



Billing Code 6325-39-P

**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Parts 330 and 731**

**RIN: 3206-AN25**

**Recruitment, Selection, and Placement (General)**

**And Suitability**

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing a final rule revising 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. OPM is making this change to promote compliance with Merit System Principles as well as the goals of the Federal Interagency Reentry Council and the President's 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." In addition, the final rule will help agencies comply with the President's Memorandum of April 29, 2016, "Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals." The intended effect of this rule is to encourage more individuals with the requisite knowledge, skills, and ability to apply for Federal positions by making it more clear that the Government provides a fair opportunity to compete for Federal employment to applicants

from all segments of society, including those with prior criminal histories or who have experienced financial difficulty through no fault of their own.

**DATES:** *Effective date:* This final rule is effective [insert date 30 days from date of publication in the FEDERAL REGISTER].

*Compliance date:* [insert date 120 days from date of publication in the FEDERAL REGISTER]. As discussed below, OPM recognizes that there are legitimate, job/position-related reasons why a hiring agency may need to determine suitability at an earlier stage in the employment process. As such, this rule allows agencies to request from OPM an exception to accommodate such circumstances. Requests for an exception must be submitted to OPM by the agency's Chief Human Capital Officer (or equivalent) at the agency headquarters level. To permit agencies time to request exceptions where appropriate, this rule will have a compliance date of [insert date 120 days from date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mr. 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.

**SUPPLEMENTARY INFORMATION:** On May 2, 2016, OPM issued a proposed rule at 81 FR 26173, to amend 5 CFR parts 330 and 731. Specifically, OPM proposed revisions to its regulations that would prohibit a hiring agency from making specific inquiries concerning an applicant's criminal or adverse credit background of the sort asked on the Optional Form (OF) 306, "Declaration for Federal Employment" in its

“Background Information” section, or in other forms used to determine suitability or conduct background investigations for Federal employment, until the hiring agency has made a conditional offer of employment to the applicant. The proposed rule also allows agencies to request from OPM an exception to collect background information earlier in the hiring process. OPM recognizes there are legitimate, job/position-related reasons why a hiring agency may need to disqualify candidates with significant issues (including criminal history) from particular types of positions they are seeking to fill or to determine suitability at an earlier stage in the employment process. OPM received a total of 25 sets of comments: 17 from individuals, three from federal agencies, two from professional organizations, one from a trade association, one from a coalition of civic advocacy groups, and one from a private corporation. OPM’s responses to the comments are discussed below.

## **Discussion of Comments**

### **Comments generally opposed to the proposed rule**

Several individuals provided general comments opposing the proposed rule (two of these comments were not specific). These comments are as follows:

One individual commented that Federal agencies should always consider an applicant’s criminal background, and that all job announcements should advise anyone with a conviction record not to apply. A second commenter likewise stated that all resumes for Federal employment be “unblemished” by criminal history. OPM is not adopting these suggestions.

While OPM agrees that Federal agencies must consider an applicant's criminal background as part of the suitability determination required for positions covered by part 731 of this chapter, agencies should not prohibit the consideration of applications from persons with conviction records during the selection process itself. Moreover, in most cases, the separate suitability determination can and should occur after the selection process and a conditional offer have been made, thereby separating criminal history as an aspect of the suitability determination from the factors that are relevant at the time of the initial assessment process. This aligns actual requirements with what we believe to be the predominant current practice, so that they better comport with the Merit System Principle stating that selection should be based solely on knowledge, skill, and ability, 5 U.S.C. 2301, and thus will encourage more individuals with the requisite knowledge, skills, and ability to apply for Federal positions.

