

companies are permitted to derive up to 30 percent of their data processing revenues from processing data that is not financial, banking, or economic. Moreover, in other respects, the Regulation Y provision is broader than the data processing provision in Regulation K.

(3) In light of the fact that the permissible scope of data processing activities under Regulation Y is now equal to, and in some respects, broader than the activity originally authorized under Regulation K, the Board believes that § 211.5(d)(10) should be read to encompass all of the activities permissible under § 225.28(b)(14) of Regulation Y. In addition, the limitations of that section would also apply to § 211.5(d)(10).

(c) *Applications.* If a U.S. banking organization wishes to engage abroad in data processing or data transmission activities beyond those described in Regulation Y, it must apply for the Board's prior consent under § 211.5(d)(20) of Regulation K. In addition, if any investor has commenced activities beyond those permitted under § 225.28(b)(14) of Regulation Y in reliance on Regulation K, it should consult with staff of the Board to determine whether such activities have been properly authorized under Regulation K.

By order of the Board of Governors,  
October 26, 1999.

**Robert deV. Frierson,**

*Associate Secretary of the Board.*

[FR Doc. 99-28380 Filed 10-29-99; 8:45 am]

BILLING CODE 6210-01-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Parts 1 and 301

[TD 8827]

#### Removal of Regulations Providing Guidance Under Subpart F, Relating to Partnerships and Branches; Correction

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Correction of temporary and final regulations.

**SUMMARY:** This document contains corrections to the temporary and final regulations (TD 8827), which were published in the **Federal Register** on Tuesday, July 13, 1999, (64 FR 37677). The regulations relate to the treatment under subpart F of certain payments involving branches of a controlled foreign corporation that are treated as

separate entities for foreign tax purposes or partnerships in which CFC's are partners.

**DATES:** These corrections are effective July 13, 1999.

**FOR FURTHER INFORMATION CONTACT:** Valerie Mark, (202) 622-3840 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

The temporary and final regulations that are the subject of these corrections are under sections 904, 954, and 7701.

##### Need for Correction

As published, the temporary and final regulations (TD 8827) contain errors that may prove to be misleading and are in need of clarification.

##### Correction of Publication

Accordingly, the publication of the temporary and final regulations (TD 8827), which are the subject of FR Doc. 99-17369, is corrected as follows:

##### § 1.904-5 [Corrected]

1. On page 37677, column 3, amendatory instructions "**Par. 2.**", last line, the language "amended by removing the last sentence" is corrected to read "amended by removing the last two sentences".

2. On page 37678, column 1, amendatory instruction "**Par. 7.**", the language "**Par. 7.**" is corrected to read "**Par. 6.**".

3. On page 37678, column 1, amendatory instruction "**Par. 9.**", the language "**Par. 9.**" is corrected to read "**Par. 7.**".

4. On page 37678, column 1, amendatory instruction "**Par. 10.**", the language "**Par. 10.**" is corrected to read "**Par. 8.**".

##### § 301.7701-3 [Corrected]

5. On page 37678, column 1, the amendatory instruction for "**Par. 11.**" is corrected to read as follows:

**Par. 9.** In § 301.7701-3, the last two sentences in paragraph (f)(1) are removed.

6. On page 37678, column 1, amendatory instruction "**Par. 12.**", the language "**Par. 12.**" is corrected to read "**Par. 10.**".

**Cynthia E. Grigsby,**

*Chief, Regulations Unit, Assistant Chief Counsel (Corporate).*

[FR Doc. 99-28037 Filed 10-29-99; 8:45 am]

BILLING CODE 4830-01-U

## DEPARTMENT OF JUSTICE

### 28 CFR Parts 0 and 27

[A.G. Order No. 2264-99]

RIN 1105-AA60

#### Whistleblower Protection For Federal Bureau of Investigation Employees

**AGENCY:** Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The Department of Justice (Department) adopts as final, with certain changes discussed below, the interim rule published last year in the **Federal Register** establishing procedures under which employees of the Federal Bureau of Investigation (FBI) may make disclosures of information protected by the Civil Service Reform Act of 1978 and the Whistleblower Protection Act of 1989. The interim rule also established procedures under which the Department will investigate allegations by FBI employees of reprisal for making such protected disclosures, and under which it will take appropriate corrective action.

