



OPM: 6325-39  
ODNI: 3910-A7

## **OFFICE OF PERSONNEL MANAGEMENT**

### **5 CFR Part 732 and Chapter IV**

## **OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE**

### **5 CFR Chapter IV**

**RIN: 3206-AM73**

### **Designation of National Security Positions in the Competitive Service, and Related Matters**

**AGENCY:** Office of Personnel Management; Office of the Director of National Intelligence.

**ACTION:** Proposed rule and withdrawal of prior proposed rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) and the Office of the Director of National Intelligence (ODNI) are proposing to issue regulations regarding designation of national security positions in the competitive service, and related matters. This proposed rule is one of a number of initiatives OPM and ODNI have undertaken to simplify and streamline the system of Federal Government investigative and adjudicative processes to make them more efficient and equitable. The purpose of this revision is to clarify the requirements and procedures agencies should observe when designating, as national security positions, positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments in the Senior Executive Service within the executive branch, pursuant to Executive Order 10450, Security Requirements for Government Employment.

**DATES:** OPM and ODNI will consider comments on this proposed rule received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL

REGISTER]. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the proposed rule published December 14, 2010, at 75 FR 77783, is withdrawn

**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.

You may also send, deliver, or fax comments to Kimberly Holden, Deputy Associate Director for Recruitment and Hiring, U. S. Office of Personnel Management, Room 6566, 1900 E Street, NW., Washington, DC 20415-9700; e-mail at [employ@opm.gov](mailto:employ@opm.gov); or fax at (202) 606-2329.

**FOR FURTHER INFORMATION CONTACT:** Linda Watson by telephone on (202) 606-1252, by fax at (202) 606-4430, by TTY at (202) 418-3134, or by email at [Linda.Watson@opm.gov](mailto:Linda.Watson@opm.gov) or Teresa Nankivell, Office of the Director of National Intelligence, Office of the National Counterintelligence Executive, phone 571-204-6623, fax to 571-204-6592, email [teresabn@dni.gov](mailto:teresabn@dni.gov).

**SUPPLEMENTARY INFORMATION:** On December 14, 2010, the U.S. Office of Personnel Management (OPM) issued a proposed rule in 75 FR 77783 to amend part 732 of title 5, Code of Federal Regulations (CFR), to clarify its coverage, and the procedural requirements for making position sensitivity designations. OPM also proposed various revisions to make the regulations more readable. This proposed rule replaces OPM's proposed rule at 75 FR 77783 (Dec. 14, 2010), which is withdrawn.

In a Memorandum dated January 25, 2013, and published in the Federal Register at 78 FR 7253 on January 31, 2013, the President directed that “[t]he Director of National Intelligence

and the Director of the Office of Personnel Management shall jointly propose the amended regulations contained in the Office of Personnel Management’s notice of proposed rulemaking in 75 FR 77783 (Dec. 14, 2010), with such modifications as are necessary to permit their joint publication, without prejudice to the authorities of the Director of National Intelligence and the Director of the Office of Personnel Management under any executive order, and to the extent permitted by law.”

Accordingly, the proposed rule issued by OPM on December 14, 2010 (75 FR 77783) is withdrawn, and, with the exception of section 732.401, OPM and ODNI are jointly reissuing and renumbering the proposed rule in a new chapter IV, part 1400 of title 5, Code of Federal Regulations. OPM will separately reissue as a final rule § 732.401, concerning OPM’s responsibility to make reemployment eligibility determinations under 5 U.S.C. 7312, 10 U.S.C. 1609(d), and section 7 of E.O. 10450, as amended.

The following sections of the joint proposed rule differ from the corresponding sections of the December 14, 2010 proposed rule:

The Authority Citation has been revised to add a reference to 50 U.S.C. 435b and a Federal Register citation to the President’s Memorandum.

Section 1400.103, formerly § 732.103, has been revised to allow OPM and ODNI to jointly issue standards, procedures, and guidance to implement the rule.

