comply with the requirements of the SAFE Act, including the licensing and registration of its employees in the Nationwide Mortgage Licensing System (NMLS).

III. Findings and Certifications

Regulatory Review—Executive Orders 12866, 13563, and 14094

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulation and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Executive Order 14094 entitled ''Modernizing Regulatory Review'' (hereinafter referred to as the ''Modernizing E.O.'') amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review), among other things.

The final rule will revise 24 CFR 202.5 (i) and (k) to update HUD's regulation to conform with the mortgage industry's evolving business practices. Additionally, the rule will lessen the administrative burden on lenders and mortgagees. This rule was determined not to be a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 as amended by Executive Order 14094 and is not an economically significant regulatory action and therefore was not subject to OMB review.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This final rule does not impose any Federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of the UMRA.

Environmental Review

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The rule will remove the requirement that lenders and mortgagees register with HUD each branch office where they conduct FHA business. This will not create an undue burden on small entities, instead it will eliminate the burden for all lenders and mortgagees of having to register branch offices with HUD and pay the associated fees. HUD has determined that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has Federalism implications if the rule either imposes substantial direct compliance costs on state and local governments or is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule will not have Federalism implications and will not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid Office of Management and Budget (OMB) control number. The information collection requirements contained in this final rule have been approved by OMB under the Paperwork Reduction Act and assigned OMB control number 2502–0059.

List of Subjects in 24 CFR Part 202

Administrative practice and procedure, Home improvement, Manufactured homes, Mortgage insurance, Reporting, and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble above, HUD amends 24 CFR part 202 as follows:

PART 202—APPROVAL OF LENDING INSTITUTIONS AND MORTGAGEES

■ 1. The authority citation for part 202 continues to read as follows:

Authority: 12 U.S.C. 1703, 1709 and 1715b; 42 U.S.C. 3535(d).

§ 202.5 [Amended]

■ 2. Amend § 202.5 by:
■ a. In paragraph (i) removing ''authorized to originate Title I loans or submit applications for mortgage insurance'' and adding in its place ''that the lender or mortgagee registers with the Department'';
■ b. In paragraph (k), adding ''or mortgagee'' after ''A lender'' in the first sentence of paragraph (k), and removing the second sentence.

Julia R. Gordon,

Assistant Secretary of Office of Housing—Federal Housing Administration.

[FR Doc. 2024–02023 Filed 2–1–24; 8:45 am]

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DEPARTMENT OF JUSTICE

28 CFR Parts 0 and 27

[Docket No. JMD 154; AG Order No. 5872–2024]

RIN 1105–AB47

Whistleblower Protection for Federal Bureau of Investigation Employees

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This rule updates the Department of Justice (''Department'') 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''). This

rule updates the description of protected whistleblower disclosures and covered personnel actions to conform to the FBI WPEA of 2016; provides for more equal access to witnesses; and specifies that compensatory damages may be awarded as appropriate. This rule also adds 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 (''ADR'') 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. This regulation reiterates that the determinations by the Director of the Office of Attorney Recruitment and Management (''OARM'') must be independent and impartial.

DATES: Effective March 4, 2024.

FOR FURTHER INFORMATION CONTACT: Morton J. Posner, General Counsel, Justice Management Division; email: *Morton.J.Posner@usdoj.gov;* telephone: 202–514–3452; Michael E. Stamp, Acting Director, Office of Attorney Recruitment and Management; email: *Michael.E.Stamp@usdoj.gov;* telephone: 202–598–7772.

SUPPLEMENTARY INFORMATION:

I. 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, Public Law 95–454 (''CSRA''), and the Whistleblower Protection Act of 1989 (''WPA''), Public Law 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 Report''). 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 issued a notice of proposed rulemaking on March 29, 2023, to reflect the PPD–19 Report's findings and recommendations, as modified to comply with the FBI WPEA of 2016, discussed in further detail below, which President Obama signed on December 16, 2016.

