



DEPARTMENT OF JUSTICE

28 CFR Parts 0 and 27

[Docket No. JMD 154; AG Order No. 5618-2023]

RIN 1105-AB47

Whistleblower Protection for Federal Bureau of Investigation Employees

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Department of Justice (“Department”) proposes to update its regulations on the protection of whistleblowers in the Federal Bureau of Investigation (“FBI”). This update reflects changes resulting from an assessment conducted by the Department in response to Presidential Policy Directive-19 of October 10, 2012, “Protecting Whistleblowers with Access to Classified Information” (“PPD-19”), and the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016 (“FBI WPEA of 2016”). The proposed changes include updating the description of protected whistleblower disclosures and covered personnel actions to conform to the FBI WPEA of 2016; providing for more equal access to witnesses; and specifying that compensatory damages may be awarded as appropriate. The proposed changes also include new provisions to formalize practices that have been implemented informally, including providing for the use of acknowledgement and show-cause orders, providing access to alternative dispute resolution through the Department’s FBI Whistleblower Mediation Program, clarifying the authority to adjudicate allegations of a breach of a settlement agreement, and reporting information about those responsible for unlawful reprisals. The proposed regulation reiterates that the determinations by the Director of the Office of Attorney Recruitment and Management (“OARM”) must be independent and impartial. Finally, through this proposed rule, the Department is inviting specific comments on and recommendations for how the Department might further revise the regulations to increase fairness, effectiveness, efficiency,

and transparency, including to provide enhanced protections for whistleblowers, in addition to the proposed changes identified above.

DATES: Written comments and related material must be postmarked, and other comments and related material must be submitted, on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. You should be aware that the Federal eRulemaking Portal will accept comments submitted prior to midnight Eastern Time on the last day of the comment period.

ADDRESSES: You should submit comments identified by docket number using any one of the following methods:

- (1) Federal eRulemaking Portal: <http://www.regulations.gov>;
- (2) Mail or Delivery: Morton J. Posner, General Counsel, Justice Management Division, U.S. Department of Justice, 145 N St., NE, Suite 8E.500, Washington, D.C. 20530.

FOR FURTHER INFORMATION CONTACT: Morton J. Posner, General Counsel, Justice Management Division, telephone 202-514-34; or Hilary S. Delaney, Assistant Director, Office of Attorney Recruitment and Management, telephone 202-532-3188; e-mail: Morton.J.Posner@usdoj.gov or Hilary.S.Delaney@usdoj.gov.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials, if any. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at <http://www.regulations.gov> or by e-mail, mail, or hand delivery, but please use only one of these

means. If you submit a comment online, it will be considered received by the Department when you successfully transmit the comment. The Department recommends that you include your name and a mailing address, an email address, or a telephone number in the body of your document.

To submit your comment online, go to <http://www.regulations.gov>, type the docket number “JMD 154” in the “SEARCH” box, and click “SEARCH.” Click on “Submit a Comment” on the line associated with this rulemaking.

B. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name and address) that you voluntarily submit, unless the process described below is followed.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you want to submit personal identifying information (such as your name and address) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You also must place all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the Department may make the determination not to post all or part of that comment on <http://www.regulations.gov>.

Personal identifying information and confidential business information identified and

located as set forth above will be placed in the agency's public docket file but not posted online. If you wish to inspect the agency's public docket file in person by appointment, please see the paragraph above entitled "FOR FURTHER INFORMATION CONTACT."

C. Viewing Comments and Documents

To view comments, go to <http://www.regulations.gov>, type the docket number "JMD-154" in the "SEARCH" box, and click "SEARCH." Click on "Open Docket Folder" on the line associated with this rulemaking.

D. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or the individual signing the comment if comments are submitted on behalf of an association, business, labor union, etc.).

II. Executive Summary

On November 1, 1999, the Department issued a final rule entitled "Whistleblower Protection For Federal Bureau of Investigation Employees," published in the Federal Register at 64 FR 58782, establishing procedures under which (1) FBI employees or applicants for employment with the FBI may make disclosures of information protected by the Civil Service Reform Act of 1978, Pub. L. 95-454 ("CSRA"), and the Whistleblower Protection Act of 1989 ("WPA"), Pub. L. 101-12; and (2) the Department will investigate allegations by FBI employees and applicants for employment of reprisal for making such protected disclosures and take appropriate corrective action. The rule is codified at 28 CFR part 27.

On January 9, 2008, the Department updated part 27 as well as 28 CFR 0.29d primarily to conform to organizational changes brought about by a restructuring of relevant offices of the FBI. Technical Amendments to the Regulations Providing Whistleblower Protection for Federal Bureau of Investigation Employees, 73 FR 1493.

On October 10, 2012, President Barack Obama issued PPD-19, which, in part, directed that the Department prepare a report that (1) assesses the efficacy of the Department's FBI

whistleblower protection regulations found in 28 CFR part 27 in deterring the personnel practices prohibited in 5 U.S.C. 2303, and in ensuring appropriate enforcement of section 2303, and (2) describes any proposed revisions to those regulations that would increase their effectiveness in fulfilling the purposes of section 2303. PPD-19 at 5.

In response to this directive, the Office of the Deputy Attorney General conducted a comprehensive review of the Department's whistleblower regulations and historical experience with their operation.¹ As part of that process, the Department formed a working group, seeking participation from the other key participants in administering the Department's FBI whistleblower regulations—the FBI, OARM, the Office of the Inspector General, and the Office of Professional Responsibility—as well as the Justice Management Division. In addition, the Department consulted with the Office of Special Counsel (“OSC”) and FBI employees, as required by PPD-19. The Department also consulted with representatives of non-governmental organizations that support whistleblowers' rights and with private counsel for whistleblowers (collectively, whistleblower advocates).²

With respect to consultation with FBI employees, the FBI's representatives on the Department's working group consulted with various FBI entities: the Ombudsman; the Office of Equal Employment Opportunity Affairs; the Office of Integrity and Compliance; the Office of Professional Responsibility; the Human Resources Division; and the Inspection Division. The representatives also solicited the views of each of the FBI's three official advisory committees that represent FBI employees—the All-Employees Advisory Committee, the Agents Committee, and the Middle-Management Committee.