Section 1400.201(a)(2)(v), formerly § 732.201(a)(2)(v), has been revised to clarify that “critical-sensitive” positions include positions involving national security adjudicative determinations generally, not just security clearance adjudications.

Section 1400.201(b) and (c), formerly § 732.201(b) and (c), have been revised and a new paragraph (d) added to clarify that in certain circumstances a position sensitivity designation

under this part may automatically carry with it, without further agency action, a risk designation under part 731 of this chapter (see 5 CFR 731.106). This change was intended only to streamline the suitability and security designation processes to the greatest extent practicable. Determinations regarding suitability and determinations regarding eligibility to hold a sensitive position are governed by distinct standards. The administrative processes that may be applicable to each determination are also distinct. The requirement that all positions receiving a position sensitivity designation under this part shall also receive a risk designation under part 731 of this chapter does not confer, and is not intended to confer, any new or additional rights of appeal upon employees or prospective employees who have been subjected to a personnel action that was based on a determination that they lack eligibility to hold a sensitive position.

Technical changes have also been made to § 1400.201 to use terms and punctuation consistently.

Section 1400.202(c), formerly § 732.202(c), has been revised to clarify that OPM's authority under Executive Order 10450, as amended, to grant waivers from, and exceptions to investigative requirements, does not include the authority to waive investigative requirements for eligibility for access to classified information, and does not affect ODNI's authority to prescribe standards for temporary eligibility for access to classified information.

Section 1400.301, formerly § 732.301, has been revised to state that certain procedural and recordkeeping requirements must be followed "subject to requirements of law, rule, regulation or Executive order," and to renumber the text.

Members of the public need not resubmit previously submitted comments on aspects of the joint proposed rule that are unchanged from the December 14, 2010 proposed rules. In the final rule, OPM and ODNI will fully address the comments received on the corresponding

provisions of the December 14, 2010 proposed rule, including any changes in the final rule made as a result of the comments. In the final rule, OPM and ODNI will also fully address the comments received in response to this notice of proposed rulemaking.

### **Regulatory Flexibility Act**

OPM and ODNI certify that this rule will not have a significant economic impact on a substantial number of small entities because the rules 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 rule 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 rule 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**

#### **5 CFR Part 732**

Administrative practices and procedures, Government employees

#### **5 CFR Part 1400**

Administrative practices and procedures, Classified information, Government employees, Investigations.

U.S. Office of Personnel Management

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Elaine Kaplan,  
Acting Director.

Office of the Director of National Intelligence

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James R. Clapper, Jr.,  
Director.

Accordingly, OPM and ODNI propose to amend title 5, Code of Federal Regulations, by establishing chapter IV consisting of part 1400 to read as follows:

**Chapter IV—Office of Personnel Management and Office of the Director of National Intelligence**

**PART 1400 -- DESIGNATION OF NATIONAL SECURITY POSITIONS**

**Subpart A--Scope**

Sec.

1400.101 Purpose.

1400.102 Definitions and applicability.

1400.103 Implementation.

**Subpart B--Designation and Investigative Requirements**

1400.201 Sensitivity level designations and investigative requirements.

1400.202 Waivers and exceptions to preappointment investigative requirements.

1400.203 Periodic reinvestigation requirements.

1400.204 Reassessment of current positions.

1400.205 Savings provision.

**Subpart C--Procedural Rights and Reporting**

1400.301 Procedural rights.

1400.302 Reporting to OPM.

**Authority:** 5 U.S.C. 1103(a)(5), 3301, 3302, 7312; 50 U.S.C. 403, 435b; E.O. 10450, 3 CFR, 1949-1953 Comp., p. 936; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 12968, 3 CFR, 1996 Comp., p. 391; E.O. 13467, 3 CFR, 2009 Comp., p. 196; 78 FR 7253.

**Subpart A--Scope**

**§ 1400.101 Purpose.**

(a) This part sets forth certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order 10450 --

Security Requirements for Government Employment (April 27, 1953), 18 FR 2489, 3 CFR 1949-1953 Comp., p. 936, as amended.