II. 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 Whistleblower Protection Enhancement Act of 2012, Public Law 112–199 (''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

[1] On November 27, 2012, President Obama signed the Whistleblower Protection Enhancement Act of 2012, Public Law 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.

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. Public Law 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. Public Law 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. Public Law 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. Public Law 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. Public Law 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, 1991). 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* Public Law 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.*

On December 23, 2022, President Joseph Biden signed Public Law 117–263, which amended 5 U.S.C. 2303 to afford FBI whistleblowers with the right to (1) appeal a final determination or corrective action order to the MSPB, and (2) subject to certain conditions, seek corrective action directly from the MSPB pursuant to 5 U.S.C. 1221. Public Law 117–263, sec. 5304(a), codified at 5 U.S.C. 2303(d)(1), (2).

Finally, on March 29, 2023, the Department published a proposed rule, which 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 part 0 and part 27; and (2) ensure that this process is consistent with changes enacted by the WPEA of 2012 and the FBI WPEA of 2016. *See* 88 FR 18487 (March 29, 2023). Through the proposed rule, the Department invited 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. *Id.*

III. Comments to the Proposed Rule and Department Responses

Following a period for public comment on the March 29, 2023, proposed rule, the Department received a number of comments, many of which generally endorsed the rulemaking proposal. Comments on the proposed rule, and the Department's responses, are included in this section, where they apply to specific subsections of the rule.

Definition of a ''Protected Disclosure''

In the proposed rule, the Department proposed several changes to the definition of a ''protected disclosure'' under 28 CFR 27.1(a) to conform to the requirements of the FBI WPEA of 2016. Under the current rule, 28 CFR 27.1(a), a disclosure is considered protected if (1) it was made to an office or individual designated to receive a protected disclosure, and (2) the person making the disclosure reasonably believed the disclosure evidenced a specific type of wrongdoing listed in § 27.1(a)(1) and (a)(2). The current rule lists the following entities and individuals as designated recipients of a protected disclosure:

- 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.

The proposed rule proposed to expand the list to comply with the change made by the FBI WPEA of 2016. Specifically, the proposed amendment to § 27.1(a) 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 Department's 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 of any of the above entities, when designated by any officer, employee, office, or division thereof for the purpose of receiving such disclosures.

With respect to § 27.1(a)(2), the current rule requires that the person making the disclosure reasonably believe that it evidences: ''Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.'' In the proposed rule, the Department proposed to amend § 27.1(a)(2) to conform to the FBI WPEA of 2016 by removing ''Mismanagement'' and replacing it with ''Gross mismanagement.''

Several commenters expressed concern with the revised definition of a ''protected disclosure'' under 28 CFR 27.1(a) in the proposed rule. One commenter expressed concern with the expanded list of offices and officials designated to receive a protected disclosure under 28 CFR 27.1(a) in the proposed rule, noting that additional recipients ''may result in a game of telephone where information may be misconstrued when it gets passed up the chain.'' Another commenter wanted to remove the limited list of recipients entirely. Several commenters expressed concern with the proposed change to § 27.1(a)(2) to remove ''Mismanagement'' and replace it with ''Gross mismanagement.'' These commenters were concerned that the change would narrow the protections currently afforded FBI whistleblowers or create difficulties in interpretation.

Notwithstanding these concerns, the Department adopts in this final rule the changes to 28 CFR 27.1(a) set forth in the proposed rule. The designated recipients for protected disclosures are mandated by statute, as is the requirement that only ''gross mismanagement''—as opposed to any other type of ''mismanagement''—constitutes a protected disclosure under the FBI WPEA of 2016, 5 U.S.C. 2303(a)(1) and (a)(2)(B). Because the purpose of this proposed rule is to conform 28 CFR part 27 to the FBI WPEA of 2016, the Department declines to adopt the changes sought by the commenters.

