FEDERAL WHISTLEBLOWER LAWS AND REGULATIONS

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THE NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center (NWC) is a not-for-profit public interest organization. Founded in 1988, the NWC conducts educational programs in order to provide the public with information on the laws governing whistleblower protection. In conjunction with the National Whistleblower Legal Defense and Education Fund, the NWC sponsors a website which provides information on pending legislation, publications, referrals and employee rights. For more information please contact the NWC at:

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Introduction

Over the past 40 years, the federal government has enacted over 90 laws and regulations covering whistleblowers, yet no single uniform national whistleblower law exists. Consequently, whistleblowers who seek protection under federal law must navigate a maze of often obscure rules and regulations governing their conduct. The scope of federal[1] protections afforded under these various laws are extremely diverse and depend on the following general factors:

1. Who is the employer?

2. What is the substance of the whistleblower disclosure?

3. Where is the allegation filed?

The different level of protection afforded employees under various federal laws can be extremely significant. For example, some federal laws have short statutes of limitation (thirty days), while others permit a whistleblower six years to file a claim. Likewise, some laws only provide for reinstatement and back pay, while others permit the employee to obtain a host of remedies, such as compensatory and punitive damages. Although most of the federal whistleblower laws protect private sector employees, some are limited to covering federal and/or public sector employees.

To assist employees or their counsel in identifying federal statutes and regulations which may apply to a whistleblower disclosure, this book compiles, for the first time, a copy of all federal statutes and regulations applicable to whistleblowers. This compilation of laws and regulations is intended to be read together with the treatises *Concepts and Procedures in Whistleblower Law* (Greenwood Press, 2001) and *Whistleblower Law: A Guide to Legal Protections for Corporate Employees* (Praeger, 2004), which set forth a comprehensive legal analysis of these statutory and regulatory provisions.

NOTES

1. Many states also have laws or "public polices" protecting whistleblowers. Often, state laws are stronger than their federal counterparts, and many states protect whistleblower disclosures for which there are no federal protections. For a description of state whistleblower protections please refer to *Concepts and Procedures in Whistleblower Law*, pp. 21-77.

SECTION 1
CONSTITUTIONAL PROTECTION/
FREEDOM OF SPEECH

First Amendment, U.S. Constitution
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment, U.S. Constitution
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1871, Section 1
42 U.S.C. § 1983
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Civil Rights Act of 1871, Sections 2 and 3
42 U.S.C. § 1985 (2) and (3)

(2) *Obstructing justice; intimidating party, witness, or juror*. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified

* * *

(3) * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Civil Rights Attorney's Fee Act
42 U.S.C. § 1988(b) and (c)

(b) In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees. In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee**.**

SECTION 2
CORPORATE/FINANCIAL
WHISTLEBLOWER PROTECTIONS

Corporate and Criminal Fraud Accountability Act
Sec. 806, Sarbanes-Oxley Act of 2002
Protection for employees of publicly traded companies who provide evidence of fraud.
18 U.S.C. § 1514A

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES- No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--(A) a Federal regulatory or law enforcement agency;(B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.(b) ENFORCEMENT ACTION-(1) IN GENERAL- A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--(A) filing a complaint with the Secretary of Labor; or(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.(2) PROCEDURE
(A) IN GENERAL- An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.
(B) EXCEPTION- Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF- An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.
(D) STATUTE OF LIMITATIONS- An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.(c) REMEDIES-(1) IN GENERAL- An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.(2) COMPENSATORY DAMAGES- Relief for any action under paragraph (1) shall include--(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
(B) the amount of back pay, with interest; and(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.(d) RIGHTS RETAINED BY EMPLOYEE- Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

Corporate Responsibility
Sec. 301, Sarbanes-Oxley Act of 2002
Audit Committee
15 U.S.C. § 78f(m)(4)

(4) COMPLAINTS- Each audit committee shall establish procedures for-
(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and
(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

Sec. 3(b)(1) of Sarbanes-Oxley*
Enforcement
15 U.S.C. § 7202(b)(1)
(b)(1) A violation by any person of this Act [the Sarbanes-Oxley Act], any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued there under, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

Corporate Responsiblity
Sec. 307, Sarbanes-Oxley Act of 2002
Rules of Professional Responsiblity for Attorneys
15 U.S.C. § 7245

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule--(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

Standards Relating To Listed Audit Committees
Securities And Exchange Commission
Final Rule
68 Federal Register 18788-01

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Federal Register pg. 18789 - 18790

I. Background and Overview of the New Rule and Amendments
In this release, we implement Section 10A(m)(1) of the Exchange Act, as added by Section 301 of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act"), which requires us to direct, by rule, the national securities exchanges and national securities associations(or "SROs") to prohibit the listing of any security of an issuer that is not in compliance with several enumerated standards regarding issuer audit committees. We received over 185 comments in response to our release proposing to implement the directive in Section 10A(m) of the Exchange Act. The final rule and form amendments we adopt today have been revised, as discussed in this release, to incorporate a number of changes recommended by commenter.
Accurate and reliable financial reporting lies at the heart of our disclosure-based system for securities regulation, and is critical to the integrity of the U.S. securities markets. Investors need accurate and reliable financial information to make informed investment decisions. Investor confidence in the reliability of corporate financial information is fundamental to the liquidity and vibrancy of our markets.
Effective oversight of the financial reporting process is fundamental to preserving the integrity of our markets. The board of directors, elected by and accountable to shareholders, is the focal point of the corporate

governance system. The audit committee, composed of members of the board of directors, plays a critical role in providing oversight over and serving as a check and balance on a company's financial reporting system. The audit committee provides independent review and oversight of a company's financial reporting processes, internal controls and independent auditors. It provides a forum separate from management in which auditors and other interested parties can candidly discuss concerns. By effectively carrying out its functions and responsibilities, the audit committee helps to ensure that management properly develops and adheres to a sound system of internal controls, that procedures are in place to objectively assess management's practices and internal controls, and that the outside auditors, through their own review, objectively assess the company's financial reporting practices.

Since the early 1940s, the Commission, along with the auditing and corporate communities, has had a continuing interest in promoting effective and independent audit committees.18 It was largely with the Commission's encouragement, for instance, that the SROs first adopted audit committee requirements in the 1970s.Over the years, others have expressed support for strong, independent audit committees, including the National Commission on Fraudulent Financial Reporting, also known as the Treadway Commission, and the General Accounting Office.

In 1998, the NYSE and the NASD sponsored a committee to study the effectiveness of audit committees. This committee became known as the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (the "Blue Ribbon Committee"). In its 1999 report, the Blue Ribbon Committee recognized the importance of audit committees and issued ten recommendations to improve their effectiveness. In response to these recommendations, the NYSE and the NASD, among others, revised their listing standards relating to audit committees, and we adopted new rules requiring disclosure relating to the functioning, governance and independence of corporate audit committees. Beginning last year, at the Commission's request, the NYSE and the NASD again reviewed their corporate governance standards, including their audit committee rules, in light of several high-profile corporate failures, and have proposed changes to their rules to provide more demanding standards for audit committees.

Recent events involving alleged misdeeds by corporate executives and independent auditors have damaged investor confidence in the financial markets. They have highlighted the need for strong, competent and vigilant audit committees with real authority. In response to the threat to the U.S. financial markets posed by these events, Congress passed, and the President signed into law on July 30, 2002, the Sarbanes-Oxley Act. The Sarbanes-Oxley Act mandates sweeping corporate disclosure and financial reporting reform to improve the responsibility of public companies for their financial disclosures. This release is the most recent of several that we have issued to implement provisions of the Sarbanes-Oxley Act.

Under new Exchange Act Rule 10A-3, SROs will be prohibited from listing any security of an issuer that is not in compliance with the following standards, as discussed in more detail in this release:

(1) Each member of the audit committee of the issuer must be independent according to specified criteria;
(2) The audit committee of each issuer must be directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the issuer, and each such registered public accounting firm must report directly to the audit committee;
(3) Each audit committee must establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters;
(4) Each audit committee must have the authority to engage independent counsel and other advisors, as it determines necessary to carry out its duties; and
(5) Each issuer must provide appropriate funding for the audit committee

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Federal Register pg. 18798
Procedures for Handling Complaints
The audit committee must place some reliance on management for information about the company's financial reporting process. Since the audit committee is dependent to a degree on the information provided to it by management and internal and outside auditors, it is imperative for the committee to cultivate open and effective channels of information. Management may not have the appropriate incentives to self-report all questionable practices. A company employee or other individual may be reticent to report concerns regarding questionable accounting or other matters for fear of management reprisal. The establishment of formal procedures for receiving and handling complaints should serve to facilitate disclosures, encourage proper individual conduct and alert the audit committee to potential problems before they have serious consequences.
Accordingly, under the listing standards called for by our final rules, each audit committee must establish procedures for:
(1) The receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters, and
(2) The confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.
As proposed, we are not mandating specific procedures that the audit committee must establish. Commenters were split over whether specific procedures should be mandated. The minority, representing primarily consultants and other third-party providers of such services, as well as several commenters representing investors, believed the Commission should mandate specific procedures, and many advocated a national "one-size-fits-all" approach. A substantial number of commenters, however, supported the Commission's approach of not mandating specific procedures, instead preferring to leave flexibility to the audit

committee to develop appropriate procedures in light of a company's individual circumstances, so long as the required parameters are met.

Given the variety of listed issuers in the U.S. capital markets, we believe audit committees should be provided with flexibility to develop and utilize procedures appropriate for their circumstances. The procedures that will be most effective to meet the requirements for a very small listed issuer with few employees could be very different from the processes and systems that would need to be in place for large, multi-national corporations with thousands of employees in many different jurisdictions. We do not believe that in this instance a "one-size-fits-all" approach would be appropriate. As noted in the Proposing Release, we expect each audit committee to develop procedures that work best consistent with its company's individual circumstances to meet the requirements in the final rule. Similarly, we are not adopting the suggestion of a few commenters that, despite the statutory language, the requirement should be limited to only employees in the financial reporting area.

While the scope of the requirements generally includes complaints received by a listed issuer regardless of source, Exchange Act Section 10A(m)(4)(B) and the relevant portion of the rules referring to confidential, anonymous submission of concerns are directed to employees of the issuer. One commenter noted that investment companies rarely have direct employees. The commenter suggested that, for investment companies, the confidential, anonymous submission requirements should extend to employees of entities engaged by an investment company to prepare or assist in preparing its financial statements. We encourage the SROs to consider the appropriate scope of the requirement with regard to investment companies, taking account of the fact that most services are rendered to an investment company by employees of third parties, such as the investment adviser, rather than by employees of the investment company.

* * *

15 U.S.C. 78j-1(m)(1).

Pub. L. 107-204, 116 Stat. 745 (2002).

A "national securities exchange" is an exchange registered as such under Section 6 of the Exchange Act [15 U.S.C. 78f]. There are currently nine national securities exchanges registered under Section 6(a) of the Exchange Act: American Stock Exchange (AMEX), Boston Stock Exchange, Chicago Board Options Exchange (CBOE), Chicago Stock Exchange, Cincinnati Stock Exchange, International Securities Exchange, New York Stock Exchange (NYSE), Philadelphia Stock Exchange and Pacific Exchange. In addition, an exchange that lists or trades security futures products (as defined in Exchange Act Section 3(a)(56) [15 U.S.C. 78c(56)]) may register as a national securities exchange under Section 6(g) of the Exchange Act solely for the purpose of trading security futures products. Regarding security futures products, see Section II.F.2.b.

A "national securities association" is an association of brokers and dealers registered as such under Section 15A of the Exchange Act [15

U.S.C. 78o-3]. The National Association of Securities Dealers (NASD) is the only national securities association registered with the Commission under Section 15A(a) of the Exchange Act. The NASD partially owns and operates The Nasdaq Stock Market (Nasdaq). Nasdaq has filed an application with the Commission to register as a national securities exchange. In addition, Section 15A(k) of the Exchange Act [15 U.S.C. 78o-3(k)] provides that a futures association registered under Section 17 of the Commodity Exchange Act [7 U.S.C. 21] shall be registered as a national securities association for the limited purpose of regulating the activities of members who are registered as broker-dealers in security futures products pursuant to Section 15(b)(11) of the Exchange Act [15 U.S.C. 78o(b)(11)]. Regarding security futures products, see Section II.F.2.b.

Release No. 33-8173 (Jan. 8, 2003) [68 FR 2638] ("Proposing Release"). The public comments we received, and a summary of the comments prepared by our staff (the "Comment Summary"), can be viewed in our Public Reference Room at 450 Fifth Street, NW, Washington, DC 20549, in File No. S7-02-03. Public comments submitted by electronic mail and the Comment Summary also are available on our website, www.sec.gov.