**DATES:** This rule is effective November 1, 1999.

**FOR FURTHER INFORMATION CONTACT:** Stuart Frisch, General Counsel, or John Caterini, Attorney-Advisor, Office of the General Counsel, Justice Management Division, U.S. Department of Justice, 950 Pennsylvania Ave., NW, Washington, DC 20530; telephone: (202) 514-3452; e-mail: John.Caterini@usdoj.gov.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

On November 10, 1998, the Department issued an interim rule establishing procedures under which FBI employees may make disclosures of information protected by the Civil Service Reform Act of 1978, Pub. L. 95-454, and the Whistleblower Protection Act of 1989, Pub. L. 101-12, codified at 5 U.S.C. 2303. The interim rule also established procedures under which the Department will investigate allegations by FBI employees of reprisal for making such protected disclosures and under which it will take appropriate corrective action.

Under sections 1214 and 1221 of title 5 of the United States Code, most federal employees who believe they have been subjected to a prohibited personnel practice, including reprisal for whistleblowing, may request an investigation by the Office of Special Counsel (OSC) (section 1214) or, in appropriate circumstances, pursue an individual right of action before the

Merit Systems Protection Board (MSPB) (sections 1214(a)(3) and 1221). Although Congress expressly excluded the FBI from the scheme established by those provisions, see 5 U.S.C. 2302(a)(2)(C)(ii), section 2303(a) of title 5 contains a separate provision that prohibits reprisals against whistleblowers in the FBI. Section 2303(b) directs the Attorney General to prescribe regulations to ensure that such reprisal not be taken, and section 2303(c) directs the President to provide for the enforcement of section 2303 "in a manner consistent with applicable provisions of section 1214 and 1221." On April 14, 1997, the President delegated to the Attorney General the "functions concerning employees of the Federal Bureau of Investigation vested in (him) by \* \* \* section 2303(c) of title 5, United States Code," and directed the Attorney General to establish "appropriate processes within the Department of Justice to carry out these functions." See 62 FR 23123 (1997).

The interim rule implements section 2303(b) and (c) and the President's April 1997 directive, superseding and replacing 28 CFR 0.39c, which gave the Counsel for the Department's Office of Professional Responsibility authority to request a stay of a personnel action against an FBI employee when he determined that there were reasonable grounds to believe that the action was taken as a reprisal for whistleblowing. The interim rule designates specific offices—the Department's Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), and the FBI's Office of Professional Responsibility (FBI OPR) (collectively, Receiving Offices)—to which an FBI employee (or applicant for employment with the FBI) may disclose information that the employee or applicant reasonably believes evidences violation of any law, rule or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. (Such disclosures are referred to herein as "whistleblower disclosures.") In accordance with section 2303(a), the interim rule prohibits reprisals against persons who make such disclosures.

The interim rule further provides that OPR or OIG (the Conducting Office) will investigate whistleblower reprisal claims and may recommend corrective action, where appropriate, to the Director, Office of Attorney Personnel Management (the Director). Under the interim rule, the Director may decide whistleblower reprisal claims presented to her by OPR or OIG (or, in appropriate circumstances, by a complainant directly). The Director may also, among

other things, authorize a temporary stay, rule on evidentiary matters, and hold a hearing. Under the interim rule, the roles and functions of the Conducting Office and the Director are thus analogous to those of the OSC and MSPB, respectively, in whistleblower cases involving federal employees generally. In addition, the interim rule imports time frames specified in the statute for the OSC/MSPB system whenever possible.

One fundamental difference, however, between the two systems is that the procedures provided in the interim rule are entirely internal to the Department. This is because section 2303 (the source of authority for the interim rule) identifies the Attorney General or her designee as recipients of protected whistleblower disclosures, rather than any outside person or entity. In addition, the President's April 1997 directive, consistent with the statute and its legislative history, directs that the Attorney General establish appropriate processes within the Department of Justice. See, e.g., 124 Cong. Rec. 28770 (1978) ("We gave (the FBI) special authority \* \* \* to let the President set up their own whistleblower (sic) system so that appeals would not be to the outside but to the Attorney General.") (statement of Representative Udall).

Although the interim rule was effective upon publication in the **Federal Register**, the Department invited post-promulgation comments. The Department received three sets of comments, which are discussed below.

