

# 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 332

RIN 3206-AL13

### Recruitment and Selection Through Competitive Examination

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing to amend its regulations governing recruitment and selection through competitive examination primarily to clarify the distinction among objections, pass overs, and suitability determinations. OPM is also proposing to amend the definition section of this part to make the regulations more readable and to remove the section in this part dealing with filling certain postmaster positions because the information is obsolete.

**DATES:** We will consider comments received on or before November 3, 2008.

**ADDRESSES:** You may submit comments through the Federal eRulemaking Portal at: <http://www.regulations.gov>. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking.

You may also send, deliver or fax comments to Angela Bailey, Deputy Associate Director for Talent and Capacity Policy, U.S. Office of Personnel Management, Room 6551, 1900 E Street, NW., Washington, DC 20415-9700; e-mail at [employ@opm.gov](mailto:employ@opm.gov); or fax at (202) 606-2329.

**FOR FURTHER INFORMATION CONTACT:** Ms. Linda Watson by telephone at (202) 606-0830; by fax at (202) 606-2329; by TTY at (202) 418-3134; or by e-mail at [linda.watson@opm.gov](mailto:linda.watson@opm.gov).

**SUPPLEMENTARY INFORMATION:** Pursuant to provisions codified in title 5, United States Code (U.S.C.), and Executive Orders issued pursuant to those

provisions, Congress and the President have delegated to OPM several authorities related to the recruitment and selection process for individuals seeking competitive service positions in the Federal Government. Under 5 U.S.C. 3318, Congress confers upon OPM the authority to rule on any objection or pass over request filed by a Federal agency seeking to fill vacancies for such positions. In recent years, OPM has delegated examining authority to Federal agencies to adjudicate most objections and pass over requests. OPM retains exclusive authority to: (a) Make medical qualification determinations pertaining to preference eligibles; and (b) grant or deny an agency's pass over request of a preference eligible with a compensable service-connected disability of 30 percent or more. Except for OPM's exclusive authority, Federal agencies with delegated examining authority under 5 U.S.C. 1104(a)(2) have the authority to adjudicate objections and pass over requests pertaining to applicants for positions in their agencies, but do not have such authority with respect to positions elsewhere in the Federal Government.

An objection is a request to remove a candidate from consideration on a particular certificate, and a pass over request is an objection filed against a preference eligible that results in the selection of a non-preference eligible. (Throughout this discussion, the use of the term "objection" in this document should be read to encompass pass overs, even if pass overs are not explicitly mentioned). OPM promulgated regulations in section 332.406 of title 5, Code of Federal Regulations (CFR), in which it describes the circumstances under which an objection will be sustained or a pass over request granted.

In addition to its authority for adjudicating objections and pass overs, OPM is authorized to regulate the fitness of applicants for competitive service positions and for career appointment in the Senior Executive Service, as well as the conduct of employees in competitive service and Senior Executive Service positions. OPM, exercising this authority, published regulations governing suitability determinations, which are located at 5 CFR part 731. As with objections and pass over requests, OPM has delegated to Federal agencies the

authority to make most suitability determinations.

Although the statutory schemes related to suitability determinations and pass overs/objections are separate and distinct from each other, OPM has, in the recent past, unintentionally mingled the two, possibly giving rise to the impression that the pass over regulations and the suitability regulations were interconnected in some way. The Merit Systems Protection Board's (MSPB) decisions in *Edwards v. Department of Justice*, 86 MSPR 365 (2000) and 87 MSPR 518 (2001), which, to some extent, erased the distinction between the two regulatory schemes, led OPM to conclude that it was essential to restore clarity to these two important and distinct features of the Federal personnel system. To dispel any confusion that has been created, OPM is proposing to revise this regulation to clarify that neither an agency's objections nor its pass over requests constitute suitability actions and that decisions on these objections or pass over requests similarly are not suitability actions. Consequently, when an objection or pass over request is made, the regulation at 5 CFR 332.406 applies, but the procedures set forth in 5 CFR part 731 do not apply. OPM has also clarified its regulations in 5 CFR part 731 to ensure that the intended distinction between the two procedures is understood and maintained. See 73 FR 20149 (April 15, 2008). To demonstrate the basis for the distinction between these two statutory schemes, a brief review of each of these schemes is helpful.