In 1940, the Commission investigated the auditing practices of McKesson & Robbins, Inc., and the Commission's ensuing report prompted action on auditing procedures by the auditing community. In the Matter of McKesson & Robbins, Accounting Series Release (ASR) No. 19, Exchange Act Release No. 2707 (Dec. 5, 1940).

For example, in 1972, the Commission recommended that companies establish audit committees composed of outside directors. See ASR No. 123 (Mar. 23, 1972). In 1974 and 1978, the Commission adopted rules requiring disclosures about audit committees. See Release No. 34-11147 (Dec. 20, 1974) and Release No. 34-15384 (Dec. 6, 1978).

See, e.g., Preliminary Report of the American Bar Association Task Force on Corporate Responsibility (July 16, 2002). The report is available on the American Bar Association's website at www.abanet.org/buslaw/.

The Treadway Commission was sponsored by the American Institute of Certified Public Accountants, the American Accounting Association, the Financial Executives Institute (now Financial Executives International), the Institute of Internal Auditors and the National Association of Accountants. Collectively, these groups were known as the Committee of Sponsoring Organizations, or COSO. The Treadway Commission's report, the Report of the National Commission on Fraudulent Financial Reporting (October 1987), is available at www.coso.org

GAO, "CPA Audit Quality: Status of Actions Taken to Improve Auditing and Financial Reporting of Public Companies," at 5 (GAO/AFMD-89-38, March 1989).

See Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (February 1999). The Blue Ribbon Committee Report is available at www.nyse.com.

See, for example, Exchange Act Release No. 42231 (Dec. 14, 1999) [64 FR 71523] (Nasdaq rules) and Exchange Act Release No. 42233 (Dec. 14, 1999) (NYSE rules) [64 FR 71529]. See also Exchange Act Release

No. 42232 (Dec. 14, 1999) [64 FR 71518] (American Stock Exchange rules) and Release No. 34-43941 (Feb. 7, 2001) [66 FR 10545] (Pacific Exchange rules).

See Exchange Act Release No. 42266 (Dec. 22, 1999) [64 FR 73389].
See Press Release No. 2002-23 (Feb. 13, 2002).
See File Nos. SR-NASD-2002-141 and SR-NYSE-2002-33 (pending before the Commission).
See, for example, John Waggoner and Thomas A. Fogarty, "Scandals Shred Investors' Faith: Because of Enron, Andersen and Rising Gas Prices, the Public is More Wary Than Ever of Corporate America," USA Today, May 2, 2002; and Louis Aguilar, "Scandals Jolting Faith of Investors," Denver Post, June 27, 2002.
See, for example, John Good, "After Enron, Beef Up Those Audit Committees," The Commercial Appeal, Apr. 26, 2002; and "FT Comment After Enron: Giving Meaning to the Codes of Best Practice: Corporate Governance: Companies Need Truly Independent Directors, Strong Audit Committees, an Outlet for Whistleblowers and Tight Controls on Share Options," The Financial Times, Feb. 19, 2002.
For example, see Release No. 34-46421 (Aug. 27, 2002) [67 FR 56462] (Ownership reports and trading by officers, directors and principal security holders); Release No. 33-8124 (Aug. 28, 2002) [67 FR 57276] (Certification of disclosure in companies' quarterly and annual reports); Release No. 33-46685 (Oct. 18, 2002) [67 FR 65325] (Proposals regarding improper influence on conduct of audits); Release No. 33-8138 (Oct. 22, 2002) [67 FR 66208] (Proposals regarding internal control reports); Release No. 33-8170 (Dec. 20, 2002) [67 FR 79466] (Proposals regarding mandated electronic filing and website posting for Forms 3, 4 and 5); Release No. 33-8176 (Jan. 22, 2003) [68 FR 4820] (Conditions for use of non-GAAP financial information); Release No. 34-47225 (Jan. 22, 2003) [68 FR 4338] (Insider trades during pension plan blackout periods); Release No. 33-8177 (Jan. 23, 2003) [68 FR 5110] (Disclosure regarding audit committee financial experts and company codes of ethics); Release No. 33-8180 (Jan. 24, 2003) [68 FR 4862] (Retention of records relevant to audits and reviews); Release No. 34-47262 (Jan. 27, 2003) [68 FR 5348] (Adoption of Form N-CSR); Release No. 33-8182 (Jan. 28, 2003) [68 FR 5982] (Disclosure about off-balance sheet arrangements); Release No. 33-8183 (Jan. 28, 2003) [68 FR 6006] (Strengthening the Commission's requirements regarding auditor independence); Release Nos. 33-8185 (Jan. 29, 2003) [68 FR 6296] and 33-8186 (Jan. 29, 2003) [68 FR 6324] (Implementation of standards of professional conduct for attorneys); and Release No. 33-8212 (Mar. 21, 2003) [68 FR 15600] (Certification of disclosure in certain Exchange Act reports).
The Sarbanes-Oxley Act provides additional protections for employees who provide evidence of fraud. See, for example, Section 806 of the Sarbanes-Oxley Act.

Exchange Act Rule 10A-3 is not intended to preempt or supersede any other federal or state requirements relating to receipt and retention of records.

See, e.g., the Letters of AuditConcerns, Inc.; CalPERS; Michael Chenkin; Confidential Communications Services, LLC; David Gold; The HR Hotline, Inc.; SWIB; Teamsters.
See, e.g., the Letters of ABA; AICPA; American Bankers Association; Cleary; CSC; Deloitte; Edison Electric Institute; E&Y; FEI; ICI; Nasdaq; The Network, Inc.; NYCBA; NYSBA; PSEG; PwC; Ralph S. Saul; State Street Corporation.
See, e.g., the Letter of S&C.
See the Letter of PwC.
Compare Release No. 33-8185 (Jan. 29, 2003) (attorney employed by an investment adviser who prepares, or assists in preparing, materials for a registered investment company to be submitted to or filed with the Commission by or on behalf of the investment company is appearing and practicing before the Commission); Release No. 34-47262 (Jan. 27, 2003) (disclosure required of code of ethics applicable to the principal executive officer and financial officer of a registered management investment company, or persons performing similar functions, regardless of whether they are employees of the investment company or a third party).

Credit Union,
Employee Protection Provision
12 U.S.C. § 1790b

(a) In general.
(1) Employees of credit unions. No insured credit union may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to the Board or the Attorney General regarding any possible violation of any law or regulation by the credit union or any director, officer, or employee of the credit union.
(2) Employees of the Administration. The Administration may not discharge or otherwise discriminate against any employee (including any employee of the National Credit Union Central Liquidity Facility) with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to the Administration or the Attorney General regarding any possible violation of any law or regulation byC (A) any credit union or the Administration; (B) any director, officer, committee member, or employee of any credit union; or (C) any officer or employee of the Administration.(b) Enforcement. Any employee or former employee who believes he has been discharged or discriminated against in violation of subsection (a) of this section may file a civil action in the appropriate United States district court before the close of the 2-year period beginning on the date of such discharge or discrimination. The complainant shall also file a copy of the complaint initiating such action with the Board.(c) Remedies. If the district court determines that a violation of subsection

(a) of this section has occurred, it may order the credit union or the Administration which committed the violationC (1) to reinstate the employee to his former position, (2) to pay compensatory damages, or
(3) take other appropriate actions to remedy any past discrimination
(d) Limitations. The protections of this section shall not apply to any employee who (1) deliberately causes or participates in the alleged violation of law or regulation, or(2) knowingly or recklessly provides substantially false information to such an agency or the Attorney General.

FDIC,
Depository institution employee protection remedy
12 U.S.C. § 1831j

(a) In general. (1) Employees of depository institutions. No insured depository institution may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to any Federal banking agency or to the Attorney General regardingC(A) a possible violation of any law or regulation; or(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; by the depository institution or any director, officer, or employee of the institution.
(2) Employees of banking agencies. No Federal banking agency, Federal home loan bank, Federal reserve bank, or any person who is performing, directly or indirectly, any function or service on behalf of the Corporation may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to any such agency or bank or to the Attorney General regarding any possible violation of any law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety byC(A) any depository institution or any such bank or agency;(B) any director, officer, or employee of any depository institution or any such bank;(C) any officer or employee of the agency which employs such employee; or (D) the person, or any officer or employee of the person, who employs such employee.
(b) Enforcement. Any employee or former employee who believes he has been discharged or discriminated against in violation of subsection (a) of this section may file a civil action in the appropriate United States district court before the close of the 2-year period beginning on the date of such discharge or discrimination. The complainant shall also file a copy of the complaint initiating such action with the appropriate Federal banking agency.
(c) Remedies. If the district court determines that a violation of subsection

(a) of this section has occurred, it may order the depository institution, Federal home loan bank, Federal Reserve bank, or Federal banking

agency which committed the violationC(1) to reinstate the employee to his former position; (2) to pay compensatory damages; or (3) take other appropriate actions to remedy any past discrimination.
(d) Limitation. The protections of this section shall not apply to any employee whoC(1) deliberately causes or participates in the alleged violation of law or regulation; or(2) knowingly or recklessly provides substantially false information to such an agency or the Attorney General.
(e) AFederal banking agency@ definedC
For purposes of subsections (a) and (c) of this section, the term AFederal banking agency@ means the Corporation, the Board of Governors of the Federal Reserve System, the Federal Housing Finance Board, the Comptroller of the Currency, and the Director of the Office of Thrift Supervision.
(f) Burdens of proof. The legal burdens of proof that prevail under subchapter III of chapter 12 of title 5 shall govern adjudication of protected activities under this section.

Monetary Transactions, Whistleblower Protection Provision (amended version)
31 U.S.C. § 5328

(a) Prohibition against discrimination. No financial institution or nonfinancial trade or business may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to the Secretary of the Treasury, the Attorney General, or any Federal supervisory agency regarding a possible violation of any provision of this subchapter or section 1956, 1957, or 1960 of title 18, or any regulation under any such provision, by the financial institution or nonfinancial trade or business or any director, officer, or employee of the financial institution or nonfinancial trade or business.
(b) Enforcement. Any employee or former employee who believes that such employee has been discharged or discriminated against in violation of subsection (a) may file a civil action in the appropriate United States district court before the end of the 2 year period beginning on the date of such discharge or discrimination.
(c) Remedies. If the district court determines that a violation has occurred, the court may order the financial institution or nonfinancial trade or business which committed the violation to (1) reinstate the employee to the employee's former position;(2) pay compensatory damages; or (3) take other appropriate actions to remedy any past discrimination.
(d) Limitation. The protections of this section shall not apply to any employee who (1) deliberately causes or participates in the alleged violation of law or regulation; or (2) knowingly or recklessly provides substantially false information to the Secretary, the Attorney General, or any Federal supervisory agency.
(e) Coordination with other provisions of law. This section shall not apply with respect to any financial institution or nonfinancial trade or business which is subject to section 33 of the Federal Deposit Insurance

Act, section 213 of the Federal Credit Union Act, or section 21A(q) of the Home Owners' Loan Act (as added by section 251(c) of the Federal Deposit Insurance Corporation Improvement Act of 1991).

Corporate and Criminal Fraud Accountability Act
Sec. 806, Sarbanes-Oxley Act of 2002
Final Rule
29 CFR Part 1980
U.S. Department of Labor
Vol. 69 Federal Register 52104 (August 24, 2004)

PART 1980 -- PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER SECTION 806 OF THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002, TITLE VIII OF THE SARBANES-OXLEY ACT OF 2002

Subpart ACComplaints, Investigations, Findings and Preliminary Orders*

§ 1980.100 Purpose and scope.

(a) This part implements procedures under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes Oxley Act of 2002 (>>Sarbanes Oxley'' or >>Act''), enacted into law July 30, 2002.Sarbanes Oxley provides for employee protection from discrimination by companies and representatives of companies because the employee has engaged in protected activity pertaining to a violation or alleged violation of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) This part establishes procedures pursuant to Sarbanes Oxley for the expeditious handling of discrimination complaints made by employees, or by persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints under Sarbanes Oxley, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges, post hearing administrative review, and withdrawals and settlements.

§ 1980.101 Definitions.

Act means section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes Oxley Act of 2002, Public Law No.107B204, July 30, 2002, codified at 18 U.S.C. 1514A.

Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.

Company means any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).

Company representative means any officer, employee, contractor, subcontractor, or agent of a company.

Complainant means the employee who filed a complaint under the Act or on whose behalf a complaint was filed.

Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

Named person means the employer and/or the company or company representative named in the complaint who is alleged to have violated the Act.

OSHA means the Occupational Safety and Health Administration of the United States Department of Labor.

Person means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons. Secretary means the Secretary of Labor or persons to whom authority under the Act has been delegated.

§ 1980.102 Obligations and prohibited acts.

(a) No company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section.

(b) An employee is protected against discrimination (as described in paragraph (a) of this section) by a company or company representative for any lawful act:

(1) To provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of 18 U.S.C. 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted byC
(i) A Federal regulatory or law enforcement agency;
(ii) Any Member of Congress or any committee of Congress; or
(iii) A person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
(2) To file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of 18 U.S.C. 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

§ 1980.103 Filing of discrimination complaint.
(a) Who may file. An employee who believes that he or she has been discriminated against by a company or company representative in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.
(b) Nature of filing. No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.
(c) Place of filing. The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: http://www.osha.gov.
(d) Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or email communication will be considered to be the date of filing; if the complaint is filed in person, by hand delivery or other means, the complaint is filed upon receipt.

§ 1980.104 Investigation.
(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the named person (or named persons) of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identity of any confidential informants). The Assistant Secretary also will notify the named person of its right under paragraphs (b) and (c) of

this section and paragraph (e) of ' 1980.110. A copy of the notice to the named person will also be provided to the Securities and Exchange Commission.

(b) A complaint of alleged violation shall be dismissed unless the complainant has made a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.

(1) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity or conduct;

(ii) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;

(iii) The employee suffered an unfavorable personnel action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

(2) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, i.e., to give rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action. Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If the required showing has not been made, the complainant will be so advised and the investigation will not commence.

(c) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint shall not be conducted if the named person, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. Within 20 days of receipt of the notice of the filing of the complaint, the named person may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the named person may request a meeting with the Assistant Secretary to present its position.

(d) If the named person fails to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the behavior protected by the Act, the Assistant Secretary will conduct an investigation. Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e) Prior to the issuance of findings and a preliminary order as provided for in ' 1980.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe

that the named person has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the named person to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The named person will be given the opportunity to submit a written response, to meet with the investigators to present statements from witnesses in support of its position, and to present legal and factual arguments. The named person will present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the named person can agree, if the interests of justice so require.

§ 1980.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary shall issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she shall accompany the findings with a preliminary order providing relief to the complainant. The preliminary order shall include all relief necessary to make the employee whole, including, where appropriate: reinstatement with the same seniority status that the employee would have had but for the discrimination; back pay with interest; and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees. Where the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge), a preliminary order of reinstatement would not be appropriate.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and the preliminary order will be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order will inform the parties of their right to file objections and to request a hearing, and of the right of the named person to request attorney's fees from the ALJ, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. The letter also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and order.

(c) The findings and preliminary order will be effective 30 days after receipt by the named person pursuant to paragraph (b) of this section, unless an objection and a request for a hearing has been filed as provided

at ' 1980.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon receipt of the findings and preliminary order.

Subpart BCLitigation

§ 1980.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to paragraph (b) of ' 1980.105. The objection or request for attorney's fees and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or email communication will be considered to be the date of filing; if the objection is filed in person, by hand delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b)(1) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which shall not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order. The named person may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement.

(2) If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order, as the case may be, shall become the final decision of the Secretary, not subject to judicial review.

§ 1980.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, part 18 of title 29 of the Code of Federal Regulations.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo, on the record. Administrative law

judges have broad discretion to limit discovery in order to expedite the hearing.
(c) If both the complainant and the named person object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.
(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

§ 1980.108 Role of Federal agencies.
(a)(1) The complainant and the named person will be parties in every proceeding. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as amicus curiae at any time at any stage of the proceedings. This right to participate includes, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a decision approving or rejecting a settlement agreement between the complainant and the named person.
(2) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.
(b) The Securities and Exchange Commission may participate as amicus curiae at any time in the proceedings, at the Commission's discretion. At the request of the Securities and Exchange Commission, copies of all pleadings in a case must be sent to the Commission, whether or not the Commission is participating in the proceeding.

§ 1980.109 Decision and orders of the administrative law judge.
(a) The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to ' 1980.104(b) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge will hear the case on the merits.
(b) If the administrative law judge concludes that the party charged has violated the law, the order will provide all relief necessary to make the employee whole, including reinstatement of the complainant to that

person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees. If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.

(c) The decision will be served upon all parties to the proceeding. Any administrative law judge's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the named person, and will not be stayed. All other portions of the judges order will be effective 10 business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

§ 1980.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board (the Board), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within 10 business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or email communication will be considered to be the date of filing; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the administrative law judge will become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement will be effective while review is conducted by the Board, unless the Board grants a motion to stay the order. The Board will specify the terms under which any briefs are to be filed. The Board will review the factual determinations of the administrative law judge under the substantial evidence standard.

(c) The final decision of the Board shall be issued within 120 days of the conclusion of the hearing, which will be deemed to be the conclusion of all proceedings before the administrative law judgeCi.e., 10 business days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed with the administrative law judge in the interim. The decision will be served upon all parties and the Chief Administrative Law Judge by mail to the last known address. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210, even if the Assistant Secretary is not a party.

(d) If the Board concludes that the party charged has violated the law, the final order will order the party charged to provide all relief necessary to make the employee whole, including reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

(e) If the Board determines that the named person has not violated the law, an order will be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was brought in bad faith, the Board may award to the named person a reasonable attorney's fee, not exceeding $1,000.

Subpart Miscellaneous Provisions

§ 1980.111 Withdrawal of complaints, objections, and findings; settlement.

(a) At any time prior to the filing of objections to the findings or preliminary order, a complainant may withdraw his or her complaint under the Act by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether to approve the withdrawal. The Assistant Secretary will notify the named person of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section.

(b) The Assistant Secretary may withdraw his or her findings or a preliminary order at any time before the expiration of the 30 day objection period described in ' 1980.106, provided that no objection has yet been filed, and substitute new findings or preliminary order. The date of the receipt of the substituted findings or order will begin a new 30 day objection period.

(c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether to approve the withdrawal. If the objections are withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section.

(d)(1) Investigative settlements. At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.
(2) Adjudicatory settlements. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement will be filed with the administrative law judge or the Board, as the case may be.
(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board, will constitute the final order of the Secretary and may be enforced pursuant to '1980.113.

§ 1980.112 Judicial review.
(a) Within 60 days after the issuance of a final order by the Board (Secretary) under ' 1980.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. A final order of the Board is not subject to judicial review in any criminal or other civil proceeding.
(b) If a timely petition for review is filed, the record of a case, including the record of proceedings before the administrative law judge, will be transmitted by the Board to the appropriate court pursuant to the rules of the court.

§ 1980.113 Judicial enforcement.
Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

§ 1980.114 District Court jurisdiction of discrimination complaints.
(a) If the Board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.
(b) Fifteen days in advance of filing a complaint in federal court, a complainant must file with the administrative law judge or the Board, depending upon where the proceeding is pending, a notice of his or her intention to file such a complaint. The notice must be served upon all parties to the proceeding. If the Assistant Secretary is not a party, a copy of the notice must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor,

Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

§ 1980.115 Special circumstances; waiver of rules.
In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Board on review may, upon application, after three days notice to all parties and interveners, waive any rule or issue any orders that justice or the administration of the Act requires.

Standards of Professional Conduct for Attorneys*
Securities and Exchange Commission
17 C.F.R. Part 205

§ 205.1 Purpose and scope.
This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

§ 205.2 Definitions.
For purposes of this part, the following definitions apply:(a) Appearing and practicing before the Commission:(1) Means:(i) Transacting any business with the Commission, including communications in any form;(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations there under regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations there under to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but(2) Does not include an attorney who:(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or(ii) Is a non-appearing foreign attorney.(b) Appropriate response means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably

believes:(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or(3) That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to ' 205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:(i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.(c) Attorney means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.(d) Breach of fiduciary duty refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.(e) Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.(f) Foreign government issuer means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a et seq., Schedule B).(g) In the representation of an issuer means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.(h) Issuer means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term "issuer" includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.(i) Material violation means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.(j) Non-appearing foreign attorney means an attorney:(1) Who is admitted

to practice law in a jurisdiction outside the United States;(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and(3) Who:(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.(k) Qualified legal compliance committee means a committee of an issuer (which also may be an audit or other committee of the issuer) that:(1) Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under ' 205.3;(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in ' 205.3(b)(4));(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:(A) Notify the audit committee or the full board of directors;(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and(C) Retain such additional expert personnel as the committee deems necessary; and(iii) At the conclusion of any such investigation, to:(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.(l) Reasonable or reasonably denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.(m) Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.(n) Report means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

' 205.3 Issuer as client.
(a) Representing an issuer. An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.(b) Duty to report evidence of a material violation.(1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:(i) The audit committee of the issuer's board of directors;(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).(4) If an attorney reasonably believes that it would be

futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:(i) To investigate such evidence of a material violation; or(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefore to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this

section.(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.(c) Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee.(1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under ' 205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).(d) Issuer confidences.(1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in "18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

§ 205.4 Responsibilities of supervisory attorneys.
(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in ' 205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.(c) A supervisory attorney is responsible for complying with the reporting requirements in ' 205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under ' 205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

§ 205.5 Responsibilities of a subordinate attorney.
(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.(c) A subordinate attorney complies with ' 205.3 if the subordinate attorney reports to his or her supervising attorney under ' 205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.(d) A subordinate attorney may take the steps permitted or required by ' 205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under ' 205.3(b) has failed to comply with ' 205.3.

§ 205.6 Sanctions and discipline.
(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or

other United States jurisdiction where the attorney is admitted or practices.(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.
' 205.7 No private right of action.(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

Securities And Exchange Commission*
Audit Committee Rules/Complaint Process
Final Rule
17 CFR 240.10A-3(b)(iv)(F)(3)
Each audit committee must establish procedures for:
(i) The receipt, retention, and treatment of complaints received by the listed issuer regarding accounting, internal accounting controls, or auditing matters; and
(ii) The confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters.

SECTION 3
ENVIRONMENTAL WHISTLEBLOWERS

Clean Air Act,
Employee Protection Provision
42 U.S.C. § 7622

(a) *Discharge or discrimination prohibited*. No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
(2) testified or is about to testify in any such proceeding, or
(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.
(b) *Complaint charging unlawful discharge or discrimination; investigation; order*
(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.
(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.
(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i)

take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) *Review*.

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) *Enforcement of order by Secretary*. Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(e) *Enforcement of order by person on whose behalf order was issued.*

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) *Mandamus*. Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28.

(g) *Deliberate violation by employee.* Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter.

Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"), Employee Protection Provision
42 U.S.C. § 9610

(a) *Activities of employee subject to protection*. No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.
(b) *Administrative grievance procedure in cases of alleged violations*. Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person, who shall be the respondent. Upon receipt of such application, the Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation, the Secretary of Labor shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. If he finds that there was no such violation, he shall issue an order denying the application. Such order issued by the Secretary of Labor under this subparagraph shall be subject to judicial review in the same manner as orders and decisions are subject to judicial review under this chapter.

(c) *Assessment of costs and expenses against violator subsequent to issuance of order of abatement*. Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) determined by the Secretary of Labor to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.
(d) *Defenses*. This section shall have no application to any employee who acting without discretion from his employer (or his agent) deliberately

violates any requirement of this chapter.
(e) *Presidential evaluations of potential loss of shifts of employment resulting from administration or enforcement of provisions; investigations; procedures applicable, etc*. The President shall conduct continuing evaluations of potential loss of shifts of employment which may result from the administration or enforcement of the provisions of this chapter, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement. Any employee who is discharged, or laid off, threatened with discharge or layoff, or otherwise discriminated against by any person because of the alleged results of such administration or enforcement, or any representative of such employee, may request the President to conduct a full investigation of the matter and, at the request of any party, shall hold public hearings, require the parties, including the employer involved, to present information relating to the actual or potential effect of such administration or enforcement on employment and any alleged discharge, layoff, or other discrimination, and the detailed reasons or justification there[of]. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation, the President shall make findings of fact as to the effect of such administration or enforcement on employment and on the alleged discharge, layoff, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public. Nothing in this subsection shall be construed to require or authorize the President or any State to modify or withdraw any action, standard, limitation, or any other requirement of this chapter.

