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Designation of National Security Positions in the Competitive Service, and Related Matters; Final Rule

OFFICE OF PERSONNEL MANAGEMENT

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: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) and the Office of the Director of National Intelligence (ODNI) are issuing final regulations regarding designation of national security positions in the competitive service, and related matters. This final 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 Senior Executive Service (SES) positions held by career appointees in the SES within the executive branch, pursuant to Executive Order 10450, Security Requirements for Government Employment.

DATES: This rule will be effective on July 6, 2015.

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SUPPLEMENTARY INFORMATION: On December 14, 2010, the Office of Personnel Management (OPM) issued a proposed rule at 75 FR 77783 to amend part 732 of title 5, Code of Federal Regulations (CFR.) The purpose of the proposed rule was to clarify its coverage, and the procedural requirements for making position sensitivity designations. In addition, OPM proposed various revisions to make the regulations more readable.

In response to the December 14, 2010, proposed rule, OPM received a total of 17 comments. Of these comments, two were from individuals, eight from unions and labor federations, two from public interest organizations, and five from agencies and agency components. These comments along with the comments received for the May 28, 2013, proposed rule, described below, are addressed in this final rule. In a Memorandum dated January 25, 2013, and published in the **Federal Register** at 78 FR 7253 on January 31, 2013, the President Directed the Director of National Intelligence and the Director of the Office of Personnel Management to 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.'' On May 28, 2013, OPM and ODNI jointly issued a proposed rule at 78 FR 31847. This proposed rule, with the exception of § 732.401, (1) withdrew the proposed rule issued by OPM on December 14, 2010 (75 FR 77783); and (2) reissued and renumbered the proposed rule in a new chapter IV, part 1400 of title 5, Code of Federal Regulations.

During the 30-day comment period between May 28, 2013, and June 27, 2013, OPM and ODNI received 12 comments. Of these comments, three were from individuals, two from unions, three from public interest organizations, and four from agencies and components of agencies. The total number of written comments received in response to the proposed rules is 29. Of the written comments received, three supported the rule and 24 opposed the rule. Two commenters did not provide an opinion and are therefore outside the scope of this rulemaking.

Discussion of Comments

Comments on the December 14, 2010 Proposed Rule To Amend 5 CFR Part 732: Designation of National Security Positions

General Comments

An individual commented that the proposed rule is well written and needed to implement E.O. 10450. He further commented in favor of the rule's ''savings provision'' to preserve federal employees' procedural rights. No response is needed.

One union asked OPM to affirm that nothing in its proposed language for part 732 (now part 1400) was intended to curtail the ability of employees to be included in bargaining units.

Response: This rule does not address collective bargaining. It addresses, instead, agencies' responsibility to properly designate positions that may have a material adverse impact to national security and to allow the correct level of background investigation.

Several commenters expressed general opposition to the rule. One agency stated that if all investigations must be initiated no later than 14 working days after the change in designation there could be substantial cost implications. Likewise, a union stated given the costs associated with investigating and reinvestigating employees, the costs associated with the proposed changes could be considerable. It also voiced concern that forcing agencies to expend resources on investigations in a cost-cutting environment could end up causing more problems than anticipated. The union expressed a concern that the proposed changes could affect staffing since they could hamper the ability of agencies to hire employees in an efficient manner.

Response: We agree that re-designation of positions as national security positions will take time and resources to accomplish; however, the potential risk associated with under-designation makes investigations at a level commensurate with the responsibilities of each position essential investments to protect the public and the United States. Agency heads are responsible for complying with the requirement that positions will only be designated as national security positions when the occupant's neglect, action or inaction could bring about a material adverse effect on national security. Further, we recognize the need to balance risks and costs. E.O. 12866 requires us to consider cost effectiveness in our rulemaking. Unless the positions in question are determined to be ones that could bring about ''exceptionally grave damage'' or ''inestimable damage to the National Security'' a Single Scope Background Investigation (SSBI) or Tier 5 Investigation would not be required. However, if it is determined that such damage could result from actions of individuals in these positions, the SSBI or Tier 5 Investigation would be appropriate, just as it currently is when access to classified material at the top secret level is a requirement of the job.

One agency commented that it is unclear why ''Part 732 is not intended

to provide an independent authority for agencies to take adverse actions when the retention of an employee is not consistent with the national security,'' because it *has* been an independent authority for such action where the employee loses their eligibility for a sensitive national security position.''

Response: The commenter is incorrect. Part 732 has never been an authority under which to conduct security adjudications. E.O. 10450, Section 2 states, ''The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to ensure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interest of the national security.'' Likewise, part 732—now part 1400—is not a source of authority for conducting security adjudications.

One agency commented that certain language in the supplementary information accompanying the December 14, 2010 proposed rule to amend 5 CFR part 732—''Nor should part 732 be construed to require or encourage agencies to take adverse actions on national security grounds under 5 CFR part 752 when other grounds are sufficient''—appears to have the intent to discourage an agency from taking adverse actions on national security grounds.

Response: It is not the rule's purpose to require, encourage, or discourage adverse actions to be based on national security determinations. This rule is silent on the grounds on which an agency may take an adverse action for such cause as to promote the efficiency of the service under 5 U.S.C. 7513.

One agency stated that the supplementary information accompanying the December 14, 2010 proposed rule is incorrect in stating that ''Nor, finally, does part 732 have any bearing on the Merit Systems Protection Board's appellate jurisdiction or the scope of the Board's appellate review of an adverse action.''

Response: The scope of the U.S. Merit Systems Protection Board's (MSPB's) appellate jurisdiction was never controlled by part 732, and is not now controlled by part 1400. OPM regulates appeal rights for adverse actions in 5 CFR part 752, and regulates appeal rights for suitability actions in 5 CFR part 731.

A public interest organization opined that the rule may not protect the merit system principles and may, instead, condone their circumvention.

Response: The rule does not require the commission of any prohibited personnel practice, and agencies must not commit prohibited personnel practices in its implementation. The commenter's statement is speculative and fails to recognize that agency heads will have no greater authority under the new rule than under the preexisting rule to designate positions in their agency as sensitive. Therefore, the concern for an increased risk of abuse is misplaced. Under both the new rule and the preexisting rule, managers are required to adhere to the merit system principles in 5 U.S.C. 2301 and to refrain from prohibited personnel practices described in 5 U.S.C. 2302(b). When OPM conducts merit system oversight under Civil Service Rule V, it is required to report the results of audits to agency heads with instructions for corrective action and, if warranted, refer evidence to the Office of Special Counsel. Additionally, if an employee appeals an adverse personnel action to the Merit Systems Protection Board, and the action was for a reason other than unfavorable national security adjudication, the employee may raise, as an affirmative defense, that he or she was subjected to a prohibited personnel practice. Finally, the new rule itself provides greater clarity and structure to guide agencies in designating their positions than the current rule, providing less opportunity for the type of abuses feared by the commenter.

One union questioned the need for the issuance of any regulation, stating OPM characterizes its proposed changes as merely intended to ''clarify'' and ''update'' existing requirements and procedures. The union further stated it is incumbent upon OPM to demonstrate that regulations that have served the needs for government for many years, since passage of the USA PATRIOT Act of 2001 and the Homeland Security Act of 2002, are now somehow inadequate.

Response: The revision is necessary to clarify the requirements and procedures agencies should observe when designating national security positions as required under E.O. 10450, *Security Requirements for Government Employment.* The proposed regulation maintains the current standard which defines a national security position as 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.'' The purpose of the revisions is to clarify the categories of positions which, by virtue of the nature of their duties fall under this definition, whether or not the position requires access to classified information. Further, significant changes have been made to reinvestigation requirements by E.O. 12968, E.O. 13467, and E.O. 13488 since part 732 was last revised, requiring clarification.

An individual expressed concern that the proposed amendment to 5 CFR part 732 and the policy it embodies was being set by OPM, and that the document did not display any concurrence or approval by the DNI.

Response: Although OPM has rulemaking authority to implement E.O. 10450 pursuant to Civil Service Rule V and 5 U.S.C. 1103, E.O. 13467 gave ODNI new responsibilities related to national security positions. Accordingly, in recognition of OPM's and ODNI's responsibilities in this area, the President directed the two agencies to engage in joint rulemaking.

Comments on Section 732.101: Purpose

One union stated that it is important that any final regulations continue to be clear regarding the intent and scope of the proposed changes to part 732, now part 1400. The commenter stated that in the past agencies have misapplied part 732 when designating positions as national security positions, thus OPM should remind agencies in the body of the regulations, rather than in the ''Scope'' preface to the regulations, that ''not all positions . . . must be designated as national security positions,'' and that ''sensitivity designations are based on the nature of a position, not on the mission of the agency or of its subcomponents.'' Further, the union recommended that this reminder be placed in 5 CFR 732.101 under a new paragraph (c).

Response: We have rejected this comment as unnecessary, since it is clear from §§ 1400.101(b) and 1400.204 that position designation is conducted on a position-by-position basis.

Comments on Section 732.102: Definition and Applicability

A public interest organization raised several concerns. First, it stated that it opposes the expansion of the definition of national security position to include employees who do not have regular use of or access to classified information.

Response: The regulation does not ''expand'' the definition of a national security position to include individuals who do not have regular use of or access to classified information, since such positions were already covered by § 732.102(a)(1) of the preexisting regulations, and by section 3(b) of E.O. 10450. Further, we believe that while access to classified information is, in and of itself, a reason to designate a position as a national security position,

positions may have the requisite national security impact independent of whether the incumbent of the position requires eligibility for access to classified information. For example, positions involving protection from terrorism have the potential to bring about a material adverse impact on the national security, especially where the position duties involve protection of borders and ports, critical infrastructure, or key resources. Positions that include responsibilities related to public safety, law enforcement, and the protection of Government information systems could also legitimately be designated as national security positions, where neglect of such responsibilities or malfeasance could bring about adverse effect on the national security. Consequently, we believe that the definition of ''national security'' positions must include positions where the duties include ''protecting the nation, its citizens and residents from acts of terrorism, espionage, or foreign aggression and where the occupants neglect, action or inaction could bring about a material adverse effect on the national security.''

Next, the organization stated that the proposed rule gives agency heads a power to designate nearly any position within their agency as a national security position, driven by improper motives such as increasing an agency's profile by inflating the number of national security positions within that agency.

Response: The commenter is mistaken in its impression that the proposed rule would expand the scope of an agency head's ability to categorize positions, since agency heads will have the same authority under the new rule as they have under the current rule to designate positions within their agency. Further, the proposed rule provides greater detail to guide agencies in making position designations, which should lead to greater consistency in designations and reduce the likelihood that agencies could over designate their positions as the commenter suggests. The comment that agencies might in an unspecified way attempt to raise their ''profile'' by over-designating their positions is vague and speculative.

Third, the organization commented that the proposed definition of a national security position is overbroad and provides too much arbitrary power to agency heads to expand the number and type of positions that could be designated as national security positions without sufficient need or justification to the detriment of the rights of federal employees and true national security interests.

Response: As we stated in the supplementary information accompanying the December 14, 2010 proposed rule, the rule seeks to ensure consistency and uniformity to limit the potential for over or under designating positions by adding content to E.O. 10450's requirement that a national security position is one where the occupant could bring about a ''material adverse effect'' on the national security. Specifically, § 1400.201(a) requires that at a minimum, the occupant of a position must be able to cause at least ''significant or serious damage'' to the national security before his or her position may be designated as ''noncritical-sensitive,'' the very lowest national security position designation. OPM and ODNI recognize the need for standard guidelines agencies can use to assist them in making these determinations. OPM and ODNI will revise the OPM Position Designation Tool and issue detailed guidance on its position designation system.

Fourth, the organization voiced a concern that designating an existing position as a national security position triggers an intensive background investigation that could potentially disqualify federal employees from jobs that they currently perform. The organization further stated that the proposed rule expands the initiation of investigations to currently employed federal workers who are performing their duties with no apparent detriment to national security.

Response: E.O.10450 has historically given agency heads the responsibility to ensure that the employment and retention in employment of any civilian officer or employee is clearly consistent with the interests of national security. Positions are to be investigated at the level commensurate with their position sensitivity designation.