Modifying the Definition of a ''Personnel Action''

One commenter suggested amending the ''personnel action'' definition under 28 CFR 27.2(b) to include all twelve actions currently listed in 5 U.S.C. 2302(a)(2)(A). The Department notes that this final rule updates the description of protected whistleblower disclosures and covered personnel actions to conform to the FBI WPEA of 2016. The commenter also suggested that the Department further expand the definition of ''personnel action'' in the rule to include retaliatory investigations and the denial, suspension, or revocation of a security clearance. Because the term ''personnel action'' is defined in 5 U.S.C. 2302(a)(2)(A), and the purpose of this proposed rule is to conform 28 CFR part 27 to the FBI WPEA of 2016, the Department declines to adopt this suggestion.

Statement of Independence and Impartiality of OARM Determinations

During the Department's PPD–19 review, whistleblower advocates expressed concern with the internal Department adjudication of FBI reprisal cases brought under part 27. To address this concern, the Department added language to 28 CFR 27.4(e)(1) in the proposed rule that the determinations by the Director of OARM (''OARM Director'') shall be independent and impartial.

One commenter suggested that the rule be further updated to apply the statement of independence and impartiality to the OARM Director's decision on a Conducting Office's request to stay a personnel action under

28 CFR 27.4(b). That provision states, in relevant part: ''[T]he 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 . . . unless the Director determines that, under the facts and circumstances involved, such a stay would not be appropriate.'' Section 27.4(d) similarly addresses the OARM Director's authority to grant a complainant's request for a stay of a personnel action ''if the Director determines that such a stay would be appropriate.''

Because the commenter's request for a statement of the OARM Director's independent and impartial determination on a request for a stay of a personnel action is consistent with the concerns raised by whistleblower advocates during the Department's PPD–19 review regarding the OARM Director's determinations under § 27.4(e), the Department adopts the commenter's suggestion, and also applies it to § 27.4(d). This final rule thus changes § 27.4(e)(1) to read: ''The determination made by the Director under this section shall be independent and impartial.''

Right to a Hearing

One commenter recommended that the rule provide a party with the right to a hearing after OARM finds that it has jurisdiction over a matter. Presently, neither party has an automatic right to a hearing before the OARM Director; however, under § 27.4(e)(3), either party may request a hearing. The OARM Director currently has the discretion to grant or deny a party's request for a hearing. Under current practice, the request will be granted when the complainant has presented a cognizable legal claim and there are disputed issues of material fact that need resolution through live, testimonial evidence. In determining whether a hearing is appropriate in a particular case, the OARM Director currently considers whether a hearing would result in unnecessary delay, needless expenditure of administrative resources, or unnecessary burdens on the parties, and whether live testimony or argument would be helpful in reaching a decision. The Department concludes that automatically granting a right to a hearing after a finding of OARM jurisdiction would not be an efficient means of resolving all matters over which OARM has jurisdiction. The Department therefore declines to adopt the recommendation.

Equalizing Access to Witnesses

During the Department's PPD–19 review, whistleblower advocate groups raised concerns that, in some cases, the FBI has obtained 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 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 implementing a regulatory provision that would help equalize access to witnesses. Because the Department agreed with that concern, the Department added a sentence to 28 CFR 27.4(e)(3) in the proposed rule 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.

Two commenters suggested changes to the proposed rule that would eliminate the OARM Director's discretion and automatically preclude the use of evidence that complainants do not have access to or relying on evidence from a witness the opposing party is unable to examine.

In the Department's view, eliminating the Director's discretion by requiring that unavailable witnesses be excluded in all cases would unfairly disadvantage whistleblowers when, through no fault of their own, witnesses who initially provided affidavits or other evidence in support of the whistleblower later become unable or unwilling to cooperate further. Under the proposed rule, depending on the circumstances of each case, the Director may exercise discretion in allowing a whistleblower to present such evidence, despite the witness's unavailability to the FBI. Because the exercise of discretion is necessary to conduct fair and just proceedings, the Department declines to adopt the suggestion to eliminate the OARM Director's discretion regarding how best to address the parties' unequal access to witnesses.