## **B. Discussion of Comments and Changes to the Interim Rule**

### *1. Definition of Protected Disclosure*

Unlike section 2303, section 2302 (which sets forth the scheme for federal employees generally) creates two types of protected disclosures. Section 2302(b)(8)(A) protects whistleblower disclosures, regardless of whom they are made to, provided that they are not otherwise specifically prohibited by law or required by Executive Order to be kept secret. Section 2302(b)(8)(B), by contrast, protects whistleblower disclosures, without qualification or exception, only if they are made to certain specific persons or entities—the OSC, an agency Inspector General, or other designee appointed by the head of the agency. Section 2303 adopts the approach set forth in 2302(b)(8)(B), in that it protects whistleblower disclosures that are made to particular persons or entities (namely, the Attorney General or her designee).

One commenter suggested that the final rule should follow the approach set forth in section 2302(b)(8)(A), under which disclosures that do not otherwise violate law or Executive Order would be protected regardless of to whom they are made. We have not adopted this suggestion. The operative statutory provision, section 2303(a), protects whistleblowing disclosures only if they are made to the Attorney General or an employee whom she designates. Section 2303(a) thus treats FBI whistleblowing activity differently from other agency whistleblowing by channeling whistleblowers to designated agency officials.

### *2. Recipients of Protected Disclosures*

As stated earlier, the interim rule designates three entities to receive whistleblower disclosures: OPR, OIG, and FBI OPR. All three commenters suggested expanding the list of recipients for protected disclosures. In particular, the commenters proposed the following additional recipients: The FBI Director and Deputy Director; the FBI Inspection Division; supervisors in the chain of command; co-workers; and members of Congress.

We agree that whistleblower disclosures made to the head of an employee's agency should be protected, and the final rule therefore includes the FBI Director and Deputy Director, as well as the Attorney General and Deputy Attorney General, as recipients for such disclosures. We have also decided to designate the highest-ranking official in each FBI field office as recipients of protected disclosures. The highest-ranking official in each FBI field office is generally a Special Agent in Charge (SAC). The exceptions are the FBI's field offices in Los Angeles, CA, New York, NY, and Washington, DC, where the highest-ranking official is an Assistant Director in Charge (ADIC). These senior officials—whether SACs or ADICs—are generally in a position to take action against and to correct management and other problems within their respective field offices. In addition, designating the heads of field offices as recipients of protected disclosures permits employees in the field to have an opportunity to make protected disclosures to officials with whom they may be more familiar, and without the necessity of contacting officials at FBI headquarters.

In response to suggestions that the Inspection Division, supervisors, and co-workers also be designated recipients for whistleblower disclosures, we note, as an initial matter, that section 2303(a) limits the universe of recipients of protected disclosures to the Attorney

General "or an employee designated by the Attorney General for such purpose." This statutory directive suggests that Congress contemplated that recipients for whistleblower disclosures would be a relatively restricted group. Given the size of the FBI, as well as the many demands on the Attorney General's time, we believe that it is appropriate, as well as within the Attorney General's authority, to designate more than one employee of the Department as a recipient. On the other hand, to designate a large (and in the case of supervisors, arguably ill-defined) group of employees as recipients would be inconsistent with Congress's decision, given the sensitivity of information to which FBI employees have access, not to protect *all* legal disclosures of wrongdoing, see 5 U.S.C.

2302(a)(2)(C)(ii), the way it did with employees of other agencies, see 5 U.S.C. 2302(b)(8) (discussed above). Given these concerns, we do not believe Congress intended to include all FBI employees in the class of those to whom protected whistleblowing disclosures may be made. Moreover, there is a difference between complaining to a fellow employee about alleged misconduct, on the one hand, and affirmatively bringing an allegation of wrongdoing to the attention of one in a position to do something about it, on the other. Even supervisors in the chain of command—though a subset of all employees—comprise a sufficiently large group in the aggregate that we do not believe Congress intended to include them as recipients of protected disclosures. Designating supervisors as recipients of protected disclosures raises the additional problem of including as recipients the very individuals against whom the prohibition on reprisal is directed, *i.e.*, individuals who have authority to take, direct others to take, recommend, or approve personnel actions against whistleblowers. Designating the highest ranking official in each field office, but not all supervisors, as recipients of protected disclosures (as discussed above) provides a way to channel such disclosures to those in the field who are in a position to respond and to correct management and other problems, while also providing an on-site contact in the field for making protected disclosures. We therefore decline to adopt the suggestion that all employees and supervisors be designated recipients of protected disclosures.