(b) All positions must be evaluated for a position sensitivity designation commensurate with the responsibilities and assignments of the position as they relate to the impact on the national security, including but not limited to eligibility for access to classified information.

**§ 1400.102 Definitions and applicability.**

(a) In this part --

*National security position* includes any position in a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security.

(i) Such positions include those requiring eligibility for access to classified information.

(ii) Other such positions include, but are not limited to, those whose duties include:

(A) Protecting the nation, its citizens and residents from acts of terrorism, espionage, or foreign aggression, including those positions where the occupant's duties involve protecting the nation's borders, ports, critical infrastructure or key resources, and where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(B) Developing defense plans or policies;

(C) Planning or conducting intelligence or counterintelligence activities, counterterrorism activities and related activities concerned with the preservation of the military strength of the United States;

(D) Protecting or controlling access to facilities or information systems where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(E) Controlling, maintaining custody, safeguarding, or disposing of hazardous materials, arms, ammunition or explosives, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(F) Exercising investigative or adjudicative duties related to national security, suitability, fitness or identity credentialing, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(G) Exercising duties related to criminal justice, public safety or law enforcement, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security; or

(H) Conducting investigations or audits related to the functions described in paragraphs (ii)(B) through (G) of this paragraph (a) definition, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security.

(b) The requirements of this part apply to positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments in the Senior Executive Service within the executive branch. Departments and agencies may apply the requirements of this part to other excepted service positions within the executive branch and contractor positions, to the extent consistent with law.

### **§ 1400.103 Implementation.**

OPM and the Security Executive Agent designated pursuant to Executive Order 13467 or any successor order may set forth policies, general procedures, criteria, standards, quality control procedures, and supplementary guidance for the implementation of this part.

### **Subpart B -- Designation and Investigative Requirements**

**§ 1400.201 Sensitivity level designations and investigative requirements.**

(a) For purposes of this part, the head of each agency must designate, or cause to be designated, a position within the department or agency as a national security position pursuant to § 1400.102(a). National security positions must then be designated, based on the degree of potential damage to the national security, at one of the following three sensitivity levels:

(1) *Noncritical-Sensitive* positions are national security positions which have the potential to cause significant or serious damage to the national security, including but not limited to:

(i) Positions requiring eligibility for access to Secret, Confidential, or "L" classified information; or

(ii) Positions not requiring eligibility for access to classified information, but having the potential to cause significant or serious damage to the national security.

(2) *Critical-Sensitive* positions are national security positions which have the potential to cause exceptionally grave damage to the national security, including but not limited to:

(i) Positions requiring eligibility for access to Top Secret or "Q" classified information;

(ii) Positions involving development or approval of war plans, major or special military operations, or critical and extremely important items of war;

(iii) National security policy-making or policy-determining positions;

(iv) Positions with investigative duties, including handling of completed counter-intelligence or background investigations, the nature of which have the potential to cause exceptionally grave damage to the national security;

(v) Positions involving national security adjudicative determinations or granting of personnel security clearance eligibility;

- (vi) Positions involving duty on personnel security boards;
- (vii) Senior management positions in key programs, the compromise of which could result in exceptionally grave damage to the national security;
- (viii) Positions having direct involvement with diplomatic relations and negotiations;
- (ix) Positions involving independent responsibility for planning or approving continuity of Government operations;
- (x) Positions involving major and immediate responsibility for, and the ability to act independently without detection to compromise or exploit, the protection, control, and safety of the nation's borders and ports or immigration or customs control or policies, where there is a potential to cause exceptionally grave damage to the national security;
- (xi) Positions involving major and immediate responsibility for, and the ability to act independently without detection to compromise or exploit, the design, installation, operation, or maintenance of critical infrastructure systems or programs;
- (xii) Positions in which the occupants have the ability to independently damage public health and safety with devastating results;
- (xiii) Positions in which the occupants have the ability to independently compromise or exploit biological select agents or toxins, chemical agents, nuclear materials, or other hazardous materials;
- (xiv) Positions in which the occupants have the ability to independently compromise or exploit the nation's nuclear or chemical weapons designs or systems;
- (xv) Positions in which the occupants obligate, expend, collect or control revenue, funds or items with monetary value in excess of \$50 million, or procure or secure funding for

goods and/or services with monetary value in excess of \$50 million annually, with the potential for exceptionally grave damage to the national security;