### Objections/Pass Overs

In general, agencies may select candidates for vacancies in the competitive service in one of two methods—the traditional "Rule of Three" method, in which an agency selects from the highest three eligibles available for appointment, drawing from a list of candidates who have been rated and ranked by numerical scores, or alternate ranking and selection procedures, pursuant to which a category rating system for evaluating candidates is established. The differences are straightforward.

When OPM or an agency's delegated examining office (DEO) uses the traditional "Rule of Three" ranking and selection procedures, the selecting

official requests a list of eligible candidates who meet the minimum qualification requirements. OPM or the DEO is required to provide either a list of all qualified candidates, appropriately rated and ranked, or enough names from the top of a register of qualified candidates, appropriately rated and ranked, to permit an agency to consider at least three candidates for appointment with respect to each vacancy that the agency intends to fill (5 U.S.C. 3317(a)). Under this procedure, eligible candidates are assigned numerical scores including veterans' preference points of 5 points or 10 points, as applicable (5 U.S.C. 3309, 3313). An appointing official must select from the highest three candidates available for appointment on the certificate furnished by OPM or the DEO, except as discussed below (5 U.S.C. 3318(a)). This ranking and selection procedure is often referred to as the "Rule of Three."

When an agency uses a category-based rating method to assess, rate, and rank job applicants for positions filled through the competitive examination process, applicants who meet the minimum qualification requirements are ranked by being placed in two or more predefined quality categories instead of being ranked in numeric score order. Veterans' preference is applied by listing preferences eligibles ahead of non-preference eligibles within the same quality category in which they were assigned based upon the job-related assessment tool(s). No points are assigned. Qualified preference eligibles with a compensable service-connected disability of 30-percent or more and those with a compensable service-connected disability of at least 10-percent but less than 30-percent are placed at the top of the highest quality category (except with respect to scientific or professional positions at or above the GS-9 level), regardless of the quality category in which they would be placed based upon their examination results. Under category rating, an appointing official may select from any of the candidates in the highest quality category (or, if fewer than three candidates have been assigned to the highest category, from a merged category consisting of the highest and the second highest quality categories), except that, generally, all the preference eligible choices must be exhausted before an agency may select a non-preference eligible candidate (5 U.S.C. 3319).

Congress gave agencies the right to object to any candidate for employment whose name appears on a certificate, whether the agency is using the

traditional "Rule of Three" or category rating. The procedures are the same, regardless of the method of selection. As prescribed in 5 U.S.C. 3318(a), OPM or an agency with delegated examining authority may sustain an objection that is based on a "proper and adequate reason under regulations prescribed by the Office (OPM)." To ensure that all applicants for competitive service positions possess the necessary health, character, and ability for the employment sought, OPM has determined that any of the reasons set forth as criteria for making suitability decisions in 5 CFR part 731 or as bases for disqualification by OPM in 5 CFR part 339 constitutes a "proper and adequate reason." In addition, OPM has determined to reserve to itself the ability to set forth in its Delegated Examining Operations Handbook additional reasons that constitute "proper and adequate" reasons for objections in OPM's view.

As previously indicated, a request for a pass over is a specific type of objection. As with any objection, an agency may not pass over a preference eligible (with respect to a Rule-of-Three selection process) or select a non-preference eligible ahead of a preference eligible in the same quality category (with respect to a category rating selection process) unless OPM or the appropriate DEO grants the agency's pass over request under 5 U.S.C. 3318(b)(1). See also 5 U.S.C. 3319(c)(2). When an agency seeks to pass over a preference eligible candidate who is a 30 percent or more compensably disabled veteran, only OPM possesses the authority to adjudicate the agency's pass over request. The standard for adjudicating a pass over request is identical to the standard for adjudicating any other objection. Consequently, an agency's pass over request will be granted if that request is based on "proper and adequate reasons," including those reasons derived from 5 CFR part 339 or 731.

