



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

**STATEMENT OF
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before the

**SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF FEDERAL
PROGRAMS AND THE FEDERAL WORKFORCE**

UNITED STATES SENATE

on

**“SAFEGUARDING OUR NATION’S SECRETS: EXAMINING THE NATIONAL
SECURITY WORKFORCE”**

November 20, 2013

Mr. Chairman, Ranking Member Portman, and members of the Subcommittee, thank you for the invitation to testify on behalf of the Office of Personnel Management (OPM) on regulations affecting the designation of positions in the Federal government as national security sensitive, as well as the *Kaplan v. Conyers* case.

Proposed Regulation

The obligation to designate national security positions is not a new authority. It is outlined in Executive Order 10450, *Security Requirements for Government Employment*, which was published in 1953. Additionally, Title 5 of the Code of Federal Regulations, Part 732, National Security Positions, requires each agency to follow established procedures to identify national security positions.

OPM and the Office of the Director of National Intelligence (ODNI) jointly proposed regulations in May of this year regarding the designation of national security positions in the competitive service. Similar regulations have been in effect for over twenty years. The proposed 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

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efficient and equitable. OPM originally issued proposed amendments on part 732 on December 14, 2010, with a publication to the Federal Register, when efforts to revise government regulations regarding the designation of national security positions first began. The December 2010 effort came after OPM engaged in extensive consultation with the Office of Management and Budget, the Department of Defense (DoD), and ODNI. The proposed rule updated OPM's longstanding regulations setting standards for designating positions in the competitive service as national security sensitive, which it had issued under the authority of various statutes and Executive Orders.

These proposed amendments were later withdrawn and reissued in May 2013 by OPM and ODNI jointly, pursuant to a January 25, 2013 Presidential Memorandum directing OPM and ODNI to jointly issue amended regulations "with such modifications as are necessary to permit their joint publication." The Presidential Memorandum recognizes the responsibility both agencies possess with respect to the relevant rulemaking authority. Specifically, in 2008, pursuant to Executive Order 13467, the Director of National Intelligence was given new responsibilities as Security Executive Agent involving, among other items, the establishment of investigative and adjudicative standards for eligibility for access to classified information and developing guidelines and instructions on the processes used for eligibility determinations. The joint reissuance recognizes the agencies' complementary missions regarding the positions covered by the rule.

The proposed rule therefore simply reissues the 2010 proposal under joint authority, with technical modifications and clarifications, and provides the public an opportunity to submit additional comments. The purpose of the proposed rule, both as originally published and as republished, 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 positions filled by career appointment.

The proposed rule maintains the current standard under Executive Order 10450, 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 revision is to clarify the categories of positions in which, by virtue of position duties, the occupant could have a material adverse effect on the national security, whether or not the positions require access to classified information. The proposed rule would also clarify complementary requirements for reviewing positions for public trust risk and national security sensitivity. Finally, the proposed rule would also clarify when reinvestigations of persons in national security positions are required.

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The proposed rule is not intended to increase or decrease the number of positions designated as national security sensitive, but is intended to provide more specific guidance to agencies, in order to enhance the efficiency, accuracy, and consistency with which agencies make position designations. The previous regulations are now twenty years old and provide only general guidance. The new regulations are intended to clarify the requirements and procedures agencies should follow when designating national security positions by providing more detail and concrete examples. In addition, the new regulations will help agencies correctly determine the specific level of sensitivity for a position that is determined to affect national security, which in turn will help determine the type of background investigation that will be required.

Finally, the proposed rule addresses periodic reinvestigations in order to better coordinate the reinvestigation requirements for national security positions with the requirements already in place for security clearances under Executive Order 12968 and for public trust positions under Executive Order 13488. This will help ensure that the same reinvestigations can be used for multiple purposes and prevent costly duplication of effort.

The proposed rule was published in the Federal Register on May 28, 2013, with a comment period that closed 30 days later. OPM and ODNI are presently reviewing the comments from members of the public.

Kaplan v. Conyers

In *Kaplan v. Conyers*, the *en banc* U.S. Court of Appeals for the Federal Circuit, in a 7-3 decision, held that the Merit Systems Protection Board (MSPB) lacks jurisdiction to review the merits of Executive Branch risk determinations regarding eligibility to hold national security sensitive positions.

Conyers examined whether the MSPB, in reviewing an appeal of an adverse personnel action against an employee (i.e., a suspension, demotion, or removal), may review the merits of DoD's predictive judgment of national security risk. DoD had taken adverse actions against two employees after determining they were ineligible to perform national security duties. On appeal from the MPSB, the Federal Circuit concluded that the MSPB can review whether DoD's action is procedurally correct but cannot review whether DoD correctly exercised its predictive judgment of national security risk. The Federal Circuit held that in passing the Civil Service Reform Act of 1978 and later civil service laws, Congress did not give the MSPB this authority.

The Federal Circuit based its decision on long-standing precedent, specifically, the Supreme Court's 1988 decision in *Department of the Navy v. Egan* that the MSPB, in reviewing an appeal of an adverse action, cannot review the merits of an agency decision to deny the employee security clearance. The Federal Circuit held that *Egan* controlled all such national security determinations, not just those related to access to classified information.

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The proposed rule discussed in the first part of this testimony was in no way related to the *Conyers* litigation. The proposed amendments were originally issued on December 14, 2010, before the MSPB issued its decisions in the *Conyers* case.

Thank you again for the opportunity to testify, and I look forward to answering any questions you may have.