SOUTHWORTH PC

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Via Regulations.gov

Scott Kupor, Director, U.S. Office of Personnel Management
James J. Woodruff II, Chairman, U.S. Merit Systems Protection Board

Re: Supplemental opposition to Promoting Employee Accountability
Docket 2025-OPM-0012; RINs 3206-AO91 and 3124-AA35

Dear Director Kupor and Chairman Woodruff:

I submit this supplemental comment for Southworth PC and request withdrawal of the proposed Promoting Employee Accountability rewrite. A federal employee's opportunity to answer the government's accusations is a safeguard against an incorrect decision. Useful assistance during a performance-improvement period can preserve the services of an employee who succeeds. Review can expose an unsupported charge or an excessive penalty. Those functions belong in OPM's evaluation of government efficiency.[1]

The new separation table does not identify warranted actions supervisors abandoned because of employee protections. The accompanying report describes selected managers' experiences without establishing that the particular restrictions OPM proposes would solve their difficulties. Its authors expressly disagree with important features of the rule. OPM should

[1] Promoting Employee Accountability, 91 Fed. Reg. 40,444 (July 2, 2026); reopening, 91 Fed. Reg. 58,387–88 (Sept. 15, 2026).

address the management and support problems the record identifies while preserving employees' meaningful opportunity to improve and defend themselves.

This supplement responds to the newly introduced data and report in the context of the original proposal. It adds public federal-sector EEO evidence relevant to the report's treatment of employee complaints and the value of review. Our July 30 comment remains our position. We recognize the government's interest in acting promptly when performance or conduct warrants action; a sound rule must also account for the consequences of acting on an incomplete or mistaken record.[2]

I Employee protections help the government make lawful and accurate decisions

The civil service framework requires fair treatment and protection against arbitrary action, discrimination and reprisal for protected disclosures, while also requiring correction of inadequate performance and separation of employees who cannot or will not improve. These obligations govern the exercise of management authority together. The number of employees removed cannot by itself establish whether the system is meeting them.[3]

An agency sets performance expectations, assigns work, develops its proposed charges and controls much of the underlying documentation. The employee's answer supplies information the proposing official may have overlooked or misunderstood. The deciding official needs a meaningful opportunity to consider that information before the action takes effect. An agency's withdrawal or correction of a defective proposal can therefore be a successful result of the process. Counting only completed separations leaves that result invisible.

HR and legal review can serve the same function. Timely, competent advice should help a supervisor document legitimate concerns and select a supportable action. Advice that a proposed action lacks evidence or would violate an employee's rights is also valuable. OPM should distinguish avoidable administrative delay from work that prevents a defective action. A manager's frustration with review does not resolve that distinction.

The EEOC's FY2025 results illustrate why the distinction matters. The agency reports more than $104.6 million in relief for 1,824 federal employees and applicants. Separately, its official No FEAR Act tables report thirty-five appellate decisions involving discrimination findings, including six involving removal. Those findings establish that unlawful treatment is a real concern within the federal workplace. OPM should account for the work employee remedies perform when evaluating a report that portrays complaints principally as impediments to removal.[4]

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[2] Southworth PC, Comment OPM-2025-0012-0430, attachment (July 30, 2026).

[3] 5 U.S.C. § 2301(b)(2), (6), (8), (9). The merit-system principles address fair treatment and employee protections alongside correction of inadequate performance.

[4] EEOC, FY2027 Agency Performance Plan and FY2025 Agency Performance Report, p. 10; No FEAR Act Appeals Data, FY2025 column, tables 706(b)(7)(i) and 706(b)(9)(i), Discipline/Removal row (accessed Sept. 23, 2026). The recovery total is not all government EEO

These EEO results do not establish that the particular procedures OPM proposes to restrict caused those recoveries or findings. The performance report does not allocate that total between settlements and adjudicated relief; the total does not establish liability in every resolved case. Neither source estimates the prevalence of unlawful personnel actions or proves what this rule would cost. Their relevance is narrower: employee remedies have consequential uses that a count of separations and selected accounts of unsuccessful complaints cannot capture. Preserving later review does not relieve OPM of assessing the consequences of reducing opportunities to identify a mistake before an action takes effect.