Another commenter expressed a concern that the OARM Director's discretion in the proposed revision to 28 CFR 27.4(e)(3) should include stipulations, or, alternatively, a standard specifying the circumstances in which the OARM Director would exercise his or her discretion.

The Department agrees that it should describe some of the factors that the OARM Director will consider when exercising the OARM Director's discretion. But because we cannot know with certainty the circumstances in which the OARM Director may decide to prohibit a party from relying on witness evidence when the other party did not have equal access to it, the Department declines to adopt the commenter's suggestion as proposed. The Department will, however, modify § 27.4(e)(3) in the final rule to specify some factors that the OARM Director may consider in the OARM Director's decision to exclude such evidence.

One commenter agreed with the proposed provision, but asserted that the Department should implement adequate security to protect witnesses from possible reprisal. OARM currently uses procedures that protect certain information obtained during the course of discovery containing personally identifiable information that could potentially impair the safety or privacy rights of past and current employees. OARM's protective procedures include the use of protective orders, redaction of documents, and closed hearings for the presentation of any live testimonial evidence. Given the OARM procedures already in place, the Department declines to adopt this suggestion.

Finally, one commenter suggested that the rule be modified to require the FBI to attempt to secure the testimony from employees in Federal service who are employed by other Federal agencies at the time of adjudication of the whistleblower reprisal complaint.

Requiring the FBI to attempt to secure the testimony from Federal employees working at other Federal agencies, however, would require the FBI to communicate directly with potentially adverse witnesses on behalf of complainants. The proposed rule helps to equalize the parties' access to witnesses. The commenter's suggested change does not further that goal. The Department declines to adopt this suggestion.

Acknowledgement and Show-Cause Orders

In the proposed rule, the Department added a new paragraph (f) to § 27.4 to formalize the OARM Director's existing practice of issuing acknowledgement and show-cause orders similar to those issued by the MSPB. Under proposed 28 CFR 27.4(f)(1), the acknowledgment orders issued by the OARM Director shall include: information on 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. The proposed provision further specified that the Acknowledgement Order shall inform the parties of the jurisdictional requirements for full adjudication of the request for corrective action and their respective burdens of proof.

In cases where the OARM Director determines that there is an initial question of the OARM Director's jurisdiction to review a request for corrective action, the OARM Director shall issue, along with the Acknowledgement Order, a Show-Cause Order explaining the grounds for such determination and directing that, within 10 calendar days of receipt of the order, the complainant submit a written response explaining why the request should not be dismissed for lack of jurisdiction. The FBI's reply to the complainant's response to the Show-Cause Order is due within 20 calendar days within its receipt of the complainant's response under proposed § 27.4(f)(3).

Two commenters suggested an extension of the 10-calendar day deadline for the complainant's response to the Show-Cause Order under § 27.4(f)(2). The Department adopts the proposal to extend that deadline and modifies § 27.4(f)(2) of this final rule to provide the complainant with 15 calendar days to respond to a Show-Cause Order.

Damages

One commenter suggested modifying 28 CFR 27.4(g) in the proposed rule to make an award of attorney's fees and costs mandatory whenever corrective action is ordered.

Section 27.4(f) currently provides the OARM Director with the authority to order certain corrective action to place the complainant, as nearly as possible, in the position he or she would have been in had the reprisal not taken place. Such corrective action ''may include,'' but is not limited to, reimbursement for attorney' fees and reasonable costs. Under section 2303(c), the Department is charged with enforcing 28 CFR part 27 ''consistent with applicable provisions of 1214 and 1221.'' Corrective action ordered by the MSPB to a prevailing party in an Individual Right of Action appeal under 5 U.S.C. 1221(g)(1)(B) ''shall include'' attorney's fees and costs provided that other requirements are met. Because the Department already enforces its corrective action authority in FBI whistleblower cases ''consistent with'' section 1221(g)(1)(B), and there are circumstances where an award of attorney's fees would not be mandatory (*e.g.,* where the complainant is a pro se litigant), the Department declines to adopt this suggestion as stated. However, this final rule, in new § 27.4(g), authorizes the OARM Director to order corrective action to a prevailing complainant that ''shall, as appropriate,'' include attorney's fees and reasonable costs, among other things.