The FBI Inspection Division conducts periodic inspections of FBI offices and workplaces and, as part of those inspections, conducts extensive interviews of employees at those

locations. Virtually all FBI employees must therefore, as part of their duties, participate from time to time in interviews with the Inspection Division and provide requested information. Required participation in such inspections is, however, distinct from whistleblowing. The provisions that apply to other federal employees recognize this distinction by providing for separate protection for required participation in an investigation: employees are protected under section 2302(b)(8) from reprisal for whistleblowing, but are protected under section 2302(b)(9)(C) from reprisal for cooperating in an Inspector General or OSC investigation. Federal employees of applicable agencies who claim reprisal under section 2302(b)(9) for cooperating in an investigation may report their allegations to the OSC, which may investigate and pursue those allegations. See 5 U.S.C. 1212, 1214. Such employees, however, are not entitled to bring an individual right of action under section 1221. Likewise, it is the FBI's policy that if an employee is subject to reprisal for any disclosure made during an inspection interview, the matter is referred to FBI OPR for review and appropriate action. Thus, there is already in place within the FBI a procedure, analogous to that provided to federal employees generally, to protect FBI employees from reprisal for disclosures made during an inspection. We therefore decline to adopt the suggestion that the FBI Inspection Division be included as a recipient of protected disclosures.

One commenter suggested that the procedures set forth in the rule should apply to disclosures made to Congress, citing several statutes relating to the right of federal employees to communicate with Congress—the Lloyd-Lafollette Act of 1912, 5 U.S.C. 7211; section 625 of the Treasury, Postal Service and General Government Appropriations Act of 1998, Pub. L. 105-61; and the Intelligence Community Whistleblower Protection Act of 1998, Pub. L. 105-272. Section 2303 (the enabling statute), however, protects whistleblower disclosures only to the extent they are made to the Attorney General or to an employee designated by the Attorney General for such purposes. As stated earlier, this indicates that, for purposes of section 2303, Congress specifically intended that protected FBI disclosures be internal to the Department. We have therefore not adopted this suggestion. We note, however, that individuals remain free to report violations by a Department official of any of the above-

listed statutes to OPR, OIG, or FBI OPR. These offices are authorized to investigate the alleged violation and to recommend appropriate corrective action.

The final rule has been changed to incorporate the additional designated recipients discussed above. We anticipate that the designated recipients, upon receiving a whistleblower disclosure, will take appropriate action within their discretion and authority, including, where appropriate, forwarding the disclosure to one of the Receiving Offices.

### *3. Protection Against Threats To Take a Personnel Action and From "Other Significant Change in Duties, Responsibilities or Working Conditions"*

Section 2303(a) prohibits "tak(ing), or fail(ing) to take" a personnel action as a reprisal for a protected disclosure. By contrast, section 2302(b)(8), the statute applicable to federal employees generally, also prohibits "threaten(ing)" to take or fail to take personnel action. All three commenters urged that the rule also protect FBI employees from threats to take or fail to take personnel action. The Department accepts this suggestion and has revised § 27.2(a) accordingly.

A related comment, made by all commenters, involves the definition of "personnel action." Section 2303(a) defines "personnel action" to mean any action described in subsections (i) through (x) of section 2302(a)(2)(A). When Congress enacted section 2303, section 2302(a)(2)(A) contained only ten subsections, the last of which, (x), defined "personnel action" to include "any other significant change in duties, responsibilities, or working conditions." Later, in 1994, Congress added another personnel practice to section 2302(a)(2)(A): "a decision to order psychiatric testing or examination." This new provision was made subsection (x), and the "other significant change" provision became subsection (xi). Because Congress did not also change section 2303(a), the net effect was to substitute the psychiatric testing provision (the new subsection (x)) for the "other significant change" provision (the old subsection (x)) in the definition of "personnel action," as it applied to the FBI. All commenters suggested that the final rule make the "other significant change" provision applicable to FBI employees. We believe that the Attorney General has authority under 5 U.S.C. 301 to expand the definition of "personnel action" for purposes of these regulations. Section 301 authorizes the Attorney General to "prescribe regulations for the

government of (her) department (and) the conduct of its employees.” Accordingly, the Department accepts this suggestion and has revised § 27.2(b).

#### *4. Absence of Confidentiality Provisions Analogous to Those Found in Sections 1212(g) and 1213(h)*

One commenter expressed concern that the interim rule does not contain “confidentiality provisions,” such as those found in sections 1212(g) and 1213(h). Section 1212(g) prohibits OSC from disclosing information about a person who alleges a reprisal, except in accordance with the Privacy Act or as required by other applicable federal law. Section 1213(h) prohibits OSC from disclosing the identity of a person making a disclosure, unless necessary because of imminent danger to public health or safety or imminent violation of any criminal law.