II The action table does not establish that safeguards prevent warranted action

OPM states that the absence of a significant increase in actions supports structural changes to encourage supervisors to act. The table does not identify how many actions were warranted. Without that information, a count of completed separations cannot establish a shortfall in accountability. The FY2025 totals are 3,492 excluding the uncertain-scope ZLM category and 4,160 including it. The FY2026 totals are 3,105 and 3,572, respectively, but cover only October through June. The notice discloses that cutoff.[5]

Those nine-month totals already equal 88.9 percent and 85.9 percent of the respective preceding twelve-month totals. That comparison does not establish year-over-year growth. It does require an explanation of the notice's characterization of FY2026 as consistent with FY2025. Matched October-through-June periods, reporting-completeness information, and a covered-workforce denominator would distinguish changes in incidence from differences in observation time, workforce size and reporting. Annualizing the partial year would not resolve seasonality or changes in workforce composition.[6]

The categories are also heterogeneous. They include performance, misconduct, combined reasons, and other grounds; they cannot be treated as a uniform count of employees who failed an improvement period. OPM appropriately separates ZLM because actions using that code may fall outside the proposal's scope. Presenting both totals is useful, but it does not determine which records belong in the relevant population.[7]

More fundamentally, the table does not measure whether a supervisor declined to pursue a warranted action because of a particular procedural requirement. It contains no measure of successful improvement, appropriate discipline short of separation, or proposed actions corrected

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costs. The decision count is not a count of people or reversals; the reporting year need not be the year of the underlying conduct.

[5] 91 Fed. Reg. at 58,388, Separations and Terminations table.

[6] Id. at 58,387–88. Comparisons: 3,105 / 3,492 = 88.9%; 3,572 / 4,160 = 85.9%. These compare nine months with twelve and are not annual growth rates.

[7] Id.; OPM, Guide to Processing Personnel Actions, Sept. 2026, ch. 31, Table 31-B, rules 21, 27, 29, 35, 41, 57, 59, 65, printed pp. 12–17. Current definitions do not establish the history of every code's use.

before they became final. OPM itself identifies other departures, including deferred resignations, reductions in force and retirements, as possible influences on the count. Neither a flat count nor an increase isolates the effect of employee safeguards on warranted personnel action. A supervisor who helps an employee improve may properly avoid a removal; a supervisor whose unsupported proposal is corrected may also properly avoid one. The table cannot distinguish either result from a failure to address actual misconduct.[8]

Before relying on the table to justify structural restrictions, OPM should publish a comparable monthly series, the covered-workforce denominator, and enough extraction information to reproduce the analysis. That explanation should identify the codes and authority fields selected, whether observations count transactions or unique employees, how corrections and repeat actions are handled, and the data version and provider completeness. OPM should then explain what the resulting measure establishes about each restriction it seeks to impose. The published separation totals cannot carry that explanatory burden by themselves.

III The report does not connect the measured burden to the proposed restrictions

We the Doers gathered the experiences of ten managers concerning twenty-two performance or conduct matters; twelve supplied detailed effort estimates. The report candidly disclaims statistical representativeness and expresses a commitment to fairness and due process. Its accounts can identify practical difficulties and inform policy without constituting a national survey. The question is how much they establish about the provisions under consideration.[9]

The reported hours reflect recalled supervisory effort valued through salary assumptions. They are not contemporaneously verified spending records or an estimate of what the proposed restrictions would save. Timing measures use different starting events and encompass different outcomes. The report excludes post-removal appeals from its stated twenty-one-month average for completed removals. Even that narrower measure does not isolate time attributable to the particular improvement-period or reply rules under consideration.[10]

The report also identifies problems in HR and legal support, documentation, training and implementation. Those burdens merit attention. They do not establish that reducing an employee's response time will address the delay the manager experienced. The relevant analysis should identify the process responsible for a delay, the proposed provision that would change it, and the useful work that might be lost as a result. A demanding personnel decision may involve both avoidable administrative delay and necessary evidentiary work.