Pipeline Safety Improvement Act of 2002,
Protection of employees providing pipeline safety information,
49. U.S.C. § 60129

(a)DISCRIMINATION AGAINST EMPLOYEE-
(1) IN GENERAL- No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
(A) provided, caused to be provided, or is about to provide or cause to be provided, to the employer or the Federal Government information relating to any violation or alleged violation of any order, regulation, or standard under this chapter or any other Federal law relating to pipeline safety;
(B) refused to engage in any practice made unlawful by this chapter or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer;
(C) provided, caused to be provided, or is about to provide or cause to be provided, testimony before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this

chapter or any other Federal law relating to pipeline safety;
(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or any other Federal law relating to pipeline safety;
(E) provided, caused to be provided, or is about to provide or cause to be provided, testimony in any proceeding described in subparagraph (D); or
(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or any other Federal law relating to pipeline safety.
(2) EMPLOYER DEFINED- In this section, the term `employer' means--
(A) a person owning or operating a pipeline facility; or
(B) a contractor or subcontractor of such a person.
(b) DEPARTMENT OF LABOR COMPLAINT PROCEDURE-
(1) FILING AND NOTIFICATION- A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person or persons named in the complaint and the Secretary of Transportation of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person or persons under paragraph (2).
(2) INVESTIGATION; PRELIMINARY ORDER-
(A) IN GENERAL- Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person or persons named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary of Labor to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify in writing the complainant and the person or persons alleged to have committed a violation of subsection (a) of the Secretary of Labor's findings. If the Secretary of Labor concludes that there is reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary of Labor shall include with the Secretary of Labor's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 60 days after the date of notification of findings under this subparagraph, any person alleged to have committed a violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 60-day period, the preliminary order shall be deemed a final order that is not subject to

judicial review.
(B) REQUIREMENTS-
(i) REQUIRED SHOWING BY COMPLAINANT- The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph
(A) unless the complainant makes a prima facie showing that any behavior described in subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
(ii) SHOWING BY EMPLOYER- Notwithstanding a finding by the Secretary of Labor that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.
(iii) CRITERIA FOR DETERMINATION BY SECRETARY- The Secretary of Labor may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
(iv) PROHIBITION- Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.
(3) FINAL ORDER-
(A) DEADLINE FOR ISSUANCE; SETTLEMENT AGREEMENTS- Not later than 90 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person or persons alleged to have committed the violation.
(B) REMEDY- If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person or persons who committed such violation to--(i) take affirmative action to abate the violation; (ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and(iii) provide compensatory damages to the complainant. If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person or persons against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.
(C) FRIVOLOUS COMPLAINTS- If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad

faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.
(4) REVIEW-
(A) APPEAL TO COURT OF APPEALS- Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.
(B) LIMITATION ON COLLATERAL ATTACK- An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.
(5) ENFORCEMENT OF ORDER BY SECRETARY OF LABOR- Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief, including, but not to be limited to, injunctive relief and compensatory damages.
(6) ENFORCEMENT OF ORDER BY PARTIES.
(A) COMMENCEMENT OF ACTION- A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person or persons to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.
(B) ATTORNEY FEES- The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award of costs is appropriate.
(C) MANDAMUS- Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.
(D) NONAPPLICABILITY TO DELIBERATE VIOLATIONS- Subsection (a) shall not apply with respect to an action of an employee of an employer who, acting without direction from the employer (or such employer's agent), deliberately causes a violation of any requirement relating to pipeline safety under this chapter or any other law of the United States.
(b) CIVIL PENALTY- Section 60122(a) is amended by adding at the end the following: (3) A person violating section 60129, or an order issued thereunder, is liable to the Government for a civil penalty of not more than $1,000 for each violation. The penalties provided by

paragraph (1) do not apply to a violation of section 60129 or an order issued thereunder.
(c) CONFORMING AMENDMENT- The analysis for chapter 601 is amended by adding at the end the following: 60129. Protection of employees providing pipeline safety information.

Safe Drinking Water Act,
Employee Protection Provision
42 U.S.C. § 300j-9(i)

(i)Discrimination prohibition: filing of complaint; investigation; orders of Secretary; notice and hearing; settlements; attorneys' fees; judicial review; filing of petition; procedural requirements; stay of orders; exclusiveness of remedy; civil actions for enforcement of orders; appropriate relief; mandamus proceedings; prohibition inapplicable to undirected but deliberate violations—
(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has—
(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,
(B) testified or is about to testify in any such proceeding, or
(C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.
(2)(A) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1) may, within 30 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.
(B)(i) Upon receipt of a complaint filed under subparagraph (A), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within 30 days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within 90 days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by clause (ii) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for agency hearing. The

Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.
(ii) If in response to a complaint filed under subparagraph (A) the Secretary determines that a violation of paragraph (1) has occurred, the Secretary shall order
(I) the person who committed such violation to take affirmative action to abate the violation,
(II) such person to reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment,
(III) compensatory damages, and
(IV) where appropriate, exemplary damages. If such an order is issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.
(3)(A) Any person adversely affected or aggrieved by an order issued under paragraph (2) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.
(B) An order of the Secretary with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.
(4) Whenever a person has failed to comply with an order issued under paragraph (2)(B), the Secretary shall file a civil action in the United States District Court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.
(5) Any nondiscretionary duty imposed by this section is enforceable in mandamus proceeding brought under section 1361 of title 28.
(6) Paragraph (1) shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this subchapter.

Solid Waste Disposal Act,
Employee Protection Provision
42 U.S.C. § 6971

(a) *General.* No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.
(b) *Remedy.* Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation, the Secretary of Labor shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. If he finds that there was no such violation, he shall issue an order denying the application. Such order issued by the Secretary of Labor under this subparagraph shall be subject to judicial review in the same manner as orders and decisions of the Administrator or subject to judicial review under this chapter.
(c) *Costs.* Whenever an order is issued under this section to abate such violation, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.
(d) *Exception.* This section shall have no application to any employee who, acting without direction from his employer (or his agent) deliberately violates any requirement of this chapter.
(e) *Employment shifts and loss.* The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which

may result from the administration or enforcement of the provisions of this chapter and applicable implementation plans, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement. Any employee who is discharged, or laid off, threatened with discharge or layoff, or otherwise discriminated against by any person because of the alleged results of such administration or enforcement, or any representative of such employee, may request the Administrator to conduct a full investigation of the matter. The Administrator shall thereupon investigate the matter and, at the request of any party, shall hold public hearings on not less than five days' notice, and shall at such hearings require the parties, including the employer involved, to present information relating to the actual or potential effect of such administration or enforcement on employment and on any alleged discharge, layoff, or other discrimination and the detailed reasons or justification therefor. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation, the Administrator shall make findings of fact as to the effect of such administration or enforcement on employment and on the alleged discharge, layoff, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public. Nothing in this subsection shall be construed to require or authorize the Administrator or any State to modify or withdraw any standard, limitation, or any other requirement of this chapter or any applicable implementation plan.

(f) *Occupational safety and health.* In order to assist the Secretary of Labor and the Director of the National Institute for Occupational Safety and Health in carrying out their duties under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Administrator shall—

(1) provide the following information, as such information becomes available, to the Secretary and the Director:

(A) the identity of any hazardous waste generation, treatment, storage, disposal facility or site where cleanup is planned or underway;

(B) information identifying the hazards to which persons working at a hazardous waste generation, treatment, storage, disposal facility or site or otherwise handling hazardous waste may be exposed, the nature and extent of the exposure, and methods to protect workers from such hazards; and

(C) incidents of worker injury or harm at a hazardous waste generation, treatment, storage or disposal facility or site; and

(2) notify the Secretary and the Director of the Administrator's receipt of notifications under section 6930 or reports under sections 6922, 6923, and 6924 of this title and make such notifications and reports available to the Secretary and the Director.

Surface Mining Act,
Employee Protection Provision
30 U.S.C. § 1293

(a) *Retaliatory practices prohibited.* No person shall discharge, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.
(b) *Review by Secretary; investigation; notice; hearing; findings of fact; judicial review.* Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary for a review of such firing or alleged discrimination. A copy of the application shall be sent to the person or operator who will be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to the alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation the Secretary shall make findings of fact. If he finds that a violation did occur, he shall issue a decision incorporating therein his findings and an order requiring the party committing the violation to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. If he finds that there was no violation, he will issue a finding. Orders issued by the Secretary under this subsection shall be subject to judicial review in the same manner as orders and decisions of the Secretary are subject to judicial review under this chapter.
(c) *Costs*. Whenever an order is issued under this section to abate any violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the persons committing the violation.

Toxic Substances Control Act,
Employee Protection Provision
15 U.S.C. § 2622

(a) *In general.* No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has—
(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;
(2) testified or is about to testify in any such proceeding; or
(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.
(b) *Remedy.*
(1) Any employee who believes that the employee has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 30 days after such alleged violation occurs, file (or have any person file on the employee's behalf) a complaint with the Secretary of Labor (hereinafter in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.
(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within 30 days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting on behalf of the complainant) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this paragraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for agency hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.
(B) If in response to a complaint filed under paragraph (1) the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order
(i) the person who committed such violation to take affirmative action to abate the violation,
(ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment,
(iii) compensatory damages, and

(iv) where appropriate, exemplary damages. If such an order issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) *Review*.

(1) Any employee or employer adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5.

(2) An order of the Secretary, with respect to which review could have been obtained under paragraph (1), shall not be subject to judicial review in any criminal or other civil proceeding.

(d) *Enforcement.* Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary shall file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief, including injunctive relief and compensatory and exemplary damages.

(e) *Exclusion.* Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from the employee's employer (or any agent of the employer), deliberately causes a violation of any requirement of this chapter.

Water Pollution Control Act,
Employee Protection Provision
33 U.S.C. § 1367

(a) *Discrimination against persons filing, instituting, or testifying in proceedings under this chapter prohibited.* No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

(b) *Application for review; investigation; hearing; review.* Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary of Labor shall cause such investigation to be

made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation, the Secretary of Labor shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. If he finds that there was no such violation, he shall issue an order denying the application. Such order issued by the Secretary of Labor under this subparagraph shall be subject to judicial review in the same manner as orders and decisions of the Administrator are subject to judicial review under this chapter.

(c) *Costs and expenses.* Whenever an order is issued under this section to abate such violation, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees), as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

(d) *Deliberate violations by employee acting without direction from his employer or his agent.* This section shall have no application to any employee who, acting without direction from his employer (or his agent) deliberately violates any prohibition of effluent limitation or other limitation under section 1311 or 1312 of this title, standards of performance under section 1316 of this title, effluent standard, prohibition or pretreatment standard under section 1317 of this title, or any other prohibition or limitation established under this chapter.

(e) *Investigations of employment reductions.* The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this chapter, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order. Any employee who is discharged or laid-off, threatened with discharge or lay-off, or otherwise discriminated against by any person because of the alleged results of any effluent limitation or order issued under this chapter, or any representative of such employee, may request the Administrator to conduct a full investigation of the matter. The Administrator shall thereupon investigate the matter and, at the request of any party, shall hold public hearings on not less than five days notice, and shall at such hearings require the parties, including the employer involved, to present information relating to the actual or potential effect of such limitation or order on employment and on any alleged discharge, lay-off, or other discrimination and the detailed

reasons or justification therefor. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation, the Administrator shall make findings of fact as to the effect of such effluent limitation or order on employment and on the alleged discharge, lay-off, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public. Nothing in this subsection shall be construed to require or authorize the Administrator to modify or withdraw any effluent limitation or order issued under this chapter.

Office of the Secretary of Labor
Part 24—Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Laws
29 CFR Part 24

AUTHORITY: 15 U.S.C. 2622; 33 U.S.C. 1367; 42 U.S.C. 300j–9(i), 5851, 6971, 7622, 9610.
SOURCE: 63 FR 6621, Feb. 9, 1998, unless otherwise noted.

§ 24.1 Purpose and scope.
(a) This part implements the several employee protection provisions for which the Secretary of Labor has been given responsibility pursuant to the following Federal statutes: Safe Drinking Water Act, 42 U.S.C. 300j–9(i); Water Pollution Control Act, 33 U.S.C. 1367; Toxic Substances Control Act, 15 U.S.C. 2622; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; Energy Reorganization Act of 1974, 42 U.S.C. 5851; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610.
(b) Procedures are established by this part pursuant to the Federal statutory provisions listed in paragraph (a) of this section, for the expeditious handling of complaints by employees, or persons acting on their behalf, of discriminatory action by employers.
(c) Throughout this part, ‘‘Secretary’’ or ‘‘Secretary of Labor’’ shall mean the Secretary of Labor, U.S. Department of Labor, or his or her

designee. ‘‘Assistant Secretary’’ shall mean the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, or his or her designee.