There are some positions for which Federal statute bars the employment of persons convicted of certain offenses. There may also be circumstances where a clean criminal history record must itself be one of the qualifications for a particular position, in light of the duties to be performed, and, therefore, becomes part of the examination for testing applicants for appointment in the competitive service that the President (and, in turn, through presidential redelegation, OPM) is entitled to prescribe. 5 U.S.C. 3301, 3302, 3304; E.O. 10577, as amended. Where criminal history-based disqualifications have a disparate impact, the agency will need to be prepared to demonstrate that they are job-related and consistent with business necessity in order to defend its decisions from a challenge related to equal employment opportunity. Moreover, applicants cannot be found unsuitable on the basis of criminal conduct unless there is a nexus between that

conduct and the efficiency of the service. Agencies have ample guidance relating to how to determine that nexus. Consistent with these principles, the proposed rule was intended to provide applicants from all segments of society, including those with prior criminal histories, a fair opportunity to compete for Federal employment.

One commenter stated that some applicants should be eliminated from consideration at the start of the hiring process based on the severity of their criminal offense, the nature of the offense vis-a-vis the duties of the position being filled, and whether the position being filled requires a security clearance. OPM agrees that certain positions may require inquiries into applicants' criminal or adverse credit history to be conducted at the start of the hiring process, and the proposed rule allows agencies to request an exception from OPM to accommodate such circumstances. But OPM cannot agree that it is appropriate, as a general rule, to eliminate applicants from consideration based upon their criminal history, before the assessment process has even occurred. The purpose of this rule is to defer the suitability process, where criminal history must and will be considered as part of an overall assessment of character and conduct, until after the assessment of relative knowledge, skills, and abilities that leads to selection of the best-qualified candidate and the conditional offer of employment. The suitability rules expressly provide for the nature of the position and the nature and seriousness of the offense to be taken into account as additional considerations during the suitability process. See 5 CFR 731.202(c). Permitting agencies to consider criminal history information in isolation, outside of the suitability process, could result in an initial selection process not exclusively based upon each candidate's qualifications and relative level of knowledge, skills, and ability with respect to the position. And it might result in

non-selection without the procedural protections that a final suitability action provides, which is not ideal. Accordingly, OPM rejects this comment, in part.

#### **Comments in support of the proposed rule**

A coalition representing criminal justice reform groups and civil and human rights advocates strongly supported the proposed rules, stating that when inquiries into criminal history are deferred until the conditional offer of employment, there is more clarity for the agency and the job applicant concerning the reason for a hiring decision based on a background check, and less opportunity for bias in the hiring process.

A professional association cast its general support for the proposed changes, noting that requesting criminal history information on the OF-306, Declaration for Federal Employment, only after a conditional offer of employment has been extended constituted “a sensible compromise” between promoting fair hiring practices and adhering to the suitability requirements pertaining to Federal employment. This organization also supported the proposal to allow OPM to grant limited exceptions to these rules on a position-by-position basis. We note that OPM would characterize what it is doing not as a “compromise,” but rather as separating more clearly the process for assessing relative knowledge, skills, and abilities from the process for determining suitability for appointment to a position in a position covered by part 731 of this chapter.

Two individuals also provided comments in general support of the proposed rule.

#### **Comments pertaining to the safety, risk, integrity of the civil service, and hiring efficiency**

Three Federal agency commenters, one professional association, one trade association, and four members of the general public commented that the proposed rule would waste government resources, as well as applicants' time, because the hiring agency must begin the employment process but later may have to rescind a conditional offer of employment upon a determination that the applicant is ineligible for federal employment on the basis of suitability, security, facility access, or qualifications criteria. Some of these commenters noted that this could result in further delays because checks would then have to be performed on remaining candidates, or because other candidates would seek employment elsewhere due to the length of the hiring process. Some of these commenters expressed general concern that delaying applicant background screening could lengthen an already-lengthy Federal hiring process, and could have adverse effects on certain applicants with criminal histories by requiring them to proceed all the way through the application process before learning of their disqualification, and by giving them an unrealistic expectation of their prospects as candidates. In related comments, one individual stated that the proposal would make the federal hiring process more complex and cumbersome.