There is no statutory or regulatory right to appeal from a decision sustaining an objection or granting a pass over request. For that reason, an individual has no right of appeal to MSPB from an OPM, agency or DEO decision to sustain an objection or grant a pass over request, regardless of the reason for the decision.

#### Suitability Actions

In 5 U.S.C. 7301, Congress conferred upon the President the authority to prescribe regulations for the conduct of employees in the Executive Branch. In addition, pursuant to 5 U.S.C. 3301, the President may "(1) prescribe such

regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service; [and] (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought.

\* \* \* Executive Order 10577 directs OPM to examine "suitability" for competitive Federal employment.

Pursuant to 5 CFR 731, OPM, an agency, or the DEO, as appropriate, may cancel an individual's eligibility, remove an individual from Federal employment, and/or debar an individual from future Federal employment when it determines the action will protect the integrity or promote the efficiency of the civil service. A non-selection (e.g., objection or pass over pursuant to 5 CFR part 332) for a specific position, however, is not a suitability action even if the non-selection is based on reasons set forth in 5 CFR 731.202(b).

Prior to taking a suitability action, OPM or an agency with delegated authority must notify the applicant, appointee, or employee in writing of the proposed action and must specify the reasons for this action. Under 5 CFR 731.302 and 731.402, the notice must also include information on the individual's right to answer to the notice in writing. After considering the answer of the individual, if any, OPM or an agency with delegated authority then renders a final decision. In 5 CFR 731.501, an individual against whom a suitability action has been taken is given the right of appeal to MSPB.

In light of these two separate and distinct statutory and regulatory schemes, an agency that wishes, for reasons set forth in 5 CFR 731.202(b), not to appoint an individual on a certificate has two options. First, the agency may make a suitability determination under 5 CFR part 731 with respect to the individual. Alternatively, the agency may object to or request to pass over the candidate pursuant to 5 CFR 332.406. Under this latter authority, an agency may choose not to appoint a candidate if its objection is sustained or its pass over request is granted. An agency may pursue either route, but must satisfy the standards applicable to the chosen procedure. It is permissible for an agency to object or request to pass over a candidate on a certificate of eligibles and then, if the objection is sustained or the pass over request is granted, to refer the candidate's application for suitability review and adjudication under 5 CFR part 731. When an agency objects to an individual on the basis of material, intentional false statement or

deception or fraud in examination or appointment, and the objection is sustained, however, an agency must also refer the candidate's application to OPM for any suitability action that may be warranted, because of the significance of these factors and to ensure uniformity throughout the Federal Government.

In this proposed regulation, OPM proposes to add the definitions for "objection" and "pass over request" to clarify the process that applies to objections and pass over requests and distinguish that process from the suitability process and to update the definitions for "active military duty" and "certificate" in 5 CFR 332.102.

OPM proposes to revise 5 CFR 332.406 to make it clear that the procedure for requesting objections and pass overs is not part of the suitability process. OPM also clarifies that an individual may not appeal an OPM or agency's decision to sustain an objection or pass over request to MSPB under 5 CFR part 731, even if the decision is based on reasons set forth in 5 CFR 731.202(b).

OPM also proposes to remove 5 CFR 332.103, Filling certain postmaster positions. This section is obsolete due to the passage of Public Law 91-375, The Postal Reorganization Act (Act). The Act transformed the former Post Office Department into the United States Postal Service (USPS) and made it an independent establishment of the executive branch of the Federal Government. USPS subsequently established its own examining and hiring system, while retaining the Civil Service retirement system.

#### E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

#### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

#### List of Subjects in 5 CFR Part 332

Government employees.

Office of Personnel Management.

Michael W. Hager,

Acting Director.