Transparency Regarding OARM and Deputy Attorney General Decisions, and the Publication of Reprisal Findings

In the proposed rule, the Department added § 27.4(h) to formalize OARM's 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.

One commenter endorsed the proposal, but suggested that the Department also report findings of reprisal to ''any other appropriate law enforcement authority.''

Under current practice, the OARM Director refers findings of reprisal internally within the FBI, and, as discussed below, the Department has decided to publish in redacted form all dispositive OARM decisions and Deputy Attorney General decisions reversing or remanding OARM decisions, including those involving reprisal findings. The Department believes these actions will help to hold those responsible for unlawful reprisal accountable and deter others from violating the protections afforded FBI whistleblowers. Because there is no other ''law enforcement authority'' that would accomplish these goals, the Department declines to adopt this recommendation.

Another commenter endorsed the proposal, but suggested that internal reporting alone is likely insufficient to deter retaliatory conduct by FBI officials. The commenter suggested that the Department consider publishing redacted or sanitized findings ''to ensure that [the] individuals responsible understand the importance of respecting whistleblower protections and the significant consequences for violating them.'' Two other commenters also recommended that the proposed regulation require that OARM publish its decisions, and one suggested prohibiting OARM from citing or relying on a citation to an unpublished decision that all parties do not have access to.

In response, the Department has decided to publish in redacted form any decisions in closed cases on the merits, as well as procedural decisions showing how the OARM Director and the Deputy Attorney General have analyzed and decided issues relating to jurisdiction, discovery, merits, corrective relief, and other issues of relevance to FBI whistleblowers. All future decisions meeting these criteria will be made public in redacted form, as will decisions issued after January 1, 2018. This is a Departmental policy decision, subject to revision or rescission, and is therefore not memorialized in this final rule. The Department also adopts the recommendation to specify in this final rule, in a new § 27.4(j), that the OARM Director will not specifically cite or rely on any unpublished FBI whistleblower decisions in OARM issuances.

Expanding the Availability of ADR

In the proposed rule, the Department proposed to add 28 CFR 27.7 (§ 27.8 in this final rule) to formalize inclusion of the Department's FBI Whistleblower Mediation Program, which was implemented in 2014. One commenter suggested that the provision be modified to expand the availability of ADR to ''unprotected or potential'' whistleblowers who have not obtained ''protected status'' under 28 CFR part 27.

As discussed in the proposed rule, mediation through the FBI Whistleblower Mediation Program may be requested by the complainant at any stage of proceedings under 28 CFR part 27—*i.e.,* from the initial filing of the complaint with the Conducting Office and at any subsequent point thereafter while the complaint is being investigated or adjudicated. The rule does not require that the complainant be deemed a ''protected'' whistleblower by the OARM Director under the adjudicative procedures set forth in 28 CFR 27.4 before electing ADR through the FBI Whistleblower Mediation Program. However, the FBI Whistleblower Mediation Program is only available to complainants who have availed themselves of the protections provided in 28 CFR part 27. To the extent the commenter suggests that the program be widely available to FBI employees generally, the Department declines to adopt this comment. The program was created, resourced, and implemented for FBI whistleblower complainants only, and was not intended to be accessible to all FBI employees.

Claims Involving a Breach of a Settlement Agreement

In the proposed rule, the Department proposed to add 28 CFR 27.8, which would authorize the OARM Director to

adjudicate claims involving a breach of a settlement agreement. Proposed § 27.8 provides that a party may file with the OARM Director a claim of a breach of a settlement agreement reached in proceedings under 28 CFR part 27. Any claim of a breach of a settlement agreement must be filed with the OARM Director ''within 30 days of the date on which the grounds for the claim of breach were known.''