Finally, the organization felt that under the proposed rule a biased agency head or his designee could abuse the authority provided by this rule to conduct abusive background investigations against disfavored employees.

Response: We disagree that background investigations are ''abusive.'' Investigations are conducted to determine an individual's character, conduct and eligibility to hold a sensitive position or access to classified information in accordance with law, statute or executive order. We also disagree that agency heads will have arbitrary power to conduct background investigations. The commenter's statement is speculative and fails to recognize that agency heads will have no greater authority under the new rule than under the preexisting rule to designate positions in their agency as sensitive. Therefore, the concern for an increased risk of abuse is misplaced. Indeed, the new rule will provide greater clarity and structure to guide agencies in designating their positions than the current rule, providing less opportunity for the type of abuses feared by the commenter.

One union expressed concern that the rule expands the definition of a national security position to include positions where the incumbent does not require a security clearance.

Response: The comment's premise is incorrect. The predecessor rule, 5 CFR 732.102(a)(1), also required certain positions to be designated as national security positions even when the occupants did not require access to classified information.

Three unions and a labor federation recommended that proposed § 732.102 (now § 1400.102) be amended by adding a new subsection (c) at the end, stating that the ''designation of a position as a national security position does not by itself mean that an occupant of the position is an ''employee engaged in intelligence, counter-intelligence, investigative, or security work which directly affects national security'' within the meaning of 5 U.S.C. 7112(b)(6).''

Several unions felt that the recommended addition was important to prevent misapplication of the regulation. They explained that, because both the regulation and 5 U.S.C. 7112(b)(6) use the phrase ''national security,'' there is a significant risk that agencies will erroneously believe that an employee occupying a designated ''national security position'' is, by reason of that designation alone, ineligible on ''national security'' grounds for inclusion in a collective bargaining unit under 5 U.S.C. 7112.

Union commenters also stated that it is well established that a position's designation as a ''national security position'' does not automatically disqualify that position from inclusion in a collective bargaining unit. The union further stated that, under 5 U.S.C. 7112(b)(6), exclusion from a bargaining unit is not warranted merely because an employee is eligible for or has access to classified information, and cited *DoD Fort Belvoir and AFGE,* 64 FLRA 217, 221 (2009). The unions then stated that therefore, the regulations should make clear that they will in no way change or affect the status of bargaining unit designations for federal employees, which remain in the jurisdiction of the FLRA. The unions also stated explicit clarification that the regulation is not an interpretation of 5 U.S.C. 7112(b)(6) and

that occupying a ''national security position'' does not by itself mean that an employee is ''engaged in . . . security work which directly affects national security'' would be a valuable and important service to users of the regulation.

Three unions stated that if OPM is unwilling to include the recommended clarification, as an alternative, OPM should, at the very least, include a cautionary message to the same effect in the supplemental accompanying the Final Rule.

Response: It is not the intention of this regulation to impact how the Federal Labor Relations Authority (FLRA) makes unit determinations based on national security under 5 U.S.C. 7112(b)(6), but to clarify the requirements and procedures agencies should observe when designating national security positions as required under E.O. 10450. This regulation is not intended to, nor could it alter, statutory authorities vested in the FLRA. For these reasons, inclusion of the language proposed by the commenters is unnecessary. A cautionary note to the FLRA in this regulation or its supplement is not necessary, since the FLRA has its own statutory mandates and is expected to interpret them consistent with those authorities.

One union noted OPM's caution to agencies against overbroad application of the national security designation, and stated OPM should recognize the need to caution agencies here as well.

Response: Agency heads are responsible for complying with the requirement that positions will only be designated as national security positions when the occupant's neglect, action or inaction could bring about a material adverse effect on national security.

A union commented the new definition of ''national security position'' under the proposed regulations is overly broad, lacks clarity, and lends itself to grave misapplication by federal agencies in designating national security positions.

Response: While positions that include responsibilities such as law enforcement, public safety, and government information systems could be classified as national security, in each instance the agency head must make a determination of whether the occupant's neglect, action or inaction could bring about a material adverse effect on national security. OPM and ODNI caution that not all positions with these responsibilities must be designated as national security positions. Rather, in each instance agencies must make a determination of whether the occupant's neglect, action or inaction could bring about a material adverse effect on the national security. Agencies are reminded that sensitivity designations are based on the nature of the position, not on the mission of the agency or of its subcomponents.

Another union stated that OPM should discard what the commenter called the ''laundry list'' of positions in § 732.102(a), as this approach is so broad as to be vague, and could therefore mislead agencies in their application of the standard set out by Executive Order 10450.

Response: OPM and ODNI disagree that the examples given are overly broad and vague. The list of position duties is an illustrative guide in identifying national security positions, and is intended to provide more clarity and consistency in agency decision-making. But to add clarifying context, we have added a new § 1400.201(a)(2)(ii), and redesignated the existing paragraphs, stating that *critical-sensitive* positions include positions not requiring eligibility for access to classified information where they have ''the potential to cause exceptionally grave damage to the national security.'' We intend this new section to complement § 1400.201(a)(1)(ii), which states that *noncritical-sensitive* positions include positions not requiring eligibility for access to classified information where they have ''the potential to cause significant or serious damage to the national security.''

Another union raised several concerns. First, it commented that the proposed definition of a national security position is overbroad and will have the effect of expanding the number and type of positions that could be designated as national security positions without sufficient need and at significant cost.

Response: As we stated in the supplementary information accompanying the December 14, 2010 proposed rule, the rule seeks to add content to E.O. 10450's requirement that a national security position is one where the occupant could bring about a ''material adverse effect'' on the national security. Specifically, § 1400.201(a) requires that at a minimum, the occupant of a position must be able to cause at least ''significant or serious damage'' to the national security before his or her position may be designated as ''noncritical-sensitive,'' the very lowest national security position designation. OPM and ODNI recognize the need for standard guidelines agencies can use to assist them in making these determinations and § 1400.201(b) authorizes OPM and ODNI to issue detailed guidance on its position designation system. Moreover, we believe agencies are mindful of the costs associated with national security investigations and that cost will act as a constraint on overdesignation. Agencies must also recognize that cost should not be a basis for underdesignation, which could increase risk to national security.

Next, the union expressed concern that without close oversight by OPM, there is an unacceptable risk that agencies will misapply the regulations.

Response: OPM has a responsibility under section 14(a)(2) of E.O. 10450, as reaffirmed by section 3(a)(i) of E.O. 13467, to monitor the fairness and impartiality of decisions made by agencies under their security programs, including position designation determinations; and to report to the agencies and the National Security Council on the need for corrective action. ODNI has a responsibility under section 2.3(c) of E.O. 13467 to exercise oversight over determinations of eligibility to hold a sensitive position, which includes ensuring that, as a foundational matter, positions are properly designated, which in turn drives the appropriate scope investigation and subsequent adjudication. Therefore, OPM and ODNI will factor position designation into their oversight reviews.

Third, in response to the December 14, 2010 proposed rule, the union, citing the Supreme Court's decision in *Cole* v. *Young,* 351 U.S. 536, stated that OPM has erred in extending the definition of national security positions beyond those that are ''directly concerned with the protection of the Nation from internal subversion or foreign aggression.'' The union noted that previously, the regulations specified that a ''national security position'' includes (1) positions that require the regular use of or access to classified information, and (2) positions that involve the protection of the nation from foreign aggression or espionage and related activities focused on the preservation of the military strength of the nation. The union asserted that the amended rule extends the definition to encompass civilian-oriented activities such as (1) protecting or controlling access to facilities or information systems; (2) exercising investigative or adjudicative duties related to suitability, fitness, identity credentialing; (3) exercising duties related to criminal justice, public safety or law enforcement; and (4) conducting related investigations or audits. To include, in the definition of national security positions, ''those [positions] which contribute to the strength of the Nation

only through their impact on the general welfare'' would potentially encompass *all* activities of the government. *Id.* at 543–44.

Response: It was not OPM's or ODNI's purpose to broaden the meaning of the term ''national security'' as used in E.O. 10450 but rather, as stated in the notice of proposed rulemaking, to recognize that there are ''positions that may have a material adverse impact on the national security, *but that may not seem to fall squarely within the current definition in § 732.102(a) of this chapter,''* necessitating clarification. 75 FR 77783. To emphasize the point that we are not changing the meaning of the term national security, we are adding a new definition to § 1400.102(a)(3) of the final rule that states that the term refers to those activities which are directly concerned with the foreign relations of the United States and protection of the nation from internal subversion, foreign aggression, or terrorism. In addition to addressing the commenter's concern, this definition makes express what was implicit in the prior rule: That the national security includes the foreign relations of the United States and protection against terrorism. This brings the rule's definition in line with Executive order 13526, under which the President has defined the ''national security,'' in the context of classification of national security information, as ''the national defense and foreign relations of the United States'' including ''defense against transnational terrorism.'' E.O. 13526, sections 1.1(a)(4), 6.1(cc).

Fourth, the union stated that OPM's definition of ''national security position'' sweeps too broadly, reinforced by the examples provided by OPM of positions that should be designated as Noncritical-Sensitive, Critical-Sensitive, or Special-Sensitive. *See* 5 CFR 1400.201(a). By way of example, the union speculated that the examples in the rule could be used to erroneously designate a food safety inspector or an IRS agent as occupying Critical-Sensitive positions.

Response: OPM and ODNI disagree that the three types of national security classifications are vague, and that the differences among them are indistinguishable due to the use of overly broad and undefined terms. To the contrary, the three sensitivity levels conform to established, long-standing national security policy. The rule changes further clarify the designation of national security positions. The examples were provided to assist agency personnel in placing positions at the various sensitivity levels once they have been designated as national security positions. The commenter's examples are inapposite in that under § 1400.102(a), before designating a position as Critical-Sensitive, an agency must first determine that the position is such that ''the occupant . . . could bring about, by virtue of the nature of the position, a material adverse effect on the national security.''

Fifth, the union was most troubled by the example of a Critical-Sensitive position offered by OPM at 5 CFR 732.201(a)(2)(xvi) (now § 1400.201(a)(2)(xvi)): Positions in which the occupant has unlimited access to and control over unclassified information if the unauthorized disclosure of that information could cause exceptionally grave damage to the national security. The union stated it had previously assumed that any information that could cause ''exceptionally grave damage to the national security'' would be classified. If *unclassified* information could cause such damage, the standard is not very demanding, and it is likely that agencies would agree and interpret the standard in a relaxed fashion.

Response: The example is intended to address the case where an employee has unlimited access to and control of documents that are not individually classifiable at the Confidential, Secret, or Top Secret level, but where the documents, upon release, will provide a compilation or mosaic of information that could cause exceptionally grave damage to the national security. This is consistent with section 1.7(e) of E.O. 13526, as well as the predecessor Executive order, E.O. 12958.

Sixth, the union stated that it appears as though the new regulation will have the ''unfortunate'' tendency to encourage agencies to redesignate many public trust positions as national security positions. The union further stated that a redesignation as national security requires only a minor shift in agency analysis of the degree of danger that could result from action or inaction by the incumbent and opined that this is a very fine distinction, one that is likely to confuse personnel security offices, and OPM should clarify the task facing personnel security officers.

Response: The underlying premise of the comment—that public trust and national security position designations are exclusive of each other—is incorrect. 5 CFR 731.106 clearly states that the two designations are complementary, and § 1400.201(c) and (d) are an effort to streamline the joint designation process. Further, as we stated in the supplementary information accompanying the December 14, 2010 proposed rule, a national security position is one where the occupant could bring about a ''material adverse effect'' on the national security. Specifically, § 1400.201(a) requires that at a minimum, the occupant of a position must be able to cause at least ''significant or serious damage'' to the national security before his or her position may be designated as ''noncritical-sensitive,'' the very lowest national security position designation. As such, some positions may be redesignated from sensitive to nonsensitive as a result. The occupants will still be subject to an appropriate risk-based public trust investigation.