One of the commenters from a Federal agency had calculated that over 10 percent of its law enforcement applicants who go through its pre-employment screening process are ultimately removed from consideration based on factors such as criminal history, delinquent debt, susceptibility to coercion, illegal use of drugs, and immigration violations, so that deferring the screening process would result in a significant unnecessary expenditure of agency time and resources in examination and qualifications assessment. The agency noted that these expenditures are significant because of its

unique, agency- and position-related requirements, including the agency's significant volume of vacancies and applicants; its pre-employment polygraph and medical examination requirements; its law enforcement and national security mission; and its need for its employees to credibly testify in criminal proceedings. Another agency commenter emphasized that the nature, seriousness, recency, and job-relatedness of certain criminal violations would almost certainly be disqualifying for certain positions under OPM's suitability regulations, making deferral of an unfavorable decision especially unfair. The agency cited specific criminal conduct that would render an applicant unsuitable for firefighter, educator, child care worker, motor vehicle operator, or financial/budget positions.

OPM acknowledges there may be instances in which an agency must rescind a job offer based on an applicant's criminal or adverse credit history, and then select another candidate, which could conceivably require that the agency screen and consider additional candidates in certain circumstances. But the commenters present no empirical evidence that changing the timing of background screening will have a general impact on time-to-hire, on the cost of background screening once it occurs, or on the efficiency of the Federal hiring process generally. As noted in the Notice of Proposed Rulemaking (81 FR at 26173), many agencies already wait until the later stages of the hiring process to collect criminal history information. We also note that these comments do not adequately take into account OPM's concern that early inquiries into an applicant's background, including his or her criminal or credit history, could have the effect of discouraging motivated, well-qualified individuals from applying for a Federal job because they have an arrest record, when the arrest did not result in a conviction or



when, following a conviction, they have fully complied with the penalty and have been rehabilitated in the eyes of the law. This discouragement also could impose a cost on the hiring process, by presenting hiring officials with a less competitive candidate pool.

OPM does agree there may be limited circumstances or positions for which it is appropriate for a hiring agency to collect information about applicants' criminal or adverse credit history earlier in the hiring process, rather than at the point at which a conditional offer of employment is made to an applicant. The proposed rule allows for agencies to request an exception from OPM to accommodate such circumstances.

With respect to these commenters' concerns about fairness to applicants, the intent of the proposed rule is to conform regulatory requirements to what we believe is the predominant agency practice and thus better serve the broader public policy ideal of providing applicants from all segments of society, including those with prior criminal histories, a fair opportunity to compete for Federal employment. Deferring consideration of this information to the stage at which suitability is adjudicated separates examining and assessment process from suitability, thereby encouraging applicants with criminal history to join the competition for vacant positions. It also means that the agency defers collection of criminal history information until the stage at which the agency is in a position to undertake a suitability determination, which makes the final decision reviewable and provides certain procedural protections.

Two individuals commented that the proposed rule may have adverse national security implications because it could result in convicted felons having access to sensitive information. A third individual opposed the proposed rule and questioned the wisdom of hiring ex-offenders who may then have access to employees' personal information and to

sensitive taxpayer records. OPM disagrees, noting that the proposed rule is not eliminating the need for, nor mitigating the thoroughness of, background investigations and appropriate related adjudicative processes for applicants for Federal jobs. The proposed rule simply impacts when during the hiring process inquiries into an applicant's criminal or adverse credit history can begin.

Another individual commented that delaying preliminary background screening could also delay the commencement of the full suitability background investigation required before appointment (or to finalize a contingent appointment) in the competitive service or the national security background investigation required to adjudicate eligibility for access to classified information. It is true that it could, in some cases, defer the commencement of the full investigation, but we believe, based upon earlier discussion with agencies, that most agencies already wait until the end of the selection process to commence those investigations. The proposed rule does not, in fact, change the current standard under 736.201(c) that a personnel background investigation may commence no later than the 14<sup>th</sup> day after placement, but that if the investigation is for a national security-sensitive position, it must both commence and be completed prior to appointment unless one of the waiver or exception conditions described in 5 CFR 1400.202 applies. The proposed rule is fully consistent with the requirement in E.O. 12968 of Aug. 4, 1995, governing investigations for eligibility for access to classified information, which provides that “[a]pplicants . . . required to provide relevant information pertaining to their background and character for use in investigating and adjudicating their eligibility for access” are those who have “received an authorized conditional offer of employment for a position that requires access to classified