One commenter suggested that there is a conflict of interest presented by proposed § 27.8, ''by reserving to the Department the right to decide whether the Department itself breached the settlement agreement.'' The commenter suggested that the provision should be modified to allow breach claims to be adjudicated in an external forum.

The Department declines to adopt this comment because other Department components, and not the FBI, adjudicate breach claims. Just as OARM has fairly decided FBI whistleblower retaliation claims, it can also fairly decide claims involving a breach of a settlement agreement.

The commenter additionally suggested that proposed § 27.8(a) be modified to include either a ''reasonable suspicion'' or ''knew/should have known'' standard, as, according to the commenter, ''those standards are more extensively construed in precedent and thus clearer in their application.''

The Department agrees with and adopts the latter comment. This final rule, which designates proposed § 27.8(a) as § 27.9(a) in the final rule, adds the words ''or should have been known'' after the word ''known'' in that paragraph.

Reference to 2303(d) MSPB Appeal Rights in the Final Rule

In the preamble to the proposed rule, the Department referenced the recent enactment of 5 U.S.C. 2303(d), which affords FBI whistleblowers the right to (1) appeal a final determination or corrective action order to the MSPB, and (2) subject to certain conditions, seek corrective action directly from the MSPB pursuant to 5 U.S.C. 1221. *See* 5 U.S.C. 2303(d)(1) and (d)(2).

Several commenters suggested that the final rule include specific reference to the MSPB appeal rights provided to FBI whistleblowers in 5 U.S.C. 2303(d). One commenter additionally suggested that the final rule add new paragraphs under 28 CFR 27.4 and 27.5 to require notice to the complainant of the right to file an Individual Right of Action appeal with the MSPB pursuant to 5 U.S.C. 2303, specify the time frames for doing so, and make clear that the complainant's filing of a request for review by the Deputy Attorney General under 28 CFR 27.5 does not affect the complainant's rights under 5 U.S.C. 2303(d).

In response, the Department agrees that 28 CFR part 27 should reference section 2303(d), which will be included in this final rule, as a new § 27.7 (which, in turn, requires changing proposed §§ 27.7 and 27.8 to §§ 27.8 and 27.9, respectively). The Department declines to adopt the suggestion that the final rule make clear that the complainant's filing of a request for review by the Deputy Attorney General does not affect the complainant's section 2303(d) rights. By citing to section 2303(d) in new § 27.7, the Department clearly informs complainants of the right to file an appeal with the MSPB.

Citation to MSPB Case Precedent as Binding

One commenter suggested that, given the recent passage of 5 U.S.C. 2303(d), the final rule should include a new provision specifying that ''all adjudications'' under 28 CFR part 27 will follow the case precedent of the MSPB and its reviewing courts. Relatedly, the commenter also suggests that, consistent with MSPB case precedent, the final rule should modify 28 CFR 27.1(a) to make clear that the whistleblower protections extend to ''perceived'' whistleblowers.

In response, the Department declines to adopt the suggestion that the Department adopt as binding the case law of the MSPB and its reviewing courts. While the Department looks to MSPB and related Federal cases as persuasive, the Deputy Attorney General has the ultimate authority to review and decide FBI whistleblower reprisal appeals under 28 CFR part 27.

Procedural Case Processing Information

One commenter suggested that the Department include a new procedural provision to clarify certain routine aspects of administrative litigations. The Department declines to adopt the suggestion, as case procedures and processing items are currently publicly available in case procedure and processing documents issued by the Office of the Deputy Attorney General and OARM and so need not be memorialized in this final rule.

Rewording ''Whistleblower''

One commenter suggests developing ''an alternate title for the term 'whistleblower'" because it ''seems to always have a negative connotation when used.''