Seventh, the union referred to a briefing held by OPM on these regulations with unions that hold consultation rights with OPM. Further, the union stated during this briefing, OPM indicated that it contemplates playing a relatively modest role in overseeing the position designation process despite the need for individualized assessments and the admitted risk of improper designation. The union stated its understanding that OPM provides general guidance and training to agencies, but that actual oversight is confined to random audits. The union requested intensive training for agency human resources staff by OPM, rigorous oversight, and a mechanism for individual employees to report allegations of abuse and for OPM to conduct targeted reviews in response to complaints.

Response: The commenter's suggestion that OPM launch an intensive training program of agency personnel security officers is outside the scope of this rule. Under section 2 of E.O. 10450, each agency is responsible for establishing and maintaining an effective security program, and this necessarily includes ensuring that its security staff is appropriately trained to follow regulations and policy directives. However, OPM has, in the past, offered instruction to agencies on applying the position designation system and will continue to do so. Further, OPM and ODNI will provide detailed guidance for a revised position designation guide. OPM and ODNI will conduct oversight and review of agencies' position designation decisions. We believe that it would be inefficient to establish a new individual complaint process for position designations that the labor representative proposes. Nonetheless, this regulation in no way purports to limit employees' existing redress avenues, including the right to report waste, fraud and abuse to the agency's Inspector General.

Eighth, the union further stated that it has observed that many agencies are woefully ill-equipped to make position

designation determinations, making the 24-month time frame unrealistic. The commenter proposes replacing the 24-month period with a 36-month period.

Response: OPM and ODNI believe that the 24-month time frame is enough time to allow agencies ample opportunity to review the positions and determine whether or not they impact national security under the new definition and make the appropriate designation change. However, we have revised the regulation to allow agencies to request an extension of the timeframe for re-designation.

Ninth, the union stressed that accuracy and consistency in the designation process are essential and errors can have profound repercussions.

Response: We agree that accuracy and consistency in the designation process are critical. This is one of the reasons for promulgating this rule. In each instance, agencies must make a determination of whether the occupant's neglect, action or inaction could bring about a material adverse effect on the national security. Agencies are reminded that sensitivity designations are based on the nature of the position, not on the mission of the agency or of its subcomponents.

Three unions commented that under the proposed regulations, certain key terms such as critical infrastructure or key resources are not defined. Instead, OPM states that agencies are to ''be guided in their assessment. . . by referring to'' the USA Patriot Act of 2001 and the Homeland Security Act of 2002. *Id.* The commenter felt that because OPM has not provided a clear definition of these terms, agencies may misinterpret and misapply them as intended in these statutes. This will likely result in the inconsistent designation of national security positions among federal employees.

Response: We agree, and have revised § 1400.102 definition and applicability to include the statutory definitions for the terms ''key resources'' and ''critical infrastructure.'' Namely, under Public Law 107–296 (the Homeland Security Act), dated November 25, 2002, ''key resources'' are defined as ''publicly or privately controlled resources essential to the minimal operations of the economy and government.'' 42 U.S.C. 5195c(e) (the Critical Infrastructures Protection Act of 2001, Section 1016 of the USA Patriot Act of 2001) defines ''critical infrastructures'' as ''systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.''

Two unions and a labor federation commented that the regulations fail to define the terms ''neglect, action, or inaction,'' and instead provide ''extreme and unguided'' deference to agencies in determining the types of conduct that could have a ''material adverse effect'' on national security. They stated that this will likely result in the arbitrary designation of ''national security positions'' inconsistent with the intent of the regulations and E.O. 10450. They proposed that OPM provide guidance to agencies to determine the types of conduct that constitute ''neglect, action, or inaction,'' and which would have a ''material adverse effect on the national security.''

Response: While we disagree with the allegations, we note, as described above, that we have given content to E.O. 10450's term ''material adverse effect'' by defining the degree of harm to the national security that must be posed by the occupant of a non-critical sensitive position, a critical-sensitive position, or a special-sensitive position. These definitions will deter over-designation. OPM's and ODNI's position designation model issued under § 1400.201(b) will provide agencies with further guidance in making these determinations. The terms neglect, action, or inaction are self-explanatory; thus they do not have to be defined.

Unions commented that the proposed regulations would also add to the definition in § 732.102(a)—now § 1400.102(a)—certain federal employee positions that are *not* typically considered to be national security related. OPM's regulations provide examples of these positions. They further stated that these examples are overly broad and should be amended to reflect those positions that have an actual adverse impact on national security as intended by the regulations and Executive Order 10450. They therefore recommended that OPM clarify the regulations to ensure that the proposed changes do not have the unintended effect of improperly designating an employee's position as a ''national security position'' when the occupant does not in fact ''have the potential to bring about a material adverse impact on the national security.''

Response: This rule provides clarity as to the categories of positions, which, by virtue of the nature of their duties, may have the potential to bring about a material adverse impact on the national security. Further, every position must be properly designated, individually, with regard to national security sensitivity considerations as this is necessary for determining appropriate investigative requirements. Finally, agency heads are responsible for complying with the requirement that positions will only be designated as national security positions when the occupant's neglect, action or inaction could bring about a material adverse effect on national security. As such, agencies will be responsible for carefully considering the nuances of position duties to determine whether or not a national security risk exists. It should not be assumed that if a position has a possible connection to the categories listed, it will always ultimately be determined to be a national security position.

A union commented that because federal fire fighters and first responders, by virtue of their positions, *respond* to emergencies, they are not typically in a position to ''bring about a material adverse effect on national security'' even if they respond to emergencies at facilities with custody over classified information. The union suggested using more clear and definitive standards that would better serve the intended purpose of the regulations. For example, OPM could amend the regulations by requiring that only those public safety officers whose routine or daily activity could ''bring about a material adverse effect on national security'' be designated as such.

Response: OPM and ODNI do not concur with amending the rule by requiring that only those public safety officer positions where the occupants' routine or daily activity could ''bring about a material adverse effect on national security'' be designated as national security positions. E.O. 10450 requires the designation of a position as ''sensitive'' whenever ''the occupant . . . could bring about, by virtue of the nature of the position, a material adverse effect on the national security.'' There are characteristics of a position other than the frequency or degree of access to classified information that could affect the occupant's ability to bring about a material adverse effect on the national security. However, as stated earlier, while positions that include responsibilities such as law enforcement, public safety, and government information systems could be classified as national security, in each instance the agency head must make a determination of whether the occupant's neglect, action or inaction could bring about a material adverse effect on national security. OPM and ODNI caution that not all positions with these responsibilities must be designated as national security positions. Rather, in each instance

agencies must make an individualized determination. Sensitivity designations are based on the nature of the position, not on the mission of the agency or of its subcomponents.

The same union recommended that OPM amend the proposed regulations to require a supervisor or manager in a national security position to oversee or accompany public safety officers while responding to emergencies where the national safety is at risk, or while handling hazardous materials, to ensure that the national security is safeguarded.

Response: OPM and ODNI will not adopt this suggestion as it is outside the scope of this rule. Agencies have authority to determine how best to manage their workforce.

One union recommended that concerning subsection (b) of § 732.102 (now § 1400.102(b)), rather than extend part 1400 to positions where the incumbent ''can'' be non-competitively converted to the competitive service, OPM should restrict the application of part 1400 to positions where the incumbent ''*will*'' be non-competitively converted to the competitive service upon successful completion of the incumbent's excepted service appointment. The commenter states that this is a more efficient use of resources and is more in line with the intent of part 1400.

Response: We do not accept this recommendation, since agencies cannot predict with certainty whether employees in excepted appointments that lead to conversion to the competitive service will meet the performance requirements and other conditions for conversion.

The same union stated that agencies should have leave to apply these regulations to its excepted service positions only when ''required'' by law, not ''to the extent consistent with law.''

Response: We do not accept this comment. Civil Service Rule VI, 5 CFR 6.3(b) gives agency heads great discretion to adopt regulations and practices governing appointments and position changes in their excepted service workforces.

Comments on Section 732.201: Sensitivity Level Designations and Investigative Requirements

A public interest organization raised several concerns about this section. First, it felt that the proposed definition is overbroad allowing almost any employee to be deemed to be holding a national security position, thus requiring the employee to undergo a background investigation, regardless of whether any potential risk to national security is genuine. Further, the commenter stated that if a federal employee is reclassified as holding a national security position and receives a negative determination as to their eligibility to maintain that position, the employee has little recourse for appeal.

Response: The commenter's statement is speculative and fails to recognize that agency heads will have no greater authority under the new rule than under the preexisting rule to designate positions in their agency at a particular level of sensitivity. Therefore, the concern for an increased risk of abuse is misplaced. Indeed, the new rule will provide greater clarity and structure to guide agencies in designating their positions than the current rule, providing less opportunity for the type of abuses feared by the commenter. Further, we disagree that agencies will have authority to designate virtually any position as a national security position under this rule. Rather, the rule requires the agency head to make a determination of whether the occupant's neglect, action or inaction could bring about a material adverse effect on national security.

Next, the organization voiced concerns that the potential for abuse is high because many of the factors that are evaluated during national security background investigations and weigh into the ultimate determination for eligibility to hold a national security position are highly subjective.

Response: Part 1400, like part 732 before it, does not prescribe adjudicative requirements or adjudicative criteria for eligibility for employment in a national security-sensitive position. Therefore, the comment is outside the scope of the rulemaking.

Third, the organization stated that the broadly proposed definition of a national security position may enable an agency head or designee to engage in retaliation for whistle blowing or exercising a grievance or complaint. The commenter complained that any appointee who reports a supervisor's misconduct under whistleblower protections of 5 U.S.C. 2302 could be reclassified as holding a national security position under the proposed definition.

Response: The commenter's statement is speculative and fails to recognize that agency heads will have the same authority under the new rule as they currently possess under the preexisting rule to designate positions in their agency as sensitive. Therefore, the concern for an increased risk of abuse is misplaced. Under both the new rule and the preexisting rule, managers are required to adhere to the merit system principles in 5 U.S.C. 2301 and to refrain from prohibited personnel practices described in 5 U.S.C. 2302(b). When OPM conducts merit system oversight under Civil Service Rule V, it is required to report the results of audits to agency heads with instructions for corrective action and, if warranted, refer evidence to the Office of Special Counsel. Additionally, if an employee appeals an adverse personnel action to the Merit Systems Protection Board, and the action was for a reason other than an unfavorable national security adjudication, the employee may raise, as an affirmative defense, that he or she was subjected to a prohibited personnel practice. Finally, the new rule itself provides greater clarity and structure to guide agencies in designating their positions than the current rule, providing less opportunity for the type of abuses feared by the commenter.

Fourth, the organization stated that a memorandum by OMB (since identified as dated January 3, 2011) solicits information from agencies in which this commenter believes provides standards for analyzing individuals' ''relative happiness'' ''despondence'' or ''grumpiness'' as a measure of waning trustworthiness. The commenter further stated that a whistleblower could be described ''grumpy,'' bringing his or her trustworthiness into question according to this analysis.

Response: This comment is outside of the scope of this rule. However, the memorandum that the commenter is citing does not establish adjudicative standards. Thus the memo is not relevant in the determination of whether or not an individual will be placed in a national security position. E.O. 10450 has historically given agency heads the responsibility to ensure that the employment and retention in employment of any civilian officer or employee is clearly consistent with the interest of national security. Positions are to be investigated at the level commensurate with their position sensitivity designation.

Finally, the organization stated that the broadness of the proposed definition of national security, subjectivity allowed in the background investigation of any appointee or applicant to a national security position, and the lack of an authorized process or guidelines for making these determinations creates unchecked opportunities for agency heads and their designees to engage in otherwise illegal retaliation.

Response: The commenter's statement is speculative and fails to recognize that agency heads will have no greater authority under the new rule than under the preexisting rule to designate positions in their agency as sensitive.

Therefore, the concern for an increased risk of abuse is misplaced. Under both the new rule and the preexisting rule, managers are required to adhere to the merit system principles in 5 U.S.C. 2301 and to refrain from prohibited personnel practices described in 5 U.S.C. 2302(b). When OPM conducts merit system oversight under Civil Service Rule V, it is required to report the results of audits to agency heads with instructions for corrective action and, if warranted, refer evidence to the Office of Special Counsel. Additionally, if an employee appeals an adverse personnel action to the Merit Systems Protection Board, and the action was for a reason other than an unfavorable national security adjudication, the employee may raise, as an affirmative defense, that he or she was subjected to a prohibited personnel practice. Finally, the new rule itself provides greater clarity and structure to guide agencies in designating their positions than the current rule, providing less opportunity for the type of abuses feared by the commenter.