As an initial matter, section 2303(c) requires the procedures set forth in the rule to be “consistent with the applicable provisions of sections 1214 and 1221.” Because section 2303(c) is silent as to sections 1212 and 1213, we decline to adopt the suggestion that the rule include the confidentiality provisions of those sections. We note in passing, however, that nothing in the interim rule suggests that a Conducting Office, the Director, or anyone else may release the identity of a whistleblower, or any other information, to the public in contravention of the Privacy Act or any other federal non-disclosure statute. To the extent the comment may have been prompted in part by § 27.4(c)(1) of the interim rule, which provided for release of Conducting Office memoranda of interview in certain circumstances, we have removed that provision.

#### *5. Proof of Reprisal*

One commenter suggested that the regulations should not require proof of reprisal, noting that section 2302(b)(8) prohibits taking certain personnel actions “because of” a protected disclosure, without explicitly mentioning reprisals. Section 2302(a), however, does not contain the “because of” construction of section 2302(b)(8). Rather, it specifically prohibits taking or failing to take personnel action “as a reprisal” for a protected disclosure. In any event, the interim rule incorporates the same standard of proof for reprisal as that set forth in section 1221(e) for the OSC/MSPB scheme. We therefore believe we have adopted the appropriate standard of proof.

#### *6. Absence of Conflict of Interest Provisions for Receiving Offices*

One commenter asserted that having OPR or OIG investigate whistleblower disclosures raised the potential for conflicts of interest, because those offices also may be responsible for investigating sources of leaks, which could themselves be protected whistleblower disclosures. A protected disclosure could not be a “leak,” however, because protected disclosures, by definition, are made to designated offices and officials that are internal to the Department. Moreover, to the extent one of these offices may have a conflict in investigating the substance of a whistleblower disclosure because of an ongoing leak investigation, § 27.1(b) of the rule provides that “(w)hen a Receiving Office receives a protected disclosure, it shall proceed in accordance with existing procedures establishing jurisdiction among the respective Receiving Offices.” Those existing procedures include consideration of conflicts of interest.

#### *7. Absence of Provisions for Disciplinary Proceedings*

One commenter suggested that the rule should provide for disciplinary proceedings in accordance with section 1215. Section 2303 (the source of authority for the rule) requires implementation of its substantive protections “in a manner consistent with applicable provisions of sections 1214 and 1221,” but is silent as to section 1215. Moreover, the Department retains its own independent authority to take appropriate disciplinary action if it determines such action to be necessary. The interim rule does not prohibit or preclude the Department from taking appropriate disciplinary action under its existing authority. We do not believe, therefore, that the rule needs to address disciplinary action.

#### *8. Availability of a Hearing*

Section 27.4(d) of the interim rule provides that “(w)here a Complainant has presented a request for corrective action directly to the Director under paragraph (c)(1) of this section, the Director may hold a hearing.” One commenter noted that this language makes hearings discretionary and suggested that complainants should have a right to a hearing. We have not adopted this suggestion. Although an employee who makes a proper appeal to the MSPB has a right “to a hearing for which a transcript will be kept,” this provision appears in 5 U.S.C. 7701(a)(1). Section 2303 (the source of authority for the rule) requires the rule to implement

applicable provisions of only sections 1214 and 1221. Because sections 1214 and 1221 are silent on the right to a hearing, the interim rule does not require (though it permits) the Director to hold a hearing where a complainant presents a request for corrective action directly to her. Accordingly, although the interim rule gives the Director discretion to hold a hearing when a complainant presents a request for corrective action under § 27.4(d), it does not provide for a right to a hearing in that circumstance.

The interim rule does not address whether the Director has discretion to hold a hearing when a Conducting Office reports findings and recommendations to the Director pursuant to § 27.4(a). Although sections 1214 and 1221 are silent on this issue, we believe the Director should have discretion to hold a hearing in those circumstances if doing so would assist in her decisionmaking. Accordingly, the final rule has been modified to give the Director discretion to hold a hearing without regard to whether a whistleblower reprisal matter is before the Director as a result of a complainant’s request (under § 27.4(c)(1)) or as a result of a Conducting Office recommendation (under § 27.4(a)). The procedures for such hearings are to be determined by the Director in the first instance (see § 27.4(e)(3)).