(xvi) Positions in which the occupants have unlimited access to and control over unclassified information, which may include private, proprietary or other controlled unclassified information, but only where the unauthorized disclosure of that information could cause exceptionally grave damage to the national security;

(xvii) Positions in which the occupants have direct, unrestricted control over supplies of arms, ammunition, or explosives or control over any weapons of mass destruction;

(xviii) Positions in which the occupants have unlimited access to or control of access to designated restricted areas or restricted facilities that maintain national security information classified at the Top Secret or “Q” level;

(xix) Positions working with significant life-critical/mission-critical systems, such that compromise or exploitation of those systems would cause exceptionally grave damage to essential Government operations or national infrastructure; or

(xx) Positions in which the occupants conduct internal and/or external investigation, inquiries, or audits related to the functions described in paragraphs (a)(2)(i) through (xix) of this section, where the occupant's neglect, action, or inaction could cause exceptionally grave damage to the national security.

(3) *Special-Sensitive* positions are those national security positions which have the potential to cause inestimable damage to the national security, including but not limited to positions requiring eligibility for access to Sensitive Compartmented Information (SCI), requiring eligibility for access to any other intelligence-related Special Sensitive information, requiring involvement in Top Secret Special Access Programs (SAP), or positions which the

agency head determines must be designated higher than Critical-Sensitive consistent with Executive order.

(b) OPM issues, and periodically revises, a Position Designation System which describes in greater detail agency requirements for designating positions that could bring about a material adverse effect on the national security. Agencies must use the Position Designation System to designate the sensitivity level of each position covered by this part. All positions receiving a position sensitivity designation under this part shall also receive a risk designation under 5 CFR part 731 (see 5 CFR 731.106) as provided in paragraphs (c) and (d) of this section.

(c) Any position receiving a position sensitivity designation under this part at the critical-sensitive or special-sensitive level shall automatically carry with that designation, without further agency action, a risk designation under 5 CFR 731.106 at the high level.

(d) Any position receiving a position sensitivity designation at the noncritical-sensitive level shall automatically carry with that designation, without further agency action, a risk designation under 5 CFR 731.106 at the moderate level, unless the agency determines that the position should be designated at the high level. Agencies shall designate the position at the high level where warranted on the basis of criteria set forth in OPM issuances as described in § 731.102(c).

**§ 1400.202 Waivers and exceptions to preappointment investigative requirements.**

(a) *Waivers -- (1) General.* A waiver of the preappointment investigative requirement contained in section 3(b) of Executive Order 10450 for employment in a national security position may be made only for a limited period:

(i) In case of emergency if the head of the department or agency concerned finds that such action is necessary in the national interest; and

(ii) When such finding is made a part of the records of the department or agency.

(2) *Specific waiver requirements.* (i) The preappointment investigative requirement may not be waived for appointment to positions designated Special-Sensitive under this part.

(ii) For positions designated Critical-Sensitive under this part, the records of the department or agency required by paragraph (a)(1) of this section must document the decision as follows:

(A) The nature of the emergency which necessitates an appointment prior to completion of the investigation and adjudication process;

(B) A record demonstrating the successful initiation of the required investigation based on a completed questionnaire; and

(C) A record of the Federal Bureau of Investigation fingerprint check portion of the required investigation supporting a preappointment waiver.

(iii) When a waiver for a position designated Noncritical-Sensitive is granted under this part, the agency head will determine documentary requirements needed to support the waiver decision. In these cases, the agency must favorably evaluate the completed questionnaire and initiate the required investigation. The required investigation must be initiated within 14 days of placing the individual in the position.