Two unions stated that the proposed changes further cloud the distinction between positions that actually constitute a national security risk and those that do not, and that the examples provided in the proposed regulations are overly broad and provide little guidance to agencies in determining whether a national security position should be designated as such.

Response: We disagree that the proposed changes cloud the distinction between positions that actually constitute a national security risk and those that do not. This rule is intended to more fully conform to section 3(b) of E.O. 10450. This rule provides clarity as to the categories of positions, which, by virtue of the nature of their duties have the potential to bring about a material adverse impact on the national security. Every position must be properly designated with regard to national security sensitivity considerations as this is necessary for determining appropriate investigative requirements.

The unions further commented that the three types of national security classifications are vague, and that the differences among them are indistinguishable due to the use of ''overly broad and undefined terms,'' and voiced concern that a Federal agency could improperly designate any position as a national security position. They also commented that in proposing changes to the types of positions requiring ''critical-sensitive'' designations, as compared to noncritical-sensitive designations under §§ 1400.102(a) and 1400.201(a)(1) and (2), OPM's examples of positions that could constitute ''critical sensitive'' positions are overly broad and could have the unintended effect of resulting in the redesignation of many positions as ''critical-sensitive.'' As an example one of the unions cited the rule's reference to ''positions in which the occupant has the ability to independently damage health and safety with devastating results.'' The commenter opined that it is unclear what the meanings of ''independently'' or ''devastating results'' are in this context. They suggested that some agencies may think that a fire fighter or first responder ''independently'' failing to follow a protocol in responding to a fire or accident that results in injury or death to a victim would meet this definition of ''devastating result.'' They also felt that some agencies may believe that a fire fighter or first responder failing to follow protocol for providing emergency medical services that inadvertently results in patient illness or death could meet this same definition. The union further stated that under these interpretations, those fire fighters or first responders could inappropriately be deemed as holding national security positions due solely to the risks associated with negligence. Another union cited the rule's reference to ''[p]ositions in which the occupant has the ability to independently compromise or exploit the nation's nuclear or chemical weapons designs or systems.'' The commenter opined that the meaning of ''independently compromise or exploit'' is unclear in this context. The commenter suggested that some agencies may think that an engineer who performs maintenance on, or oversees the refueling of Navy ships or nuclear submarines could have his or her position improperly redesignated from ''nonsensitive'' to ''critical-sensitive.''

Response: OPM and ODNI disagree that the three types of national security designations are vague, and that the differences among them are indistinguishable due to the use of overly broad and undefined terms. To the contrary, the three sensitivity levels conform to established, long-standing national security policy. The examples were provided to assist agency personnel in placing positions at the various sensitivity levels once they have been designated as national security positions. Indeed, the new rule will provide greater clarity and structure to guide agencies in designating their positions than does the current rule.

We also do not agree that firefighters or first responders will be improperly placed in a critical-sensitive position; they must have the potential to cause exceptionally grave damage to the national security before their positions can be so designated. We believe the scenario concerning maintenance and refueling is not based on a natural or reasonable reading of the cited text. Moreover, the rule makes clear that an employee is in a ''critical-sensitive'' position only if he or she could cause ''exceptionally grave'' damage to the national security. This will deter the risk of over-designation.

A union commented that the list of examples provided in the proposed rule by OPM includes ''[p]ositions in which the occupant has the ability to independently compromise or exploit biological select agents or toxins, chemical agents, nuclear agents, or other hazardous materials.'' The definitions of ''independently compromise or exploit'' remain unclear. Some agencies may believe that a fire fighter or first responder, who may have access to certain chemicals used during emergency clean-up, or to medications used to assist during a medical emergency, would meet the criteria for a ''critical-sensitive'' position. However, as noted above, under this interpretation, those fire fighters or first responders would be improperly placed within that designation.

Response: We do not agree that firefighters or first responders will necessarily be improperly placed in a critical sensitive position; they may be properly placed in a critical sensitive position when the occupant of the position has the independent ability to cause exceptionally grave damage to the national security by means of hazardous materials through their neglect, action or inaction. Hazardous materials as used here include, but are not limited to, biological select agents or toxins, chemical agents, and nuclear materials.

Two unions likewise stated that the proposed regulations could confuse agencies and provide for the inconsistent application of the regulations throughout federal agencies. They stated the overly broad examples provided in the proposed regulations could potentially result in the over-designation of federal positions as ''sensitive'' positions. They recommended that OPM provide a more detailed definition of those classifications and provide a more detailed definition of the terms ''independently,'' ''devastating results,'' ''compromise,'' and ''exploit'' in the final regulation to ensure a narrower interpretation of employees that could be designated as ''critical-sensitive.''

Response: Again, OPM and ODNI disagree that the examples given are overly broad. The description of the

three sensitivity levels conform to established, long-standing national security policy, and does not refer to specific job positions, but to position duties and responsibilities. Agencies are reminded that sensitivity designations are based on the nature of the position, not on the mission of the agency or its subcomponents. Further, OPM and ODNI do not believe it necessary to provide a more detailed definition of sensitivity level designations in the final rule. Agencies are to use the examples provided as a guide in placing positions at the appropriate sensitivity level once they have been properly designated as national security positions. However, OPM and ODNI plan to provide a revised position designation model to facilitate agency head designations.

One union stated OPM should add a new sub-section (4) following § 732.201(a)(3). This new sub-section (4) should again clarify what is already present in the intent of OPM's proposed changes and in Executive Order 10450; that is, that: ''*Access or the requirement of eligibility for access to personally identifiable information, financially sensitive information, or other sensitive unclassified information, is not a basis for designating a position as a sensitive national security position under this part absent a finding by the head of the designating agency that the occupant of the position could, by virtue of the nature of the position, bring about a material adverse effect on the national security.*'' If OPM chooses not to add the suggested sub-section (4) above, the union recommended that OPM should include this language in its prefatory discussion of part 732's scope, given that OPM already cautions that not all positions having security or law enforcement-related duties must be designated as national security positions.

Response: OPM and ODNI do not agree. Access to unclassified information has never solely been a basis for designating a position as sensitive, and designation of a national security position has always been tied to whether an occupant can bring about material adverse impact to national security. This regulation already contains such language. The additional language will only cause confusion.

Comments on Section 732.202: Exceptions to and Waivers of Investigative Requirements in Limited Circumstances

An agency stated that the language in the proposed rule refers to a waiver being made only for a limited amount of time. The agency further stated that it is unclear as to what is meant by a limited time and clarification is needed.

Response: A ''limited period of time'' is intended for a case of emergency. In such a situation, the requisite investigation should be done as soon as practicable. The pre-appointment investigation waiver should only be utilized when an agency has found such a waiver to be in the national interest. Further, this finding must be made a part of the department or agency records.

One agency inquired as to whether each agency will be required to go to OPM for exception from investigative requirements for their unpaid interns since the National Agency Check with inquiries (NACI) takes a longer period of time to complete than the time that the intern is at the agency; or, alternatively, if OPM will consider giving blanket guidance in this matter. The commenter's rationale seems to indicate that the internship in question is temporary.

Response: Although the NACI is not an appropriate level of investigation for National Security positions, the comment related to interns is herein addressed for other types of investigations that are appropriate for National Security purposes, such as the Access National Agency Check and Inquiries (ANACI). While there is not a specific exception for interns, based on the commenter's rationale, this type of position is covered by the exception at § 1400.202(b)(1). Each agency will have to request an exception.

Section 3(a) of E.O. 10450, as amended, allows OPM to make exceptions from investigative requirements for temporary employees, including interns with temporary appointments, only ''upon the request of the head of the department or agency concerned.'' Our regulation must be consistent with the Executive Order it implements. However, while a request must be sufficiently informative to allow OPM to make a reasoned decision to grant it, the Executive Order imposes no requirement for the request to be individualized, highly detailed, or limited to a short duration. Therefore we do not believe that this long-standing requirement of E.O. 10450 will be unduly burdensome to implement. Internship, in and of itself, is not the determinate factor as to whether there should be an exception to investigative requirements, nor is pay status relevant. Rather, the nature of the duties of the position will be assessed to make this determination.

One agency felt that no changes should be made to the current § 732.202(a) (renumbered as § 1400.202(a)) concerning waivers of investigative requirements. The commenter expressed concern that the rule will expand the number of ''sensitive'' positions and that accordingly, the regulation should continue to allow waivers of investigations for noncritical-sensitive positions to be granted without any conditions and limitations. Lastly, the commenter stated that the elimination of the automatic exception is unnecessary.

Response: First, the commenter is incorrect in assuming that the regulation will expand the number of sensitive positions. The purpose of the rule is to clarify the kinds of positions where the occupant could have a material adverse effect on the national security, consistent with E.O. 10450; while defining materiality as at least a ''significant or serious'' effect. The rule does not foreordain a net increase or a net decrease in the number of positions designated as ''sensitive.'' The condition that a waiver can only be granted in an ''emergency'' and where retention is ''clearly consistent with the interests of the national security'' is a requirement of Executive Order that OPM has no authority to vary. Moreover, the proposed and final rule requires the investigation for the NCS position to have at least been initiated, even if a waiver is granted.

One agency noted that ''under the proposed regulations, a waiver of the pre-appointment check for Noncritical-Sensitive positions would be required to be based on an emergency, and the agency would be required to favorably evaluate a completed questionnaire and initiate the required investigation within 14 days after appointment.'' The agency expressed concern that individuals already possessing a Secret security clearance based on the level of investigation required for military service, the National Agency Check with Local law and Credit Checks (NACLC), may require a waiver before they can begin work in a civilian Noncritical-Sensitive position because a different level of investigation is required for civilian employment. The commenter suggested acceptance of investigations conducted for Secret access in the military service might decrease the number of waiver requests.

Response: The condition that a waiver can only be granted in an ''emergency'' and where retention is ''clearly consistent with the interests of the national security'' is a requirement of Executive Order that OPM has no authority to vary. Further, under existing guidelines for reciprocity, if the appointee has a current investigation

that meets the investigative and adjudicative requirements for the new position, no new investigation or adjudication is necessary. However, a NACLC is not a satisfactory investigation for civilian employment as it does not meet the requirements of E.O. 10450. We recognize that security clearance reciprocity rules require agencies to accept existing clearances as individuals move between various positions performing work for, or on behalf of, the Government. Accordingly, we have adjusted the language in § 1400.202(a)(2)(iii).

The investigative standards promulgated by OPM and ODNI pursuant to E.O. 13467, when implemented, will ensure alignment using consistent standards, to the extent possible, of security and suitability investigations for employment in covered positions, and to prevent unnecessary duplication of effort when an appointment in a sensitive position requires investigations for multiple purposes (*e.g.,* an investigation for suitability under E.O. 10577, and for eligibility for access to classified information under E.O. 12968).

The same agency questioned whether or not agencies can submit blanket exception requests versus annual submissions.

Response: This rule does not require an annual re-approval of the exception, or restrict OPM from approving blanket exceptions in appropriate circumstances. Upon request of an agency head, OPM may, in its discretion, authorize exceptions to investigative requirements for appointments that are intermittent, seasonal, temporary, or not to exceed an aggregate of 180 days.

Comments on Section 732.203: Periodic Reinvestigation Requirements

One public interest organization commented that the proposed rule will greatly increase the number of investigations, and retaliatory investigations in violation of the Whistleblower Protection Act.

Response: OPM and ODNI do not agree that the rule will greatly increase the number of background investigations, as E.O. 10450 already requires background investigations of all employees. Further, every position must be properly designated with regard to national security sensitivity considerations as this is necessary for determining appropriate investigative requirements. This rule is intended to provide increased detail over the current rule to assist agency heads in designating positions as sensitive as required in section 3(b) of E.O. 10450 and will advance uniformity and consistency in investigations and adjudications of persons occupying those positions as required in EO 13467.