§ 24.2 Obligations and prohibited acts.

(a) No employer subject to the provisions of any of the Federal statutes listed in § 24.1(a), or to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq*., may discharge any employee or otherwise discriminate against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee’s request, engaged in any of the activities specified in this section.

(b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has:

(1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a) or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;

(2) Testified or is about to testify in any such proceeding; or

(3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

(c) Under the Energy Reorganization Act, and by interpretation of the Secretary under any of the other statutes listed in § 24.1(a), any employer is deemed to have violated the particular federal law and these regulations if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has:

(1) Notified the employer of an alleged violation of such Federal statute or the AEA of 1954;

(2) Refused to engage in any practice made unlawful by such Federal statute or the AEA of 1954, if the employee has identified the alleged illegality to the employer; or

(3) Testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of such Federal statute or the AEA of 1954.

(d)(1) Every employer subject to the Energy Reorganization Act of 1974, as amended, shall prominently post and keep posted in any place of employment to which the employee protection provisions of the Act apply a fully legible copy of the notice prepared by the Occupational Safety and Health Administration, printed as appendix A to this part, or a notice approved by the Assistant Secretary for Occupational Safety and Health that contains substantially the same provisions and explains the employee protection provisions of the Act and the regulations in this part. Copies of the notice prepared by DOL may be obtained from the Assistant Secretary for Occupational Safety and Health, Washington, D.C. 20210, from local offices of the Occupational Safety and Health Administration, or from the Department of Labor’s Website at

http://www.osha.gov.
(2) Where the notice required by paragraph (d)(1) of this section has not been posted, the requirement in § 24.3(b)(2) that a complaint be filed with the Assistant Secretary within 180 days of an alleged violation shall be inoperative unless the respondent establishes that the complainant had notice of the material provisions of the notice. If it is established that the notice was posted at the employee's place of employment after the alleged discriminatory action occurred or that the complainant later obtained actual notice, the 180 days shall ordinarily run from that date.
§ 24.3 Complaint.
(a) *Who may file.* An employee who believes that he or she has been discriminated against by an employer in violation of any of the statutes listed in § 24.1(a) may file, or have another person file on his or her behalf, a complaint alleging such discrimination.
(b) *Time of filing.* (1) Except as provided in paragraph (b)(2) of this section, any complaint shall be filed within 30 days after the occurrence of the alleged violation. For the purpose of determining timeliness of filing, a complaint filed by mail shall be deemed filed as of the date of mailing.
(2) Under the Energy Reorganization Act of 1974, any complaint shall be filed within 180 days after the occurrence of the alleged violation.
(c) *Form of complaint.* No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation.
(d) *Place of filing.* A complaint may be filed in person or by mail at the nearest local office of the Occupational Safety and Health Administration, listed in most telephone directories under U.S. Government, Department of Labor. A complaint may also be filed with the Office of the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, D.C. 20210.
(Approved by the Office of Management and Budget under control number 1215–0183.)
§ 24.4 Investigations.
(a) Upon receipt of a complaint under this part, the Assistant Secretary shall notify the person named in the complaint, and the appropriate office of the Federal agency charged with the administration of the affected program of its filing.
(b) The Assistant Secretary shall, on a priority basis, investigate and gather data concerning such case, and as part of the investigation may enter and inspect such places and records (and make copies thereof), may question persons being proceeded against and other employees of the charged employer, and may require the production of any documentary or other evidence deemed necessary to determine whether a violation of the law involved has been committed.
(c) Investigations under this part shall be conducted in a manner which protects the confidentiality of any person other than the complainant who provides information on a confidential basis, in accordance with part 70 of this title.

(d)(1) Within 30 days of receipt of a complaint, the Assistant Secretary shall complete the investigation, determine whether the alleged violation has occurred, and give notice of the determination. The notice of determination shall contain a statement of reasons for the findings and conclusions therein and, if the Assistant Secretary determines that the alleged violation has occurred, shall include an appropriate order to abate the violation. Notice of the determination shall be given by certified mail to the complainant, the respondent, and their representatives (if any). At the same time, the Assistant Secretary shall file with the Chief Administrative Law Judge, U.S. Department of Labor, the original complaint and a copy of the notice of determination.

(2) The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of a timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination of the Assistant Secretary shall be inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.

(3) A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next day delivery service. A copy of the request for a hearing shall also be sent to the Assistant Secretary for Occupational Safety and Health and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

§ 24.5 Investigations under the Energy Reorganization Act.

(a) In addition to the investigation procedures set forth in § 24.4, this section sets forth special procedures applicable only to investigations under the Energy Reorganization Act.

(b)(1) A complaint of alleged violation shall be dismissed unless the complainant has made a *prima facie* showing that protected behavior or conduct as provided in § 24.2(b) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to meet the required elements of a *prima facie* case, as follows:

(i) The employee engaged in a protected activity or conduct, as set forth in § 24.2;

(ii) The respondent knew that the employee engaged in the protected activity;

(iii) The employee has suffered an unfavorable personnel action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required elements of a *prima facie* case, *i.e.*, to give rise to an inference that the respondent knew that the employee engaged in protected activity, and that the protected activity was likely a reason for the personnel action. Normally the burden is satisfied, for example, if it is shown that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If these elements are not substantiated in the investigation, the investigation will cease.

(c)(1) Notwithstanding a finding that a complainant has made a *prima facie* showing required by this section with respect to complaints filed under the Energy Reorganization Act, an investigation of the complainant's complaint under that Act shall be discontinued if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct.

(2) Upon receipt of a complaint under the Energy Reorganization Act, the respondent shall be provided with a copy of the complaint (as supplemented by interviews of the complainant, if any) and advised that any evidence it may wish to submit to rebut the allegations in the complaint must be received within five business days from receipt of notification of the complaint. If the respondent fails to make a timely response or if the response does not demonstrate by clear and convincing evidence that the unfavorable action would have occurred absent the protected conduct, the investigation shall proceed. The investigation shall proceed whenever it is necessary or appropriate to confirm or verify the information provided by respondent.

(d) Whenever the Assistant Secretary dismisses a complaint pursuant to this section without completion of an investigation, the Assistant Secretary shall give notice of the dismissal, which shall contain a statement of reasons therefore, by certified mail to the complainant, the respondent, and their representatives. At the same time the Assistant Secretary shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and a copy of the notice of dismissal. The notice of dismissal shall constitute a notice of determination within the meaning of § 24.4(d), and any request for a hearing shall be filed and served in accordance with the provisions of § 24.4(d) (2) and (3).

§ 24.6 Hearings.

(a) *Notice of hearing.* The administrative law judge to whom the case is assigned shall, within seven calendar days following receipt of the request for hearing, notify the parties by certified mail, directed to the last known address of the parties, of a day, time and place for hearing.

All parties shall be given at least five days notice of such hearing. However, because of the time constraints upon the Secretary by the above statutes, no requests for postponement shall be granted except for compelling reasons or with the consent of all parties.

(b) *Consolidated hearings.* When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his own or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one case may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

(c) *Place of hearing.* The hearing shall, where possible, be held at a place within 75 miles of the complainant's residence.

(d) *Right to counsel.* In all proceedings under this part, the parties shall have the right to be represented by counsel.

(e) *Procedures, evidence and record*—(1) *Evidence.* Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

(2) *Record of hearing.* All hearings shall be open to the public and shall be mechanically or stenographically reported. All evidence upon which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits and other pertinent documents or records, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

(3) *Oral argument; briefs.* Any party, upon request, may be allowed a reasonable time for presentation of oral argument and to file a pre-hearing brief or other written statement of fact or law. A copy of any such pre-hearing brief or other written statement shall be filed with the Chief Administrative Law Judge or the administrative law judge assigned to the case before or during the proceeding at which evidence is submitted to the administrative law judge and shall be served upon each party. Post-hearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge and shall be due within the time prescribed by the administrative law judge.

(4) *Dismissal for cause.*

(i) The administrative law judge may, at the request of any party, or on his or her own motion, issue a recommended decision and order dismissing a claim:

(A) Upon the failure of the complainant or his or her representative to attend a hearing without good cause; or

(B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.

(ii) In any case where a dismissal of a claim, defense, or party is sought,

the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include a recommended order dismissing the claim, defense or party.

(f)(1) At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or participate as *amicus curiae* at any time in the proceedings. This right to participate shall include, but is not limited to, the right to petition for review of a recommended decision of an administrative law judge, including a decision based on a settlement agreement between complainant and respondent, to dismiss a complaint or to issue an order encompassing the terms of the settlement.

(2) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, shall be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

(g)(1) A Federal agency which is interested in a proceeding may participate as *amicus curiae* at any time in the proceedings, at the agency's discretion.

(2) At the request of a Federal agency which is interested in a proceeding, copies of all pleadings in a case shall be served on the Federal agency, whether or not the agency is participating in the proceeding.

§ 24.7 Recommended decision and order.

(a) Unless the parties jointly request or agree to an extension of time, the administrative law judge shall issue a recommended decision within 20 days after the termination of the proceeding at which evidence was submitted. The recommended decision shall contain appropriate findings, conclusions, and a recommended order and be served upon all parties to the proceeding.

(b) In cases under the Energy Reorganization Act, a determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. The proceeding before the administrative law judge shall be a proceeding on the merits of the complaint. Neither the Assistant Secretary's determination to dismiss a complaint pursuant to § 24.5 without completing an investigation nor the Assistant Secretary's determination not to dismiss a complaint is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation on the basis that such a determination to dismiss was made in error.

(c)(1) Upon the conclusion of the hearing and the issuance of a recommended decision that the complaint has merit, and that a violation of the Act has occurred, the administrative law judge shall issue a recommended order that the respondent take appropriate affirmative

action to abate the violation, including reinstatement of the complainant to his or her former position, if desired, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and, when appropriate, compensatory damages. In cases arising under the Safe Drinking Water Act or the Toxic Substances Control Act, exemplary damages may also be awarded when appropriate.
(2) In cases brought under the Energy Reorganization Act, when an administrative law judge issues a recommended order that the complaint has merit and containing the relief prescribed in paragraph (c)(1) of this section, the administrative law judge shall also issue a preliminary order providing all of the relief specified in paragraph (c)(1) of this section with the exception of compensatory damages. This preliminary order shall constitute the preliminary order of the Secretary and shall be effective immediately, whether or not a petition for review is filed with the Administrative Review Board. Any award of compensatory damages shall not be effective until the final decision is issued by the Administrative Review Board.
(d) The recommended decision of the administrative law judge shall become the final order of the Secretary unless, pursuant to § 24.8, a petition for review is timely filed with the Administrative Review Board.
§ 24.8 Review by the Administrative Review Board.
(a) Any party desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a petition for review with the Administrative Review Board (‘‘the Board’’), which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, such a petition must be received within ten business days of the date of the recommended decision of the administrative law judge, and shall be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the recommended decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the recommended decision, except that for cases arising under the Energy Reorganization Act of 1974, a preliminary order of relief shall be effective while review is conducted by the Board.
(b) Copies of the petition for review and all briefs shall be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.
(c) The final decision shall be issued within 90 days of the receipt of the complaint and shall be served upon all parties and the Chief Administrative Law Judge by mail to the last known address.
(d)(1) If the Board concludes that the party charged has violated the law, the final order shall order the party charged to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person’s former or substantially equivalent position, if desired, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and, when appropriate, compensatory damages. In cases arising under the Safe Drinking Water Act or the Toxic Substances Control Act, exemplary damages may also

be awarded when appropriate.
(2) If such a final order is issued, the Board, at the request of the complainant, shall assess against the respondent a sum equal to the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant, as determined by the Board, for, or in connection with, the bringing of the complaint upon which the order was issued.
(e) If the Board determines that the party charged has not violated the law, an order shall be issued denying the complaint.
§ 24.9 Exception.
This part shall have no application to any employee alleging activity prohibited by this part who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of a Federal statute listed in § 24.1(a).

Office of Surface Mining Reclamation and Enforcement, Department of the Interior –Protection of Employees Part 865 30 C.F.R. 865

AUTHORITY: Secs. 201, 501, 502 and 703, Pub. L. 95–87, 91 Stat. 445 (30 U.S.C. 1201.)
SOURCE: 42 FR 62712, Dec. 13, 1977, unless otherwise noted. Redesignated at 44 FR 15312, Mar. 13, 1979.