#### *9. Performance of OSC and MSPB Functions by External Entities; Judicial Review*

One commenter suggested that the interim rule is invalid in its entirety, because it fails to establish entities external to and independent of the Department to perform the functions of the OSC and MSPB (whose functions, under the rule, are performed by the Conducting Offices and the Director, respectively). Adopting this suggestion, however, would require the Attorney General to take an action that is beyond her authority. The President’s April 1997 directive ordered the Attorney General to establish “appropriate processes within the Department of Justice,” 62 FR 23123 (1997) (emphasis added). We do not believe that section 2303 requires the creation of external entities to carry out the OSC/MSPB functions. If Congress had wanted to provide FBI employees with fora outside the Department to address their whistleblower reprisal claims, it could have included them in the OSC/MSPB scheme. The fact that Congress did not do so, see 5 U.S.C. 2302(a)(2)(C)(ii), strongly suggests that Congress, in enacting section 2303, did not envision

the creation of external entities to perform the OSC/MSPB functions.

Two commenters requested that we provide for judicial review of decisions made under the rule, because sections 1214(c)(1) and 1221(h) provide for it. We have not accepted this suggestion. Section 2302 (the source of authority for the rule) does not provide for judicial review, and Congress has therefore not waived sovereign immunity for this purpose. Under the doctrine of separation of powers, neither the President nor the Attorney General has the authority to waive sovereign immunity; only Congress has that authority.

#### 10. Other Changes to the Interim Rule

a. For the sake of clarity, we changed the order of paragraphs (d), (e) and (f) of § 27.4, and divided the former paragraph (f) (now paragraph (e)) into subparagraphs.

b. In § 27.1(b), to reflect current practice and policy see 28 CFR 0.29d(a), we added a sentence regarding the referral of whistleblowing allegations by OPR and OIG to FBI OPR.

c. In § 27.3(f), to be consistent with an applicable provision of section 1214, we added language to clarify that a complainant may agree to extend the 240-day time limit for the Conducting Office to make its determination of whether there are reasonable grounds to determine that there has been or will be a reprisal for a protected disclosure.

d. In § 27.4(a), to be consistent with an applicable provision of section 1214 (section 1214(b)(2)(E)), we added the following sentence: "A determination by the Conducting Office that there are reasonable grounds to believe a reprisal has been or will be taken shall not be cited or referred to in any proceeding under these regulations, without the Complainant's consent." We did not incorporate the provision in section 1214(b)(2)(E) relating to "any other administrative or judicial proceeding," because we lack authority to prescribe what courts and other agencies may or may not cite or reference. In addition, because the Conducting Office may continue to investigate any violation of law, rule, or regulation (see § 27.4(c)) and may report its findings to appropriate Department officials, the restriction in § 27.4(a) does not apply to such further proceedings conducted by OIG or OPR.

e. In § 27.4(b), we have added language to permit the Director, when considering comments on a Conducting Office request for an extension of a stay, to request additional information as the Director deems necessary. The interim rule did not preclude the Director from

seeking additional information in those circumstances. We believe that the Director has such authority and therefore made it explicit.

f. We modified § 27.4(c)(1) to make it more consistent with applicable provisions of section 1214.

g. We revised § 27.4(e)(3) to clarify the process by which assertions of privilege are to be decided.

h. In the second sentence of § 27.5, to clarify a potential ambiguity, we have stricken "(or a designee)" after "Deputy Attorney General." The Deputy Attorney General may designate a Department official to assist or advise him in conducting a review. We do not, however, believe that the authority of the Deputy Attorney General to conduct a review should be delegated. We also clarified a possible ambiguity in the first sentence of that section concerning the time within which a complainant or the FBI may seek review of a determination or corrective action order by the Director.

#### C. Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. This rule merely establishes procedures under which FBI employees or applicants for employment with the FBI may make certain protected disclosures of information and establishes procedures under which the Department will investigate allegations of reprisal against such individuals.

#### D. Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866. The Department has determined that this rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget.

#### E. Executive Order 12612

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### F. Unfunded Mandates Reform Act of 1995

This rule will not, in the aggregate, result in the expenditure by State, local and tribal governments, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### G. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### List of Subjects in 28 CFR Part 27

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

For the reasons stated in the preamble, the interim rule amending 28 CFR part 0 and adding 28 CFR Part 27, which was published at 63 FR 62937, November 10, 1998, is adopted as a final rule with the following changes:

1. Revise Part 27 to read as follows:

#### PART 27—WHISTLEBLOWER PROTECTION FOR FEDERAL BUREAU OF INVESTIGATION EMPLOYEES

##### Subpart A—Protected Disclosures of Information

Sec.