information.” E.O. 12968, 3 CFR, 1995 Comp., p. 391, secs. 1.1(b), 3.2(a), reprinted as amended in 5 U.S.C. 3161 note.

One commenter mistakenly believes the proposed rule will weaken background checks, and thus poses a threat to the security of Federal employees, the American people, and U.S. government assets and secrets. The proposed rule does not, in any way, change the need to collect background information after the conditional job offer has been made and to evaluate any known issues prior to appointment (or after an appointment that is contingent upon a favorable adjudication). Similarly, it does not impact the integrity or thoroughness of the background investigation process. The proposed rule only affects the point at which an agency may collect information about an applicant’s criminal or adverse credit history.

Another individual believes the proposed rule will give the perception that the Federal government is establishing a hiring preference for ex-convicts or using Federal jobs as a relief-work or program for ex-convicts, which could demoralize the Government’s workforce and discourage talented applicants from applying. This comment does not pertain to the merits of the rule but rather, expresses a concern that the rule will be misperceived to the detriment of the Federal hiring process. OPM believes that this concern is speculative. The proposed rule does not provide a hiring or selection priority for ex-convicts, nor does it allow individuals to be appointed who should be adjudicated unsuitable for Federal employment. Similarly, it has no bearing on whether an individual requires eligibility for access to classified information, and, if so, should be deemed eligible under the adjudicative guidelines for such decisions. The rule simply addresses at which point during the selection process an agency may make inquiries into

an applicant's background, thereby helping to support a process where selections and conditional offers follow a fair and open competition based on applicants' relative knowledge, skill, and ability. In doing so, the rule is intended to attract all qualified applicants by making it more clear that, subject to certain exceptions, adverse background information will not be collected until after applicants' competencies are assessed, thereby reinforcing the notion that the Federal government is a model employer.

Three commenters supported deferring the collection of applicants' criminal history information until later in the hiring process, but proposed alternative approaches that they believed would achieve a better balance between fairness versus timeliness, and efficiency. A commenter from a Federal agency suggested the rule be modified to allow agencies to administer the OF-306 when an employee is determined to be within reach for selection. Another commenter from a Federal agency suggested that the rule be modified to allow agencies to administer the OF-306 at the time of scheduling an interview, i.e., after preliminary qualifications screening but before selection. A professional association recommended following an example from state government, of conducting criminal history screening after an interview as part of the final selection process. While all of these approaches have merit, OPM is not adopting them at this time because assessment instruments are not uniform across civil service examinations. Some examinations have an interview component while others do not; some employ multiple interviews. Permitting criminal history screening at the time of a conditional offer provides a uniform standard that is not dependent on the specific instruments that are being used in a competitive examination to assess applicant competencies.

**Exception based on location or type of position**

A professional organization commented that the process by which agencies may seek exceptions to collect information earlier in the process about applicants' criminal or credit history (on a case-by-case basis) could result in additional delays. OPM will provide further guidance after the publication of this final rule, but notes that an agency will not have to wait until it has a vacant position to request an exception. If there is a position or group of positions within the agency for which there is a legitimate need to collect information earlier in the process, the hiring agency may request an exception at any time. Once an agency receives an exception from OPM to collect background information from applicants for a particular position or group of positions earlier in the hiring process, the agency will not be required to request an exception subsequently, or each time, the position is being filled thereafter.

Another professional organization suggested that OPM make clear in the final rule that exceptions from the proposed changes must be requested prior to the posting of any vacancy announcement to which it will apply. Of course if an agency requests an exception on the ground that it is necessary to ask for certain background information as an aspect of determining whether a particular applicant is qualified for the position, then, the agency, of necessity, would be required to make that clear in advance of posting the job opportunity announcement. OPM agrees with this suggestion, however, even when the exception is to be requested in order to enable the agency to adjudicate suitability in advance, and has amended proposed 5 CFR part 330 subpart M accordingly.

This organization suggested OPM modify 5 CFR 330.1300 by including specific conditions under which OPM may grant an exception to these provisions. OPM is not adopting this suggestion. OPM is not yet in a position to anticipate all of the

circumstances that could warrant an exception, and wishes to gain experience with the regulation, and explore further the sorts of situations agencies may bring to its attention, before it limits its discretion to a list of specific conditions. Therefore we prefer, at least for now, to provide examples of the types of factors OPM will consider in determining whether to grant an exception.

The same organization also suggested that the final rule include a provision requiring agencies which are granted an exception to provide notice of the exception in their job announcements for positions for which the exception was granted. OPM agrees that agencies which receive exceptions should provide notice of the exception in their job announcements. Among other things, an agency that receives an exception in order to use background information as an aspect of assessing qualifications will, of necessity, need to disclose the qualifications and how they will be assessed as part of the job opportunity announcement. We do not believe a requirement in the final rule is necessary; OPM will require notice in its approval letters granting such exceptions.

One commenter from an agency and one individual suggested that OPM, in the final rule, specifically exempt from these provisions positions with law enforcement and national security duties. We see no reason why an agency filling a position that is national security sensitive cannot defer the collection of background information until after a putative selection, based upon relative degree of knowledge, skills, and abilities, has been made. Many agencies already do this. Moreover, even as to law enforcement positions, OPM is not adopting this suggestion. Because specific duties and agency requirements may differ, we prefer to rely on the mechanism for exceptions described in the proposed rule which allows agencies to request an exception for specific positions to

collect background information pertaining to an applicant's criminal or adverse credit history earlier in the hiring process.

A coalition representing criminal justice reform groups and civil and human rights advocates recommended that OPM permit no exception allowing agencies to collect information about applicants' criminal or adverse credit history prior to a conditional offer of employment. OPM is not adopting this suggestion. OPM leaves open the possibility that for certain positions there may be valid, job and position-related reasons why an agency may seek to disqualify applicants with significant criminal or adverse credit history backgrounds early in the process (such as law enforcement positions requiring the eventual appointee to be in a position to testify in legal proceedings). For these reasons OPM is retaining the exception provision.

The coalition commented that, in the event the exception provision is retained in the final rule, OPM should place the burden of proof on agencies seeking exceptions, should adjudicate requests under a rigorous standard of proof, and should give the public the opportunity to respond in opposition to an agency's request for exception. OPM does not adopt this suggestion. Currently, there are no limitations on the point at which agencies may initiate the collection of background information. The decision to impose the restriction is a policy decision, not a legal requirement. Accordingly, we do not believe that a uniform burden and standard of proof or a public notice-and-comment process is necessary or would assist us in our decision-making process, and it would be likely to unnecessarily delay the hiring process. The manner in which OPM grants exceptions must be flexible.

#### **Other Comments**

One agency commented that asking applicants whether they have been fired from a job, as is asked on the OF- 306, in connection with competitive hiring is a valid question and that restricting employers from doing so before making a selection hinders the employer from fully evaluating applicants and choosing the best candidate. Another agency commented that it needs to use the OF-306 prior to a conditional offer of employment because it is not just a background screening form, but is also used to collect important applicant information related to an applicant's citizenship, Selective Service registration status, military service and type of discharge, and relatives. This information is needed to ensure that candidates meet legal requirements for appointment in competitive hiring. OPM agrees that inquiries into an applicant's prior employment may have a bearing on his or her fitness for the job and points out that the proposed rule does not restrict agencies from collecting information about an applicant's prior employment prior to making a selection. The context of the proposed rule is information of the sort asked on the OF-306's 'Background Information' section specific to an applicant's criminal or adverse credit history. These provisions also do not prevent a hiring agency from collecting information about prior work history earlier in the hiring process. OPM has amended the final rule to provide greater clarity with respect to this issue.