§ 865.1 Scope.
This part establishes procedures regarding—
(a) The reporting of acts of discriminatory discharge or other acts of discrimination under the Act caused by any person. Forms of discrimination include, but are not limited to: Firing, suspension, transfer or demotion, denial or reduction of wages and benefits, coercion by promises of benefits or threats of reprisal, and interference with the exercise of any rights afforded under the Act:
(b) The investigation of applications for review and holding of informal conferences about the alleged discrimination; and
(c) The request for formal hearings with the Office of Hearings and Appeals.
§ 865.11 Protected activity.
(a) No person shall discharge or in any other way discriminate against or cause to be fired or discriminated against any employee or any authorized representative of employees because that employee or representative has—
(1) Filed, instituted or caused to be filed or instituted any proceedings

under the Act by—
(i) Reporting alleged violations or dangers to the Secretary, the State Regulatory Authority, or the employer or his representative.
(ii) Requesting an inspection or investigation; or
(iii) Taking any other action which may result in a proceeding under the Act.
(2) Made statements, testified, or is about to do so—
(i) In any informal or formal adjudicatory proceeding;
(ii) In any informal conference proceeding;
(iii) In any rulemaking proceeding;
(iv) In any investigation, inspection or other proceeding under the Act;
(v) In any judicial proceeding under the Act.
(3) Has exercised on his own behalf or on behalf of others any right granted by the Act.
(b) Each employer conducting operations which are regulated under this Act, shall within 30 days from the effective day of these regulations, provide a copy of this part to all current employees and to all new employees at the time of their hiring.
[42 FR 62712, Dec. 13, 1977; 43 FR 2722, Jan. 19, 1978. Redesignated at 44 FR 15312, Mar. 13, 1979]

§ 865.12 Procedures for filing an application for review of discrimination.

(a) Who may file. Any employee, or any authorized representative of employees, who believes that he has been discriminated against by any person in violation of § 865.11(a) of this part may file an application for review. For the purpose of these regulations, an application for review means the presentation of a written report of discrimination stating the reasons why the person believes he has been discriminated against and the facts surrounding the alleged discrimination.
(b) Where to file. The employee or representative may file the application for review at any location of the Office and each office shall maintain a log of all filing.
(c) Time for filing. The employee or representative shall file an application for review within 30 days after the alleged discrimination occurs. An application is considered filed—
(1) On the date delivered if delivered a person to the Office, or
(2) On the date mailed to the Office.
(d) Running of the time of filing. The time for filing begins when the employee knows or has reason to know of the alleged discriminatory activity.

§ 865.13 Investigation and conference procedures.

(a) Within 7 days after receipt of any application for review, the Office shall mail a copy of the application for review to the person alleged to have caused the discrimination, shall file the application for review with the Office of Hearings and Appeals and shall notify the employee and the alleged discriminating person that the Office will investigate the complaint. The alleged discriminating person may file a response to the application for review within 10 days after he receives the copy of the application for review. The response shall specifically admit, deny or

explain each of the facts alleged in the application unless the alleged discriminating person is without knowledge in which case he shall so state.

(b) The Office shall initiate an investigation of the alleged discrimination with 30 days after receipt of the application for review. The Office shall complete the investigation with 60 days of the date of the receipt of the application for review. If circumstances surrounding the investigation prevent completion within the 60-day period, the Office shall notify the person who filed the application for review and the alleged discriminating person of the delay, the reason for the delay, and the expected completion date for the investigation.

(c) Within 7 days after completion of the investigation the Office shall invite the parties to an informal conference to discuss the findings and preliminary conclusions of the investigation. The purpose of the informal conference is to attempt to conciliate the matter. If a complaint is resolved at an informal conference, the terms of the agreement will be recorded in a written document that will be signed by the alleged discriminating person, the employee and the representative of the Office. If the Office concludes on the basis of a subsequent investigation that any party to the agreement has failed in any material respect to comply with the terms of any agreement reached during an informal conference, the Office shall take appropriate action to obtain compliance with the agreement.

(d) Following the investigation and any informal conference held, the Office shall complete a report of investigation which shall include a summary of the results of the conference. Copies of this report shall be available to the parties in the case.

§ 865.14 Request for hearing.

(a) If the Office determines that a violation of this part has probably occurred and was not resolved at an informal conference, the Director shall request a hearing on the employee's behalf before the Office of Hearings and Appeals within 10 days of the scheduled informal hearing. the parties shall be notified of the determination. If the Director declines to request a hearing the employee shall be notified within 10 days of the scheduled informal conference and informed of his right to request a hearing on his own behalf.

(b) The employee may request a hearing with the Office of Hearings and Appeals after 60 days have elapsed from the filing of his application.

§ 865.15 Formal adjudicatory proceedings.

(a) Formal adjudication of a complaint filed under this part shall be conducted in the Office of Hearings and Appeals under 43 CFR part 4.

(b) A hearing shall be held as promptly as possible consistent with the opportunity for discovery provided for under 43 CFR part 4.

(c) Upon a finding of violation of § 865.11 of this part, the Secretary shall order the appropriate affirmative relief including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. At the request of the employee a sum equal to the aggregate amount of all costs and expenses including attorneys' fees which have been reasonably incurred

by the employee for, or in connection with, the institution and prosecution of the proceedings shall be assessed against the person committing the violation.
(d) On or after 10 days after filing an application for review under this part the Secretary or the employee may seek temporary relief in the Office of Hearings and Appeals under 43 CFR part 4.

Pipeline Safety
DOL Rules and Procedures
Final Rule
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DEPARTMENT OF LABOR
Procedures for the Handling of Discrimination Complaints under Section 6 of the Pipeline Safety Improvement Act of 2002
Occupational Safety and Health Administration
29 CFR Part 1981

PART 1981--PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER SECTION 6 OF THE PIPELINE SAFETY IMPROVEMENT ACT OF 2002
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67 FR 65008 (October 22, 2002). Subpart A--Complaints, Investigations, Findings and Preliminary Orders

Sec. 1981.100 Purpose and scope.
(a) This part implements procedures under section 6 of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. 60129 (``the Pipeline Safety

Act"), which provides for employee protection from discrimination by a person owning or operating a pipeline facility or a contractor or subcontractor of such person because the employee has engaged in protected activity pertaining to a violation or alleged violation of any order, regulation, or standard under chapter 601, subtitle VIII of title 49 of the United States Code or any other provision of Federal law relating to pipeline safety.

(b) This part establishes procedures pursuant to the Pipeline Safety Act for the expeditious handling of discrimination complaints made by employees, or by persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints under the Pipeline Safety Act, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges, post-hearing administrative review, and withdrawals and settlements.

Sec. 1981.101 Definitions.

Act or Pipeline Safety Act means section 6 of the Pipeline Safety Improvement Act of 2002, Public Law 107-355, December 17, 2002, 49 U.S.C. 60129. Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act. Complainant means the employee who filed a complaint under the Act or on whose behalf a complaint was filed. Employee means an individual presently or formerly working for a person owning or operating a pipeline facility or a contractor or subcontractor of such a person, an individual applying to work for a person owning or operating a pipeline facility or a contractor or subcontractor of such a person, or an individual whose employment could be affected by a person owning or operating a pipeline facility or a contractor or subcontractor of such a person. Employer means a person owning or operating a pipeline facility or a contractor or subcontractor of such a person. Gas pipeline facility includes a pipeline, a right of way, a facility, a building, or equipment used in transporting gas or treating gas during its transportation. Hazardous liquid pipeline facility includes a pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid. Named person means the person alleged to have violated the Act. OSHA means the Occupational Safety and Health Administration of the United States Department of Labor. Person means a corporation, company, association, firm, partnership, joint stock company, an individual, a State, a municipality, and a trustee, receiver, assignee, or personal representative of a person. Pipeline facility means a gas pipeline facility and a hazardous liquid pipeline facility. Secretary means the Secretary of Labor or persons to whom authority under the Act has been delegated.

Sec. 1981.102 Obligations and prohibited acts.

(a) No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or

any person acting pursuant to the employee's request, engaged in any of the activities specified in paragraphs (b)(1) through (5) of this section. (b) It is a violation of the Act for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has: (1) Provided, caused to be provided, or is about to provide or cause to be provided to the employer or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety; (2) Refused to engage in any practice made unlawful by chapter 601, in subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer; (3) Provided, caused to be provided, or is about to provide or cause to be provided, testimony before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, or testimony in any proceeding under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety;(4) Commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety; or (5) Assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety.(c) This part shall have no application to any employee of an employer who, acting without direction from the employer (or such employer's agent), deliberately causes a violation of any requirement relating to pipeline safety under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law.

Sec. 1981.103 Filing of discrimination complaint.

(a) Who may file. An employee who believes that he or she has been discriminated against by an employer in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.

(b) Nature of filing. No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.

(c) Place of filing. The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: http://www.osha.gov.
(d) Time for filing. Within 180 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery or other means, the complaint is filed upon receipt.
(e) Relationship to section 11(c) complaints. A complaint filed under the Pipeline Safety Act that alleges facts which would constitute a violation of section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), will be deemed to be a complaint filed under both the Pipeline Safety Act and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would constitute a violation of the Pipeline Safety Act will be deemed to be a complaint filed under both the Pipeline Safety Act and section 11(c). Normal procedures and timeliness requirements for investigations under the respective laws and regulations will be followed.

Sec. 1981.104 Investigation.
(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the named person of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identity of any confidential informants). The Assistant Secretary will also notify the named person of his or her rights under paragraphs (b) and (c) of this section and paragraph (e) of Sec. 1981.110. A copy of the notice to the named person will also be provided to the Department of Transportation.
(b)A complaint of alleged violation shall be dismissed unless the complainant has made a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.
(1) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:
(i) The employee engaged in a protected activity or conduct;
(ii) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;
(iii) The employee suffered an unfavorable personnel action; and
(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

(2) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, i.e., to give rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action. Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If the required showing has not been made, the complainant will be so advised and the investigation will not commence.

(c) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint shall not be conducted if the named person, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. Within 20 days of receipt of the notice of the filing of the complaint, the named person may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating his or her position. Within the same 20 days, the named person may request a meeting with the Assistant Secretary to present his or her position.

(d) If the named person fails to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the behavior protected by the Act, the Assistant Secretary will conduct an investigation. Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of title 29 of the Code of Federal Regulations.

(e) Prior to the issuance of findings and a preliminary order as provided for in Sec. 1981.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the named person has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the named person to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The named person will be given the opportunity to submit a written response, to meet with the investigators to present statements from witnesses in support of his or her position, and to present legal and factual arguments. The named person will present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards

as the Assistant Secretary and the named person can agree, if the interests of justice so require.

Sec. 1981.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary shall issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she shall accompany the findings with a preliminary order providing relief to the complainant. The preliminary order shall include, where appropriate, a requirement that the named person abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages. Where the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge), a preliminary order of reinstatement would not be appropriate. At the complainant's request the order shall also assess against the named person the complainant's costs and expenses (including attorney's and expert witness fees) reasonably incurred in connection with the filing of the complaint.(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and the preliminary order will be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order will inform the parties of their right to file objections and to request a hearing, and of the right of the named person to request attorney's fees from the administrative law judge, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. The letter also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and order.

(c) The findings and the preliminary order will be effective 60 days after receipt by the named person pursuant to paragraph (b) of this section, unless an objection and a request for a hearing has been filed as provided at Sec. 1981.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon receipt of the findings and preliminary order.

Subpart B--Litigation

Sec. 1981.106 Objections to the findings and the preliminary order and request for a hearing.(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record within 60 days of receipt of the

findings and preliminary order pursuant to paragraph (b) of Sec. 1981.105. The objection or request for attorney's fees and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001 and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.(b)(1) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which shall not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order. The named person may file a motion with the Office of Administrative Law Judges for stay of the Assistant Secretary's preliminary order.(2) If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order, as the case may be, shall become the final decision of the Secretary, not subject to judicial review.

Sec. 1981.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, part 18 of title 29 of the Code of Federal Regulations**.**

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo, on the record. Administrative law judges have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the named person object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

Sec. 1981.108 Role of Federal agencies.

(a)(1) The complainant and the named person will be parties in every proceeding. At the Assistant Secretary's discretion, the Assistant

Secretary may participate as a party or as amicus curiae at any time at any stage of the proceedings. This right to participate includes, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a decision approving or rejecting a settlement agreement between the complainant and the named person.
(2) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.
(b) The Secretary of Transportation may participate as amicus curiae at any time in the proceedings, at the Secretary of Transportation's discretion. At the request of the Secretary of Transportation, copies of all pleadings in a case must be sent to the Secretary of Transportation, whether or not the Secretary of Transportation is participating in the proceeding.