- 27.1 Making a protected disclosure.
- 27.2 Prohibition against reprisal for making a protected disclosure.

##### Subpart B—Investigating Reprisal Allegations and Ordering Corrective Action

- 27.3 Investigations: The Department of Justice's Office of Professional Responsibility and Office of the Inspector General.
- 27.4 Corrective action and other relief: Director, Office of Attorney Personnel Management.
- 27.5 Review.
- 27.6 Extensions of time.

**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).

**Subpart A—Protected Disclosures of Information****§ 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 the Department of Justice's (Department's) Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR) (collectively, Receiving Offices), the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office, the disclosure will be a "protected disclosure" if the person making it reasonably believes that it evidences:

- (1) A violation of any law, rule or regulation; or
- (2) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) When a Receiving Office receives a protected disclosure, it shall proceed in accordance with existing procedures establishing jurisdiction among the respective Receiving Offices. OPR and OIG shall refer such allegations to FBI OPR for investigation unless the Deputy Attorney General determines that such referral shall not be made.

**§ 27.2 Prohibition against reprisal for making a protected disclosure.**

(a) Any employee of the FBI, or of any other component of the Department, who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, a personnel action, as defined below, with respect to any FBI employee as a reprisal for a protected disclosure.

(b) Personnel action means any action described in clauses (i) through (xi) of 5 U.S.C. 2302(a)(2)(A) taken with respect to an FBI employee other than one in a position which the Attorney General has designated in advance of encumbrance as being a position of a confidential, policy-determining, policy-making, or policy-advocating character.

**Subpart B—Investigating Reprisal Allegations and Ordering Corrective Action****§ 27.3 Investigations: The Department of Justice's Office of Professional Responsibility and Office of the Inspector General.**

(a)(1) An FBI employee who believes that another employee of the FBI, or of any other Departmental component, has taken or has failed to take a personnel action as a reprisal for a protected disclosure (reprisal), may report the alleged reprisal to either the Department's OPR or the Department's OIG (collectively, Investigative Offices). The report of an alleged reprisal must be made in writing.

(2) For purposes of this subpart, references to the FBI include any other Departmental component in which the person or persons accused of the reprisal were employed at the time of the alleged reprisal.

(b) The Investigative Office that receives the report of an alleged reprisal shall consult with the other Investigative Office to determine which office is more suited, under the circumstances, to conduct an investigation into the allegation. The Attorney General retains final authority to designate or redesignate the Investigative Office that will conduct an investigation.

(c) Within 15 calendar days of the date the allegation of reprisal is first received by an Investigative Office, the office that will conduct the investigation (Conducting Office) shall provide written notice to the person who made the allegation (Complainant) indicating—

- (1) That the allegation has been received; and
- (2) The name of a person within the Conducting Office who will serve as a contact with the Complainant.

(d) The Conducting Office shall investigate any allegation of reprisal to the extent necessary to determine whether there are reasonable grounds to believe that a reprisal has been or will be taken.

(e) Within 90 calendar days of providing the notice required in paragraph (c) of this section, and at least every 60 calendar days thereafter (or at any other time if the Conducting Office deems appropriate), the Conducting Office shall notify the Complainant of the status of the investigation.

(f) The Conducting Office shall determine whether there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure. The Conducting Office shall make this determination within 240

calendar days of receiving the allegation of reprisal unless the Complainant agrees to an extension.

(g) If the Conducting Office decides to terminate an investigation, it shall provide, no later than 10 business days before providing the written statement required by paragraph (h) of this section, a written status report to the Complainant containing the factual findings and conclusions justifying the termination of the investigation. The Complainant may submit written comments on such report to the Conducting Office. The Conducting Office shall not be required to provide a subsequent written status report after submission of such comments.

(h) If the Conducting Office terminates an investigation, it shall prepare and transmit to the Complainant a written statement notifying him/her of—

- (1) The termination of the investigation;
- (2) A summary of relevant facts ascertained by the Conducting Office;
- (3) The reasons for termination of the investigation; and
- (4) A response to any comments submitted under paragraph (g) of this section.

(i) Such written statement prepared pursuant to paragraph (h) of this section may not be admissible as evidence in any subsequent proceeding without the consent of the Complainant.