The report and the authors' comment state that the EEO complaints were meritless or invalid, that no grievances were upheld, and that no disability-discrimination claims were

[8] 91 Fed. Reg. at 58,387–88. The objection concerns what the published table measures, not whether OPM possesses additional information.

[9] We the Doers, Fast but Fair Federal Firing (Aug. 27, 2026), pp. 2, 8–10, 29–30 (Report); We the Doers, Comment OPM-2025-0012-0685, attachment p. 1 (Sept. 16, 2026) (Doers Comment).

[10] Report, pp. 5, 9–10, 17–18, 32.

substantiated. Those assertions must be acknowledged. But the materials supply neither the underlying decisions nor a disposition record that permits readers to distinguish merits rejection, procedural dismissal, withdrawal, settlement and pending proceedings. An unsuccessful claim does not by itself establish knowing falsity or abuse. Without that distinction, the record cannot establish how much of the reported burden represents misuse of a process rather than the cost of deciding a disputed claim.[11]

The original proposal also cites surveys and earlier studies describing management reluctance, procedural burdens and knowledge gaps. We do not contend that the agency has no evidence of those concerns. But evidence that some supervisors encounter difficulty does not identify how often warranted actions are abandoned because of the particular protections being restricted, or establish why those restrictions are preferable to practical support and more timely internal review. OPM may make predictive judgments under uncertainty; it must still explain the connection between the problem identified and the remedy selected.[12]

IV The report authors disagree with important features of the proposal

We the Doers' September 16 comment supports significant changes, including eliminating additional pre-PIP periods, using the Fully Successful performance threshold, and requiring acceptable performance for a full year. Its authors nevertheless recommend a different approach to the duration of a performance-improvement period, expressly oppose allowing earlier assistance to substitute for assistance during that period, and oppose the prohibition on penalty tables. OPM should address those disagreements when evaluating the report's support for the rule.[13]

The proposed § 432.104(b) starts with a thirty-calendar-day maximum, subject to agency discretion to extend it and a requirement that the opportunity be commensurate with the job. We the Doers recognizes that flexibility. Its recommendation instead begins with a thirty-to-ninety-day range related to the duties, permitting longer periods for unusual work. Its authors explain why longer deliverables can require sixty or ninety days for evaluation and useful assistance. The disagreement concerns the governing approach, not whether the proposal contains an exception.[14]

The authors' objection to substituting earlier help for assistance during the PIP is equally pertinent. They regard assistance during the improvement period as useful to both the employee

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[11] Doers Comment, p. 1; Report, pp. 6, 20–31. The categories of EEO complaints, grievances, accommodation requests and leave overlap; their totals cannot be added as distinct employees or independent events.

[12] 91 Fed. Reg. at 40,445–49, 40,451–52. The original notice's survey, experience and policy rationales remain part of the record; this supplement evaluates the additional support offered on reopening.

[13] Doers Comment, pp. 4–7.

[14] Proposed 5 C.F.R. § 432.104(b), 91 Fed. Reg. at 40,461; Doers Comment, pp. 4–5.

and the government. The report records three passed PIPs among fourteen performance matters. That small group establishes no national success rate. It does establish that successful improvement is an outcome within the very material OPM has asked commenters to consider.[15]

The authors also warn that losing the Douglas framework could create confusion and oppose eliminating penalty tables used as guideposts. Their position does not resolve the legal questions, and OPM may disagree with their recommendations. But it must explain its choices in light of the whole record, including the parts of that record that favor retaining useful guidance and assistance.[16]