The commenter's allegation about the possibility of abuse is speculative and fails to recognize that agency heads will have no greater authority under the new rule than under the preexisting rule to designate positions in their agency as sensitive. Therefore, the concern for an increased risk of abuse is misplaced. Under both the new rule and the preexisting rule, managers are required to adhere to the merit system principles in 5 U.S.C. 2301 and to refrain from prohibited personnel practices described in 5 U.S.C. 2302(b). When OPM conducts merit system oversight under Civil Service Rule V, it is required to report the results of audits to agency heads with instructions for corrective action and, if warranted, refer evidence to the Office of Special Counsel. Additionally, if an employee appeals an adverse personnel action to the Merit Systems Protection Board, and the action was for a reason other than an unfavorable national security adjudication, the employee may raise, as an affirmative defense, that he or she was subjected to a prohibited personnel practice. Finally, the new rule itself provides greater clarity and structure to guide agencies in designating their positions than the current rule, providing less opportunity for the type of abuses feared by the commenter.

One agency stated that the new ''tiered'' approach to investigations requires continuous evaluation at the higher tiers; thus, it requests clarification as to whether or not the requirement for a 5 year reinvestigation is in conflict with the continuous evaluation requirement or whether the 5 year reinvestigation will be in addition to continuous evaluation.

Response: For employees requiring access to classified information or eligibility for such access, section 3.4 of E.O. 12968, as amended, requires periodic reinvestigations and allows for reinvestigation at any time; while section 3.5 requires, in addition, a ''continuous evaluation'' program. They are distinct requirements. The new Federal investigative standards jointly issued by OPM and ODNI, and being implemented by agencies, are consistent with the standards prescribed by this final rule. ODNI will issue additional guidance on continuous evaluation as needed.

One agency commented that due to the cost impact of the five year reinvestigation cycle, a period of time should be allotted for agencies to assess the volume of reinvestigations needed and to comply with the new requirement.

Response: We agree that assessing the volume of reinvestigations needed may take time and resources to accomplish, and are essential investments to protect the public and the United States. Agencies have 24 months following the effective date of this rule to determine whether changes to position sensitivity designations are necessary. During this time, agencies should concurrently assess the volume of reinvestigations needed. We believe this is ample time to assess the volume of reinvestigations to be in compliance with the new requirements. Further, we recognize the need to balance risks and costs. E.O. 12866 requires us to consider cost effectiveness in our rule making. Every position must be properly designated with regard to national security sensitivity considerations as this is necessary for determining appropriate investigative requirements. In determining the type of investigation that will be required at each sensitivity level, the most comprehensive and costly investigation, the SSBI or Tier 5 investigation, has been reserved for critical sensitive and special sensitive positions. These positions are only those which could cause ''exceptionally grave damage'' or ''inestimable damage'' to the national security. Positions at the non-critical sensitive level will require a less extensive and, consequently, less costly, investigation.

One union noted that paragraph (b) of 5 CFR 732.203 (now § 1400.203) adds a 5-year reinvestigation requirement for national security positions that do not require eligibility for access to classified information. The union stated the plain language of the authorities relied on by OPM does not mandate periodic reinvestigations for national security positions that do not require eligibility for access to classified information. The union therefore recommended OPM eliminate the reinvestigation requirement for positions that do not require eligibility for access to classified information or, alternatively, decrease the frequency of periodic reinvestigations for positions that do not require eligibility for access to classified information.

Response: OPM and ODNI disagree with the commenter's recommendation to eliminate the reinvestigation requirement for positions that do not require eligibility for access to classified information or, alternatively, decrease the frequency of periodic reinvestigations for positions that do not require eligibility for access to classified information. In order to facilitate the goals of statute and Executive Order to

align investigations of persons working for or on behalf of the Federal Government to achieve consistency, efficiency and reciprocity of background investigations, both public trust positions under part 731 and sensitive positions under part 1400 will undergo reinvestigations on a coordinated cycle to ensure that a single investigative process can be used to address both security and suitability concerns. Accordingly, we have decided to retain the 5 year frequency.

One union opposed periodic reinvestigations at five-year intervals, and reaffirmed its long-standing view that reinvestigations at such short intervals are a waste of time and money, and impose undue burdens on employees and agencies alike. The union urged OPM to reconsider the frequency of the reinvestigation requirement for national security positions, especially positions whose incumbents do not require access to classified information.

Response: OPM and ODNI disagree with the commenter's recommendation that OPM reconsider the frequency of reinvestigation requirements for national security positions. Background investigations must occur frequently enough to ensure continued employment of individuals in national security positions remains clearly consistent with the interests of national security. Background investigations must be conducted at a frequency and scope that will satisfy the reinvestigation requirements for both national security and public trust positions. Accordingly, we have decided to retain the 5 year frequency.

The same union recommended that to mitigate the cost and the impact on employees of more frequent national security reinvestigations, OPM should narrow the scope of such reinvestigations.

Response: OPM and ODNI agree with this comment. Consistent with section 2.1(a) of E.O. 13467, OPM and ODNI chaired an inter-agency working group that developed new Federal investigative standards for national security and suitability investigations approved by the Security and Suitability Executive Agents in December 2012. When fully implemented, they will limit the coverage of reinvestigations to new information that is needed to ensure continued eligibility and suitability.

Comments on Section 732.204: Reassessment of Current Positions

An agency requested that new investigations based on position redesignation be done at the time individuals are due for reinvestigation as this timing will allow the costs and workload to be spread across a five year span, instead of all occurring in one year.

Response: Agencies have 24 months following the publication of this rule to determine whether changes and position sensitivity designations are necessary. We believe this is ample time to budget for cost of the position re-designation and the requisite investigation. However, in response to this comment we have amended § 1400.204 to allow agencies to request an extension of the timeframe for re-designation and initiation of reinvestigation, if justified.

Another agency commented that the period of 24 months is not adequate time for large agencies to reassess all of their positions and recommended the period be increased to 36 months to allow agencies ample opportunity to fully review the duties of positions and make the appropriate designation changes.

Response: OPM and ODNI believe that the 24 month time frame is enough time to allow agencies ample opportunity to review the positions and determine whether or not they impact national security under the new definition and make the appropriate designation changes. However, in response to this comment we have amended § 1400.204 to allow agencies to request an extension of the timeframe for re-designation, if justified.

A public interest organization stated that the proposed rule has excessive budgetary and administrative burdens that the required reassessments and additional background investigations impose on each agency and on the Office of Personnel Management.

Response: Again, while investigations will take time and financial resources to accomplish, they are essential investments to ensure continued employment is appropriate. This new rule is intended to provide greater detail to assist agency heads in designating positions as sensitive as required in section 3(b) of E.O. 10450 and will advance uniformity and consistency in investigations and adjudications of persons occupying those positions as required in E.O. 13467. This rule will provide clarity as to the categories of positions, which, by virtue of the nature of their duties have the potential to bring about a material adverse impact on the national security. Further, every position must be properly designated with regard to national security sensitivity considerations as this is necessary for determining appropriate investigative requirements.

A union commented the proposed changes do not set forth the procedures that agencies must take in assessing or reassessing national security positions. Failure to provide agencies with appropriate direction in assessing or reassessing current positions will force agencies to establish their own guidelines, and likely result in the inefficient and inconsistent application of the regulations throughout the federal government. The unions recommended that the final regulations designate a specific, detailed, uniform process for all agencies to make this determination.

Response: OPM and ODNI will issue further detailed guidance in a revised position designation system which will provide the uniformity the commenters are seeking. OPM and ODNI will require agencies to assess all current positions using the definitions of sensitivity level designations provided in § 1400.201 within 24 months of the effective date of the final rule, unless an extension is granted. This is necessary to ensure that all positions are properly designated using the updated definition. Agency heads must make a determination of whether the occupant's neglect, action or inaction could bring about a material adverse effect on national security to ensure proper position designations are applied and correct investigations conducted.

Comments on Section 732.205: Savings Provision

OPM specifically requested comment on its savings provision at § 732.205 (renumbered as § 1400.205). An agency stated it did not have any issues with the addition of a savings provision to avoid any adverse impact to employee procedural rights.

Response: We agree and have made no changes to this section of the regulation except as described below. The savings provision ensures there will be no adverse impact to the procedural rights of employees when employees are already awaiting adjudication of a prior investigation at the time of a redesignation required by this rule.

A union suggested that the rule at § 732.205, now § 1400.205, be modified to reflect OPM's stated intent to avoid ''any adverse impact'' (presumably from redesignations under this rule) to the procedural rights of employees awaiting adjudication of prior investigations.

Response: We agree and have revised the rule to say that the rule may not be applied to ''make an adverse inference'' in pending administrative proceedings. We have also revised the rule to make clear that after the redesignation of a position a new adjudication may be appropriate.

A public interest organization stated that OPM should obtain a cost estimate for the investigations anticipated by the rule and re-submit it with a new request for comments when the public knows how much the proposal will cost.

Response: OPM and ODNI are not adopting this recommendation. This rule is intended to provide increased detail over the preexisting rule to assist agency heads in designating positions as sensitive as required in section 3(b) of E.O. 10450 and will advance uniformity and consistency in investigations and adjudications of persons occupying those positions as required in E.O. 13467. While OPM and ODNI have not done a cost estimate for the investigations anticipated by this rule, agency heads already must investigate their employees and should already budget for this activity. Further, every position must be properly designated with regard to national security sensitivity considerations as this is necessary for determining appropriate investigative requirements. Ensuring personnel occupying national security sensitive positions by conducting the appropriate level of investigation is not an unnecessary expense.

Comments on Section 732.301: Procedural Rights

A public interest organization stated that background investigation interviews are conducted in secret and many factors used are entirely subjective, thus a negative determination could easily be made based on false or misleading information, and the employee would then be unable to remain in his/her job. Further, the commenter opined that employees have no way to challenge negative determinations which could be based on false information.

Response: The comment does not appear to be directly related to the regulation. Nonetheless, we note that investigative interviews are not conducted in secret. However, they are conducted in private because of the personal information discussed, and there are privacy protections associated with investigation records. The individual being investigated has the right to access the final report of investigation, has the opportunity to rebut any information he or she believes is false or inaccurate as part of the adjudicative process, and has the opportunity to request an amendment of records under the Privacy Act. E.O. 12968, as amended, provides individuals review and appeal rights when an investigation for eligibility for access to classified information results in an unfavorable eligibility determination, and § 1400.301 of the rule also prescribes minimum procedural requirements for unfavorable adjudications generally.

An agency inquired as to whether non-selected individuals will receive the procedural rights in § 1400.301, and stated that clarification is needed.

Response: The term ''non-selection'' is not a term used in this rule; the rule refers to a change from tentative favorable placement or clearance decision to an unfavorable decision. Therefore, we are unable to respond to this comment, because it is outside the scope of the rulemaking.

One agency objected to OPM deleting the reference to adjudicative decisions made ''under this part'' in § 732.301.

Response: We do not accept this comment. The intent of the revised language in § 732.301, now § 1400.301, is to ensure that agencies understand that this section is not the authority for making an eligibility decision. Rather, an agency makes an eligibility decision for sensitive positions using national security adjudicative guidelines rooted in requirements established in Executive Order 10450 and, if applicable, 12968. Section 1400.301 simply addresses procedures that agencies are to follow in rendering an unfavorable eligibility decision, under the applicable executive order, based on an OPM investigation.

A public interest organization takes issue with the statutory procedures available to employees under 5 U.S.C. 7513 or 7532, as relevant, when an employee is suspended or removed based on an unfavorable security determination. The commenter appears to be concerned that the amendment to 5 CFR part 1400 will result in more employees being subject to adverse actions under statutory procedures that the commenter perceives as deficient.

Response: The comment is outside the scope of the rulemaking and appears to take issue with existing statutory language that is not the subject of part 1400.

Two unions stated that OPM's proposed regulations do not provide adequate procedural rights for employees who are adversely affected by an agency's decision based on an OPM investigation, and more specifically, when an employee's favorable national security placement is unfavorably changed. These unions likewise believe that employees who are adversely affected by an agency's decision to classify them in a national security position are afforded minimal and inadequate due process. They requested OPM include in its final regulations certain procedural safeguards, including, but not limited to, (1) adequate notice to employees that their position is being reassessed for national security purposes; (2) requirements that the process be transparent; and (3) the ability for employees to appeal agency decisions to unfavorably redesignate national security positions.