Sec. 1981.109 Decision and orders of the administrative law judge.
(a) The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to Sec. 1981.104(b) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge will hear the case on the merits.
(b) If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorney and expert witness fees) reasonably incurred. If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.

(c) The decision will be served upon all parties to the proceeding. Any administrative law judge's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the named person, and will not be stayed by the filing of a timely petition for review with the Administrative Review Board. All other portions of the judge's order will be effective 10 business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

Sec. 1981.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board (``the Board''), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within 10 business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the administrative law judge will become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement will be effective while review is conducted by the Board, unless the Board grants a motion to stay the order. The Board will specify the terms under which any briefs are to be filed. The Board will review the factual determinations of the administrative law judge under the substantial evidence standard.

(c) The final decision of the Board shall be issued within 90 days of the conclusion of the hearing, which will be deemed to be the conclusion of all proceedings before the administrative law judge--i.e., 10 business

days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed with the administrative law judge in the interim. The decision will be served upon all parties and the Chief Administrative Law Judge by mail to the last known address. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210, even if the Assistant Secretary is not a party.

(d) If the Board concludes that the party charged has violated the law, the final order will order the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

(e) If the Board determines that the named person has not violated the law, an order will be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was brought in bad faith, the Board may award to the named person a reasonable attorney's fee, not exceeding $1,000.

Subpart C--Miscellaneous Provisions

Sec. 1981.111 Withdrawal of complaints, objections, and findings; settlement.

(a) At any time prior to the filing of objections to the findings or preliminary order, a complainant may withdraw his or her complaint under the Act by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether to approve the withdrawal. The Assistant Secretary will notify the named person of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section.

(b) The Assistant Secretary may withdraw his or her findings or a preliminary order at any time before the expiration of the 60-day objection period described in Sec. 1981.106, provided that no objection has yet been filed, and substitute new findings or preliminary order. The date of the receipt of the substituted findings or order will begin a new 60-day objection period.

(c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether to approve the withdrawal. If the objections are withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section.

(d)(1) Investigative settlements. At any time after the filing of a complaint, and before the findings and/or order are objected to or

become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.(2) Adjudicatory settlements. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement will be filed with the administrative law judge or the Board, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board will constitute the final order of the Secretary and may be enforced pursuant to Sec. 1981.113.

Sec. 1981.112 Judicial review.

(a) Within 60 days after the issuance of a final order by the Board (Secretary) under Sec. 1981.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. A final order of the Board is not subject to judicial review in any criminal or other civil proceeding.

(b) If a timely petition for review is filed, the record of a case, including the record of proceedings before the administrative law judge, will be transmitted by the Board to the appropriate court pursuant to the rules of the court.

Sec. 1981.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

Sec. 1981.114 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Board on review may, upon application, after three days notice to all parties, waive any rule or issue any orders that justice or the administration of the Act requires.

SECTION 4
NUCLEAR WHISTLEBLOWER PROTECTION

Atomic Energy Act/
Energy Reorganization Act,
Employee Protection Provision
42 U.S.C. § 5851

(a) *Discrimination against employee*.
(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
(E) testified or is about to testify in any such proceeding or;
(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.
(2) For purposes of this section, the term "*employer*" includes—
(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);
(B) an applicant for a license from the Commission or such an agreement State;
(C) a contractor or subcontractor of such a licensee or applicant;
(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;
(E) a contractor or subcontractor of the Commission;
(F) the Commission; and
(G) the Department of Energy.
(b) *Complaint, filing and notification*.
(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 180 days after such violation occurs, file (or have

any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to

(i) take affirmative action to abate the violation, and

(ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

(C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.
(4) If the Secretary has not issued a final decision within 1 year after the filing of a complaint under paragraph (1), and there is no showing that such delay is due to the bad faith of the person seeking relief under this paragraph, such person may bring an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.
(c) *Review*.
(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.
(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.
(d) *Jurisdiction*. Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.
(e) *Commencement of action*.
(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.
(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.
(f) *Enforcement*. Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28.
(g) *Deliberate violations*. Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or

her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.).
(h) *Non-preemption*. This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.
(i) *Posting requirement*. The provisions of this section shall be prominently posted in any place of employment to which this section applies.
(j) *Investigation of allegations.*
(1) The Commission or the Department of Energy shall not delay taking appropriate action with respect to an allegation of a substantial safety hazard on the basis of—
(A) the filing of a complaint under subsection (b)(1) of this section arising from such allegation; or
(B) any investigation by the Secretary, or other action, under this section in response to such complaint.
(2) A determination by the Secretary under this section that a violation of subsection (a) of this section has not occurred shall not be considered by the Commission or the Department of Energy in its determination of whether a substantial safety hazard exists.

Department of Energy
Defense Activites Whistleblower
Protection Program
42 U.S.C. § 7239

(a) Program required
The Secretary of Energy shall establish a program to ensure that covered individuals may not be discharged, demoted, or otherwise discriminated against as a reprisal for making protected disclosures.
(b) Covered individuals
For purposes of this section, a covered individual is an individual who is an employee of the Department of Energy, or of a contractor of the Department, who is engaged in the defense activities of the Department.
(c) Protected disclosures
For purposes of this section, a protected disclosure is a disclosure--
(1) made by a covered individual who takes appropriate steps to protect the security of the information in accordance with guidance provided under this section;
(2) made to a person or entity specified in subsection (d); and
(3) of classified or other information that the covered individual reasonably believes to provide direct and specific evidence of any of the following:
(A) A violation of law or Federal regulation.
(B) Gross mismanagement, a gross waste of funds, or abuse of authority.
(C) A false statement to Congress on an issue of material fact.

(d) Persons and entities to which disclosures may be made
A person or entity specified in this subsection is any of the following:
(1) A member of a committee of Congress having primary responsibility for oversight of the department, agency, or element of the Government to which the disclosed information relates.
(2) An employee of Congress who is a staff member of such a committee and has an appropriate security clearance for access to information of the type disclosed.(3) The Inspector General of the Department of Energy.
(4) The Federal Bureau of Investigation.
(5) Any other element of the Government designated by the Secretary as authorized to receive information of the type disclosed.
(e) Official capacity of persons to whom information is disclosed
A member of, or an employee of Congress who is a staff member of, a committee of Congress specified in subsection (d) who receives a protected disclosure under this section does so in that member or employee's official capacity as such a member or employee.
(f) Assistance and guidance
The Secretary, acting through the Inspector General of the Department of Energy, shall provide assistance and guidance to each covered individual who seeks to make a protected disclosure under this section. Such assistance and guidance shall include the following:
(1) Identifying the persons or entities under subsection (d) to which that disclosure may be made.
(2) Advising that individual regarding the steps to be taken to protect the security of the information to be disclosed.
(3) Taking appropriate actions to protect the identity of that individual throughout that disclosure.
(4) Taking appropriate actions to coordinate that disclosure with any other Federal agency or agencies that originated the information.
(g) Regulations
The Secretary shall prescribe regulations to ensure the security of any information disclosed under this section.
(h) Notification to covered individuals
The Secretary shall notify each covered individual of the following:
(1) The rights of that individual under this section.
(2) The assistance and guidance provided under this section.
(3) That the individual has a responsibility to obtain that assistance and guidance before seeking to make a protected disclosure.
(i) Complaint by covered individuals
If a covered individual believes that that individual has been discharged, demoted, or otherwise discriminated against as a reprisal for making a protected disclosure under this section, the individual may submit a complaint relating to such matter to the Director of the Office of Hearings and Appeals of the Department of Energy.
(j) Investigation by Office of Hearings and Appeals
(1) For each complaint submitted under subsection (i), the Director of the Office of Hearings and Appeals shall--

(A) determine whether or not the complaint is frivolous; and
(B) if the Director determines the complaint is not frivolous, conduct an investigation of the complaint.
(2) The Director shall submit a report on each investigation undertaken under paragraph (1)(B) to—
(A) the individual who submitted the complaint on which the investigation is based;
(B) the contractor concerned, if any; and(C) the Secretary of Energy.
(k) Remedial action
(1) Whenever the Secretary determines that a covered individual has been discharged, demoted, or otherwise discriminated against as a reprisal for making a protected disclosure under this section, the Secretary shall--
(A) in the case of a Department employee, take appropriate actions to abate the action; or
(B) in the case of a contractor employee, order the contractor concerned to take appropriate actions to abate the action.
(2)(A) If a contractor fails to comply with an order issued under paragraph (1)(B), the Secretary may file an action for enforcement of the order in the appropriate United States district court.
(B) In any action brought under subparagraph (A), the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.
(l) Relationship to other laws
The protections provided by this section are independent of, and not subject to any limitations that may be provided in, the Whistleblower Protection Act of 1989 (Public Law 101-512) or any other law that may provide protection for disclosures of information by employees of the Department of Energy or of a contractor of the Department.
(m) Annual report
(1) Not later than 30 days after the commencement of each fiscal year, the Director shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the investigations undertaken under subsection (j)(1)(B) during the preceding fiscal year, including a summary of the results of each such investigation.
(2) A report under paragraph (1) may not identify or otherwise provide any information about an individual submitting a complaint under this section without the consent of the individual.
(n) Implementation report
Not later than 60 days after October 5, 1999, the Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report describing the implementation of the program required by this section.

SEC. 627 . LIMITATION ON LEGAL FEE REIMBURSEMENT.
Title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 et seq.) is amended by adding at the end the following new section :

LIMITATION ON LEGAL FEE REIMBURSEMENT
SEC. 212. The Department of Energy shall not, except as required under a contract entered into before the date of enactment of this section , reimburse any contractor or subcontractor of the Department for any legal fees or expenses incurred with respect to a complaint subsequent to--
(1) an adverse determination on the merits with respect to such complaint against the contractor or subcontractor by the Director of the Department of Energy's Office of Hearings and Appeals pursuant to part 708 of title 10, Code of Federal Regulations, or by a Department of Labor Administrative Law Judge pursuant to section 211 of this Act; or
(2) an adverse final judgment by any State or Federal court with respect to such complaint against the contractor or subcontractor for wrongful termination or retaliation due to the making of disclosures protected under chapter 12 of title 5, United States Code, section 211 of this Act, or any comparable State law, unless the adverse determination or final judgment is reversed upon further administrative or judicial review.

Department of Energy Acquisition Regulation; Rewrite of Regulations Governing Management and Operating Contracts
Agency: Department of Energy.
Action: Final rule.
***65 Federal Register* 80994 (December 22, 2000)**

Subpart 903.9--Whistleblower Protection for Contractor Employees
903.901 Scope.
903.902 Definition.
903.903 Applicability.
903.970 Remedies.903.971 Contract clause.
Subpart 903.9--Whistleblower Protection for Contractor Employees
903.901 Scope.
This subpart implements the DOE Contractor Employee Protection Program as set forth at 10 CFR part 708. Part 708 establishes criteria and procedures for the investigation, hearing, and review of allegations from DOE contractor employees of employer reprisal resulting from employee disclosure of information to DOE, to Members of Congress, or to the contractor; employee participation in proceedings before Congress or pursuant to this subpart; or employee refusal to engage in illegal or dangerous activities, when such disclosure, participation, or refusal pertains to employer practices which the employee believes to be unsafe; to violate laws, rules, or regulations; or to involve fraud, mismanagement, waste, or abuse.
903.902 Definition.

Contractor, as used in this subpart, has the meaning contained in 10 CFR 708.2.
903.903 Applicability.
10 CFR part 708 is applicable to complaints of retaliation filed by employees of contractors, and subcontractors, performing work on behalf of DOE directly related to DOE-owned or leased facilities, if the complaint stems from a disclosure, participation, or refusal described in 10 CFR 708.5.
903.970 Remedies.
(a) Contractors found to have retaliated against an employee in reprisal for such disclosure, participation or refusal are required to provide relief in accordance with decisions issued under 10 CFR part 708.
(b) 10 CFR part 708 provides that for the purposes of the Contract Disputes Act (41 U.S.C. 605 and 606), a final decision issued pursuant to 10 CFR part 708 shall not be considered to be a claim by the Government against a contractor or a decision by the contracting officer subject to appeal. However, a contractor's disagreement and refusal to comply with a final decision could result in a contracting officer's decision to disallow certain costs or to terminate the contract for default. In such case, the contractor could file a claim under the Disputes clause of the contract regarding the disallowance of cost or the termination of the contract.
903.971 Contract clause.
The contracting officer shall insert the clause at 952.203-70, Whistleblower Protection for Contractor Employees, in contracts that involve work to be done on behalf of DOE directly related to activities at DOE-owned or leased sites.