V OPM should preserve useful safeguards and address the causes of delay

Performance improvement must remain a usable opportunity

Congress requires assistance in improving unacceptable performance and an opportunity to demonstrate acceptable performance before the specified action against an employee who continues to perform unacceptably. The merit-system principles likewise recognize both correction of inadequate performance and separation of employees who cannot or will not improve. Improvement is part of the statutory design for accountability.[17]

OPM should retain a job-specific opportunity whose duration permits the assigned work to be evaluated and assistance to be used. The proposed discretion to extend thirty days is relevant, but its existence does not explain why thirty days is the appropriate starting maximum across varied duties. The final rule should require the duration to reflect the work cycle, the standards being tested and the assistance reasonably needed, with reasons documented when an agency limits the period despite longer deliverables. The report authors' thirty-to-ninety-day recommendation is a concrete alternative OPM should evaluate, not an automatic substitute for the statutory inquiry.

OPM should also preserve assistance during the improvement opportunity. Proposed § 432.104(c) permits assistance before or during the period and states that its nature is not determinative of a subsequent action. Earlier guidance may help an employee, but it does not necessarily provide feedback on work performed under the improvement plan. The final rule should require useful assistance during the opportunity and explain how its adequacy can be evaluated as part of determining whether the opportunity was meaningful.[18]

Proposed § 432.105(a) separately requires a removal proposal following qualifying continued failure. A successfully completed PIP does not itself trigger that provision, and the proposal permits mitigation or rescission by a higher official or agency head. Those

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[15] Doers Comment, p. 5; Report, p. 9. Two employees who passed a PIP later transferred; those transfers are not additional initial outcomes.

[16] Doers Comment, p. 7; proposed 5 C.F.R. § 752.403(c)–(f), 91 Fed. Reg. at 40,465.

[17] 5 U.S.C. § 4302(c)(5)–(6); 5 U.S.C. § 2301(b)(6).

[18] Proposed 5 C.F.R. § 432.104(b)–(c), 91 Fed. Reg. at 40,461; Doers Comment, pp. 4–6.

qualifications do not explain why the proposing official must begin with removal rather than another justified response. OPM should preserve agency authority to select an appropriate action at the proposal stage and explain why it rejects that alternative if it adopts a mandatory proposal requirement.[19]

An answer deadline must permit an informed answer

The proposed ordinary reply periods are seven to ten calendar days for covered performance and adverse actions and one to five business days for short suspensions. The provisions retain extensions with different grounds and limits, including additional time necessary to comply with law, rule or regulation. We the Doers supports defining a period but takes no position on whether seven to ten days is reasonable. Its submission therefore supplies no endorsement of that specific window.[20]

Congress requires a reasonable opportunity to answer. For § 7513 actions, seven days is a minimum, not a finding that every record can reasonably be answered within seven or ten days. The constitutional pretermination opportunity is limited and takes available posttermination process into account; it need not resemble a trial. Its function nevertheless includes an initial check on whether the proposed action has reasonable grounds. A reply period must permit that work to occur.[21]

OPM should preserve an individualized reasonable-time standard, including extensions for the volume and complexity of the material, access to the agency's evidence, and information reasonably needed to answer. The answer period should be usable in practice. An employee must be able to review the evidence, obtain appropriate representation and identify material information bearing on the proposed action. Time during which necessary agency-held material is unavailable should not defeat that opportunity. The final rule should make those considerations part of the extension decision rather than rely on unexplained discretion to cure an otherwise unsuitable ordinary deadline.

OPM also should examine whether compressing that opportunity shifts work into later disputes rather than eliminating unnecessary work. The report does not quantify that effect, and we do not claim a measured increase in litigation. The point is that the analysis should include the foreseeable cost of discovering material facts after a decision instead of before it. OPM should likewise examine its assumption that faster procedures will increase supervisors'

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[19] Proposed 5 C.F.R. § 432.105(a), (c), (d)(4), 91 Fed. Reg. at 40,461–62; 5 U.S.C. §§ 4302(c)(6), 4303(a), (c).