In April 2014, after completion of the PPD-19 review, the Department issued a report, “Department of Justice Report on Regulations Protecting FBI Whistleblowers” (“PPD-19

¹ On November 27, 2012, President Obama signed the Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199, (“WPEA of 2012”). The Department considered the WPEA of 2012 as part of its PPD-19 review.

² The Department convened a meeting with the following whistleblower advocate organizations: Project on Government Oversight; Kohn, Kohn & Colapinto; Government Accountability Project; American Civil Liberties Union; and a former chief counsel to the chairman of the Merit Systems Protection Board.

Report”). (A copy of this report is available at www.regulations.gov in connection with this rulemaking, or as provided above under the heading FOR FURTHER INFORMATION CONTACT.) The report considered the historical context of the Department’s efforts to protect FBI whistleblowers from reprisal and the Department’s current policies and procedures for adjudicating claims of reprisal against FBI whistleblowers; summarized and analyzed statistics regarding the use of these policies and procedures in recent years; and identified desired changes to existing policies and procedures as a result of this assessment.

The Department’s proposed rule reflects the PPD-19 Report’s findings and recommendations, as modified to comply with the FBI WPEA of 2016, discussed in further detail below in this preamble, which President Obama signed on December 16, 2016. In addition, through this notice of proposed rulemaking, the Department is inviting specific comments on and recommendations for how the Department might further revise the regulations to increase fairness, effectiveness, efficiency, and transparency, including to provide enhanced protections for whistleblowers.

III. Historical Background on FBI Whistleblower Protection

Legislative protection of civilian Federal whistleblowers from reprisal began in 1978 with passage of the CSRA, and was expanded by the WPA and the WPEA of 2012. Currently, Federal employees fall into three categories. Most civilian Federal employees are fully covered by the statutory regime established by the CSRA, which permits them to challenge alleged reprisals through the OSC and the Merit Systems Protection Board (“MSPB”). By contrast, some Federal agencies that deal with intelligence are expressly excluded from the whistleblower protection scheme established by these statutes.

The FBI is in an intermediate position: Although it is one of the agencies expressly excluded from the scheme established for Federal employees generally, its employees nevertheless are protected by a separate statutory provision and special regulations promulgated pursuant to that provision, which forbid reprisals against FBI whistleblowers and provide an

administrative remedy within the Department. *See* 28 CFR part 27.

To elaborate, the CSRA sets forth “prohibited personnel practices,” which are a range of personnel actions that the Federal Government may not take against Federal employees. One such prohibited personnel practice is retaliating against an employee for revealing certain agency information. Specifically, the CSRA originally made it illegal for an agency to take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for disclosure of information that the employee or applicant reasonably believed evidenced a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Pub. L. 95-454, sec. 101(a), codified at 5 U.S.C. 2302(b)(8). The CSRA also created the MSPB and OSC to enforce the prohibitions on specified personnel practices.

The CSRA, however, expressly excluded from this scheme the FBI, the Central Intelligence Agency, various intelligence elements of the Department of Defense, and any other executive agency or unit thereof as determined by the President with the principal function of conducting foreign intelligence or counterintelligence activities. Pub. L. 95-454, sec. 101(a), codified at 5 U.S.C. 2302(a)(2)(C)(ii).

For the FBI alone, the CSRA specifically prohibited taking a personnel action against employees or applicants for employment as a reprisal for disclosing information that the employee or applicant reasonably believed evidenced a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Id.*, codified at 5 U.S.C. 2303(a)(1), (2). The CSRA defined a “personnel action” for the purpose of the FBI-specific prohibition as any action specifically described in clauses (i) through (x) of 5 U.S.C. 2302(a)(2)(A), taken with respect to an employee in—or an applicant for—a position other than one of a confidential, policy-determining, policymaking, or policy-advocating character. *Id.*, codified at 5 U.S.C. 2303(a). In addition, the CSRA limited the protection of the FBI-specific prohibition to only those disclosures that the

FBI employee made through narrowly defined internal channels—*i.e.*, to the Attorney General or the Attorney General’s designee. *Id.* Finally, the CSRA directed the President to provide for the enforcement of the provision relating to FBI whistleblowers in a manner consistent with applicable provisions of 5 U.S.C. 1206, the section of the CSRA that originally set out the responsibilities of the OSC, the MSPB, and agency heads in response to a whistleblower complaint and provided for various remedies. *Id.*, codified at 5 U.S.C. 2303(c).

In April 1980, the Department published a final rule implementing section 2303. The rule provided, among other things, for a stay of any personnel action if there were reasonable grounds to believe that the personnel action was taken, or was to be taken, as a reprisal for a disclosure of information by the employee to the Attorney General or the Attorney General’s designee that the employee reasonably believed evidenced wrongdoing covered by section 2303. Office of Professional Responsibility; Protection of Department of Justice Whistleblowers, 45 FR 27754, 27755 (Apr. 24, 1980).

In 1989, the statutory scheme for most civilian employees changed in some respects when Congress passed the WPA, which significantly expanded the avenues of redress generally available to civilian Federal employees. In doing so, it replaced section 1206 with sections 1214 and 1221; these new sections set forth the procedures under which OSC would investigate prohibited personnel practices and recommend or seek corrective action, and the circumstances under which an individual right of action before the MSPB would be available. Pub. L. 101-12, sec. 3. Consistent with this change, the WPA amended section 2303, governing FBI whistleblowers, to replace the requirement that enforcement of whistleblower protections be consistent with applicable provisions of section 1206 with a requirement that enforcement be consistent with applicable provisions of newly-added sections 1214 and 1221. Pub. L. 101-12, sec. 9(a)(1).