Response: E.O. 10450 gives agency heads the responsibility to ensure that the employment, and retention in employment, of any civilian officer or employee is consistent with the interest of national security. Positions are to be investigated at the level commensurate with their position sensitivity designation. Agencies may provide advance notice of the redesignation of a position to allow time for a completion of the forms, releases, and other information needed from the incumbent to initiate the investigation. However, this rule intentionally does not create procedural rights regarding designation of national security positions. Since the position designation process is a discretionary agency decision, employees should consult with their agency human resources office regarding whether any administrative procedures are available to employees if they wish to dispute whether their position is properly designated.

In regard to assessment or reassessment of positions, in each instance agencies must make a determination of whether the occupant's neglect, action or inaction could bring about a material adverse effect on the national security. All positions must be assessed and the criteria used must provide transparency in agencies designating national security positions. Agencies are reminded that sensitivity designations are based on the nature of the position, not on the mission of the agency or of its subcomponents.

One union noted that OPM's December 14, 2010 document specifically states that ''Part 732 is not intended to provide an independent authority for agencies to take adverse actions when the retention of an employee is not consistent with national security.'' The union noted that by failing to provide procedural rights to those employees who are adversely affected by an improper agency determination, the regulations do not provide the safeguards necessary to prevent an agency from removing an employee under the guise of national security, when in fact the agency has an independent motive. The union thus requested that OPM include in its final regulations certain procedural safeguards, including, but not limited to, (1) adequate notice to employees that

their position is being reassessed for national security purposes; (2) requirements that the process be transparent; and (3) the ability for employees to appeal agency decisions to unfavorably redesignate national security positions.

Response: Again, This rule intentionally does not create procedural rights regarding designation of national security positions. Since the position designation is a discretionary agency decision, employees should consult with their agency human resources office regarding whether any administrative procedures are available to employees if they wish to dispute whether their position was properly designated.

One union noted that OPM correctly stated in the supplementary information accompanying the December 14, 2010 proposed rule that, absent a specific grant of statutory authority, OPM may not alter by this rulemaking the jurisdiction granted to a tribunal by statute. The union recommended adding a new paragraph to § 1400.301 to explicitly state that it is not OPM's purpose to affect any tribunal's jurisdiction or scope of review, or to affect unit determinations under 5 U.S.C. 7116.

Response: We do not accept this comment. It is self-evident that OPM and ODNI do not, in this rulemaking, attempt to affect any tribunal's jurisdiction or scope of review, or to affect unit determinations. This regulation is not intended to, nor could it alter, statutory authorities vested in the MSPB or the FLRA. This proposed rule is intended to provide increased detail over the current rule to assist agency heads in designating positions as sensitive as required in section 3(b) of E.O. 10450 and to advance uniformity and consistency in investigations and adjudications of persons occupying those positions as required in E.O. 13467. Agency heads will have the same authority under the new rule as they currently possess under the existing rule to designate all positions in their agency. For these reasons, inclusion of the language proposed by the commenter is unnecessary.

One union recommended that OPM insert the word ''reasonable'' before the word ''opportunity'' in § 732.301(a)(4)(ii), now § 1400.301(c)(1), because a ''reasonable opportunity'' is surely what is already implied by this sub-paragraph and part 732 as a whole.

Response: We have not adopted this suggestion because as noted by the commenter, ''reasonable opportunity'' to respond is implicit in the section; but more importantly, because the specific nature of the right to respond, *e.g.,* applicable time limits, will depend on the applicable executive order, regulation, or agency policy governing the proceeding.

A union endorsed the proposed language in the procedural rights section, 5 CFR 732.301 (now § 1400.301), and agreed that agencies should, at a minimum, comply with their own procedural regulations, and that employees should also be notified of any appeal rights. While the union is of the view that the MSPB should also review a determination that an employee is not eligible to hold a sensitive position, it agrees with OPM's comment, in the December 14, 2010 **Federal Register** document, that this regulation does not have any bearing on the Merit Systems Protection Board's appellate jurisdiction or the scope of the Board's appellate review of an adverse action.

Response: OPM and ODNI acknowledge this comment, to which no further response is needed.

Comments on Section 732.401: Reemployment Eligibility of Certain Former Federal Employees

An agency recommended amending § 732.401, concerning reemployment of persons summarily removed on national security grounds, to reprint the language from section 7 of E.O. 10450. A union stated OPM should make clearer in the text of the regulation that the provisions regarding reemployment eligibility for individuals removed for national security reasons do not apply to individuals removed pursuant to chapter 75. In this regard, OPM should remind agencies that, for example, individuals removed pursuant to chapter 75 remain immediately eligible for appointment to non-sensitive positions.

Moreover, another union noted that because the December 14, 2010 proposed rule is withdrawn, there is no proposed rule to finalize. It further commented that § 732.401 should be further amended to clarify that it does not apply to removals under chapter 75 of title 5, United States Code, and that persons removed under chapter 75 are eligible for appointment to nonsensitive positions without the need for prior OPM approval.

Response: We cannot accept these comments because they are outside the scope of the rulemaking. As OPM and ODNI stated in the **Federal Register** notice accompanying the proposed rule, § 732.401 is not affected by this joint rulemaking, and OPM will revise § 732.401 at a future date.

Comments on the May 28, 2013 Proposed Rule To Amend 5 CFR Part 1400: Designation of National Security Positions in the Competitive Service, and Related Matters

General Comments

Several commenters expressed general opinions on the proposed rule. An individual commenter agreed with the redesignation of the sections of the Code of Federal Regulations. In addition, an agency stated that this rule is long overdue and should make it easier and more efficient for agencies to make the national security determination.

Response: We acknowledge these comments, to which no further response is required.

An individual asked when the rule would be final.

Response: This rule will be effective 30 days after it is posted in the **Federal Register**, as required by 5 U.S.C. 553(d).

An agency suggested incorporating the Adjudicative Guidelines for Determining Eligibility For Access to Classified Information in the regulations, without specifying where. The agency stated that there are no standards for adjudicating whether an individual is fit to occupy a national security position in E.O. 10450.

Response: This recommendation is outside the scope of the rule. Part 1400, like part 732 before it, does not prescribe adjudicative requirements or adjudicative criteria for eligibility for employment in a national security-sensitive position. Section 2 of E.O. 10450 assigns to each agency head the responsibility to establish and maintain a program to ensure that the employment and retention of civilian officers and employees is clearly consistent with the interests of the national security. ODNI is currently working on guidance to address this concern. Furthermore, E.O. 10450, section 8 lays out adjudicative criteria. Agency heads have supplemented these criteria through agency regulations. A public interest organization raised several concerns regarding the proposed rule. First, it stated that OPM and ODNI should not proceed with the rulemaking until the conclusion of litigation in *Kaplan* v. *Conyers,* a case then pending before the Court of Appeals for the Federal Circuit.

Response: The Federal Circuit issued its decision on August 20, 2013. A petition for certiorari to the United States Supreme Court was denied on March 31, 2014 in *Northover* v. *Archuleta.*

Conyers concerns the question of whether the Merit Systems Protection

Board may review the merits of a national security determination. In contrast, this rule governs the standards for designating positions as national security sensitive under section 3 of E.O. 10450. The outcome of the referenced litigation does not affect this rule.

Next, the commenter stated that the proposed rule fails to ensure whistleblower protections for employees in national security sensitive positions who file appeals with the Merit Systems Protection Board.

Response: As we explained in response to an identical comment on the earlier proposed rule, it is not our purpose in this rulemaking to address the Merit Systems Protection Board's appellate jurisdiction over adverse actions, or the availability of whistleblower reprisal defenses. The comment is therefore outside the scope of the rulemaking.

Third, the commenter stated that ''the proposed rule grants the agencies the authority to adjudicate and determine eligibility for national security positions without sufficient oversight.''

Response: The commenter is incorrect. This rule does not address how agencies are to administer their security programs, instituted under section 2 of E.O. 10450, including any adjudications or determinations of eligibility required by such programs. Because this responsibility is committed to agency heads, section 1400.301 specifies only minimum procedural rights. However, with respect to oversight, OPM and ODNI intend for the recordkeeping and reporting requirements in §§ 1400.202, 1400.301, and 1400.302 to enhance their ability to conduct oversight under section 14 of E.O. 10450 and section 2.3 of E.O. 13467, respectively.

Fourth, the commenter felt that OPM and ODNI, by employing an ''extremely broad'' definition of a national security position, will allow agencies to erroneously designate low-level positions as national security positions.

Response: We do not accept this comment. As we noted in our response to an identical comment on the earlier proposed rule, the regulation adds content to section 3(b) of E.O. 10450, which requires the designation, as sensitive, of every position, the occupant of which could have a material adverse effect on the national security. This rule is intended to provide increased detail over the current rule to assist agency heads in designating positions as sensitive as required in section 3(b) of E.O. 10450 and will advance uniformity and consistency in investigations and adjudications of persons occupying those positions as required in E.O. 13467. The commenter does not recommend alternative text that would better guide agency heads in their exercise of judgment.

Fifth, the commenter was concerned that newly-required national security investigations will have significant cost implications in a constrained fiscal environment, and that the rule does not provide sufficient oversight to prevent inappropriate and expansive national security designations.

Response: As we noted in response to an identical comment on the earlier proposed rule, we agree that any re-designation of positions as national security positions, and resulting investigations, will take time and resources to accomplish; however, an investigation at a level commensurate with the risk to the national security is an essential investment to protect the public and the United States, and is indeed a requirement of section 3 of E.O. 10450. Agency heads are responsible for complying with the requirement that positions will only be designated as national security positions when the occupant's neglect, action or inaction could bring about a material adverse effect on national security. Further, we recognize the need to balance risks and costs. E.O. 12866 requires us to consider cost effectiveness in our rulemaking. Unless the positions in question are determined to be ones that could bring about ''exceptionally grave damage to the national security'' an SSBI or Tier 5 investigation would not be required. However, if it is determined that such damage could result from actions of individuals in these positions, the SSBI or Tier 5 investigation would be appropriate, just as it currently is when access to classified material at the top secret level is a requirement of the job.

Finally, the commenter requested more data on the current number of national security positions, the expected number after this rule goes into effect, the estimated cost of implementation, and the reporting and oversight mechanisms OPM recommends for improving the efficiencies, effectiveness, and accountability in agency national security designations.

Response: The requested data and supplemental information are not available. The intent of the proposed rule is to provide more uniform and consistent guidance to agencies when determining position sensitivity. OPM and ODNI believe that the two notices of proposed rulemaking, on December 14, 2010 and May 28, 2013 provided sufficient notice for informed public comment on the proposed rule.

A union felt that ''[t]he changes proposed by OPM and ODNI should be withdrawn in their entirety'' because they ''reflect a rushed effort to drastically expand the reach of national security designations without any attempt at meaningful analysis.''

Response: We disagree with the premise underlying this proposal to withdraw the rule. As indicated in the December 14, 2010 notice of proposed rulemaking, the rule was based on a careful analysis of the need to coordinate existing authorities governing investigative and reinvestigative requirements for suitability, security clearances, and national security position duties.

A union was concerned that OPM and ODNI's May 28, 2013 **Federal Register** document did not recite the supplementary information that accompanied the December 14, 2010 version of the proposed rule. The commenter felt that important precautionary notes had been lost. In particular, the commenter expressed concern about the omission of OPM's prior statements that ''in each instance, agencies must make a determination of whether the occupant's neglect, action or inaction could bring about a material adverse effect on the national security'' and that sensitivity designations ''are based on the nature of a position, not on the mission of the agency or of its subcomponents.'' The commenter expressed concern that the December 2010 **Federal Register** document cannot be relied upon as an interpretation of the rule. The commenter also read the absence of explanatory text as a ''deliberate silence . . . clearly evince[ing] a bias in favor of overdesignation.''