[20] Proposed 5 C.F.R. §§ 432.105(d)(2), 752.203(c), 752.404(c)(1), 91 Fed. Reg. at 40,462, 40,464–66; Doers Comment, p. 6. Unlike § 752.404(c)(1), § 432.105(d)(2)(i) specifies consideration of a settlement or termination offer for its ordinary extension; additional-time exceptions remain.

[21] 5 U.S.C. § 7513(b)(2)–(3); 5 U.S.C. § 4303(b)(1)(B)–(C); 5 U.S.C. § 7503(b)(2)–(3); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545–46 (1985). These provisions address the answer and representation rights relevant to preparing it.

willingness to act: confidence that a process is fair and will produce a defensible decision may matter to that willingness. The new record does not test the competing effects.

The medical-answer provision requires particular care. Under proposed § 432.105(d)(2)(ii), failing to raise a relevant medical issue in the answer waives raising it before the decision takes effect, except where statute prohibits waiver. The provision separately requires documentation and permits a later examination whose results become part of the answer. Incomplete documentation is not itself the express waiver trigger. Nevertheless, the report does not analyze whether the answer window permits relevant conditions to be recognized and raised or what this waiver would accomplish. OPM should remove the waiver default and require consideration of material medical information received before the decision takes effect, consistent with governing statutes and examination rules.[22]

Restrictions on grievances require evidence about the review being displaced

Proposed § 752.203(f) generally excludes suspensions of fourteen days or less from negotiated grievance procedures unless the agency and OPM authorize an exception. It permits administrative grievances where agency policy authorizes them. The report's seven reported grievances do not identify a set of covered short-suspension disputes or provide their underlying dispositions. The authors' statement that no grievances were upheld does not establish that eliminating negotiated review improves decision quality or that the remaining avenues supply equivalent correction.[23]

OPM should retain access to negotiated grievance review for these suspensions unless it can justify the exclusion in relation to the actions and remedies actually affected. Any final explanation should identify which forums remain available to which employees, the issues those forums can decide, and the remedies they can provide. A general observation that employees can pursue other claims does not answer whether they can obtain review of the suspension's factual basis or penalty.

Penalty guidance and accurate records can support efficient management

Proposed § 752.403(e) reaches recommended as well as mandatory penalty tables, subject to its legal exception. OPM argues that tables can displace individual judgment and push penalties upward or downward. It should evaluate an alternative that addresses that concern: permit genuinely nonbinding guidance, require the penalty to be justified on the facts, and make clear that departures are permissible. The report authors' objection to losing guidance makes that

[22] Proposed 5 C.F.R. § 432.105(d)(2)(ii), 91 Fed. Reg. at 40,462. The waiver concerns the period before the decision takes effect and retains the statutory exception.

[23] Proposed 5 C.F.R. § 752.203(f), 91 Fed. Reg. at 40,464; Report, pp. 6, 20–21; Doers Comment, p. 1.

alternative especially relevant. Their preferred approach sometimes contemplates penalty floors; our recommendation here is to preserve advisory guidance without making it binding.[24]

MSPB's separately issued final rule retains reasonableness review and mitigation in §1201.56(b)(3). It takes effect October 5, 2026, and applies to Board appeals filed on or after that date. The concern here is the quality and consistency of the initial agency decision, not a claim that all appellate safeguards disappear. The reopening expressly disclaims reliance on the new action data for the part 1201 changes; this discussion addresses the report's treatment of guidance and preserves our original objection.[25]

Proposed §§ 432.108 and 752.407 restrict settlement-related personnel-record changes but retain specified exceptions. An agency determination of error can support correction during or after the action; the separate persuasive-evidence exception operates before the final decision. The remaining question is the effect on disputed post-decision matters that can reasonably settle without an agency determination of error. The report authors support the restrictions, but their submission supplies no agreements or disposition analysis distinguishing concealment of substantiated misconduct from correction of an unreliable action. OPM should preserve a documented route for justified negotiated resolutions at that stage while retaining accurate underlying records and an accurate account of the disposition.[26]