The WPA also amended the regime generally applicable to civil service employees by revising section 2302 to protect only disclosures of information the employee reasonably

believes evidences “gross mismanagement,” rather than “mismanagement,” as originally provided by the CSRA. Pub. L. 101-12, sec. 4(a). However, the WPA did not make a corresponding change to section 2303, the statute applicable to FBI whistleblowers.

On April 14, 1997, President William J. Clinton issued a memorandum delegating to the Attorney General the functions concerning employees of the FBI vested in the President by the CSRA, and directing the Attorney General to establish appropriate processes within the Department to carry out these functions. Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, 62 FR 23123 (Apr. 28, 1997). In November 1999, the Department published a final rule establishing procedures under which FBI employees or applicants for employment may make disclosures of wrongdoing. 64 FR 58782 (Nov. 1, 1999). The rule created a remedial scheme within the Department through which FBI employees can seek redress when they believe they have suffered reprisal for making a protected disclosure. Subject to minor amendments in 2001 and 2008, the rule, codified at 28 CFR part 27, remains in force.

On November 27, 2012, the month following President Obama’s issuance of PPD-19, he signed the WPEA of 2012 into law. That act, among other things, amended 5 U.S.C. 1214 and 5 U.S.C. 1221 to authorize awards of compensatory damages. Although the FBI is expressly excluded from coverage under these statutory provisions and is instead covered by 5 U.S.C. 2303, section 2303 directs that the President ensure enforcement of section 2303 in a “manner consistent with the applicable provisions of sections 1214 and 1221.” 5 U.S.C. 2303(c). The WPEA of 2012 also expanded the number of prohibited personnel actions set out in section 2302(a)(2), but made no corresponding change to the cross-reference in section 2303(a). Accordingly, the Department has considered the WPEA of 2012’s changes to sections 1214, 1221, and 2302(a) and their impact on the FBI’s whistleblower protection program under section 2303 and has concluded that corresponding technical amendments to the current regulations are appropriate, as described further below.

On December 16, 2016, President Obama signed Public Law 114-302, the FBI WPEA of 2016. That statute made two changes to the statutory whistleblower protection scheme applicable to FBI employees. First, it expanded the list of recipients set forth in 5 U.S.C. 2303(a) to whom a disclosure could be made to be protected (assuming the substantive requirements are met). Protected disclosures now may be made to an employee's supervisor in the employee's direct chain of command, up to and including the Attorney General; the Inspector General; the Department's Office of Professional Responsibility; the FBI Office of Professional Responsibility; the FBI Inspection Division; Congress, as described in 5 U.S.C. 7211; OSC; or an employee designated to receive such disclosures by any officer, employee, office, or division of the listed entities. *See* Pub. L. 114-302, sec. 2.

Second, the FBI WPEA of 2016 changed the substantive requirement for a protected disclosure, requiring that the disclosure be one that the discloser reasonably believes evidences *any* violation (previously, "a violation") of any law, rule, or regulation, or *gross* mismanagement (previously, just "mismanagement"), in addition to the previous (and unchanged) provision for disclosures of a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Id.*

And most recently, Public Law 117-263, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, amended section 2303, specifically allowing FBI employees to appeal a final determination or corrective action order to the MSPB pursuant to section 1221. *See* Pub. L. 117-263, sec. 5304(a), codified at 5 U.S.C. 2303(d).

The changes contemplated by this proposed rule are intended to (1) improve, pursuant to PPD-19 and consistent with the Department's recommendations in the PPD-19 Report, the internal investigation and adjudication of whistleblower retaliation claims by FBI employees and applicants for employment under the remedial scheme initially established in 1999 and codified at 28 CFR parts 0 and 27; and (2) ensure that this process is consistent with changes enacted by the WPEA of 2012 and the FBI WPEA of 2016.

Finally, through this notice of proposed rulemaking, the Department is inviting specific comments on and recommendations for how the Department might further revise the regulations to increase fairness, effectiveness, efficiency, and transparency, including to provide enhanced protections for whistleblowers, in addition to the proposed changes.

IV. Proposed Changes in This Rule

A. Revising the Description of a Protected Disclosure in Part 0.29d to Conform to the Requirements of the FBI WPEA of 2016

The Department proposes amendments to 28 CFR 0.29d to conform to the substantive requirements of a protected disclosure found in 5 U.S.C. 2303(a)(2)(A) and (B), as amended by the FBI WPEA of 2016. Specifically, the Department proposes that, in the first sentence of 28 CFR 0.29d(a), the phrase “a violation of any law, rule, or regulation, or mismanagement” be changed to “any violation of any law, rule, or regulation, or gross mismanagement” to conform to the statutory text. The Department invites comments on this proposed change.

B. Proposed Changes to Part 27

1. Expanding the Definition of Persons to Whom a Protected Disclosure Must Be Made to Conform to the Requirements of the FBI WPEA of 2016

To conform to the requirements of the FBI WPEA of 2016, the Department proposes to expand the set of offices and officials to whom a “protected disclosure” must be made. Under the current rule, a disclosure is considered protected if (1) its content qualifies for protection, and (2) it was made to one of these identified entities or individuals:

- the Department’s Office of Professional Responsibility;
- the Department’s Office of the Inspector General;
- the FBI Office of Professional Responsibility;
- the FBI Inspection Division Internal Investigations Section;
- the Attorney General;
- the Deputy Attorney General;

- the Director of the FBI;
- the Deputy Director of the FBI; or
- the highest ranking official in any FBI field office.