In response, the Department declines to adopt the suggestion because the updated regulations are intended to reflect changes resulting from an assessment conducted by the Department in response to PPD–19, and the FBI WPEA of 2016, both of which use that terminology, and changing the term would lead to unnecessary confusion. Moreover, the Department does not perceive the term ''whistleblower'' as having any negative connotation.

The FBI's Prepublication Review Process

One commenter suggests that the Department add a provision to the final rule to modify the FBI's prepublication review process to allow for the disclosure of content that the commenter believes may otherwise be protected by the First Amendment's Free Speech Clause. The Department understands the suggestion to be directed at the FBI's prepublication review process in general, and not specifically directed at issues related to FBI whistleblower claims of unlawful reprisal. Because the FBI's prepublication process is outside the scope of 28 CFR part 27, the Department declines to adopt the suggested change.

Suspension of Security Clearances

One commenter suggested that the Department ''[p]rovide a regulation stopping the FBI from suspending security clearances of employees or suspending them from duty without pay until legal or administrative action is taken against them.'' The National Security Act of 1947 and PPD–19 make it unlawful for an agency (including the FBI) to take any action affecting an employee's eligibility for access to classified information in reprisal for making a protected disclosure. These protections against revocations of security clearances apply to FBI employees. The investigation and adjudication of allegations that the suspension or revocation of security clearances held by Department employees was in retaliation for making protected disclosures are governed by different laws than those governing FBI whistleblower reprisal allegations, including 50 U.S.C. 3341, PPD–19, and DOJ Instruction 1700.00.01. Security clearance suspensions are outside the scope of 28 CFR part 27, and the Department therefore declines to adopt this suggestion.

IV. Regulatory Analyses

In developing this final 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 rule is summarized below.

A. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)

This final rule is not a significant regulatory action under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563 and amended by Executive Order 14094. This rule makes procedural changes to the existing regulatory framework for resolving claims of whistleblower retaliation by FBI employees and applicants. The changes do not materially affect the number of claims or the time, cost, or resources required to address them. 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 final rule does not have a significant economic impact on a substantial number of small entities. This 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. This rule will perhaps have a 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.

C. Paperwork Reduction Act

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

D. 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 final rule under that order and determined that this rule does not have federalism implications.

E. 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 Governments, 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 final rule does not require or result in expenditures by any of the above-named entities. This rule addresses the Department's internal procedures related to protected disclosures.

F. Executive Order 12988 (Civil Justice Reform), Plain Language

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

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

This final 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.

H. 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 this final rule. First, this rule relates primarily to agency management, personnel, and organization. 5 U.S.C. 804(3)(B). Second, to the extent that this 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 rule, and the rule does not substantially affect such parties' substantive rights or obligations. *Id.,* 803(3)(C). Instead, this 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. However, the Department is submitting a copy of this final rule to both houses of Congress and to the Comptroller General.

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 amends 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. In § 0.29d(a), remove the words ''a violation of any law, rule, or regulation, or mismanagement'' and add, in their place, the words ''any violation of any law, rule, or regulation, or 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 revising paragraph (a) and adding paragraph (c) to 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–INSD) (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:

(1) Any violation of any law, rule or regulation; or

(2) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

* * * * *

(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. In § 27.2, paragraph (b), remove the reference ''(xi)'' and add, in its place, the reference ''(xii)''.

■ 6. Amend § 27.4 by:

■ a. Revising paragraphs (a), (c)(1), (e)(1), (e)(3), (f), and (g); and

■ b. Adding paragraphs (e)(4), (h), (i), and (j).

The revisions and additions read as follows:

§ 27.4 Corrective action and other relief; Director, Office of Attorney Recruitment and 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 Recruitment and 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 paragraphs (e) and (f) of this section. A determination by the Conducting Office that there are reasonable grounds to believe that 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.