Practical support should be evaluated as an alternative to restricting employee participation

The report and its authors' comment identify practical improvements in professional support, accessible tools, performance standards and documentation. OPM already proposes more frequent and expanded supervisory training. We support useful training; its inclusion does not establish the separate necessity of restricting employee protections. OPM should pair useful training with timely HR and legal assistance and the resources needed to apply it. The authors themselves call for measuring support-office responsiveness and balancing timeliness with quality. Training should cover clear standards and contemporaneous documentation, useful assistance during improvement periods, recognition of accommodation and retaliation issues, and the assessment of an employee's answer. Supervisors should have timely access to qualified HR and legal staff when an actual issue arises. Shortening an employee's answer does not itself resolve a delay in obtaining that advice.[27]

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[24] 91 Fed. Reg. at 40,451, 40,465 (proposed 5 C.F.R. § 752.403(e)); Doers Comment, p. 7.

[25] 91 Fed. Reg. 56,549–50, 56,574 (Sept. 3, 2026) (final 5 C.F.R. §1201.56(b)(3)); 91 Fed. Reg. 58,387–88 (Sept. 15, 2026).

[26] Proposed 5 C.F.R. §§ 432.108(b)–(d), 752.407(b)–(d), 91 Fed. Reg. at 40,463, 40,466; Report, pp. 20–22, 27; Doers Comment, p. 6.

[27] Proposed 5 C.F.R. § 412.202(b), 91 Fed. Reg. at 40,461; Report, pp. 32–37; Doers Comment, pp. 3–4.

An effective evaluation would distinguish time spent awaiting internal review from time spent gathering evidence or providing an improvement opportunity. It would track successful improvement, appropriate discipline, decisions sustained or corrected on review, and the reasons for avoidable delay. Agencies have real resource constraints. OPM should compare the resources required for competent initial decisions with the cost of avoidable disputes and correction after the fact. It need not resolve every operational problem in one rule, or prove that training alone would solve them. It should assess these alternatives and explain why the additional restrictions on employee participation would address the identified problem more effectively, accounting for their effects on accuracy as well as speed.

VI OPM should withdraw the restrictions that the reopened record does not justify

Under *State Farm*, an agency must examine the relevant evidence and explain a rational connection between the facts found and the action chosen. It may exercise policy judgment under uncertainty. That flexibility does not dispense with consideration of important aspects of the problem, contrary evidence, and relevant alternatives. Here, the agency must address the useful work performed by the safeguards it would restrict, the report authors' disagreements, and the limits of the inference it draws from separation counts. General agreement that supervisors need support cannot substitute for that analysis.[28]

I therefore request withdrawal of the proposed rewrite. If OPM instead proceeds, it should revise the improvement and assistance provisions, retain individualized reasonable reply opportunities, remove the medical-waiver default, preserve short-suspension grievance review and nonbinding penalty guidance, and permit justified record corrections and resolutions. Before adopting restrictions premised on the new evidence, it should supply the comparable data and provision-specific analysis described above and provide a meaningful opportunity to comment on any materially new supporting analysis. Our original objections remain preserved; this supplement does not attribute the new action table to the part 715 or part 1201 changes, for which the notice disclaims reliance.[29]

Federal employees should meet legitimate standards. They should also have a meaningful opportunity to show that an accusation is mistaken, a proposed penalty is excessive, or their performance can improve. The government benefits when those opportunities work. OPM should improve the administration of that process and retain the protections that help it reach the right result.

Respectfully,
Shaun C. Southworth
Founder and CEO
Southworth PC

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[28] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 52 (1983); 5 U.S.C. § 706(2)(A).

[29] 91 Fed. Reg. at 58,387–88. The reopening requests comment on the proposal as informed by the new data and report and separately limits reliance on the new action data.