Response: On January 25, 2013, the President directed OPM and ODNI to jointly propose the regulations that OPM originally proposed on December 14, 2010, with only ''such modifications as are necessary to permit their joint publication.'' Further, in the supplementary information accompanying the May 28, 2013 joint proposed rule, OPM and ODNI expressly referenced the prior **Federal Register** document and advised that persons who already commented need not resubmit comments. Thus the supplementary information accompanying the December 14, 2010 proposed rule, including the two quotations the commenters referenced, are also relevant to the May 28, 2013 proposed rule. To reemphasize our position, the rule's purpose is not to increase or decrease the number of

positions designated as national security positions, but to add clarity and consistency to the position designation process.

A union commented that in proposing 5 CFR part 1400, OPM and ODNI removed the language in the December 2010 proposed amendments to 5 CFR part 732 making the part applicable to ''positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service,'' and recognizing that 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.'' The commenter objected that this was a ''dramatic change.''

Response: The commenter is incorrect. The quoted language appeared in the proposed rule in § 1400.102(b), and OPM and ODNI are now finalizing that section.

A public interest organization expressed concern that the rule, as applied, will have the effect of harming whistleblower protections, by increasing the number of national security positions. In support of its argument, the organization cites *Kaplan* v. *Conyers,* a case decided by the Court of Appeals for the Federal Circuit, in which OPM argued that the Merit Systems Protection Board cannot review the merits of an adjudicative decision that an individual is ineligible to occupy a national security position, when, as a result of the decision, the employing agency takes an adverse action against the employee.

Response: This rule's purpose is not to increase or decrease the number of positions designated as national security positions, but to clarify E.O. 10450's position designation requirements; to ensure that positions are investigated at the appropriate level, as also required by E.O. 10450; and to untangle the effect of multiple executive orders and regulations governing suitability and national security that have been issued subsequent to E.O. 10450. These regulations are silent on the scope of an employee's rights to Board review when an agency deems the employee ineligible to occupy a sensitive position.

Next, the commenter asked OPM and ODNI to defer their rulemaking until the *Conyers* litigation is resolved by the courts. It stated that it anticipated that if the Court of Appeals for the Federal Circuit rules in the Government's favor in *Conyers,* Congress will abrogate the decision through legislation. Thus, OPM and ODNI should not engage in rulemaking until the conclusion of the legislative process.

Response: We decline the commenter's request for further delays since the justification of the comment has been overcome by events—namely the conclusion of the litigation referenced by the commenter—and there is great current need to clarify position designation and national security reinvestigation requirements.

Third, the commenter stated that the regulation would give agencies ''unlimited authority'' to designate any positions in scientific or engineering fields as ''noncritical sensitive'' because of the possibility that the occupants of such positions could harm public safety or health.

Response: We disagree with the commenter. Under E.O. 10450, and as reflected in this rule, a position cannot be designated as a national security position unless the occupant could have a material adverse effect on the national security.

Finally, the commenter expressed concern that if, following the publication of these rules, agencies (1) designate greater numbers of scientific positions as national security positions; (2) agency managers are then motivated to retaliate against the scientists occupying those positions for complaining about the distortion or suppression of scientific information; (3) the agency at issue has a procedure for demoting or removing employees on national security grounds; and (4) the supervisors use those procedures, instead of ordinary conduct-based removal procedures to retaliate against the scientists, the scientists will not have robust appeal rights.

Response: The speculative chain of events posited by the commenter is not a convincing reason to withdraw this rule, which is needed to improve consistency across the Government in designating positions as sensitive as called for in E.O. 10450 and to harmonize the requirements of multiple Presidential executive orders.

Lastly, an individual urged that the rule not be implemented unless and until the President and heads of agencies excluded from the prohibited personnel practice protection ensure the federal civil service embodies the merit system principles.

Response: It is not clear exactly what the commenter is requesting, with respect to the rule's subject matter. However, the apparent concern for an increased risk of abuse is misplaced. Under both the new rule and the preexisting rule, managers are required to adhere to the merit system principles in 5 U.S.C. 2301 and to refrain from prohibited personnel practices described in 5 U.S.C. 2302(b).

Comments on Section 1400.102: Definitions and Applicability

One public interest organization commented that OPM and ODNI seek to expand the definition of a national security sensitive position to include certain positions where the occupant does not require eligibility for access to classified information.

Response: We disagree. Under the prior rule, as under the new rule, a national security sensitive position was one in which the occupant could have a material adverse effect on the national security even if the occupant did not require eligibility for access to classified information.

A public interest organization also commented that the standard for designating a ''national security position'' is low and subjective.

Response: We do not agree with this comment. A national security position must meet the materiality thresholds specified in § 1400.201(a).

An agency wishes to add a definition for ''security clearance.'' In addition, the agency would like OPM to identify the applicability of this guidance to individuals with security clearance *eligibility* versus individuals with a security clearance, or both.

Response: The proposed change is unnecessary. Section 1400.102(a)(4) already makes the rule applicable to positions requiring eligibility for access to classified information, while § 1400.201 already specifies the level of clearance that results in either a noncritical-sensitive or a critical-sensitive position designation.

An agency commented that § 1400.102(a)(4)(ii), by authorizing the designation of certain positions as ''sensitive'' even when the occupant does not require access to classified information or eligibility for such access, will create confusion over who has access to classified information.

Response: The preexisting provision, § 732.102(a)(1) authorized the designation of certain positions as ''sensitive'' even when the occupant does not require access to classified information or eligibility for such access, and it is unclear how retaining this requirement will result in any confusion. Further, even if a person is in a national security position, they must have a need to know before they can have access to classified information. The commenter requested no additional changes.

A union commented that the categories of national security positions in § 1400.102 are vague and overbroad, and will ''turn on its head'' the requirement of E.O. 10450 for

individualized determinations of position sensitivity. The union specifically expresses concern with § 1400.102(a)(4)(ii)(B) that national security positions include, but are not limited to, those whose duties include ''[d]eveloping defense plans or policies.''

Response: OPM and ODNI agree with the commenter that position designations must be on a position-by-position basis. While we disagree that the categories in § 1400.102 will result in a wholesale occupational approach to position designation rather than the position-by-position approach contemplated by E.O. 10450, we agree with the commenter that the specific example it cited is, as drafted, overbroad. We have revised it to read as follows: ''Developing plans or policies related to national defense or military operations.''

Comments on Section 1400.201: Sensitivity Level Designations and Investigative Requirements

One public interest organization commented that OPM and ODNI seek to designate virtually every meaningful job in the government as sensitive.

Response: We disagree with this comment. The rule makes clear that a position may be designated as a national security sensitive position only if the occupant could have a material, *i.e.,* at least a serious or significant adverse effect on the national security. It is not our purpose to increase or decrease the number of sensitive positions, but to ensure that agencies designate positions commensurate to national security impact.

The same organization commented that the standards for designating positions as noncritical-sensitive or critical-sensitive under § 1400.201(a)—respectively, the potential to cause ''significant or serious'' damage or ''exceptionally grave'' damage to national security– are too subjective, and cited a court case in which it believed that an agency applied position designation standards too subjectively.

Response: We do not accept this comment. The commenter failed to supply an alternative standard that in its view would provide a more reliable nexus to protecting the national security. Moreover, the case cited by the commenter does not concern position designation at all.

Finally, the organization commented that certain examples of critical-sensitive positions in § 1400.201(a)(2) are over-inclusive and lack a demonstrable nexus with the national security.

Response: We do not accept this comment. The regulation makes clear that the positions described in paragraph (a)(2) must be ''national security'' positions under § 1400.102(a), the occupants of which could cause ''exceptionally grave'' damage to the national security under § 1400.201(a)(2).

A union objected to the use of examples in § 1400.201(a) rather than guiding principles, stating that OPM's and ODNI's approach may result in categorical, rather than individual designations of positions contrary to the intent of E.O. 10450. The commenter singled out paragraph (a)(2)(vi), ''[p]ositions involving duty on personnel security boards,'' as especially likely to result in a categorical approach to position designation.

Response: OPM and ODNI agree with the commenter that position designation must be on a position-by-position basis; but we disagree with the commenter's assertion that agencies will use the examples in § 1400.201(a) as shortcuts rather than as guideposts. As noted above, we have added a new § 1400.201(a)(2)(ii), stating more generally that critical-sensitive positions include positions not requiring eligibility for access to classified information where the positions have ''the potential to cause exceptionally grave damage to the national security.''

An agency expressed concern that under § 1400.201(c) and (d), positions designated as ''sensitive'' must also have a position risk designation for suitability purposes under 5 CFR 731.106. The commenter asks whether this has the effect of conferring appeal rights to persons in sensitive positions under OPM's suitability regulations (5 CFR part 731). In addition, the commenter observed that a higher level of investigation would be required if a position required access to secret information but was also designated at the high risk level under 5 CFR part 731.

Response: 5 CFR 731.106 requires all positions in the competitive service and other covered positions to have a public trust designation, in addition to a sensitivity designation, if applicable. This is not a new requirement; it has been a requirement of OPM regulation for the past 14 years. What is new is the requirement in § 1400.201(c) and (d) for an automatic assignment of risk level based on position sensitivity. This will make it easier for agencies to manage their existing obligations.

The commenter is not correct in understanding that if an agency designates a position requiring access to classified information at the ''Secret'' level as High Risk instead of Moderate Risk, that may require a higher level of investigation.

Two unions commented in opposition to § 1400.201(c) and (d), which provide, with certain exceptions, for automatic public trust designations at the high or moderate risk level for all national security positions. The commenter argued that the rule change is inconsistent with 5 CFR 731.106, which makes the designation of a position's public trust risk independent of the designation of a position's national security sensitivity, and which gives agency heads discretion to make public trust risk designations.

Response: We disagree that § 1400.201(c) and (d) are inconsistent with § 731.106. Section 731.106 does not give agencies complete discretion to determine the public trust risk level of each position. Indeed, § 731.106(a) states that position designations are guided by OPM issuances and § 731.106(c) states that national security sensitivity designations are ''complementary'' to public trust risk designations. Agencies' authority to designate the public trust risk level of a position is a delegated OPM function and as such, is subject to OPM performance standards and oversight under 5 U.S.C. 1104(b).

One of these unions commented that § 1400.201(c) and (d) will have the effect of making public trust position designations unreviewable.

Response: There was no prior provision for administrative or judicial review of public trust position designations. OPM, in 5 CFR 731.501, has never made position designations appealable to the Merit Systems Protection Board. Thus, the change in policy identified by the commenter does not exist.

The same union, commenting in opposition to § 1400.201(c) and (d), which provide, with certain exceptions, for automatic public trust designations at the high or moderate risk level for all national security positions, expressed concern that OPM's and ODNI's purpose in making the change is to allow agencies to argue in pending litigation that employees in noncritical-sensitive positions also pose public trust risks, thereby justifying their removal on national security grounds.

Response: Our purpose in making this change, as stated in the May 28, 2013 **Federal Register** document, is to streamline the existing designation process. We emphasized in that document, however, that ''[d]eterminations regarding suitability and determinations regarding eligibility to hold a sensitive position are governed by distinct standards.'' The national

security sensitivity of a position has no bearing on whether an individual has the requisite character and conduct for appointment in the competitive service under the suitability standards in 5 CFR 731.202. Accordingly, we reject the comment.

Comments on Section 1400.203: Periodic Reinvestigation Requirements

An agency suggested incorporating the Adjudicative Guidelines for Determining Eligibility For Access to Classified Information in the reinvestigation standards in § 1400.203(b). The agency states that there are no standards for adjudicating whether an individual is fit to occupy a national security position in E.O. 10450 following a reinvestigation.

Response: This recommendation is outside the scope of the rule. Part 1400, like part 732 before it, does not prescribe adjudicative requirements or adjudicative criteria for eligibility for employment in a national security-sensitive position. Section 2 of E.O. 10450 assigns to each agency head the responsibility to establish and maintain a program to ensure that the employment and retention of civilian officers and employees is clearly consistent with the interests of the national security.

A commenter asked that § 1400.203(b) be written in such a way as to ensure that employees receive an aligned investigation that addresses both suitability and security concerns.

Response: We agree with the comment. Ensuring greater alignment is the principal reason why OPM and ODNI proposed amending this section, and why we revised the investigative standards in December 2012. No additional changes were proposed by the commenter so no further response is required.

