinvestigation requirements, but did not state that an investigation for employment in a sensitive national security position may also be sufficient to meet public trust reinvestigation

requirements. The text of the proposed rule has been revised to clarify that both types of national security investigations may be sufficient to meet public trust reinvestigation requirements. Further, the November 3, 2009, proposed rule stated that a “reevaluation” may be sufficient to meet public trust reinvestigation requirements, without defining a “reevaluation.” The text of the proposed rule has been revised to eliminate this ambiguous term. OPM is soliciting public comment on these revisions to the text of the proposed rule, in addition to soliciting public comment on the appropriate cycle for public trust reinvestigations.

Assessments Resulting From Reinvestigations

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

As currently provided at 5 CFR 731.106(f), a person's employment status will determine the applicable agency authority and procedures to be followed in any action taken based on the results of the reinvestigation. In most circumstances, the subject of a reinvestigation will have been employed by his or her agency for more than one year and, under those circumstances, only OPM could make a suitability determination and take a suitability action under very limited circumstances. As provided under 5 CFR 731.105(d), OPM could take a suitability action based on (1) a material, intentional false statement, or deception or fraud in examination or appointment; (2) refusal to furnish testimony, or (3) a statutory or regulatory bar that prevents the lawful employment of the person. However, conduct that surfaces during a reinvestigation (for example, off-duty criminal conduct) could form the basis for an adverse action under 5 CFR part 752.

Consistent with the changes made to 5 CFR 731.106, the reporting requirements under 5 CFR 731.206 would be modified to require agencies to report any decisions and actions taken as a result of a background

investigation or reinvestigation. Here, the “level” of investigation is replaced by the “level or nature” of the investigation as a reporting obligation, to be consistent with E.O. 13488. The actual information reported is unchanged. Section 731.206 of title 5, Code of Federal Regulations, also would be clarified to reflect current practice that agencies follow in reporting the completion dates of background investigations. This is important, since the public trust position reinvestigation schedule is tied to the completion date of a relevant investigation.

Technical Amendment

OPM proposes a technical amendment to the Authorities for this part to reflect the President's signing of Executive Order 13488 on January 16, 2009, which authorizes the Director of OPM to issue regulations and guidance implementing the order. In this reopener, OPM also makes a technical revision to the authority citation to correct the citation format.

Regulatory Flexibility Act

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

E.O. 12866, Regulatory Review

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

E.O. 13132

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

E.O. 12988—Civil Justice Reform

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

Unfunded Mandates Reform Act of 1995

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

of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

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

List of Subjects in 5 CFR Part 731

Administrative practices and procedures, Government employees.

U.S. Office of Personnel Management.

John Berry,

Director.

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

PART 731—SUITABILITY

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

Authority: 5 U.S.C. 1302, 3301, 7301; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, as amended; E.O. 13467, 3 CFR, 2009 Comp., p. 198; E.O. 13488, 74 FR 4111; 5 CFR, parts 1, 2 and 5.

Subpart A—Scope

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

§ 731.106 Designation of public trust positions and investigative requirements.

* * * * *

(d) *Reinvestigation requirements.*

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

(2) If, prior to the next required reinvestigation, a separate investigation is conducted to determine a person's eligibility (or continued eligibility) for access to classified information or to hold a sensitive position, or as a result of a change in risk level as provided in § 731.106(e), and that investigation is conducted at an equal or higher level than is required for a public trust reinvestigation, a new public trust reinvestigation is not required. Such a completed investigation restarts the

cycle for a public trust reinvestigation for that person.

* * * * *

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

3. Revise § 731.206 to read as follows:

§ 731.206 Reporting requirements.

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

[FR Doc. 2010–28054 Filed 11–4–10; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 5 and 119

[Docket No. FAA–2009–0671; Notice No. 10–15]

RIN 2120–AJ86

Safety Management Systems for Part 121 Certificate Holders

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to require each certificate holder operating under 14 CFR part 121 to develop and implement a safety management system (SMS) to improve the safety of their aviation related activities. A safety management system is a comprehensive, process-oriented approach to managing safety throughout an organization. An SMS includes an organization-wide safety policy; formal methods for identifying hazards, controlling, and continually assessing risk; and promotion of a safety culture. SMS stresses not only compliance with technical standards but increased

emphasis on the overall safety performance of the organization.

DATES: Send your comments on or before February 3, 2011.

ADDRESSES: You may send comments identified by Docket Number FAA–2009–0671 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

- *Hand Delivery:* Bring comments to Docket Operations in Room W12–140 of the West Building (Ground Floor) at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit <http://DocketsInfo.dot.gov>.

Docket: To read background documents or comments received, go to <http://www.regulations.gov> at any time or to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Scott Van Buren, Chief System Engineer for Aviation Safety, Office of Accident Investigation and Prevention (AVP), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; *telephone:* (202) 494–8417; *facsimile:* (202) 267–3992; *e-mail:* scott.vanburen@faa.gov. For legal questions, contact Anne Bechdolt, Regulations Division, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence