

# Proposed Rules

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

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR PART 300

[Docket ID: OPM–2023–0014]

RIN 3206–AO37

### Bar to Appointment of Persons Who Fail To Register Under Selective Service Law

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing to revise the procedures for determining whether an individual's failure to register with the Selective Service System (SSS) was knowing and willful. These changes are intended to ensure that individuals in these circumstances have an opportunity to fully explain their failure to register and that the determination is based on a more complete record. In addition, the rule proposes to enable Federal agencies to make initial determinations as to whether an individual's failure to register with the SSS was knowing and willful.

**DATES:** Comments must be received on or before April 8, 2024.

**ADDRESSES:** You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by the following method:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for sending comments.

All submissions must include the agency name and docket number or RIN for this rulemaking. Please identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number of this proposed rule. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within

the specified open comment period. Before finalizing this rule, OPM will consider all comments we receive on or before the closing date for comments. OPM may make changes to the final rule in light of the comments we receive.

**FOR FURTHER INFORMATION CONTACT:** Michael Mahoney at [mike.mahoney@opm.gov](mailto:mike.mahoney@opm.gov), by fax at (202) 606–4430, TDD at (202) 418–3134, or by email at [employ@opm.gov](mailto:employ@opm.gov).

**SUPPLEMENTARY INFORMATION:** OPM proposes to change its procedures for determining whether an individual's failure to register with the SSS was knowing and willful. Specifically, OPM is proposing to clarify the applicable standard used to determine what constitutes “knowing and willful,” to establish new procedures for individuals to submit evidence in support of their non-registration, and to allow Executive agencies to make the initial determination as to whether an individual's failure to register with the SSS was knowing and willful. OPM is proposing these changes to ensure that individuals in these circumstances have an opportunity to fully explain their failure to register and that the determination is based on a more complete record.

OPM's proposal to allow Executive agencies to conduct the initial adjudication should alleviate Federal agencies' having to delay the recruitment process to send cases to OPM for adjudication. In its March 2021 report,<sup>1</sup> the National Academy of Public Administration (NAPA) recommended that OPM adopt a more decentralized and risk-based approach to executing its transactional approval and oversight responsibilities. Specifically, NAPA recommended that OPM delegate, to the maximum extent possible, decision-making authorities to agencies, and conduct cyclical reviews to verify that appropriate actions were taken. NAPA's Rec. 2.5 was incorporated into OPM's Strategic Plan as Objective 4.2, which reads as follows: “Increase focus on Governmentwide policy work by shifting more low-risk delegations of authorities to agencies.” OPM's proposal is consistent with NAPA's

<sup>1</sup> National Academy of Public Administration. “Elevating Human Capital: Reframing the U.S. Office of Personnel Management's Leadership Imperative” <https://www.volckeralliance.org/sites/default/files/attachments/OPM-Final-Report-National-Academy-of-Public-Administration.pdf>.

recommendation to decentralize and to allow agencies to conduct more decision making.

### Background

Under the Military Selective Service Act of 1948, as amended (hereafter referred to as “the Act”), all male citizens and every other male person residing in the U.S. between the ages of 18 and 26 who were born after December 31, 1959, are required to register with the SSS, unless the Act exempts them. (50 U.S.C. 3802). In addition, the Act establishes that “[e]very person shall be deemed to have notice of the requirements of this chapter upon publication by the President of a proclamation or other public notice fixing a time for any registration under section 3802 of this title.” (50 U.S.C. 3813). In 1980, President Carter issued such a proclamation (Proclamation No. 4771, July 2, 1980), which required that registration begin on July 21, 1980. That proclamation, as amended, remains in effect. Every covered male is now deemed to have had notice of these requirements by virtue of that Act and Proclamation 4771, as amended.

In 1985, Congress enacted 5 U.S.C. 3328, which provides that men who are born in 1960 or later and who are required to, but did not, register under section 3 of the Act (now codified at 50 U.S.C. 3802) generally are ineligible for Federal service. Section 3328 provides that an individual born after 1959 and required to register and “who is not so registered or knowingly and willfully did not so register before the requirement terminated or became inapplicable to the individual, shall be ineligible for appointment to a position in an Executive agency,” unless the individual can establish “by a preponderance of the evidence that the failure to register was neither knowing nor willful.” Section 3328 also provides that OPM, “in consultation with the Director of the Selective Service System, shall prescribe regulations to carry out” section 3328, including “provisions prescribing procedures for the adjudication of determinations of whether a failure to register was knowing and willful.” In 1987, Congress amended section 3328 to allow OPM to establish decision-making authority with agencies through rulemaking (Pub.

L. 100–180, 101 Stat. 1019, December 4, 1987).

As noted above, section 3328 applies only to males who are (or were) required to register. Certain individuals may be (or may have been) exempt from registration as provided by sections 3 and 6(a) of the Act (50 U.S.C. 3802 and 3806(a)) or by Presidential proclamation. Examples of individuals who may be so excluded are: (1) Certain non-immigrant aliens who are residing in the United States temporarily, such as those on visitor or student visas; (2) individuals who are unable to register due to circumstances beyond their control, such as being hospitalized, institutionalized, or incarcerated; and (3) members of the Armed Forces on full-time active duty, as well as cadets and midshipmen at the United States service academies.

An individual covered by the Act who has not registered can do so at any time before reaching age 26. Once the individual is age 26, he may no longer register and is no longer able to correct his failure to register. Consequently, as a general rule, these cases arise only when an applicant fails to register prior to a temporary offer of employment, or during an employee's employment tenure, and the applicant or employee is age 26 or older and the possibility of registration is precluded. The current regulations, promulgated in 1987, establish that agencies should "request a written statement of Selective Service registration status from each covered individual at an appropriate time during the employment consideration process." (5 CFR 300.704(a)). Accordingly, OPM is called upon to adjudicate a case involving failure to register only if registration is precluded due to the covered individual's age.

In 2011, OPM issued a notice of proposed rulemaking that was substantively similar to this proposed rule. 76 FR 73521, November 29, 2011 ("2011 proposed rule"). OPM did not finalize the 2011 proposed rule due to competing priorities (RIN 3206–AM06 withdrawn March 20, 2017). Although this proposed rule largely renews the 2011 proposal, OPM considered prior comments in formulating this proposed rule. (See the discussion in "Agency Adjudication" and the discussion regarding § 300.705 in "Proposed Changes in this Rule.")

#### *The Applicable Standard*

The statute OPM is required to implement contains an ambiguity with respect to an individual who was required to register and failed to do so. Certain provisions of section 3328 (e.g., subsection (a)(2)) indicate that a failure

to register that is both knowing and willful is necessary to make the individual ineligible for Federal employment. The third sentence of subsection (b) of section 3328, however, states that OPM's procedures must require that a determination that a failure to register was knowing and willful "may not be made if the individual concerned shows by a preponderance of the evidence that the failure to register was neither knowing nor willful." This provision suggests that a failure to register that is either knowing or willful would suffice to make the individual ineligible for employment.

There is substantial case law, under the Act and in other contexts, concerning the meaning of the terms "knowing" and "willful." Although OPM acknowledges that the terms have substantial overlap, it is possible, at least theoretically, that a failure to register could be knowing but not willful or the reverse. Accordingly, OPM believes that there are divergent potential interpretations of the statute, either of which could be reasonable constructions, and that this ambiguity should be resolved.

#### **Summary of Major Provisions in This Proposed Rule**

##### *OPM's Interpretation of Knowing and Willful*

OPM proposes to resolve the ambiguity in 5 U.S.C. 3328 by amending 5 CFR part 300 to provide that a failure to register is not a bar to appointment unless such failure was both knowing and willful. In other words, the applicant or employee could establish eligibility under the Act by demonstrating, by a preponderance of the evidence (i.e., the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true—see proposed 5 CFR 300.703 Definitions), that a failure to register was either not knowing or not willful. This is consistent with the text of Section 3328(a)(2) which makes an individual who is no longer able to register ineligible only if he "knowingly and willfully did not so register before the requirement terminated or became inapplicable to the individual."<sup>2</sup> It is also consistent with the text of Section

<sup>2</sup> Section 3328(a) also renders ineligible one "who is not registered" (emphasis added). Because this refers to covered individuals under the age of 26, such individuals may remedy the failure by registering. Thus, there is no need to adjudicate these cases, as the covered individual becomes eligible upon registration.

3328(b), which requires OPM to "prescrib[e] procedures for the adjudication of determinations of whether a failure to register was knowing and willful." (emphasis added). This interpretation is supported by Congress's stated concern that a person should not be ineligible for Federal service unless his failure to register is determined to be both knowing and willful. See H.R. Conf. Rept. No. 99–235 at 517, July 29, 1985 (noting adoption of Senate provision with House amendment requiring that non-registration must be "knowing and willful"). This interpretation is also more consistent with the statutory scheme as a whole. Under 50 U.S.C. 3813, "[e]very person shall be deemed to have notice of the requirements" of SSS registration after July 2, 1980. So, if a showing of knowledge alone were sufficient to make a person ineligible for Federal employment, it would be virtually impossible for an applicant or employee ever to prevail, because the law presumes he has knowledge of the requirement to register. Moreover, the legislative history, which indicates that Congress was concerned with draft eligible males who "refused" to register, is also consistent with this interpretation. See House Rept. No. 99–81, May 10, 1985. The reference to "refusal" in the legislative history implies that the individual has taken affirmative steps or acts to decline to do something.

OPM's proposed interpretation is consistent with OPM's longstanding practice in adjudicating eligibility for Federal employment. Accordingly, if this interpretation is finalized and codified in Code of Federal Regulations, no prior decisions regarding eligibility would be impacted by this rulemaking.

##### *New Procedures To Submit and Assess Evidence*

This proposed rule also establishes new procedures for submitting evidence to be used by the decisionmaker in undertaking the inquiry required by section 3328. The existing procedures (5 CFR 300.705(d)) provide only for the submission of a request for an OPM determination together with any explanation or other documentation the covered individual chooses to furnish. It has been difficult for an individual to establish, through these limited procedures, that his failure to register was either not knowing or not willful. The more robust procedures that OPM is proposing would expressly require an individual to submit a sworn statement in support of his claim and make himself available to be interviewed by the adjudicator or provide testimony

concerning his explanation for his failure to register.

OPM believes that the proposed procedures would provide an individual with a more meaningful opportunity to explain why his failure to register meets the statutory and regulatory standard of proof. These procedures would also provide the adjudicator a more complete record on which to base his or her determination. These proposed procedures are discussed below.

#### *Agency Adjudication*

OPM proposes to modify 5 CFR part 300 to allow Executive agencies the authority to make the initial determination as to whether an individual's failure to register with the SSS was knowing and willful based on OPM's proposed interpretation. This will permit agencies to make faster decisions and reduce paperwork after consideration of an applicant's experience and qualifications prior to the completion of the Optional Form (OF) 306, Declaration for Federal Employment. In response to the 2011 proposed rule, some agencies expressed concern that they lacked the experience to adjudicate these eligibility issues; however, OPM would provide training and reference materials to assist agencies in making these determinations. Some agencies also expressed concern that they lack resources to adjudicate eligibility. Based on these comments received in response to the 2011 proposed rule, OPM proposes to allow agencies either to request that OPM provide initial adjudication or to leverage initial determinations made by another agency.