* * * * *

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

* * * * *

(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 and 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. The determination made by the Director under this section 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. In excluding such evidence, the Director may consider certain factors, including, but not limited to: the probative value of the evidence; whether the evidence is supported by sufficient guarantees of trustworthiness after considering the totality of the circumstances under which it was made and any corroborating evidence; and whether the evidence is duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. 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 the Director 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 15 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 shall, as appropriate, include: placing the Complainant, as nearly as possible, in the position the Complainant 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), shall forward to FBI OPR, FBI–INSD, and the Director of the FBI, a copy of the Director's written opinion finding that there has been a prohibited reprisal. FBI OPR shall make an independent determination of whether disciplinary action is warranted.

(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.

(j) The Director will not cite or rely upon any unpublished FBI whistleblower decision issued by the Director or Deputy Attorney General in rendering any decision under § 27.4.

■ 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, and 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 § 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) of this section.

(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 Right to appeal to or seek corrective relief from the U.S. Merit Systems Protection Board.

An FBI whistleblower may appeal to, or seek corrective relief from, the U.S. Merit Systems Protection Board in accordance with the provisions of 5 U.S.C. 2303(d).

■ 9. Add § 27.8 to read as follows:

§ 27.8 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.

■ 10. Add § 27.9 to read as follows:

§ 27.9 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 or should have been 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: January 25, 2024.

Merrick B. Garland,

Attorney General.

[FR Doc. 2024–01934 Filed 2–1–24; 8:45 am]

BILLING CODE 4410–AR–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2023–0652]

RIN 1625–AA09

Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Jupiter, FL

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily modifying the operating schedule that governs the Indiantown Road Bridge across the Atlantic Intracoastal Waterway (AICW), mile 1006.2, at Jupiter, Florida. This action is necessary to alleviate vehicle traffic congestion on the Indiantown Road Bridge caused by the replacement of another nearby bridge. Once construction of the nearby bridge is complete, the Indiantown Road Drawbridge will return to normal scheduled operations.

DATES: This temporary final rule is effective from 12:01 a.m. on February 5, 2024, through 11:59 p.m. on August 31, 2025.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov.* Type the docket number USCG–2023–0652 in the ''SEARCH'' box and click ''SEARCH''. In the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary final rule, call or email Mr. Leonard Newsom, Seventh District Bridge Branch, Coast Guard; telephone (305) 415–6946, email *Leonard.D.Newsom@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of proposed rulemaking (advance, supplemental)
§ Section
U.S.C. United States Code
FL Florida
AICW Atlantic Intracoastal Waterway
FDOT Florida Department of Transportation

II. Background Information and Regulatory History

On October 20, 2023, the Coast Guard published a notice of proposed rulemaking entitled ''Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, at Jupiter, FL'' in the **Federal Register** (88 FR 72415). There we stated why we issued the NPRM and invited comments on our proposed regulatory action related to this regulatory change. During the NPRM comment period that ended November 20, 2023, no comments were received.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 499. The Indiantown Road Bridge across the AICW, mile 1006.2, at Jupiter, Florida. The Indiantown Road Bridge is a double-leaf bascule bridge with 35 feet of vertical clearance in the closed position. The operating schedule requires the bridge to open each hour and half-hour as needed per 33 CFR 117.261(q).

The bridge owner, Florida Department of Transportation, has requested this change during the replacement of an adjacent bridge. The closing of the adjacent bridge has resulted in significant increase in vehicle traffic congestion of the area. The only alternate route for land traffic to access the mainland is via the Donald Ross Bridge approximately 4.5 miles south of the Indiantown Road Bridge. This rule will reduce the number of openings which will subsequently allow the local traffic to flow with less obstructions and delay.

IV. Discussion of Comments, Changes, and the Temporary Final Rule

The Coast Guard provided a comment period of 30 days, and no comments were received. The current regulation provides for the bridge to open twice an hour. This temporary final rule allows for the bridge to remain closed to navigation during designated times and all other times open twice an hour. Vessels that can pass beneath the bridge without an opening may do so at any time.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability that vessels able to transit the bridge while in the closed position may do so at any time.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, 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. The Coast Guard received zero comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant