



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Federal Investigative
Services Division

Federal Investigations Notice

Notice No. 09-06

Date: September 18, 2009


Subject: Changes to 5 CFR part 731, Suitability Regulations

On April 15, 2008, revised suitability regulations were published in the Federal Register (Volume 73, Number 73, pages 20149 – 20159). The new regulations became effective on June 16, 2008. The regulations were revised again and published in the Federal Register on November 10, 2008 (Volume 73, Number 218, pages 66489 – 66493). On January 9, 2009, the changes became effective. The suitability regulations found in title 5, Code of Federal Regulations, part 731 (5 CFR part 731) cover applicants, appointees, and employees in the following types of government jobs:

- Competitive service positions;
- Excepted service appointments where the incumbent can be noncompetitively converted to the competitive service; and,
- Career appointments to positions in the Senior Executive Service.

The purpose of this Notice is to ensure agencies are aware of the various changes outlined in both issuances and have taken the necessary steps to adjust their suitability programs accordingly. The April 15, 2008, revisions modify and more precisely define and clarify the scope of the regulation, the procedural requirements for taking suitability actions, and the respective authorities of OPM, agencies, and the Merit Systems Protection Board. The November 10, 2008, revisions require reciprocity for background investigations and suitability adjudications, with limited exceptions. Reciprocity applies where a person previously was investigated at a level that meets or exceeds the level required for the new position, was determined suitable under 5 CFR part 731 or fit based on character and conduct under criteria equivalent to the suitability factors of 5 CFR 731.202, and meets continuous service requirements. Attached is an outline of the specific regulation changes and a discussion of their impact on agencies making suitability determinations or taking suitability actions under delegated authority under 5 CFR part 731.

For general questions, please contact FISD's Agency Liaison Group (ALG) at (703) 603-0442. For specific questions about suitability adjudication, please contact the Suitability Adjudications Branch (SAB) at (724) 794-5612, ext.7400.



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Code: **5 CFR part 731**
Distribution: **SOIs/SONs**
Notice Expires: **Until superseded**

**Summary of Major Changes and Clarifications to
5 CFR part 731, Suitability Regulations**

| <i>Location</i> | <i>Nature of change or clarification</i> | <i>Impact</i> |
|------------------------------------|---|--|
| Subpart A Scope | Executive Order (E.O.) 13467 added as an authority related to the suitability regulations | E.O. 13467 designates the OPM Director as the Suitability Executive Agent |
| §731.101(a) Purpose | Suitability determinations and actions are distinct from objections to eligibles or passovers of preference eligibles. | Decisions about objections and passovers are not suitability actions and are not subject to the procedural requirements or appeal rights of part 731. |
| §731.101(b) Definitions | The definition of “applicant” includes not only those who are currently under consideration, but also those who have been considered for employment. | Suitability actions may be warranted for individuals who are not currently, but were previously, under consideration. For instance, if an individual provided fraudulent information in an attempt to obtain a Federal job, he or she might no longer be actively under consideration because the qualification requirements were not met. In such a case, it is in the best interests of the Government to refer the case to OPM for suitability adjudication. |
| | “Core duty” means a continuing responsibility that is of a particular importance to the relevant covered position or the achievement of the agency’s mission. | Reciprocity of suitability determinations is not required when the investigative record on file for the person shows conduct that is incompatible with the core duties of the relevant covered position. Whether an individual’s prior conduct is incompatible with the core duties of a position is inherently a case-by-case determination focused not only on the unique duties of the specific position, but also on the specific nature of the prior conduct. Core duties will vary from agency to agency and from position to position, and the identification of core duties is within the discretion of individual agencies. |
| | “Covered positions” define the types of government jobs subject to 5 CFR part 731 procedures. These positions are as follows: positions in the competitive service; positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service; and career appointments to positions in the Senior Executive Service. | The coverage of part 731 has been broadened to include positions, such as Federal career interns, that begin in the excepted service but can noncompetitively convert to competitive service. Jurisdiction under part 731 for such positions begins with appointments made (for appointees/employees) or applications filed (for applicants) on or after June 16, 2008. OPM and agencies will adjudicate the suitability of these individuals under part 731 procedures. Agencies must make appropriate referrals of these cases to OPM for falsification and other serious issues that warrant Governmentwide debarment. |

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| | <p>The definition of “material” clarifies that a false statement may be material even if OPM or an agency does not rely upon it.</p> | <p>Reliance on information that has been found to be false is not a prerequisite to determining the materiality of falsification. For instance, when there is no positive educational requirement or other validated experience is qualifying, an individual may meet the basic qualifications for the job despite making false statements about education or experience. However, the dishonesty associated with submitting false information is still of concern. Such false claims would be capable of influencing official decisions, and would, therefore, be “material.”</p> |
| | <p>“Suitability actions” are outcomes that are taken under the procedures of 5 CFR part 731, subparts C and D. As outlined in §731.203(a), these only include: cancellation of eligibility; removal; cancellation of reinstatement eligibility; and debarment. “Suitability determinations” are decisions by OPM or an agency that a person is suitable or not suitable.</p> | <p>This change makes clear the distinction between the process of making a suitability determination and taking a suitability action.</p> |
| <p>§731.103 Delegation to agencies</p> | <p>§731.103(b) - Agencies must send cases (for covered positions) to OPM when debarment from all Federal jobs is warranted.</p> | <p>If the agency believes a Governmentwide debarment might be warranted and appropriate, these cases must be referred because only OPM can impose a period of Governmentwide debarment from all covered positions.</p> |
| | <p>§731.103(d) - OPM must be informed in all cases (for covered positions) of material, intentional false statement, or deception or fraud in examination or appointment.</p> | <p>OPM must be informed because when material, intentional false statement, or deception or fraud in examination or appointment is established, a Governmentwide debarment may be warranted.</p> |
| | <p>§731.103(g) - Agencies are not required to obtain prior approval from OPM to take action under their own authority, but must notify OPM when they do so in cases involving material, intentional false statement, or deception or fraud in examination or appointment; or refusal to furnish testimony as required by §5.4 of 5 CFR.</p> | <p>OPM may determine it appropriate to debar a person from all covered positions, even though an agency has taken action to remove the person under other authority, if the person, for example, provided material, intentional false statements in connection with the employment process.</p> |

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| <p>§731.104 Positions subject to investigation</p> | <p>§731.104(a) – Unless §731.104(b)(2), discussed below, applies, the following are not subject to investigation when the person has already undergone a background investigation, has been serving continuously for at least one year, and has been determined suitable or fit based on the factors in 5 CFR 731.202 or equivalent criteria:</p> <ul style="list-style-type: none"> • Appointments, conversions to appointments, or transfers from one covered position to another • Transfers from non-covered excepted service positions to covered positions • Appointments to covered positions when the person has been working continuously for at least one year as a Federal Government contract employee where a Federal agency has determined the person to be fit to perform work on the contract | <p>These changes provide the policy for reciprocity of background investigations as they relate to suitability for employment in covered positions. There are exceptions to this reciprocity policy, however, as provided at §731.104(b)(2).</p> |
| | <p>§731.104 (b)(2) – Regardless of any exceptions noted in §731.104(a), appointments to covered positions are subject to investigation when:</p> <ul style="list-style-type: none"> • The covered position requires a higher level of investigation than previously conducted for the person being appointed • An agency obtains new information in connection with the person’s appointment that calls into question the person’s suitability under §731.202 | <p>When a higher level of investigation is required for the position in question, the new investigation must be conducted to ensure the person meets the requirements for the job regardless of any prior investigation.</p> <p>With regard to sources of “new information,” there are a variety of ways in which new information might be obtained. Examples include a newly-executed Declaration for Federal Employment (Optional Form 306) submitted by the subject which discloses information of a suitability concern or when information comes to light as the result of reference checks or employment interviews.</p> |

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| | <p>§731.104(c) - Positions that are intermittent, seasonal, per diem, or temporary (up to 180 days) do not require a background investigation.</p> | <p>This change was made to maintain consistency between this part, which concerns suitability, and 5 CFR part 732, which governs positions of national security. Although those occupying such positions are not subject to the investigative requirements of part 731, the rule goes on to state agencies “must conduct such checks as it deems appropriate to ensure the suitability of the person.” To accomplish such checks, some agencies may choose to investigate these persons in the same manner as they would those actually covered by part 731, but are not required to do so. The checks required by §731.104(c) need not rise to the level required for an investigation under part 731.</p> |
| | <p>§731.104(e) - Criteria equivalent to the factors at 5 CFR 731.202, are criteria that provide adequate assurance that the person to be appointed, converted to an appointment, or transferred is suitable to be employed in a covered position, as determined by OPM, in issuances under 5 CFR part 731.</p> | <p>The following are criteria that may be equivalent to the factors in 5 CFR 731.202:</p> <p>In a July 31, 2008, memorandum to heads of agencies and departments, OPM’s Director issued <i>Final Credentialing Standards for Issuing PIV cards</i>. This guidance includes supplemental credentialing standards that agencies have the flexibility to apply for individuals who are not subject to a suitability or security determination. The standards are intended to ensure that granting a PIV card does not present an unacceptable risk. These standards are equivalent to the factors in 5 CFR 731.202, when considered and applied consistent with OPM issuances concerning the evaluation of suitability concerns.</p> <p>5 CFR 302.203 indicates that the qualification standards established by an agency for employment in the Excepted Service may provide that certain reasons may disqualify an applicant for appointment. A list of concerns is provided that may, among others, be included as disqualifying. The list includes factors that are similar in nature to the factors listed in 5 CFR 731.202. Agencies have the flexibility under this regulation to establish specific disqualification standards. If they choose to establish standards that mirror the factors in 5 CFR 731.202, and to consider issues in a consistent manner with OPM issuances concerning the evaluation of suitability concerns, the criteria would be considered to be equivalent to 5 CFR 731.202.</p> |
| <p>§731.105 Authority to take suitability actions</p> | <p>Neither OPM nor an agency acting under delegated authority may take a suitability action on a position not subject to investigation.</p> | <p>This clarification provides that suitability <i>actions</i> may not be effected on positions not within the scope of part 731, i.e., not subject to investigation. It also ensures consistency with §731.104(b)(3), which states that, suitability <i>determinations</i> must be made for all appointments that are subject to investigation.</p> |

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| <p>§731.202 Criteria for making suitability determinations</p> | <p>§731.202(b)(5) now reads “Alcohol abuse, without evidence of substantial rehabilitation, of a nature and duration that suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the applicant or appointee or others.”</p> | <p>OPM revised §731.202(b)(5) to clarify that alcohol abuse, as outlined here, can only be the basis of a negative suitability determination in the absence of “evidence of substantial rehabilitation.”</p> |
| | <p>§731.202(c) - OPM and agencies must consider any of the additional considerations cited here, to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent.</p> | <p>This states more clearly that OPM or an agency need not consider all of the additional considerations, but must consider only those that it deems pertinent. The MSPB’s review is limited to OPM or the agency’s determination - the Board cannot consider, as aggravating or mitigating factors, additional considerations that OPM or the agency did not deem pertinent.</p> |
| | <p>§731.202(d) - Reciprocity. An agency cannot make a new determination under this section for a person who has already been determined suitable or fit based on character or conduct unless a new investigation is required under §731.104 or §731.106, or no new investigation is required, but the record on file for the person shows conduct that is incompatible with the core duties of the relevant covered position.</p> | <p>This establishes the policy on reciprocity concerning suitability or fitness adjudications for individuals who are moving into positions in the competitive service.</p> |
| <p>§731.203 Suitability actions by OPM and other agencies</p> | <p>§731.203(b) - A non-selection, or cancellation of eligibility for a specific position based on an objection to an eligible or passover of a preference eligible under 5 CFR 332.406, is <i>not</i> a suitability action even if it is based on reasons set forth in §731.202.</p> | <p>Objections/passovers may be based on any of the reasons described in § 332.406(b), which include criteria described in § 731.202, consistent with §731.101(a); however, neither objections/passovers nor any other mere non-selections are suitability actions covered by part 731’s procedural requirements and appeals processes</p> |

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| <p>§731.204 (OPM action) and §731.205 (agency action) Debarment</p> | <p>An additional period of debarment may be imposed following the expiration of a period of OPM or agency debarment, but only after the person again becomes an applicant, appointee, or employee subject to OPM's or an agency's suitability jurisdiction, and their suitability is determined. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.</p> | <p>An additional period of debarment based in whole or in part on the same conduct on which a previous suitability action was based would be warranted when:</p> <ul style="list-style-type: none"> • There are continuing concerns the individual's employment would not protect the integrity or promote the efficiency of the service because the conduct is egregious in nature and/or an adverse relationship exists between the prior conduct and the duties of the new position • The conduct upon which the prior determination was made is part of a pattern of misconduct that has continued despite the prior debarment. |
| <p>§731.205 Debarment by agencies</p> | <p>Agencies may impose debarment periods of up to three years from positions in their own agencies.</p> | <p>This reflects a change from the previous regulations, where agencies were limited to imposition of a debarment period up to one year only. The debarment period affects only positions within the agency and must be enforced by the agency. Cases containing issues warranting a Governmentwide debarment must be referred to OPM for adjudication.</p> |
| <p>§731.302 (OPM action) and §731.402 (agency action) Notice of proposed action</p> | <p>Respondents must be notified that they may be represented by a representative of their choice and that if they wish to have such a representative, they must designate the representative in writing.</p> | <p>OPM expects the role of a designated representative would be similar to that of a representative in other administrative actions, i.e., that a properly-designated representative would have the authority to act on behalf of the person he or she represents, including corresponding on behalf of the person and being responsible for meeting deadlines.</p> |
| <p>§731.501 Appeal to the Merit Systems Protection Board</p> | <p>The Board must consider the record as a whole and make a finding on each charge and specification in making its decision.</p> <p>If the Board sustains fewer than all the charges, the Board must remand the case to OPM or the agency to determine whether the suitability action taken is appropriate based on the sustained charge(s). However, the agency must hold in abeyance a decision on remand until the person has exhausted all rights to seek review of the Board's decision, including court review.</p> | <p>MSPB must review and make findings on all matters raised in any appeal before it; OPM modified the final rule to state this explicitly.</p> <p>Holding remand decisions in abeyance helps eliminate confusion about when a person can file a petition for review of an initial decision by MSPB, as well as confusion resulting from situations in which an agency is simultaneously reviewing a case on remand while MSPB is considering a petition for review or the case is pending review in court.</p> |