OPM notes in this regard that agencies are not required to sponsor or conduct separate information collections subject to Office of Management and Budget (OMB) clearance in order to ask these kinds of questions to applicants as part of the competitive Civil Service hiring process. Under OMB's regulations implementing the Paperwork Reduction Act (PRA), "[e]xaminations designed to test the aptitude, abilities, or knowledge of the persons tested and the collection of information for identification or



classification in connection with such examinations” do not constitute information collections subject to the PRA’s requirements. See 5 CFR 1320.3(h)(7).

One individual asked whether the proposed rule was “politically motivated” for an electoral purpose. It was not. The origins of the proposed rule began several years ago. OPM proposed this rule to better harmonize the the requirements concerning the timing and objectives of the merit selection process and the suitability function.

One professional organization supports the proposal to include these rules under 5 CFR part 731 to ensure that any non-selections based on information from the OF-306 are appealable to the Merit Systems Protection Board (MSPB) under 5 CFR part 731.501. It appears the commenter may have misinterpreted the proposed rule. Only suitability actions as defined in 5 CFR part 731.203 (cancellation of eligibility, removal, cancellation of reinstatement rights, and debarment) are appealable to the MSPB. Nonselection is not appealable, as stated in 5 CFR 302.406(g) and 731.203(b).

The same organization recommended that OPM codify in the final rules the mitigating factors described in section 2(b)(i-iii) of the Presidential memorandum titled, “Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals” (81 FR 26993, 26995). OPM is not adopting this suggestion because these criteria pertain to occupational licensure, not to whether an individual is suitable for Federal employment. The purpose of the proposed rule is to affect at what point in the hiring process an agency may make inquiries into an applicant’s background, not to impact the criteria used to determine an applicant’s suitability for employment. However, we note that separate sections of this Memorandum are relevant to this rule. Section 1 formally reconstitutes the Federal Interagency Reentry Council as a Presidentially-established Council; section

1(a)(xvii) formalizes OPM's membership; and section 2(a) directs that "Agencies making suitability determinations for Federal employment shall review their procedures for evaluating an applicant's criminal records to ensure compliance with 5 CFR part 731 and any related, binding guidance issued by the Office of Personnel Management, with the aim of evaluating each individual's character and conduct." OPM expects that this rule will assist agencies in complying with the President's mandate.

This organization also asked that OPM amend its suitability regulations to require an agency to include a record of any exception granted by OPM, permitting it to conduct suitability screening prior to a conditional offer of employment, as part of the "materials relied upon" in charging an individual. OPM does not accept this recommendation, because the timing of a suitability inquiry is unrelated to the charges brought against an applicant, appointee, or employee in a proposed suitability action.

A coalition representing criminal justice reform groups and civil and human rights advocates recommended that OPM implement a centralized means of collecting data on the impact of the proposed rule by documenting the number of conditional offers and final hiring decisions of persons with prior convictions. The coalition believes this data would help maintain the integrity of the background check process and also help with oversight. OPM is not adopting this suggestion as part of the rulemaking but will oversee agencies' compliance with the rule, as part of the merit system audit and compliance process under Civil Service Rules V and X.

The coalition also suggested the proposed rules should apply to positions filled in the excepted service. OPM notes these provisions do apply to certain positions in the excepted service. OPM is not accepting this recommendation as to all excepted service

positions, but notes that under the current suitability regulations at 5 CFR 731.101(b), the definition of “Covered Position” includes a small subset of excepted service positions within OPM’s jurisdiction, namely positions in the excepted service “where the incumbent can be noncompetitively converted to the competitive service . . . .”

For other positions in the excepted service, OPM generally lacks the authority to prescribe qualification, fitness, or suitability standards or to regulate the timing of employer inquiries. For those positions excepted from the competitive service by Acts of Congress, hiring procedures and standards for making qualification or fitness determinations may be prescribed by statute. Where the statute is silent, or where the exception from the competitive service is made by the President (or by OPM under presidential delegation), Civil Service Rule VI, § 6.3(b) states that “[t]o the extent permitted by law and the provisions of this part, appointments and position changes in the excepted service shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary.” See 5 CFR § 6.3(b) (codifying this section of the Rule). Agency heads have the discretion to decide whether or not to establish criteria for making fitness determinations and determine whether their standards are equivalent to suitability standards established by OPM (but must consider OPM guidance when exercising this discretion). See Section 3 of E.O. 13488 of January 16, 2009, 3 CFR, 2009 Comp., p. 189.

The coalition notes, in support of its comment, that under Civil Service Rule VI, § 6.3(a), “OPM, in its discretion, may by regulation prescribe conditions under which excepted positions may be filled in the same manner as competitive positions are filled and conditions under which persons so appointed may acquire a competitive status in

accordance with the Civil Service Rules and Regulations.” The coalition cites this provision as “clear authority” for OPM to impose identical hiring requirements on the excepted service. However, the cited provision is not authority for OPM to override the discretion given to agencies in filling positions in the excepted service. Rather, it is a mechanism for OPM to permit agencies to hire for the excepted service in the same manner as for the competitive service and upon doing so, to give competitive status (i.e., the ability to be noncompetitively assigned to positions in the competitive service) to excepted service employees who have been hired in that manner. See 5 CFR 212.301, 302.102(c).

The coalition suggested that OPM include language in the final rule that requires agencies to comply with title VII of the Civil Rights Act of 1964, and Equal Employment Opportunity Commission (EEOC) guidelines pertaining to the use of conviction records in hiring decisions, including an individualized assessment of applicants’ criminal history. OPM is not adopting this suggestion because these rules only pertain to the timing of inquiries into an applicant’s criminal or adverse credit history, not to the selection process for Federal employment, and agencies have an independent obligation to comply with title VII.

### **Changes to the OF 306**

One agency and a coalition representing criminal justice reform groups and civil and human rights advocates suggested OPM also make changes to the OF-306 to facilitate the rule’s implementation. OPM is not addressing these comments at this time because the OF 306 and other investigative questionnaires are not promulgated through

rulemaking, but through the separate PRA process. The comments may be resubmitted when the information collections are up for renewal under the PRA.

One individual suggested that OPM remove the requirement to provide a Social Security number (SSN) on the OF-306. OPM is not adopting this suggestion because it is beyond the scope of the proposed rule, which pertains to when during the hiring process an agency may collect information about an applicant's criminal or adverse credit history.

**Comments outside the scope of the proposed rule:**

A private company commented that the proposed rule will inadvertently deter private sector employers from taking advantage of the Work Opportunity Tax Credit (WOTC), which is designed to encourage private employers to hire people with criminal histories, among others. This company requests that OPM clarify in the final rule that private employers can use the WOTC credit without violating these provisions. This comment is beyond the scope of the proposed regulations, which only pertain to Federal employment. OPM suggests private companies consult the Internal Revenue Service for information concerning the WOTC.

The same company suggested that OPM make clear in the final rule that these provisions only pertain to Federal employment. OPM is not adopting this suggestion because we do not believe such clarification is necessary. By statute and under the Civil Service Rules, OPM's jurisdiction in these matters is limited to Federal employment.

One organization similarly expressed concern that the proposed rule may persuade state and local governments to enact regulatory or contractual measures which, in turn, impose burdensome requirements on private investigative and security firms.

The comment is not accompanied by a specific recommendation related to the rulemaking, and is speculative, so there is no basis for OPM to consider the comment.