#### *OPM's Authority*

This proposed rule, however, also provides that OPM reserves reconsideration authority for itself so that an individual may seek review, by an OPM official designated by the Director, of an agency's initial determination that a failure to register was knowing and willful. OPM may also initiate reconsideration on its own initiative. OPM is also proposing that an OPM decision on reconsideration is final and no further adjudication by any agency is available.

This proposed rule also authorizes OPM to audit and oversee agencies' performance of this function, and to revoke the authority from any particular agency if the agency fails to carry out the function in accordance with applicable law. If OPM revokes the authority of a particular agency, the Director of OPM must designate an OPM official who will make the initial

determinations on adjudication requests arising from that agency.

OPM considered the merits of allowing each agency to adjudicate cases even when another agency has already made a determination of an applicant's or employee's eligibility. OPM considered the implications of two agencies reaching different conclusions or outcomes on the hiring process, and on the individual involved. OPM also considered what role OPM should play where one agency finds an individual to be ineligible and a subsequent agency finds the individual to be eligible. OPM has considered several options for OPM's role where a second agency adjudicates the case and reaches a different result from the first agency. One option would be to require the second agency to request OPM's review of the case. OPM's decision could be treated as a decision on reconsideration and binding on all agencies. Another option would be to require the second agency to notify OPM and provide its finding and rationale for reaching a different conclusion. The agency could move forward with the hiring action unless OPM took the case up for reconsideration on its own (as allowed by the regulations). Because the primary purpose in OPM extending authority to conduct initial adjudications to agencies is to promote efficiency, OPM seeks to avoid a process that will hinder agency review. Conversely, agencies generally would not be expected to reach different results, so OPM believes that some oversight of those cases is needed. As described previously, to reduce the potential burden on agencies, OPM is proposing that an agency must rely on a determination of eligibility (or ineligibility) made by another agency, except in situations in which the second agency has documentary evidence showing the agency making that determination either erred or did not have complete information when making its determination. In these situations, the second agency may present the documentary evidence along with the case file to OPM for reconsideration. OPM reconsideration for these purposes would work in a manner similar to the current reconsideration process: OPM would review the information and render a final decision on whether an individual's failure to register was knowing and willful and this decision would be binding on all agencies. OPM welcomes comment on these various considerations and options.

OPM is also considering whether OPM's initial decisions should be treated with more deference than other agency decisions. Because OPM has

extensive experience adjudicating these cases and has the ultimate administrative decision-making authority, it would be less likely that an agency should reach a different result than a prior OPM initial decision. Nonetheless, OPM does not want to institute procedures that would discourage agencies from reviewing an individual's case—particularly since the proposed process would provide increased opportunity for an individual to provide information to support his case.

As noted above OPM is proposing that an agency decision is binding on subsequent agencies unless a subsequent agency has documentary evidence showing the initial agency erred or was not privy to the documentary evidence when making its determination. In such instances, an agency could request OPM reconsideration of another agency's decision. OPM requests comments regarding what oversight OPM should provide for agency decisions to promote efficiency and avoid unnecessary duplication of effort.

#### *Consultation With the Selective Service System*

Individuals covered by the Act who have not registered, and who are seeking to become employed or remain employed by the Federal Government, must demonstrate by a preponderance of the evidence that their failure to register was not knowing and willful. In acting on individual cases, agencies may consult with the SSS. The Selective Service website provides easy and immediate access to verify individuals' registration status, and agencies can request relevant documents from the SSS.

#### *Elimination of "Applicant's Statement of Selective Service Registration Status"*

OPM's current regulations contain a self-certification statement of Selective Service registration to be completed by applicants and employees. Historically, agencies reproduced this statement on a separate form, as agencies could transpose the self-certification statement from 5 CFR 300.704. That statement was approved for use under OMB Control Number 3206-0166, which expired in 1995. OPM has streamlined the application process and reduced paperwork for Federal agencies by eliminating the need for a separate self-certification statement. A question on Selective Service registration is now part of OF 306, Declaration for Federal Employment, which is used to determine an applicant's acceptability and suitability for Federal positions.

Therefore, the Applicant's Statement of Selective Service Registration Status is no longer needed, and we are proposing to remove it from OPM's regulations.

### Proposed Changes in This Rule

To accomplish the objectives described in the previous section, this rule proposes to make specific changes in subpart G of 5 CFR part 300. The revised § 300.701 would replace the relevant statutory text that is repeated in the current § 300.701 with a concise statement of the purpose of subpart G, which is to implement the statutory bar on employment in an Executive agency of an individual who was required to register with the SSS, but who knowingly and willfully failed to register before reaching age 26.

The discussion of coverage in § 300.702 would be revised to include a shorter and clearer statement on applicability. The revised section clarifies that the subpart applies to all appointments in Executive agencies, as defined in 5 U.S.C. 105.

In § 300.703, which defines terms used in subpart G, OPM is proposing to add "authorized agency official" as a defined term to refer to an official designated by the head of an Executive agency to be responsible for determinations as to whether the failure of an applicant or employee covered by subpart G to register with the SSS was knowing and willful. The head of an Executive agency may delegate this authority to the agency's Chief Human Capital Officer (CHCO) or equivalent. OPM welcomes comment regarding whether an Executive agency should be authorized to delegate to another official at the agency's headquarters level. The definition for "authorized agency official" also captures the fact that an agency may request that OPM conduct the initial adjudication, in which case the "authorized agency official" will be an OPM official designated by the OPM Director.

OPM proposes several revisions to the definition for "covered individual." First, OPM proposes to remove the reference to "or becomes 18 following appointment" because those individuals become covered by the statutory requirement to register. Second, OPM proposes to remove paragraph (c) of the current definition, which explains that the term "covered individual" includes U.S. citizens and aliens (including parolees and refugees and those who are lawfully admitted to the United States for permanent residence and for asylum), and paragraph (d) of the current definition, which explains that certain nonimmigrant aliens, such as those admitted on visitor or student

visas, are exempt from the registration requirement. As described in the Background section of this notice, the statute specifies which individuals are subject to the registration requirement. The proposed definition explains the individuals required to register in terms of the statute. Although there are several groups (such as those admitted on visitor or student visas) who are exempt from the registration requirement either by statute or Presidential Proclamation, the current regulatory text only identifies one of those exceptions. OPM proposes to remove this additional text and to define coverage using the statute.

This proposed rule revises the remaining sections of subpart G to clarify the responsibilities of agencies regarding job applicants and employees who are required to register with the SSS. The proposed rule also sets forth the procedures for determinations by agencies, and subsequent reconsideration of those determinations by OPM, concerning whether a covered individual's failure to register was knowing and willful.

Section 300.704 of this proposed rule requires a Federal agency, before hiring a job applicant who is required to register with the SSS, to determine the Selective Service status of that individual. If the individual provides proof that he has registered, the agency may continue to consider him for appointment. If an agency fails to make the required determination prior to appointment, the agency must take steps to make the determination as soon as the omission is discovered.

Section 300.705 of this proposed rule concerns acceptable proof of registration status. The agency must require the individual to complete and sign OF 306 (Declaration for Federal Employment) (available at: <https://www.opm.gov/media/dxrbwvmb/declaration-for-federal-employment-optional-form-august-2023.pdf>) or another similar form<sup>3</sup> provided by the agency documenting his registration status. An agency must also allow the individual to provide a copy of his Selective Service acknowledgement card or other proof of registration or exemption that the SSS furnishes. Furthermore, in accordance with the Fair Chance Act and unless permitted by law, an agency may not ask applicants to answer the questions on the OF 306 that address criminal history information until the agency has made a conditional offer of employment to the applicant.

<sup>3</sup> An agency that uses a similar form provided by the agency must comply with the Paperwork Reduction Act for that form.

In the 2011 proposed rule, OPM proposed to allow an agency to accept either the form or the documentation from the Selective Service; however, comments from agencies recommended that all covered individuals be required to provide a standardized form self-certifying registration status. OPM is interested in comments on whether the completed self-certification should be required in all cases.

Generally, an applicant or employee must provide the self-certification within 7 business days of the request by the agency, although an agency may specify another reasonable time. If the covered individual is a current or former Federal appointee and the agency is able to confirm that his official personnel folder contains evidence of his eligibility for appointment under the Selective Service law, then the agency is not required to inquire about his registration status.

An applicant who fails to comply with this section cannot be given any further consideration for employment. If an applicant provides documentation indicating that he has not registered, then the agency must comply with the requirements detailed in § 300.706 before the agency can proceed with the appointment. If an employee fails to provide acceptable documentation and there is nothing in his Official Personnel Folder indicating his registration status has been resolved previously, then the agency must comply with the requirements detailed in § 300.706.

Section 300.706 of this proposed rule sets forth an agency's responsibility concerning applicants who are required to register with the SSS but have not done so. In the case of any such person who is under age 26, the agency must provide him with a written notice advising him to register and including specific information about how to do so, the proof of registration he must provide to the agency (and the agency deadline for doing so, in order for the agency to continue to consider the individual), and a statement describing the consequences of failing to comply.

The agency must also provide notice to an individual whose failure to register was not detected by the agency until after the time of appointment and who may still register. The agency must notify such an individual that unless he registers promptly (and the agency should provide a reasonable deadline for compliance) he will no longer be eligible for retention in his position and will thus be subject to termination. (In light of the congressional intent to encourage compliance with the registration requirement, we encourage agencies also to advise individuals for

whom the obligation to register has not arisen at the time of appointment that a future failure to register between the ages of 18 and 26 will preclude any subsequent appointment in the civil service).

In the case of an individual who is over age 26, the agency must inform him that it will deem him ineligible for appointment (for an applicant) or retention in his position (for a current employee) unless he provides evidence that his failure to register was not knowing and willful. The agency must inform the individual as to how to request a determination that his failure to register was not knowing and willful, establish a reasonable deadline for his doing so, and inform him that his failure to seek such a determination within a reasonable time will result in the elimination of the individual from further consideration for appointment (applicant) or termination of his employment by the agency (current employee).

Because the above-referenced obligations are owed solely to Congress to fulfill the purpose of the underlying statute, *i.e.*, to encourage registration with the Selective Service, any failure by the agency to comply with any of these obligations must not be interpreted to give rise to any defense or claim by an individual that his failure to register was the fault of the agency.

Section 300.707 of this proposed rule outlines the procedure for determining whether the individual's failure to register was knowing and willful. An individual who asks an agency to determine that his failure to register was not knowing and willful must submit a sworn statement to the agency explaining why he did not register, along with any other supporting documents. The burden of proof is on the individual to demonstrate, by a preponderance of the evidence, that his failure to register was not knowing and willful. The agency would first have to determine whether OPM or another agency had previously made a determination in the individual's case; if so the hiring agency must rely on the previously made determination unless the hiring agency has documentary evidence showing the initial agency erred or was not privy to the documentary evidence when making its determination. In such instances, the hiring agency could request OPM reconsideration of another agency's decision. OPM expects that agencies will be able to verify this information through an automated system. OPM would provide additional guidance and instructions upon development of this resource. An agency may also check

with OPM or other agencies directly. As a reminder to agencies, prior OPM decisions are added to an individual's Official Personnel File (OPF) and the electronic OPF. If the matter had previously been adjudicated by OPM pursuant to a reconsideration request under § 300.708, that determination would be final.