An agency commented, ''If the issue is the level and frequency of background investigations, [we] suggest simply increasing the frequency and/or investigation level of high risk public trust positions and [letting] the current designations stand.''

Response: We did not accept this comment. The purpose of § 1400.203, like § 732.203 before it, is to establish a reinvestigation requirement for sensitive positions that do not require eligibility for access to classified information. The only new requirement is to establish a reinvestigation requirement for noncritical sensitive positions that do not have access to classified information. The reinvestigation requirement for these national security positions will occur at a frequency and scope sufficient to satisfy the reinvestigative requirement for both national security and public trust positions. This ensures greater alignment between national security and suitability reinvestigations and prevents duplication of investigations, consistent with E.O. 13467.

One union commented that OPM and ODNI should eliminate reinvestigation requirements for national security positions that do not require eligibility for access to classified information, or in the alternative, adopt a 15-year reinvestigation cycle.

Response: We do not accept this recommendation. Section 2 of E.O. 10450 mandates that agency heads ensure that ''retention in employment of any civilian officer or employee in the department or agency is clearly consistent with the interests of the national security,'' and section 3(b) requires an investigation for any position designated as national security sensitive. We do not see, and the commenter does not explain, how eliminating the investigative requirements for the occupants of national security positions altogether, or reducing the frequency of investigations to once every 15 years, would allow the Government to meet E.O. 10450's mandates.

The same union commented that section 3001(a)(7) of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), which defines a ''periodic reinvestigation'' solely for purposes of that section as a reinvestigation for a security clearance every 5, 10, or 15 years, allows an inference that Congress did not intend for investigations *other than* for security clearances to occur as frequently.

Response: The commenter did not draw a correct inference from section 3001(a)(7), which addresses only periodic reinvestigations for security clearances, not for national security positions generally; and which does so by incorporating a reinvestigation cycle mandated by the President pursuant to his discretionary powers under Article II of the Constitution and section 801(a)(2) of the National Security Act of 1947, as amended. Indeed, section 3001(a)(7) does not even have any legal effect within section 3001 of the IRTPA, as it is an orphaned definition; the term appears nowhere else in that section. The President, in E.O.s 10450 and 13467, has conferred authority upon OPM and ODNI to prescribe investigative standards for sensitive positions and this rule is an exercise of that delegated authority.

The commenter also felt that the responsibility to conduct ''continuous evaluation'' of cleared personnel under section 3.5 of E.O. 12968 cannot be the source of the reinvestigation requirements in 5 CFR 1400.203.

Response: The commenter is correct. Section 1400.203(a) refers to the reinvestigation requirements in section 3.4 of E.O. 12968, as amended; not to the continuous evaluation requirements in section 3.5 of that order, which are distinct requirements to be implemented by ODNI.

One union commented that ''based on the number of employees holding sensitive positions who do not have access to classified information, the additional number of employees who would now be subject to periodic reinvestigation as a result of the proposed change could very well be in the tens of thousands;'' and that ''OPM's billing rates for FY–2013 indicate that a single periodic reinvestigation for an employee in a Public Trust position that is also a national security position is upward of $2,964.'' The commenter stated that the rule's new reinvestigation requirements are unnecessary and costly.

Response: The prior regulation, 5 CFR 732.203, already required national security reinvestigations at least every 5 years for the occupants of critical-sensitive positions; and the existing regulations in 5 CFR 731.106 already required suitability reinvestigations at least every 5 years for those occupants of public trust positions who were also designated as noncritical-sensitive under § 731.106(c)(2). This may limit the rule change's financial impact. But in addition, E.O. 10450 expressly requires agency heads to ensure that ''retention in employment . . . is clearly consistent with the interests of the national security.'' It is difficult to see how agency heads can fulfill this obligation in the absence of a periodic reinvestigation requirement. Moreover, E.O. 13467 directs that investigations for employment in a national security position be ''aligned using consistent standards to the extent possible.'' Consistent with section 2.1(a) of E.O. 13467, OPM and ODNI chaired an inter-agency working group that developed new Federal investigative standards for national security and suitability investigations approved by the Security and Suitability Executive Agents in December 2012, with a 5-year reinvestigation cycle. This interagency process by its nature took account of agencies' budgetary concerns.

Comments on Section 1400.204: Reassessment of Current Positions

An agency commented that the administrative burden of re-evaluating position designations is unnecessary,

since in its view most positions designated as ''sensitive'' already require a security clearance.

Response: We believe that the 24-month time frame is sufficient to allow agencies ample opportunity to review positions to determine whether or not they impact national security under the new definition, and make the appropriate designation changes. However, in response to this comment we have amended § 1400.204 to allow agencies to request an extension of the timeframe for re-designation, if justified.

To the extent that the commenter believes that reevaluating positions is unnecessary, regardless of time frame, OPM and ODNI disagree. The under-designation of positions poses a risk to the national security while the over-designation of positions imposes unjustified investigative costs on the Government.

One public interest organization commented that OPM and ODNI should not promulgate this regulation, requiring, in § 1400.204, that agencies determine which positions should be sensitive, until OPM has first determined which positions already are sensitive. The commenter states that without knowledge of the number of such positions, OPM cannot demonstrate the need for an ''expansion'' of such positions.

Response: OPM disagrees with the commenter's statement that the rule's purpose is to expand the number of positions designated as sensitive. Under the new rule, as under the prior rule, a national security sensitive position is one in which the occupant could have a material adverse effect on the national security. Correct application of this standard is a requirement of Executive order. The commenter's proposal for a headcount by OPM prior to agencies' own assessment of their position designations will result in significant, unnecessary duplication of effort.

The same public interest organization commented that OPM should prescribe guidance on position designation.

Response: The final rule already accomplishes this.

A union commented that 24 months will be an insufficient period of time for agencies to reassess current positions and to determine if changes are necessary.

Response: OPM and ODNI note that agencies have 24 months following the effective date of this rule to determine whether changes and position sensitivity designations are necessary. We believe this is ample time. However, as previously noted, in response to this comment we have amended § 1400.204 to allow agencies to request an extension of the timeframe for re-designation, if justified.

Comments on Section 1400.301: Procedural Rights

An agency suggested incorporating the Adjudicative Guidelines for Determining Eligibility For Access to Classified Information as a requirement in § 1400.301.

Response: We reject this comment, since § 1400.301 addresses the minimum procedural and recordkeeping requirements for security determinations, not the substantive standards for making favorable or unfavorable adjudicative decisions.

An agency recommended that OPM clarify that agencies must not compromise national security when applying procedural rights, and the agency suggested amending § 1400.301 to incorporate the specific procedures in E.O. 12968 for withholding material that could compromise national security.

Response: The amendment requested by the commenter is unnecessary. Section 1400.301 already states that agencies must comply with all applicable administrative procedural requirements, as provided by law, rule, or regulation. Section 1400.301(c) specifies that an agency is ''subject to requirements of law, rule, regulation, or Executive order.''

An agency recommended amending § 1400.301 to incorporate the specific procedures, in E.O. 12968, for reconsideration and appeal of preliminary decisions to deny or revoke a security clearance.

Response: We do not accept this comment as it is not our purpose with this rulemaking to supplant existing procedures established under E.O.s 10450 and 12968.

An agency suggested amending section 1400.301 to refer to the procedural rights when a decision is made based on an OPM investigation *or* based on an investigation by an agency acting under delegated authority pursuant to 5 CFR part 736.

Response: We accept this change. 5 U.S.C. 1104 requires OPM to prescribe performance standards and a system of oversight for delegated investigative functions. The recommended change will help OPM meet this statutory obligation.

One agency expressed concern that § 1400.301 changes the Merit Systems Protection Board's appellate jurisdiction over adverse actions.

Response: The commenter is incorrect. Section 1400.301 addresses procedures that agencies are to follow in rendering a decision based on an OPM investigation. This section does not address the scope of the Board's review when an agency takes an adverse action against an employee following an unfavorable security determination.

One public interest organization commented that OPM and ODNI seek to divest civil service employees of their right to appeal adverse actions.

Response: We disagree with this comment. The rule's purpose is to ensure that agencies are properly carrying out their position designation responsibilities under E.O. 10450. The MSPB's jurisdiction over adverse actions initiated under chapter 75, subchapter II is prescribed by statute.

Comments on Section 1400.302: Reporting to OPM

An agency recommended that OPM amend its reporting forms and its investigative database to accommodate the reporting requirements prescribed by § 1400.302.

Response: We agree with this comment. Section 1400.302(c) already states that OPM will issue separate guidance on new data collections. We are amending this text to state that ODNI jointly issues this guidance with OPM. The commenter requested no additional changes.

Additional Technical Revision

OPM and ODNI did not receive public comments on the text in proposed § 1400.102(b) related to Senior Executive Service positions. The proposed text—in describing the ''*positions*'' to which the part applies—referred to ''career *appointments* in the Senior Executive Service in the executive branch.'' In the final rule, OPM and ODNI have revised the text to refer to ''Senior Executive Service (SES) positions held by career appointees in the SES in the executive branch.'' This revision does not substantively change the scope of the rule's coverage.

Note on the Authority Citation: OPM and ODNI are amending the authority citation to reflect the Office of the Law Revision Counsel's editorial reclassification of 50 U.S.C. 403 and 435b as 50 U.S.C. 3023 and 3341, respectively; to reflect the compilation of the President's Memorandum of January 25, 2013 (formerly cited as 78 FR 7253) in title 3 of the Code of Federal Regulations; and to make technical citation corrections.

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 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 in 5 CFR Part 1400

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

U.S. Office of Personnel Management.

Katherine Archuleta,

Director. Office of the Director of National Intelligence.

James R. Clapper, Jr.,

Director.

Accordingly, OPM and ODNI 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

Subpart B—Designation and Investigative Requirements

Subpart C—Procedural Rights and Reporting

Authority: 5 U.S.C. 1103(a)(5), 3301, 3302, 7312; 50 U.S.C. 3023, 3341; 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, 1995 Comp., p. 391; E.O. 13467, 3 CFR, 2008 Comp., p. 196; 3 CFR, 2013 Comp., p. 358.

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), 3 CFR 1949–1953 Comp., p. 936.

(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—

(1) *Critical infrastructures* are systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

(2) *Key resources* are publicly or privately controlled resources essential to the minimal operations of the economy and government.

(3) *National security* refers to those activities which are directly concerned with the foreign relations of the United States, or protection of the Nation from internal subversion, foreign aggression, or terrorism.

(4) *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 plans or policies related to national defense or military operations;

(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 (a)(4)(ii)(B) through (G) of this section, 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 Senior Executive Service (SES) positions held by career appointees in the SES 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 not requiring eligibility for access to classified information, but having the potential to cause exceptionally grave damage to the national security;

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

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

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

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

(vii) Positions involving duty on personnel security boards;

(viii) Senior management positions in key programs, the compromise of which could result in exceptionally grave damage to the national security;

(ix) Positions having direct involvement with diplomatic relations and negotiations;

(x) Positions involving independent responsibility for planning or approving continuity of Government operations;

(xi) 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;

(xii) 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;

(xiii) Positions in which the occupants have the ability to independently damage public health and safety with devastating results;

(xiv) 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;

(xv) Positions in which the occupants have the ability to independently compromise or exploit the nation's nuclear or chemical weapons designs or systems;

(xvi) 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;

(xvii) 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;

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

(xix) 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;

(xx) 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

(xxi) 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 (xx) 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 and ODNI issue, and periodically revise, 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) of this title.

§ 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 expedite the submission of the request for an investigation at the appropriate level.

(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, 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; 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.

§ 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.

(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 July 6, 2015.

(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.

(d) Agencies may request an extension, pursuant to guidance issued jointly by OPM and ODNI, of the timeframe for redesignation of positions or initiation of reinvestigations, if justified by severe staffing, budgetary, or information technology constraints, or emergency circumstances.

§ 1400.205 Savings provision.

No provision of the rule in this part may be applied to make an adverse inference in pending administrative proceedings. However, the redesignation of a position may require that the occupant of that position undergo a new adjudication. 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 an investigation conducted under an OPM delegation of authority, or when an agency, as a result of information in such an 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, 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 and ODNI guidance, issued as necessary under § 1400.103.

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