See 28 CFR 27.1(a). The proposed rule would expand this list to comply with the changes made by the FBI WPEA of 2016. *See* Pub. L. 114-302, sec. 2. Specifically, the proposed rule would require that, to be protected, a disclosure must be made to:

- a supervisor in the direct chain of command of the employee, up to and including the Attorney General;
- the Inspector General;
- the Department's Office of Professional Responsibility;
- the FBI Office of Professional Responsibility;
- the FBI Inspection Division;
- Congress, as described in section 7211;
- OSC; or
- an employee of any of the above entities, when designated by any officer, employee, office, or division thereof for the purpose of receiving such disclosures.

In addition, in order to emphasize the necessity of making a disclosure to a designated recipient for it to be protected (where it meets the substantive requirements), the Department proposes adding paragraph (c) in § 27.1, stating expressly that a disclosure must be made to one of the offices or officials specified in paragraph (a) in § 27.1 in order to qualify as a protected disclosure under part 27. This change would not alter the substantive requirements of the current § 27.1, and does not restrict the expanded list of offices and officials to whom a disclosure may be made as described immediately above, but is added to avoid any potential misunderstanding regarding this key procedural element of a protected disclosure covered by part 27. FBI whistleblowers are only entitled to statutory protection from reprisals for making

protected disclosures when they make disclosures to offices or officials specifically listed in the FBI WPEA of 2016. To ensure FBI whistleblowers are fully protected, this change clearly identifies the expanded list of offices and officials to whom disclosures must be made. The Department invites comments on this proposed change.

2. Revising the Substantive Requirements of a Protected Disclosure to Conform to the Requirements of the FBI WPEA of 2016.

The Department proposes amendments to 28 CFR 27.1(a)(1) and (a)(2) to conform to the substantive requirements of a protected disclosure found in 5 U.S.C. 2303(a)(2)(A) and (B), as amended by the FBI WPEA of 2016. Specifically, the Department proposes that 28 CFR 27.1(a)(1) be changed from “A violation of any law, rule, or regulation” to “Any violation of any law, rule, or regulation.” The Department also proposes that, for the same reason, “Mismanagement” in 28 CFR 27.1(a)(2) be removed and replaced with “Gross mismanagement.” The Department invites comments on this proposed change.

3. Revising the Definition of “Prohibited Personnel Practice” Following Enactment of the WPEA of 2012.

The Department also proposes an amendment to 28 CFR 27.2(b) to conform § 27.2(b)’s definition of “personnel action” to the definition now found in 5 U.S.C. 2302(a)(2)(A). Section 2303 provides that, “[f]or the purpose of this subsection, ‘personnel action’ means any action described in clauses (i) through (x) of section 2302(a)(2)(A).” When section 2303 was first enacted, section 2302(a)(2)(A) contained only ten clauses, designated (i) through (x), and thus the definition of “personnel action” was identical for both sections. Clause (x) was a “catch-all” provision covering “any other significant change in duties, responsibilities, or working conditions.” In 1994, Congress added an additional personnel action to section 2302(a)(2)(A), a decision to order psychiatric testing or examination. *See* Pub. L. 103-424, sec. 5(a) (1994). The additional personnel action was designated as clause (x), and the catch-all provision was redesignated as clause (xi). *Id.* sec. 5(a)(2). This change did not alter section 2303, which

continued to refer only to “clauses (i) through (x) of section 2302(a)(2)(A).” Pursuant to the Attorney General’s authority under 5 U.S.C. 301 to “prescribe regulations for the government of [the] department[and] the conduct of its employees,” the Department accepted commenters’ recommendations to define “personnel action” to include all eleven personnel actions in section 2302(a)(2)(A), including the catch-all provision, in its 1999 final rule, as codified at 28 CFR 27.2(b). *See* 64 FR 58784–85

Several years after this change, the WPEA of 2012 added a twelfth personnel action to section 2302(a)(2)(A): “the implementation or enforcement of any nondisclosure policy, form, or agreement” (the nondisclosure provision). Pub. L. 112-199, sec. 104(a)(2). This new provision was designated as clause (xi), while the catch-all provision, formerly clause (xi), became clause (xii).

The Department proposes to define “personnel action” in § 27.2(b) to include all twelve personnel actions currently listed in section 2302(a)(2)(A), including the nondisclosure provision added by the WPEA of 2012. Doing so will ensure that FBI employees making protected disclosures are shielded against the same adverse personnel actions as other Federal civilian employees, which appears to have been the underlying purpose of incorporating section 2302’s definition of “personnel action” into section 2303. The Attorney General has the authority to incorporate the nondisclosure provision into the definition of “personnel action” in § 27.2(b) pursuant to 5 U.S.C. 301, which authorizes the Attorney General to “prescribe regulations for the government of [the] department[and] the conduct of its employees.” *See In re Boeh*, 25 F.3d 761, 763 (9th Cir. 1994) (explaining that section 301 permits the Department of Justice to regulate “the conduct of employees, the performance of the agency’s business, and the use of its records”). The Attorney General invoked the same authority in the 1999 final rule discussed above. 64 FR 58784–85. The net effect of the proposed revisions to the definition of “personnel action” in § 27.2(b) will be to retain the catch-all provision, while also including the non-disclosure provision added by the WPEA of 2012. The Department invites comments on

this proposed change.

4. Equalizing Access to Witnesses

During the PPD-19 review, whistleblower advocate groups raised concerns that, in an unspecified number of cases, the FBI has been able to obtain evidence from FBI management officials or employees as witnesses, either through affidavits or testimony at a hearing, but that complainants were unable to obtain similar access to FBI witnesses, particularly former employees. Because the Director of OARM (“OARM Director”) lacks the authority to compel attendance at a hearing, appearance at a deposition, or the production of documentary evidence from individuals not currently employed by the Department, the groups asked the Department to consider a regulatory provision that would help all parties equalize access to witnesses.