(j) Nothing in this part shall prohibit the Receiving Offices, in the absence of a reprisal allegation by an FBI employee under this part, from conducting an investigation, under their pre-existing jurisdiction, to determine whether a reprisal has been or will be taken.

**§ 27.4 Corrective action and other relief: Director, Office of Attorney Personnel Management.**

(a) If, in connection with any investigation, the Conducting Office determines that there are reasonable grounds to believe that a reprisal has been or will be taken, the Conducting Office shall report this conclusion, together with any findings and recommendations for corrective action, to the Director, Office of Attorney Personnel Management (the Director). If the Conducting Office's report to the Director includes a recommendation for corrective action, the Director shall provide an opportunity for comments on the report by the FBI and the Complainant. The Director, upon receipt of the Conducting Office's report, shall proceed in accordance with paragraph (e) of this section. A determination by the Conducting Office that there are reasonable grounds to believe a reprisal

has been or will be taken shall not be cited or referred to in any proceeding under these regulations, without the Complainant's consent.

(b) At any time, the Conducting Office may request the Director to order a stay of any personnel action for 45 calendar days if it determines that there are reasonable grounds to believe that a reprisal has been or is to be taken. The Director shall order such stay within three business days of receiving the request for stay, unless the Director determines that, under the facts and circumstances involved, such a stay would not be appropriate. The Director may extend the period of any stay granted under this paragraph for any period that the Director considers appropriate. The Director shall allow the FBI an opportunity to comment to the Director on any proposed extension of a stay, and may request additional information as the Director deems necessary. The Director may terminate a stay at any time, except that no such termination shall occur until the Complainant and the Conducting Office shall first have had notice and an opportunity to comment.

(c)(1) The Complainant may present a request for corrective action directly to the Director within 60 calendar days of receipt of notification of termination of an investigation by the Conducting Office or at any time after 120 calendar days from the date the Complainant first notified an Investigative Office of an alleged reprisal if the Complainant has not been notified by the Conducting Office that it will seek corrective action. The Director shall notify the FBI of the receipt of the request and allow the FBI 25 calendar days to respond in writing. If the Complainant presents a request for corrective action to the Director under this paragraph, the Conducting Office may continue to seek corrective action specific to the Complainant, including the submission of a report to the Director, only with the Complainant's consent. Notwithstanding the Complainant's refusal of such consent, the Conducting Office may continue to investigate any violation of law, rule, or regulation.

(2) The Director may not direct the Conducting Office to reinstate an investigation that the Conducting Office has terminated in accordance with § 27.3(h).

(d) Where a Complainant has presented a request for corrective action to the Director under paragraph (c) of this section, the Complainant may at any time request the Director to order a stay of any personnel action allegedly taken or to be taken in reprisal for a protected disclosure. The request for a

stay must be in writing, and the FBI shall have an opportunity to respond. The request shall be granted within 10 business days of the receipt of any response by the FBI if the Director determines that such a stay would be appropriate. A stay granted under this paragraph shall remain in effect for such period as the Director deems appropriate. The Director may modify or dissolve a stay under this paragraph at any time if the Director determines that such a modification or dissolution is appropriate.

(e)(1) The Director shall determine, based upon all the evidence, whether a protected disclosure was a contributing factor in a personnel action taken or to be taken. Subject to paragraph (e)(2) of this section, if the Director determines that a protected disclosure was a contributing factor in a personnel action taken or to be taken, the Director shall order corrective action as the Director deems appropriate. The Director may conclude that the disclosure was a contributing factor in the personnel action based upon circumstantial evidence, such as evidence that the employee taking the personnel action knew of the disclosure or that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

(2) Corrective action may not be ordered if the FBI demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(3) In making the determinations required under this subsection, 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. 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.

(f) If the Director orders corrective action, such corrective action may

include: placing the Complainant, as nearly as possible, in the position he would have been in had the reprisal not taken place; reimbursement for attorneys fees, reasonable costs, medical costs incurred, and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages.

(g) If the Director determines that there has not been a reprisal, the Director shall report this finding in writing to the complainant, the FBI, and the Conducting Office.

#### § 27.5 Review.

The Complainant or the FBI may request, within 30 calendar days of a final determination or corrective action order by the Director, 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.

#### § 27.6 Extensions of time.

The Director may extend, for extenuating circumstances, any of the time limits provided in these regulations relating to proceedings before him and to requests for review by the Deputy Attorney General.

Dated: October 6, 1999.

**Janet Reno,**

*Attorney General.*

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