If there was no record of a prior determination by OPM, and no record of a prior determination by another agency, for an applicant, the agency would have to investigate and adjudicate the matter or request that OPM do so if the agency wanted to proceed with the selected applicant. (There is no obligation for an agency to investigate and adjudicate the matter for an applicant if the agency determines not to proceed with that applicant.) For a current employee, the agency must investigate and adjudicate the matter or request that OPM do so. This could include consulting with the SSS and questioning the individual and any others who submitted sworn statements on his behalf. The agency would be required to inform the individual in writing of its decision and inform him of his right to ask OPM to reconsider the agency's decision within 30 days after the date of the individual's receipt of the agency's decision.

The proposed regulatory text sets forth a process by which, if there was no decision upon reconsideration by OPM but another agency, including OPM in an initial decision, had previously adjudicated the matter, the current agency must rely on the determination made by the other agency unless the current agency had documentary evidence not previously considered or which indicated the initial agency's decision was made in error. If the current agency does have such documentary evidence, the agency may request OPM reconsideration of the matter. An OPM decision in these circumstances becomes binding on all agencies, and issue a decision on reconsideration to permit a different outcome. As a reminder, a hiring agency always has the option of disqualifying an unregistered applicant from further consideration and selecting another individual who is eligible and within reach for appointment. As noted in the "OPM's authority" discussion, OPM is considering other options and welcomes comments on this process.

Proposed § 300.708 provides for reconsideration by OPM of an agency determination that an individual's failure to register with the SSS was knowing and willful. OPM may do so either when it receives a request from an agency pursuant to proposed § 300.707,

the affected individual or on its own initiative. A reconsideration decision is made by the Director of OPM or by another official authorized by the Director to make such decisions. A reconsideration decision by OPM is final and there is no further right to administrative review. If OPM affirms the agency's determination, the individual will no longer be eligible for Federal employment. If he is currently employed by the agency, the agency must terminate his employment promptly on the grounds that his appointment was not lawfully made.

Proposed § 300.709 describes two methods by which OPM will provide oversight for adjudication of employment eligibility due to Selective Service violations. First, OPM would maintain a database of agency determinations under subpart G. Second, OPM may audit agency decisions and suspend or revoke an agency's authority to adjudicate if the agency is not carrying out its responsibilities under this subpart in accordance with applicable law and regulations. In such a case, OPM would resume initial adjudication of cases for that agency.

## Expected Impact of This Rule

### A. Statement of Need

OPM proposes to codify its interpretation of the statutory prohibition against employing an individual whose failure to register with the SSS was knowing and willful. OPM also proposes to change its procedures for determining whether an individual's failure to register with the SSS was knowing and willful. In addition, the proposed rule would authorize Federal agencies to make initial determinations as to whether an individual's failure to register with the SSS was knowing and willful. Establishing this authority directly with the hiring agency will facilitate more efficient decisions and reduce paperwork for Federal agencies.

### B. Impact

This proposed rule would change the procedures for determining whether an individual's failure to register with the SSS was knowing and willful. The impact of this proposed rule is twofold:

- The proposed changes will ensure that individuals who failed to register with SSS and have applied for positions within the Federal Government or are currently Federal Government employees have an opportunity to fully explain their failure to register, and that the determination is based on a more complete record. For cases received by OPM to adjudicate, approximately one

percent of these individuals are removed or denied employment per year on average over the past three years.

- OPM believes that authorizing Federal agencies to adjudicate eligibility will facilitate more efficient decisions and eliminate administrative burden on agencies by reducing the amount of paperwork inherent in the current process and by shortening the length of time it takes to render a decision. Because the proposed rule allows for a decision by one agency to be leveraged and applied by another agency, this process will facilitate shorter adjudication processing times across government. We envision this flexibility will lead to communities of practice and greater sharing of knowledge with respect to this process, which will result in economies of scale across Federal agencies.

### C. Costs

The costs associated with the proposed rule include: the costs associated with the resources agencies will need in order to make an initial determination as to whether an individual's failure to register was knowing and willful, and the usual learning curve of implementing a regulatory change. These costs are best measured or described in terms of their short-term impact. (OPM expects the proposed changes to yield economies of scale within and across agencies in the long-term.) In the short-term, agencies must develop the expertise and comfort level for making adjudications of initial decisions and have the proper delegations of authority in place to govern operational day-to-day processing of this casework. To help agencies minimize costs associated with this process, OPM intends to provide technical assistance upon request to any agency that may require such assistance. In addition, OPM would issue supplemental explanatory guidance based on agency feedback not long after the effective date of the final rule.

OPM estimates that adjudication of Selective Service registration cases can be performed by agency human resource (HR) specialists at the General Schedule (GS) or equivalent 11 through 14 grade levels, with appropriate supervision. In terms of annual salary rates, this range falls between \$78,592 for a GS 11 step 1 HR specialist and \$172,075 for a GS 14 step 10 level HR specialist (based on January 2023 pay tables for the Pay Area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA areas; see <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB.pdf>). In addition, we

estimate agency review of an internal recommendation to be performed by a Headquarters level management official at the GS 15 grade level with a salary range of \$155,700 to \$183,500, and the final approval and authorization executed by the agency's CHCO or designee at the GS 15 or Senior Executive Service (SES) levels with a salary range of \$155,700 through \$183,500 for GS 15 level employees and a range of \$172,100 through \$235,600 for SES level IV through level I employees (based on January 2023 Executive pay tables; see <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/EX.pdf>).

The amount of time spent by all agency employees involved in the review, preparation, and authorization of adjudication actions will vary within and across agencies depending on the volume of cases and level of expertise within each individual agency. OPM expects the non-managerial grade level needed to perform this function will decrease over time as a result of institutional experience gained by agencies, knowledge sharing, the development of communities of practice, and the leveraging of decisions made by other agencies. As a reference point, OPM found that performing the function for the first time (little to no training and no prior agency expertise) required approximately 4 to 6 hours, including drafting and review. After developing in-house expertise, OPM has found that the function can be performed by a lower-graded employee in 2–4 hours with roughly 30 minutes of review. Because OPM plans to share the expertise it has developed over the years, agencies will benefit from OPM training and examples.

In terms of long-term impact, providing initial adjudication may represent an increased workload burden for some agencies. OPM processes approximately 200 cases per year from all Federal agencies. Under this proposed rule, any individual agency would be responsible for adjudicating a small fraction of those cases in a given year.

OPM does not expect the proposed rule to result in higher costs for job applicants and current employees. Currently, job applicants and current employees send any requested additional information via email or through the U.S. Postal Service or alternative mail delivery services. On average applicants respond within one week depending on which method they use. OPM estimates that this response time and the various methods used to

send requested information will not change as a result of this rulemaking.

### D. Benefits

The benefits associated with this proposed rule will be realized by both hiring/employing agencies as well as the applicants and employees who failed to register with the SSS. The proposed rule provides that agencies may make initial determinations of an applicant's or employee's failure to register with SSS or leverage a decision previously made by another agency. By having more control over this process, agencies will be better able to manage their caseloads, which will reduce the length of time it takes for an adjudication and thus shorten the time to hire. (Hiring actions typically are delayed during the adjudication process).

This proposed rule also allows one agency to leverage or apply an adjudication decision made by another Federal agency. This flexibility will improve the efficiency of this process in general and may be a significant benefit to those agencies with relatively limited resources which may be unable to perform this function in a timely manner. Job applicants who have not registered with SSS will realize a faster, more efficient process without any changes to the appeals process they are currently subject to. OPM expects the proposed changes to yield economies of scale within and across agencies once agencies become proficient in making initial determinations. OPM will provide training to agencies en masse, or on an individual basis, in addition to issuing supplemental guidance to the final rule, and plans to develop an accessible repository of past OPM decisions as well as agency decisions made after the final rule becomes effective.

### E. Regulatory Alternatives

The regulatory alternative to this proposed rule is the option of OPM retaining primary responsibility for making initial determinations of Selective Service registration and eligibility for appointment. Under current regulations, agencies seeking an initial adjudication request in writing from OPM a decision on a particular applicant or employee. OPM reviews the materials submitted for review and renders a decision as to whether the individual's failure to register was knowing and willful. Thus, two entities are involved in the current process: the requesting agency and OPM. The proposed rule streamlines this process by allowing agencies to complete the initial determination process in house. (The proposed rule preserves the

current mechanism that allows an individual to appeal an initial determination to OPM.) This proposal also provides agencies with a standardized set of criteria to follow when making their initial determinations to ensure consistency across government in the adjudication process. Lastly, the proposed rule further streamlines the current process by providing for agencies to leverage a determination already made by another hiring or employing agency. This streamlined process will benefit both agencies as well as the individuals for whom a decision is being sought by reducing the length of time inherent in the adjudication process. This rule proposes to give agencies more control over this process than is currently the case.

### Procedural Issues and Regulatory Review

#### Severability

Severability is an important remedial doctrine that arises in cases challenging the legality of statutes and agency rules. When reviewing a rule, if a court determines that a particular provision is unlawful, severability addresses whether judicial relief should extend to the entire rule or whether it can be limited to the invalid provision, leaving in effect the remainder of the rule (*see* <https://www.acus.gov/sites/default/files/documents/tailoring-the-scope-of-judicial-remedies-in-administrative-law-final-report.pdf>). OPM intends and expects that, if any part or section is held to be invalid or unenforceable as applied to any person or circumstance, a reviewing court should construe that part or section so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision is invalid and unenforceable in all circumstances, in which event the provision should be severable from the remainder of this.

In particular, OPM considers the interpretation of the statutory language regarding “knowing and willful” to be severable from the procedural changes proposed. OPM also considers the regulatory changes proposed with respect to allowing agencies to conduct the initial adjudication to be severable from the changes to the information an applicant (or employee) must provide as part of the adjudicatory process. OPM invites comment on the severability of these provisions.

#### Regulatory Review

Executive Orders 12866 (Sept. 30, 1993), 13563 (Jan. 18, 2011), and 14094 (Apr. 6, 2023) direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. A regulatory impact analysis must be prepared for major rules with economically significant effects of \$200 million or more in any one year. While this rule does not reach the economic effect of \$200 million or more, this rule was reviewed by the Office of Management and Budget as a significant, but not economically significant rule.

#### Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this rule will not have a significant economic impact on a substantial number of small entities.

#### Federalism

OPM examined this rule in accordance with Executive Order 13132, “Federalism,” and determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

#### Civil Justice Reform

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

#### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million or more in any 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.

#### Paperwork Reduction Act (44 U.S.C. 3501–3521)

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act (PRA). The existing regulation at 5 CFR 300.704(b) codified OMB Control Number 3206–0166, which is no longer in use (note the current regulation erroneously displays

an expiration date of October 31, 1989.) OPM is proposing to eliminate the codified form as there is an OMB-approved collection of information titled *Declaration for Federal Employment (OF 306)*, OMB Control Number 3206–0182, which covers this information and eliminates the need for OMB Control No. 3206–0166. OPM does not anticipate any changes to the data elements, costs, or burden for the current collection with this proposed rule. The system of record notice for the currently approved collection is <https://www.opm.gov/information-management/privacy-policy/sorn/opm-sorn-govt-1-general-personnel-records.pdf>. Additional information regarding the collection—including all background materials—can be found at <https://www.reginfo.gov/public/do/PRAMain> by using the search function to enter either the title of the collection or the OMB Control Number.

#### List of Subjects in 5 CFR Part 300

Freedom of information, Government employees, Reporting and recordkeeping requirements, Selective Service System.

Office of Personnel Management.

**Kayyonne Marston,**

*Federal Register Liaison.*

Accordingly, the Office of Personnel Management proposes to amend 5 CFR part 300 as follows:

### PART 300—EMPLOYMENT (GENERAL)

- 1. The authority citation for part 300 is revised to read as follows:

**Authority:** 5 U.S.C. 552, 2301, 2302, 3301, and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., page 218, unless otherwise noted. Secs. 300.101 through 300.104 also issued under 5 U.S.C. 7201, 7204, and 7701; E.O. 11478, 3 CFR 1966–1970 Comp., page 803, E.O. 13087; and E.O. 13152. Secs. 300.401 through 300.408 also issued under 5 U.S.C. 1302(c). Secs. 300.501 through 300.507 also issued under 5 U.S.C. 1103(a)(5). Sec. 300.603 also issued under 5 U.S.C. 1104. Secs. 300.701 through 300.709 also issued under 5 U.S.C. 3328(b).

- 2. Subpart G is revised to read as follows:

#### Subpart G—Statutory Bar to Appointment of Persons Who Fail To Register Under the Selective Service Law

|         |   |
|---------|---|
| Sec.    |   |
| 300.701 | Purpose.  |
| 300.702 | Coverage.   |
| 300.703 | Definitions.  |
| 300.704 | Agency responsibility to determine registration status. |
| 300.705 | Proof of registration.                                  |

300.706 Agency responsibility regarding covered individuals who have not registered.

300.707 Agency determination of whether the failure to register was knowing and willful.

300.708 Reconsideration by OPM.

300.709 OPM Oversight.

### § 300.701 Purpose.

This subpart implements 5 U.S.C. 3328, which bars from employment in an Executive agency an individual who was required to register with the Selective Service System and “who is not so registered or knowingly and willfully did not so register before the requirement terminated or became inapplicable to the individual.” The bar on employment does not apply to such an individual who can demonstrate by a preponderance of the evidence either that the failure to register was not knowing or that the failure to register was not willful.

### § 300.702 Coverage.

This subpart covers all appointments to positions in Executive agencies.

### § 300.703 Definitions.

In this subpart—

*Agency* means an Executive agency as defined in 5 U.S.C. 105.

*Appointment* means any personnel action that brings onto the rolls of an agency as an officer or employee as defined in 5 U.S.C. 2104 and 2105, respectively, a person who is not currently employed in that agency. It includes initial employment as well as transfer between agencies and subsequent employment after a break in service. A personnel action that moves an employee within an agency without a break in service of more than 3 days is not an appointment for purposes of this subpart.

*Authorized agency official* means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned, except that delegation from the head of an agency is limited to the agency’s Chief Human Capital Officer or equivalent. If the head of an agency (or equivalent) requests that OPM provide the initial adjudication, the authorized agency official means an official designated by the OPM Director to act for the Director in the matter concerned.

*Covered individual* means a male—

(a) Whose application for appointment is under consideration by an agency or who is currently employed by an agency;

(b) Who was born after December 31, 1959, and is at least 18 years of age; and

(c) Who is either (1) an applicant who is or was required to register under

Selective Service law at any time prior to or concurrent with the consideration of his application; or (2) an appointee who is or was required to register under 50 U.S.C. 3802 at any time prior to his current appointment.

*Exempt* refers to those individuals excluded from the requirement to register with the Selective Service System under Selective Service law or by Presidential proclamation.

*Preponderance of the evidence* means that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

*Selective Service law* means the Military Selective Service Act, rules and regulations issued thereunder, and proclamations of the President under the Act.

*Selective Service System* means the agency responsible for administering the registration system and for determining who is required to register and who is exempt.

### § 300.704 Agency responsibility to determine registration status.

(a) An agency seeking to appoint a covered individual must determine the covered individual’s eligibility before he may be appointed. An agency’s failure to make a required registration status determination prior to a covered individual’s appointment, however, does not relieve the agency from having to make such a determination when the agency becomes aware of the omission thereafter and does not relieve the covered individual from the obligation to cooperate with the agency in reaching a determination. The agency must take all appropriate steps to make the determination as soon as it discovers the omission, regardless of the intervening appointment.

(b) As provided by § 300.707(e) of this part, an agency may, but is not obligated to, hold open a vacancy while the individual takes steps to resolve the registration issue.

### § 300.705 Proof of registration.

(a)(1) At an appropriate time during the consideration process prior to appointment, an agency must require a covered individual to complete Optional Form 306, Declaration for Federal Employment, or a form provided by the agency that requests information on registration status.

(2) The agency must allow a covered individual to submit, in addition to the form(s) described in paragraph (a)(1) of this section, a copy of his Selective Service acknowledgement card or other

proof of registration or exemption issued by the Selective Service System.

(b) An agency may give no further consideration for appointment to a covered individual who fails, within 7 business days, or another reasonable time specified by the agency, to provide the information on registration status as required by paragraph (a) of this section.

(c) An agency considering appointment of a covered individual who is a current or former Federal appointee is not required to inquire about his registration status if the agency determined that his application materials or Official Personnel Folder contains evidence that the individual is registered, is exempt, or has had a prior determination under this subpart that his failure to register was not knowing and willful.