Therefore, the Department proposes adding a sentence to § 27.4(e)(3) to give the OARM Director the discretion to prohibit a party from adducing or relying on evidence from a person whom the opposing party does not have an opportunity to examine or to give less weight to such evidence. The Department invites comments on this proposed change.

5. Improving Case Processing by Use of Acknowledgement and Show-Cause Orders.

The Department proposes to formalize the use of acknowledgement and show-cause orders by the OARM Director to assist in the management and adjudication of whistleblower reprisal claims.

Under OARM’s current procedures, 28 CFR 27.4(c)(1), when a complainant files a request for corrective action (“RCA”) with OARM, the OARM Director is to notify the FBI of the RCA—usually by forwarding the RCA to the FBI—and provide the FBI 25 calendar days to file its response. In some instances, however, the allegations in a complainant’s RCA are insufficient to allow either the OARM Director or the FBI to reasonably construe the specific claims raised. In such cases, the agency’s usual practice is for the OARM Director to issue an order requiring the complainant to supplement the RCA to specifically address the elements of a whistleblower claim necessary for OARM’s jurisdiction. The OARM Director then forwards

the RCA, as supplemented, to the FBI for a response. The complainant is afforded an opportunity to file a reply to the FBI's response, and the FBI is afforded time to file a surreply. The OARM Director then makes a jurisdictional determination regarding the complainant's RCA. If the OARM Director finds that it has jurisdiction to consider all or some of the complainant's claims, the parties are so notified and are directed to engage in relevant discovery.

The MSPB's analogous procedures illustrate how the use of acknowledgment and show-cause orders may expedite the process. *See* Merit Sys. Protection Bd., Judges' Handbook 19–21 (2019), <https://www.mspb.gov/appeals/files/ALJHandbook.pdf>. At the MSPB, an administrative judge must ordinarily issue an acknowledgment order within three business days of receipt of an appeal; that order acknowledges receipt of the appeal and informs the parties of the MSPB's case processing procedures regarding, for example, designation of a representative, discovery, and settlement. *Id.* at 20.

The proposed amendments at § 27.4(f) would formalize the OARM Director's existing use of acknowledgment and show-cause orders similar to those issued by the MSPB. The current language pertaining to OARM's initial case processing procedures in 28 CFR 27.4(c)(1) would be revised accordingly to reflect the practice used by the OARM Director in issuing an acknowledgment order, which would also be reflected in a new paragraph (f) in § 27.4. The new paragraph (f) would also formalize the practice of issuing a show-cause order where the OARM Director determines that there is an initial question of jurisdiction and would contain procedures relating thereto. The Department invites comments on this proposed change.

6. Awarding Compensatory Damages.

In directing agency heads to consider corrective actions in cases in which reprisal for whistleblowing is found to have occurred, PPD-19 provided that corrective action may include compensatory damages, to the extent authorized by law. PPD-19 at 2. Accordingly, the Department proposes amending paragraph (g) of § 27.4 to provide that the OARM Director may award compensatory damages to the extent authorized by law, in addition to other available

relief. Currently, under § 27.4(f), permissible OARM corrective action includes: placing the Complainant, as nearly as possible, in the position he would have been in had the reprisal not taken place; reimbursement for attorney's fees, reasonable costs, medical costs incurred, and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages. The Department invites comments on this proposed change.

7. Reporting Findings of Unlawful Reprisal.

In drafting the PPD-19 Report, the Department considered a recommendation that any final decision that includes a finding of unlawful reprisal be forwarded to the appropriate authority for consideration of whether disciplinary action is warranted against the officials responsible for the reprisal. In 2013, the OARM Director implemented a policy of forwarding to the FBI Office of Professional Responsibility, the FBI Inspection Division, and the FBI Director a copy of the final determination in cases where the OARM Director finds reprisal. That decision includes citations to the supporting evidence of record as well as the names of the officials found to be responsible for the reprisal. The Department proposes to formalize this process through the addition of paragraph (h) in § 27.4. The Department invites comments on this proposed change.

8. Proposed Statement: Independence and Impartiality of OARM Determinations.

During the Department's PPD-19 review, whistleblower advocates expressed concern with the internal Departmental adjudication of FBI reprisal cases brought under part 27. In drafting the PPD-19 Report, the Department considered whether to amend part 27 to make explicit what has always been implicit regarding the independence and impartiality of the determinations made by the OARM Director. The Department thus proposes adding language to § 27.4(e)(1) to note expressly that the determinations made by the OARM Director shall be independent and impartial. The Department invites comments on this proposed change.

9. Providing Access to Alternative Dispute Resolution ("ADR").

As a result of its review under PPD-19, the Department determined that ADR should be

made more readily available in whistleblower cases because ADR can focus the parties' attention at early stages of a proceeding, enabling each side to learn more about the other side's goals in a manner that may facilitate early resolution. PPD-19, at 11. Accordingly, the Department created a voluntary mediation program for FBI whistleblower cases using the existing Department of Justice Mediator Corps ("DOJMC").

The Department's Equal Employment Opportunity ("EEO") community created the DOJMC Program in 2009 as a means of informal resolution to address and, when possible, resolve workplace disputes. Although the program focuses on EEO issues, the mediators are available to help resolve any type of dispute. The FBI Office of Equal Employment Opportunity Affairs is responsible for the operational management of the DOJMC Program, the scope of which is Department-wide. The DOJMC currently has approximately 70 collateral-duty mediators. Roughly two-thirds are FBI employees; the remaining mediators are drawn from across other Department components. Current mediator resources are expected to be sufficient to make available a mediator from outside the FBI should the complainant so desire.

The Department launched the mediation program for FBI whistleblower cases in April 2014, staffed by a cadre of skilled mediators trained by the Department for that purpose. The Department proposes to formalize inclusion of the ADR program by amending part 27 to add § 27.7, which would provide that the complainant may request ADR from the time of the filing of the initial claim with the office that will conduct the investigation ("Conducting Office"), *see* 28 CFR 27.3(c), and at any subsequent point thereafter throughout the process. Under proposed new paragraph (b) of § 27.7, if the Complainant elects ADR, the FBI, represented by the Office of General Counsel, will participate. When ADR is elected, under proposed new paragraph (c) of § 27.7, proceedings will be stayed upon transmittal of the matter to the DOJMC Program office. The initial period of the stay will be 90 days and may be extended for up to 45 additional days upon joint request from the parties to the office before which the matter is stayed. Additional requests for an extension of the stay would be available only by grant of the OARM

Director, regardless of the office before which the matter is pending, and only upon joint request by the parties showing good cause. The Department invites comments on this proposed change.

10. Authority of the OARM Director to Adjudicate Allegations of a Breach of a Settlement Agreement.

The Department has concluded that the OARM Director should adjudicate allegations of a breach of any settlement agreement reached in proceedings and in a forum under this part 27. Arguably, the OARM Director would have the authority to do so under the change proposed for § 27.4(e)(4) because the provision includes the broad authority to manage the adjudication of claims of reprisal. The Department nonetheless proposes to add § 27.8 making clear that the OARM Director has authority to adjudicate allegations of a breach of a settlement agreement reached in proceedings and in a forum under this part 27. In addition, § 27.8 would state that, in carrying out the function of adjudicating claims of a breach of such settlement agreements, the OARM Director shall exercise the authorities granted under the change proposed for § 27.4(e)(4), in accordance with any procedures the OARM Director may establish to facilitate the efficient discharge of that function. The new § 27.8 also would provide the parties with a right of review by the Deputy Attorney General of any decision by the OARM Director on a breach of settlement claim. The Department invites comment on this proposed change.

11. Invitation to Submit Comments and Recommendations to Enhance Fairness, Efficiency and Transparency Regarding Whistleblower Activity, Including to Provide Enhanced Protections for Whistleblowers.

The Department believes that the process by which it adjudicates allegations that the FBI has retaliated against whistleblowers should be as fair, effective, efficient, and transparent as possible. The Department therefore invites specific comments on and recommendations for how the Department might revise part 27 to increase fairness, effectiveness, efficiency, and transparency, including to provide enhanced protections for whistleblowers, in addition to the proposed changes described above.

V. Regulatory Analyses

In developing this proposed rule, the Department considered numerous statutes and executive orders applicable to rulemaking. The Department's analysis of the applicability of those statutes and executive orders to this rulemaking is summarized below.

A. Executive Orders 12866 (Regulatory Planning and Review) and EO 13563 (Improving Regulation and Regulatory Review)

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563. The proposed rule proposes procedural changes to the existing regulatory framework for resolving claims of whistleblower retaliation by FBI employees and applicants. The proposed changes will not materially affect the number of claims or the time, cost, or resources required to address them. The proposed rule if adopted would not have an annual effect on the economy of \$100 million or more, adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; would not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; and would not raise novel legal or policy issues. Accordingly, this rule does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866. The Office of Management and Budget has not reviewed this rule under these Orders.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–12, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. 5 U.S.C. 601.

The Department certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed rule addresses the Department's internal process for addressing allegations of retaliation for protected whistleblowing by FBI employees and applicants. It has no application to small entities as defined above. The proposed rule, if adopted, would perhaps have tangential, indirect, and transitory impact on law firms and advocacy organizations representing FBI whistleblowers inasmuch as they would have to become familiar with the changes in procedure.

If your business, organization, or governmental jurisdiction qualifies as a small entity and you believe this rule would have a significant economic impact on it, please submit a comment (see ADDRESSES list, page 2, *supra*) explaining why you think your entity qualifies and how and to what degree this rule would economically affect it.

C. Small Business Regulatory Enforcement Fairness Act of 1996

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), the Department will assist small entities in understanding this proposed rule. If you believe the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the persons listed in the FOR FURTHER INFORMATION CONTACT section, above.

D. Paperwork Reduction Act

This proposed rule will not call for a new collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–20. Specifically, the existing and proposed rules regulate administrative actions or investigations involving an agency against specific individuals or entities and thus fall outside the scope of the Paperwork Reduction Act. See 44 U.S.C. 3518(c)(1)(B)(ii).

E. Executive Order 13132 (Federalism)

A rule has federalism implications under Executive Order 13132 if it has a substantial direct

effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. E.O. 13132, sec. 1(a). The Department has analyzed this proposed rule under that Order and determined that this rule does not have federalism implications.

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–38, requires Federal agencies to determine whether a rule, if promulgated, will result in the expenditure by State, local, or tribal government, in the aggregate, or by the private sector, of \$100 million (adjusted for inflation) or more in any one year. 2 U.S.C. 1532(a). This proposed rule would not require or result in expenditures by any of the above-named entities. The rule addresses the Department’s internal procedures related to protected disclosures.

G. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule does not have tribal implications under Executive Order 13175 because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

I. Congressional Review Act

The reporting requirements of the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996), 5 U.S.C. 801–08, do not apply to the proposed rule. First, this rule relates primarily to agency management, personnel, and organization. 5 U.S.C. 804(3)(B). Second, to the extent that the rule affects non-agency parties such as applicants for employment and former employees, these parties are a small subset of the cases subject to the proposed rule, and the rule does not substantially affect such parties’

substantive rights or obligations. *Id.* 803(3)(C). Instead, the rule makes changes primarily related to administrative processing of whistleblower retaliation cases. This action is accordingly not a “rule” as that term is used by the Congressional Review Act, *see* 5 U.S.C. 804(3), and the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects

28 CFR Part 0

Authority delegations (Government agencies), Government employees, National defense, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

28 CFR Part 27

Government Employees; Justice Department; Organization and functions (Government agencies); Whistleblowing.