(iv) When waiving the preappointment investigation requirements, the applicant must be notified that the preappointment decision was made based on limited information, and that the ultimate appointment decision depends upon favorable completion and adjudication of the full investigative results.

(b) *Exceptions to investigative requirements.* Pursuant to section 3(a) of E.O. 10450, as amended, upon request of an agency head, the Office of Personnel Management may, in its discretion, authorize such less investigation as may meet the requirement of national security with respect to:

(1) Positions that are intermittent, seasonal, per diem, or temporary, not to exceed an aggregate of 180 days in either a single continuous appointment or series of appointments; or

(2) Positions filled by aliens employed outside the United States.

(c) *Applicability.* This section does not apply to:

(1) Investigations, waivers of investigative requirements, and exceptions from investigative requirements under 42 U.S.C. 2165(b);

(2) Investigative requirements for eligibility for access to classified information under Executive Order 12968, as amended; or

(3) Standards for temporary eligibility for access to classified information established by the Security Executive Agent pursuant to section 3.3(a)(2) of Executive Order 12968, as amended.

#### **§ 1400.203 Periodic reinvestigation requirements.**

(a) The incumbent of a national security position requiring eligibility for access to classified information is subject to the reinvestigation requirements of E.O. 12968, as amended.

(b) The incumbent of a national security position that does not require eligibility for access to classified information is subject to periodic reinvestigation at least once every five years. Such reinvestigation must be conducted using a national security questionnaire, and at a frequency and scope that will satisfy the reinvestigation requirements for both national security and public trust positions.

#### **§ 1400.204 Reassessment of current positions.**

(a) Agency heads must assess each position covered by this part within the agency using the standards set forth in this regulation as well as guidance provided in OPM issuances to determine whether changes in position sensitivity designations are necessary within 24 months of [EFFECTIVE DATE OF THE FINAL RULE].

(b) Where the sensitivity designation of the position is changed, and requires a higher level of investigation than was previously required for the position,

(1) The agency must initiate the investigation no later than 14 working days after the change in designation, and

(2) The agency will determine whether the incumbent's retention in sensitive duties pending the outcome of the investigation is consistent with the national security.

(c) Agencies may provide advance notice of the redesignation of a position to allow time for completion of the forms, releases, and other information needed from the incumbent to initiate the investigation.

#### **§ 1400.205 Savings provision.**

No provision of the rule in this part shall be applied in such a way as to affect any administrative proceeding pending on the effective date of the final regulation. An administrative proceeding is deemed to be pending from the date of the agency or OPM notice described in § 1400.301(c)(1).

### **Subpart C--Procedural Rights and Reporting**

#### **§ 1400.301 Procedural rights.**

When an agency makes an adjudicative decision based on an OPM investigation, or when an agency, as a result of information in an OPM investigation, changes a tentative

favorable placement or clearance decision to an unfavorable decision, the agency must comply with all applicable administrative procedural requirements, as provided by law, rule, regulation, or Executive order, including E.O. 12968, as amended, and the agency's own procedural regulations, and must:

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

(b) Consider all available, relevant information in reaching its final decision; and

(c) At a minimum, subject to requirements of law, rule, regulation, or Executive order:

(1) Provide the individual concerned notice of the specific reason(s) for the decision, an opportunity to respond, and notice of appeal rights, if any; and

(2) Keep any record of the agency action required by OPM as published in its issuances.

#### **§ 1400.302 Reporting to OPM.**

(a) Each agency conducting an investigation under E.O. 10450 is required to notify OPM when the investigation is initiated and when it is completed.

(b) Agencies must report to OPM an adjudicative determination and action taken with respect to an individual investigated pursuant to E.O. 10450 as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

(c) To comply with process efficiency requirements, additional data may be collected from agencies conducting investigations or taking action under this part. These collections will be identified in separate OPM guidance, issued as necessary under 5 CFR 732.103.

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