### § 300.706 Agency responsibility regarding covered individuals who have not registered.

(a) In the case of a covered individual who is under age 26 and has not registered with the Selective Service System, and in order to further Congress’s purpose in enacting 5 U.S.C. 3328, the agency must provide the individual with a written notice that advises him to register promptly and includes the following:

(1) Information about how to register online on the Selective Service System’s website;

(2) A statement requiring the individual to submit a new Optional Form 306, “Declaration for Federal Employment” agency form, or a copy of his Selective Service acknowledgement card or other proof of registration or exemption issued by the Selective Service System to prove that he has complied;

(3) A statement requiring the individual to submit any additional documentation the agency deems necessary to establish that the individual has registered;

(4) A deadline for submitting the required documentation; and

(5) A statement that, if the individual fails to provide the required documentation by the deadline, he will no longer be eligible for appointment, or, in the case of a covered individual who has already been appointed, a statement that the failure to register will result in the individual being terminated on the ground that he was ineligible for appointment at the time he was appointed.

(b) In the case of a covered individual who is age 26 or older and has not registered with the Selective Service System, the agency, when it learns of the failure to register, must notify the



individual in writing that, as required by 5 U.S.C. 3328, he is ineligible for appointment or for continued employment unless his failure to register was not knowing and willful. The notice must inform the individual that he may request in writing a determination by the agency that his failure to register was not knowing and willful if he provides, along with his request, a written explanation of his failure to register, as described in § 300.707. The notice must specify how to submit the request (*e.g.*, to whom, in what format) and by when the request must be received. The individual's failure to submit this request within a reasonable time, as determined by the agency, obligates the agency to eliminate the individual from further consideration for an appointment or to commence steps to terminate the individual's continued employment, as applicable.

**§ 300.707 Agency determination of whether the failure to register was knowing and willful.**

(a)(1) An individual who, as provided in § 300.706(b), requests a determination that his failure to register was not knowing and willful must submit to the agency a sworn statement that explains why he failed to register. The sworn statement must set forth all relevant facts and circumstances, including whether this issue has ever been adjudicated by another agency. This sworn statement must be signed and must include the following statement, "I declare, under penalty of perjury, that the facts stated in this statement are true and correct." He may also submit any other documents that support his claim, including sworn statements from other individuals with first-hand knowledge of the relevant facts.

(2) The record for review by the authorized agency official must include the documents submitted pursuant to paragraph (a)(1) of this section, the documentation submitted pursuant to § 300.705(a), a copy of the written notice referred to in § 300.706(b), his request for a determination that his failure to register was not knowing and willful, and any other relevant documents. The individual must demonstrate by a preponderance of the evidence that his failure to register was not knowing and willful.

(b) Upon receiving a request for a determination that an individual's failure to register was not knowing and willful, the agency may proceed with the adjudication process.

(c) When building the record to evaluate the issue of whether the failure

to register was knowing and willful, the agency may investigate the information in the documents provided by all appropriate means, including questioning the covered individual or employee and any other person who submitted a statement in support of his claim, and consulting with the Selective Service System. Refusal of any individual who submits a sworn statement under this section to be interviewed may be grounds for a determination that the covered individual's failure to register was knowing and willful.

(d) If the agency chooses to pursue adjudication, the agency must determine whether the issue was previously adjudicated by OPM or another agency.

(1) If the issue was previously adjudicated by OPM pursuant to a reconsideration request under § 300.708, that decision is final.

(2) If the issue was previously adjudicated by another Federal agency, that agency's decision is final unless the hiring agency has documentary evidence showing the initial agency erred or did not have complete information when making its determination. In such instances, the hiring agency may request OPM reconsideration of another agency's decision pursuant to § 300.708. The agency must provide to OPM whatever documents OPM decides it needs to determine whether to permit the earlier decision to be superseded.

(3) If the issue was not previously adjudicated, the authorized agency official must examine the individual's request and reach his or her own conclusion as to whether the failure to register was knowing and willful. The agency must inform the individual in writing of its decision. The decision must inform the individual that he may request reconsideration of the agency's determination under § 300.708 within 30 days after the date of receipt of the decision, at which time the agency's decision becomes final unless the individual has timely filed a request for reconsideration with OPM.

(e) If the individual is an employee, the agency must file a copy of the decision in the employee's official personnel folder.

(f) An agency is not required to keep a vacant position open for a covered individual who seeks a determination under this section, unless otherwise required by law. An agency always has the option of disqualifying the applicant and considering the next eligible and available candidate.

(g) If the agency finds that the failure to register was knowing and willful, a covered individual is ineligible for further employment consideration by that agency, or for continued Federal employment if he has already been appointed.

**§ 300.708 Reconsideration by OPM.**

(a) When a request for reconsideration is filed with OPM in a timely manner, OPM will inform the agency and the individual that it has received the request.

(b) The Director of OPM, or other authorized OPM official designated by the Director, on his or her own initiative or at the request of the individual, may review the decision of an agency under § 300.707 and make a determination based on all documentation provided to affirm or overrule the agency's decision. The authorized OPM official may investigate the information in the documents provided by all appropriate means, including questioning the covered individual or any other person who submitted a statement in support of his claim, and consulting with the Selective Service System. The official will examine the individual's request and make his or her own conclusion as to whether the failure to register was knowing and willful. The decision of OPM is final. There is no further right to administrative review.

(c) OPM will provide the agency and the covered individual with a copy of its decision.

(d) If OPM affirms the agency's determination that the failure to register was knowing and willful, the agency must cease considering the individual for appointment or, if the individual is a current employee, initiate steps to terminate his employment.

**§ 300.709 OPM Oversight.**

OPM may audit agency decisions under this subpart and may suspend or revoke an agency's authority under this subpart if it determines the agency is not carrying out its responsibilities under this subpart in accordance with applicable law and regulations. In the event of such a suspension or revocation, the Director of OPM must designate an authorized OPM official who will make the determinations for that agency under this section while that suspension or revocation is in effect.

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