Authority and Issuance

For the reasons stated above, the Department of Justice proposes to amend 28 CFR parts 0 and 27 as follows:

PART 0 ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

§ 0.29d [Amended]

2. Amend § 0.29d, in paragraph (a), by:
 - a. Removing the words “a violation” and adding in their place the words “any violation”;
 - b. Removing the word “mismanagement” and adding in its place the words “gross mismanagement”.

PART 27—WHISTLEBLOWER PROTECTION FOR FEDERAL BUREAU OF INVESTIGATION EMPLOYEES

3. The authority citation for part 27 is revised to read as follows:

Authority: 5 U.S.C. 301, 3151; 28 U.S.C. 509, 510, 515–519; 5 U.S.C. 2303; President’s Memorandum to the Attorney General, Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, 3 CFR p. 284 (1997); Presidential Policy Directive 19, “Protecting Whistleblowers with Access to Classified Information” (October 10, 2012).

4. Amend § 27.1 by:

a. Revising the introductory text of paragraph (a)

b. In paragraph (a)(1), removing the words “A violation,” and adding in their place “Any violation”;

c. In paragraph (a)(2), removing the word “Mismanagement,” and adding in its place “Gross mismanagement”;

d. Adding paragraph (c).

The revisions and addition read as follows.

§ 27.1 Making a protected disclosure.

(a) When an employee of, or applicant for employment with, the Federal Bureau of Investigation (FBI) (FBI employee) makes a disclosure of information to a supervisor in the direct chain of command of the employee, up to and including the Attorney General; to the Department of Justice’s (Department’s) Office of the Inspector General (OIG), the Department’s Office of Professional Responsibility (OPR), the FBI Office of Professional Responsibility (FBI OPR), or the FBI Inspection Division (FBI-INSID) (collectively, Receiving Offices); to Congress as described in 5 U.S.C. 7211; to the Office of Special Counsel; or to an employee of any of the foregoing entities when designated by any officer, employee, office, or division named in this subsection for the purpose of receiving such disclosures, the disclosure will be a “protected disclosure” if the person making it reasonably believes that it evidences:

* * * * *

(c) To be a “protected disclosure” under this part, the disclosure must be made to an office or official specified in paragraph (a) of this section.

§ 27.2 [Amended]

5. Amend § 27.2, in paragraph (b), by removing “(xi)” and adding in its place “(xii)”.

6. Amend § 27.4 by:

a. In paragraph (a), removing the term “paragraph (e)” and adding in its place “paragraphs (e) and (f)”;

b. Revising the second sentence of paragraph (c)(1);

c. Adding a sentence at the end of paragraph (e)(1), revising paragraph (e)(3), and adding paragraph (e)(4); and

d. Revising paragraphs (f) and (g);

e. Adding paragraphs (h) and (i).

The revisions and the additions read as follows:

§ 27.4 Corrective action and other relief; Director, Office of Attorney Recruitment and Management.

* * * * *

(c) * * *

(1) * * * Within 5 business days of the receipt of the request, the Director shall issue an Acknowledgment Order in accordance with paragraph (f)(1) of this section. * * *

* * * * *

(e)(1) * * * The determinations made by the Director shall be independent and impartial.

(3) In making the determinations required under this paragraph, the Director may hold a hearing at which the Complainant may present evidence in support of his or her claim, in accordance with such procedures as the Director may adopt. The Director is hereby authorized to compel the attendance and testimony of, or the production of documentary or other evidence from, any person employed by the Department if doing so appears reasonably calculated to lead to the discovery of admissible evidence, is not otherwise prohibited by law or regulation, and is not unduly burdensome. The Director may prohibit a party from adducing or relying on evidence from a person whom the opposing party does not have an opportunity to examine, or the Director may give less weight to such evidence. Any privilege available in judicial and administrative proceedings relating to the disclosure of documents or the giving of testimony shall be available before the Director. All assertions of such privileges shall be decided by the Director. The Director may, upon request, certify a ruling on an assertion of privilege for review by the Deputy Attorney General.

(4) Subject to paragraph (f) of this section, the Director may establish such procedures as he or she deems reasonably necessary to carry out the functions assigned under this paragraph.

(f)(1) Within 5 business days of receipt by the Director under paragraph (a) of this section of a report from a Conducting Office, or a request for corrective action from a Complainant under paragraph (c)(1) of this section, the Director shall issue an Acknowledgement Order that:

- (i) Acknowledges receipt of the report or request;
- (ii) Informs the parties of the relevant case processing procedures and timelines, including the manner of designation of a representative, the time periods for and methods of discovery, the process for resolution of discovery disputes, and the form and method of filing of pleadings;
- (iii) Informs the parties of the jurisdictional requirements for full adjudication of the request; and
- (iv) Informs the parties of their respective burdens of proof.