Accordingly, OPM proposes to amend 5 CFR part 332 as follows:

### PART 332—RECRUITMENT AND SELECTION THROUGH COMPETITIVE EXAMINATION

1. The authority citation for part 332 is revised as follows:

**Authority:** 5 U.S.C. 1103, 1104, 1302, 3301, 3302, 3304, 3312, 3317, 3318, 3319; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218.

#### Subpart A—General Provisions

2. Revise § 332.102 to read as follows:

##### § 332.102 Definitions.

In this part:

*Active military duty* means active duty in full pay status in the Armed Forces of the United States, including an initial period of active duty for training, as defined in Chapter 1 of title 38, U.S. Code.

*Certificate* means a list of eligibles from which an appointing officer selects one or more applicants for appointment.

*Objection* means an agency's request to remove a candidate from consideration on a particular certificate.

*Pass over request* means an objection filed against a preference eligible that results in the selection of a non-preference eligible.

##### § 332.103 [Removed]

3. Remove § 332.103.

#### Subpart D—Consideration for Appointment

4. Revise § 332.406 to read as follows:

##### § 332.406 Objections to eligibles.

(a) *Delegated authority.* Except as specified in paragraphs (a)(1) and (a)(2) of this section, OPM has delegated the authority to adjudicate objections to eligibles, including pass over requests, to Federal agencies.

(1) OPM retains exclusive authority to approve the sufficiency of an agency's request to pass over preference eligibles who are thirty percent (30%) or more compensably disabled. Such persons have the right, in accordance with 5 U.S.C. 3318, to respond to the pass over request before OPM makes a final decision.

(2) OPM also retains the exclusive authority to approve the sufficiency of an agency's reasons to medically disqualify or medically pass over a preference eligible or disabled veteran in certain circumstances, in accordance with part 339 of this chapter.

(3) An agency must refer any objection or pass over request that is based on material, intentional false statement or deception or fraud in examination or appointment to OPM for a suitability action where warranted, under part 731 of this chapter.

(b) *Standard for objections or pass overs.* An agency is not required to consider an individual for a position when an objection to or request to pass over the particular individual is sustained or granted. An objection,

including a pass over request, may be sustained only if the objection is based on a proper and adequate reason. The reasons set forth for disqualification by OPM in part 339 of this chapter constitute proper and adequate reasons to sustain an objection. Similarly, the criteria for making suitability determinations in part 731 of this chapter constitute proper and adequate reasons to sustain an objection or grant a pass over request. In addition, reasons published by OPM in the Delegated Examining Operations Handbook, constitute proper and adequate reasons to sustain an objection or grant a pass over request.

(c) *Sufficiency of the reasons for a pass over.* Subject to the exception set forth in paragraph (e) of this section, an agency may not pass over a preference eligible to select a non-preference eligible unless OPM or an agency with delegated authority also makes a determination that the sufficiency of the reasons is supported by the evidence submitted for a pass over request.

(d) *Agency's obligation while request for objection is pending.* Subject to the exception set forth in paragraph (e) of this section, if an agency makes an objection against an applicant for a position, or seeks to pass over the applicant, and the individual that the agency wishes to select would be within reach of selection only if the objection is sustained, or the pass over granted, that agency may not make a selection for the position.

(e) *Applicability of paragraphs (c) and (d) of this section.* Paragraphs (c) and (d) of this section do not apply if the agency has more than one position to fill from the same certificate and holds open a position that the individual against whom an objection has been filed, or a pass over request made, could fill, in the event that the objection is not sustained or the pass over request is denied.

(f) *Procedures for objections and pass overs.* Agencies must follow the procedures for objecting to or requesting to pass over an eligible published by OPM in the Delegated Examining Operations Handbook.

(g) *No appeal rights to Merit Systems Protection Board (MSPB).* An individual may not appeal to the MSPB a decision by OPM or an agency with delegated authority to sustain an objection or grant a pass over request pursuant to this part irrespective of the reason for the decision.

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