A coalition representing criminal justice reform groups and civil and human rights advocates recommended that OPM also extend these rules to its contractors. OPM cannot adopt this suggestion as part of the rulemaking, which pertains only to competitive Federal hiring, not contracting.

One individual asked whether there is evidence that “many” agencies administer the Optional Form (OF) 306, “Declaration for Federal Employment” prior to the point at which a tentative job offer is made. OPM stated in the Supplementary Information section of the proposed rule that to the contrary “many agencies already . . . wait until the later stages of the hiring process to collect this kind of information.” (81 FR at 26173.) This assertion is based upon the results of a survey we conducted on this matter. This survey was developed and issued to all Chief Human Capital Officers Act agencies. Eighteen (18) agencies/sub-agencies responded to the survey. The comment was not accompanied by a recommendation related to the rulemaking, so there is no basis to consider the comment.

Two commenters opposed the proposed rule in the mistaken belief that the rule’s purpose was to improve employment opportunities for individuals who had become criminals “through no fault of their own.” The commenters were apparently confused by a citation, in the proposed rule’s Supplementary Information (81 FR at 26174), to a Presidential Memorandum, “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 (79 FR 7045). OPM cited the memorandum

as a basis to defer the collection of certain applicant employment or credit information until the later stages of the hiring process, not for the reasons the commenters suggested. Because the comments were based on a faulty premise, OPM did not consider them.

One commenter asked that OPM revise the proposed rule to improve the formula for cost-of-living allowances for annuities. The comment was outside the scope of the proposal and was not considered.

#### **Executive Order 13563 and Executive Order 12866, Regulatory Review**

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

#### **Regulatory Flexibility Act**

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because the regulations pertain 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**

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.

### **Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)**

This final regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

### **List of Subjects**

#### **5 CFR Part 330**

Armed forces reserves, District of Columbia, Government employees.

#### **5 CFR Part 731**

Administrative practices and procedures, Government employees.

U.S. Office of Personnel Management

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Beth F. Cobert



Accordingly, OPM is amending 5 CFR parts 330 and 731 as follows:

**PART 330-- RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)**

1. The authority citation for part 330 continues 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).

2. Add subpart M, consisting of § 330.1300 to read as follows:

**Subpart M-Timing of Background Investigations**

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

A hiring agency may not make specific inquiries concerning an applicant's criminal or credit background of the sort asked on the OF-306 or other forms used to conduct suitability investigations for Federal employment (i.e., inquiries into an applicant's criminal or 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, or previous work history, prior to making a conditional offer of employment to an applicant. However, in certain situations, agencies may have a business need to obtain information about the 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 criminal or adverse credit history earlier in the process or consider the disqualification of candidates with criminal backgrounds or other conduct issues from particular types of positions. 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. OPM may also consider positions for which the expense of completing the examination makes it appropriate to adjudicate suitability 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 his or her 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 background information prior to completion of the assessment process and the making of a conditional offer of employment.

#### **PART 731—SUITABILITY**

3. The authority citation for part 731 continues 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, 3 CFR 2010 Comp., p. 189; 5 CFR parts 1, 2 and 5.

4. In § 731.103, revise paragraph (d) to read as follows:

**§ 731.103 Delegation to agencies.**

\* \* \* \* \*

(d)(1) A hiring agency may not make specific inquiries concerning an applicant's criminal or credit background of the sort asked on the OF-306 or other forms used to conduct suitability investigations for Federal employment (i.e., inquiries into an applicant's criminal or 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, or previous work history, prior to making a conditional offer of employment to an applicant. However, in certain situations, agencies may have a business need to obtain information about the suitability or background of applicants earlier in the process. If so, agencies must request an exception from the Office of Personnel Management, in accordance with the provisions of 5 CFR part 330 subpart M.

(2) OPM reserves the right to undertake a determination of suitability based upon evidence of falsification or fraud relating to an examination or appointment at any point when information giving rise to such a charge is discovered. OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud in examination or appointment, and OPM will take a suitability action where warranted.

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