(2) In cases where the Director determines that there is a question about the Director's jurisdiction to review a request from the Complainant, the Director shall, simultaneously with the issuance of the Acknowledgement Order, issue a Show-Cause Order explaining the grounds for such determination and directing that the Complainant, within 10 calendar days of receipt of such order, submit a written statement, accompanied by evidence, to explain why the request should not be dismissed for lack of jurisdiction. The Complainant's written statement must provide the following information as necessary to address the jurisdictional question or as otherwise directed:

- (i) The alleged protected disclosure or disclosures;
- (ii) The date on which the Complainant made any such disclosure;
- (iii) The name and title of any individual or office to whom the Complainant made any such disclosure;
- (iv) The basis for the Complainant's reasonable belief that any such disclosure evidenced any violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety;
- (v) Any action the FBI allegedly took or failed to take, or threatened to take or fail to take, against the Complainant because of any such disclosure, the name and title of all officials responsible for each action, and the date of each action;
- (vi) The basis for the Complainant's belief that any official responsible for an action knew of any protected disclosure, and the date on which the official learned of the disclosure;
- (vii) The relief sought; and
- (viii) The date the reprisal complaint was filed with the Investigative Office and the date on which the Conducting Office notified the Complainant that it was terminating its investigation into the complaint, or if the Complainant has not received such notice, evidence that 120 days have passed since the Complainant filed a complaint of reprisal with the Investigative Office.

(3) The FBI shall file a reply to the Complainant's response to the Show-Cause Order within 20 calendar days of receipt of such reply.

(i) The reply shall address issues identified by the Director in the Show-Cause Order and matters raised in the Complainant's response to that order under paragraph (f)(2) of this section, and shall include: a statement identifying any FBI actions taken against the Complainant and the reasons for taking such actions; designation of and signature by the FBI legal representative; and any other documents or information requested by the Director.

(ii) The reply may also include any and all documents contained in the FBI record of the action or actions.

(4) After receipt of the FBI's response, the record on the jurisdictional issue will close, absent a request from either party establishing exigent circumstances requiring the need for the presentation of additional evidence or arguments.

(g) If the Director orders corrective action, such corrective action may include: placing the Complainant, as nearly as possible, in the position he or she would have been in had the reprisal not taken place; reimbursement for attorney's fees, reasonable costs, medical costs incurred, and travel expenses; back pay and related benefits; compensatory damages to the extent authorized by law; and any reasonable and foreseeable consequential damages.

(h) Whenever the Director determines that there has been a reprisal prohibited by § 27.2 of this part, the Director, in addition to ordering any corrective action as authorized by § 27.4(g), above, shall forward to the FBI OPR and the FBI-INSD, with a copy to the Director of the FBI, a written summary of the Director's findings of reprisal, the evidence supporting the findings, and the officials responsible for the reprisal. FBI OPR shall make a determination of whether disciplinary action is warranted against any officials the Director identified as responsible for the reprisal.

(i) If the Director determines that there has not been any reprisal prohibited by § 27.2, the Director shall report this finding in writing to the Complainant, the FBI, and the Conducting

Office.

7. Revise § 27.5 to read as follows:

§ 27.5 Review.

(a) Within 30 calendar days of a finding of a lack of jurisdiction, a final determination on the merits, or corrective action ordered by the Director, the Complainant or the FBI may request review by the Deputy Attorney General of that determination or order. The Deputy Attorney General shall set aside or modify the [Director](#)'s actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. The Deputy Attorney General has full discretion to [review](#) and modify corrective action ordered by the [Director](#), provided, however that if the Deputy Attorney General upholds a finding that there has been a reprisal, then the Deputy Attorney general shall order appropriate corrective action.

(b) The parties may not file an interlocutory appeal to the Deputy Attorney General from a procedural ruling made by the Director during proceedings pursuant to section 27.4 of this part. The Deputy Attorney General has full discretion to review such rulings by the Director during the course of reviewing an appeal of the Director's finding of a lack of jurisdiction, final determination, or corrective action order brought under paragraph (a).

(c) In carrying out the functions set forth in this section, the Deputy Attorney General may issue written directives or orders to the parties as necessary to ensure the efficient and fair administration and management of the review process.

8. Add § 27.7 to read as follows:

§ 27.7 Alternative dispute resolution.

(a) At any stage in the process set forth in §§ 27.3 through 27.5 of this part, the Complainant may request Alternative Dispute Resolution (ADR) through the Department of

Justice Mediator Corps (DOJMC) Program. The Complainant may elect to participate in ADR by notifying in writing the office before which the matter is then pending.

(b) If the Complainant elects mediation, the FBI, represented by the Office of General Counsel, will participate.

(c) When the Complainant requests to engage in ADR, the process set forth in §§ 27.3 through 27.5, as applicable, including all time periods specified therein, will be stayed for an initial period of 90 days, beginning on the date of transmittal of the matter to the DOJMC Program office. Upon joint request by the parties to the office before which the matter is stayed, the period of the stay may be extended up to an additional 45 days. Further requests for extension of the stay may be granted only by the Director, regardless of the office before which the matter is pending, upon a joint request showing good cause. The stay otherwise will be lifted if the DOJMC Program notifies the office before which the matter is stayed that the Complainant no longer wishes to engage in mediation, or that the parties are unable to reach agreement on resolution of the complaint and that continued efforts at mediation would not be productive.

9. Add § 27.8 to read as follows:

§ 27.8 Authority of the Director to review and decide claims of a breach of a settlement agreement.

(a) Any party to a settlement agreement reached in proceedings and in a forum under this part may file a claim of a breach of that settlement agreement with the Director within 30 days of the date on which the grounds for the claim of breach were known.

(b) The Director shall adjudicate any timely claim of a breach of a settlement agreement. The Director shall exercise the authority granted under § 27.4(e)(4) to ensure the efficient administration and management of the adjudication of the breach claim, pursuant to any procedures the Director deems reasonably necessary to carry out the functions assigned under this paragraph.

(c) A party may request, within 30 calendar days of a decision on a claim of a breach of a settlement agreement by the Director, review of that decision by the Deputy Attorney General.

Dated: March 17, 2023.

Merrick B. Garland,
Attorney General.

[FR Doc. 2023-05927 Filed: 3/28/2023 8:45 am; Publication Date: 3/29/2023]