Nuclear Regulatory Commission
Rule for Initiating Safety Proceedings
10 C.F.R. § 2.206

§ 2.206 Requests for action under this subpart.
(a) Any person may file a request to institute a proceeding pursuant to Sec. 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper. Requests must be addressed to the Executive Director for Operations and must be filed either by delivery to the NRC Public Document Room at 2120 L Street, NW., Washington, DC, or by mail or telegram addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. The request must specify the action requested and set forth the facts that constitute the basis for the request. The Executive Director for Operations will refer the request to the Director of the NRC office with responsibility for the subject matter of the request for appropriate action in accordance with paragraph (b) of this section.
(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of the NRC office with responsibility for the subject matter of the request shall either institute the requested proceeding in accordance with this subpart or shall

instituted in whole or in part, with respect to the request, and the reasons for the decision. advise the person who made the request in writing that no proceeding will be
(c)(1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.
(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

Nuclear Regulatory Commission
Employee Protection
10 C.F.R. § 50.7

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.
(1) The protected activities include but are not limited to:
(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;
(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;
(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;
(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text. (v) Assisting or participating in, or is about to assist or participate in, these activities.
(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.
(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a

violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended. (b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages. (c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for--

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, ``Notice to Employees,'' referenced in 10 CFR 19.11(c). This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

(2) Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter or by calling the NRC Information and Records Management Branch at (301) 415- 7230. (f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as [[Page 658]] amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

Department of Energy Part 708
DOE Contractor
Employee Protection Program
10 C.F.R. Part 708

Subpart A - General Provisions
Sec. 708.1 What is the purpose of this part? This part provides procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.
Sec. 708.2 What are the definitions of terms used in this part? For purposes of this part: Contractor means a seller of goods or services who is a party to: (1) A management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE-owned or -leased facilities, or (2) A subcontract under a contract of the type described in paragraph (1) of this definition, but only with respect to work related to activities at DOE-owned or -leased facilities. Day means a calendar day. Discovery means a process used to enable the parties to learn about each other's evidence before a hearing takes place, including oral depositions, written interrogatories, requests for admissions, inspection of property and requests for production of documents. DOE Official means any officer or employee of DOE whose duties include program management or the investigation or enforcement of any law, rule, or regulation relating to Government contractors or the subject matter of a contract. EC Director means the Director of the Office of Employee Concerns at DOE Headquarters, or any official to whom the Director delegates his or her functions under this part. Employee means a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in Sec. 708.5 of this subpart. Field element means a DOE field-based office that is responsible for the management, coordination, and administration of operations at a DOE facility. Head of Field Element means the manager or head of a DOE operations office or field office, or any official to whom those individuals delegate their functions under this part. Hearing Officer means an individual appointed by the OHA Director to conduct a hearing on a complaint filed under this part. Management and operating contract means an agreement under which DOE contracts for the operation, maintenance, or support of a Government- owned or -leased research, development, special production, or testing establishment that is wholly or principally devoted to one or more of the programs of DOE. Mediation means an informal, confidential process in which a neutral third person assists the parties in reaching a mutually acceptable resolution of their dispute; the neutral third person does not render a decision. OHA Director means the Director of the Office of Hearings and Appeals, or any official to whom the Director delegates his or her

functions under this part. Party means an employee, contractor, or other party named in a proceeding under this part. Retaliation means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in Sec. 708.5 of this subpart. You means the employee who files a complaint under this part, or the complainant.

Sec. 708.3 What employee complaints are covered?

This part applies to a complaint of retaliation filed by an employee of a contractor that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site, if the complaint stems from a disclosure, participation, or refusal described in Sec. 708.5.

Sec. 708.4 What employee complaints are not covered?

If you are an employee of a contractor, you may not file a complaint against your employer under this part if: (a) The complaint is based on race, color, religion, sex, age, national origin, or other similar basis; or (b) The complaint involves misconduct that you, acting without direction from your employer, deliberately caused, or in which you knowingly participated; or (c) Except as provided in Sec. 708.15(a), the complaint is based on the same facts for which you have chosen to pursue a remedy available under: (1) Department of Labor regulations at 29 CFR part 24, “Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes;” (2) Federal Acquisition Regulations, 48 CFR part 3, “Federal Acquisition Regulation; Whistleblower Protection for Contractor Employees (Ethics);” or (3) State or other applicable law, including final and binding grievance-arbitration, as described in Sec. 708.15 of subpart B; or (d) The complaint is based on the same facts in which you, in the course of a covered disclosure or participation, improperly disclosed Restricted Data, national security information, or any other classified or sensitive information in violation of any Executive Order, statute, or regulation. This part does not override any provision or requirement of any regulation pertaining to Restricted Data, national security information, or any other classified or sensitive information; or (e) The complaint deals with “terms and conditions of employment” within the meaning of the National Labor Relations Act, except as provided in Sec. 708.5.

Subpart B - Procedures

Sec. 708.5 What employee conduct is protected from retaliation by an employer?

If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for: (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals-- (1) A substantial violation of a law, rule, or regulation; (2) A substantial and

specific danger to employees or to public health or safety; or (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or (c) Subject to Sec. 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would-- (1) Constitute a violation of a federal health or safety law; or (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

Sec. 708.6 What constitutes "a reasonable fear of serious injury?"

Participation in an activity, policy, or practice may cause an employee to have a reasonable fear of serious injury that justifies a refusal to participate if: (a) A reasonable person, under the circumstances that confronted the employee, would conclude there is a substantial risk of a serious accident, injury, or impairment of health or safety resulting from participation in the activity, policy, or practice; or (b) An employee, because of the nature of his or her employment responsibilities, does not have the training or skills needed to participate safely in the activity or practice. [57 FR 7541, Mar. 3, 1992, as amended at 65 FR 6319, Feb. 9, 2000]

Sec. 708.7 What must an employee do before filing a complaint based on retaliation for refusal to participate?

You may file a complaint for retaliation or refusing to participate in an activity, policy, or practice only if: (a) Before refusing to participate in the activity, policy, or practice, you asked your employer to correct the violation or remove the danger, and your employer refused to take such action; and (b) By the 30th day after you refused to participate, you reported the violation or dangerous activity, policy, or practice to a DOE official, a member of Congress, another government official with responsibility for the oversight of the conduct of operations at the DOE site, your employer, or any higher tier contractor, and stated your reasons for refusing to participate.

Sec. 708.8 Does this part apply to pending cases? The procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part.

Sec. 708.9 When is a complaint or other document considered to be "filed" under this part?

Under this part, a complaint or other document is considered "filed" on the date it is mailed or on the date it is personally delivered to the specified official or office.

Sec. 708.10 Where does an employee file a complaint?

(a) If you were employed by a contractor whose contract is handled by a contracting officer located in DOE Headquarters when the alleged retaliation occurred, you must file two copies of your written complaint with the EC Director. (b) If you were employed by a contractor at a DOE field facility or site when the alleged retaliation occurred, you must file two copies of your written complaint with the Head of Field Element at the DOE field element with jurisdiction over the contract.

Sec. 708.11 Will an employee's identity be kept confidential if the employee so requests?

No. The identity of an employee who files a complaint under this part appears on the complaint. A copy of the complaint is provided to the contractor and it becomes a public document.

Sec. 708.12 What information must an employee include in a complaint?

Your complaint does not need to be in any specific form but must be signed by you and contain the following: (a) A statement specifically describing (1) The alleged retaliation taken against you and (2) The disclosure, participation, or refusal that you believe gave rise to the retaliation; (b) A statement that you are not currently pursuing a remedy under State or other applicable law, as described in Sec. 708.15 of this subpart; (c) A statement that all of the facts that you have included in your complaint are true and correct to the best of your knowledge and belief; and (d) An affirmation, as described in Sec. 708.13 of this subpart, that you have exhausted (completed) all applicable grievance or arbitration procedures.

Sec. 708.13 What must an employee do to show that all grievance-arbitration procedures have been exhausted?

(a) To show that you have exhausted all applicable grievance- arbitration procedures, you must: (1) State that all available opportunities for resolution through an applicable grievance-arbitration procedure have been exhausted, and provide the date on which the grievance-arbitration procedure was terminated and the reasons for termination; or (2) State that you filed a grievance under applicable grievance- arbitration procedures, but more than 150 days have passed and a final decision on it has not been issued, and provide the date that you filed your grievance; or (3) State that your employer has established no grievance- arbitration procedures. (b) If you do not provide the information specified in Sec. 708.**13**(a), your complaint may be dismissed for lack of jurisdiction as provided in Sec. 708.17 of this subpart.

Sec. 708.14 How much time does an employee have to file a complaint?

(a) You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation. (b) The period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance- arbitration procedure. The time period for filing stops running on the day the internal grievance is filed and begins to run again on the earlier of: (1) The day after such dispute resolution efforts end; or (2) 150 days after the internal grievance was filed if a final decision on the grievance has not been issued. (c) The period for filing a complaint does not include time spent resolving jurisdictional issues related to a complaint you file under State or other applicable law. The time period for filing stops running on the date the complaint under State or other applicable law is filed and begins to run again the day after a final decision on the jurisdictional issues is issued. (d) If you do not file your complaint during the 90-day period, the Head of Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and that official may, in his or her discretion, accept your complaint for processing.

Sec. 708.15 What happens if an employee files a complaint under this part and also pursues a remedy under State or other law?
(a) You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless: (1) Your complaint under State or other applicable law is dismissed for lack of jurisdiction; (2) Your complaint was filed under 48 CFR part 3, Subpart 3.9 and the Inspector General, after conducting an initial inquiry, determines not to pursue it; or (3) You have exhausted grievance-arbitration procedures pursuant to Sec. 708.13, and issues related to alleged retaliation for conduct protected under Sec. 708.5 remain. (b) Pursuing a remedy other than final and binding grievance- arbitration procedures does not prevent you from filing a complaint under this part. (c) You are considered to have filed a complaint under State or other applicable law if you file a complaint, or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such complaint before, concurrently with, or after you file a complaint under this part. (d) If you file a complaint under State or other applicable law after filing a complaint under this part, your complaint under this regulation will be dismissed under Sec. 708.17(c)(3). [57 FR 7541, Mar. 3, 1992, as amended at 65 FR 6319, Feb. 9, 2000]

Department of Energy
Whistleblower Enforcement Policy
10 C.F.R. Part 820 App.A (XIII)

a. DOE contractors may not retaliate against any employee because the employee has disclosed information, participated in activities or refused to participate in activities listed in 10 CFR 708.5 (a)-(c) as provided by 10 CFR 708.43. DOE contractor employees may seek remedial relief for allegations of retaliation from the DOE Office of Hearings and Appeals (OHA) under 10 CFR part 708 (Part 708) or from the Department of Labor (DOL) under sec. 211 of the Energy Reorganization Act (sec. 211), implemented in 29 CFR part 24.
b. An act of retaliation by a DOE contractor, proscribed under 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a)-(c) concerning nuclear safety in connection with a DOE nuclear activity, may constitute a violation of a DOE Nuclear Safety Requirement under 10 CFR part 820 (Part 820). The retaliation may be subject to the investigatory and adjudicatory procedures of both Part 820 and Part 708. The same facts that support remedial relief to employees under Part 708 may be used by the Director of the Office of Investigation and Enforcement (Director) to support issuance of a Preliminary Notice of Violation (PNOV), a Final Notice of Violation (FNOV), and assessment of civil penalties. 10 CFR 820.24-820.25.
c. When an employee files a complaint with DOL under sec. 211 and DOL collects information relating to allegations of DOE contractor

retaliation against a contractor employee for actions taken concerning nuclear safety, the Director may use this information as a basis for initiating enforcement action by issuing a PNOV. 10 CFR 820.24. DOE may consider information collected in the DOL proceedings to determine whether the retaliation may be related to a contractor employee's action concerning a DOE nuclear activity.

d. The Director may also use DOL information to support the determination that a contractor has violated or is continuing to violate the nuclear safety requirements against contractor retaliation and to issue civil penalties or other appropriate remedy in a FNOV. 10 CFR 820.25.

e. The Director will have discretion to give appropriate weight to information collected in DOL and OHA investigations and proceedings. In deciding whether additional investigation or information is needed, the Director will consider the extent to which the facts in the proceedings have been adjudicated as well as any information presented by the contractor. In general, the Director may initiate an enforcement action without additional investigation or information.

f. Normally, the Director will await the completion of a Part 708 proceeding before OHA or a sec. 211 proceeding at DOL before deciding whether to take any action, including an investigation under Part 820 with respect to alleged retaliation. A Part 708 or sec. 211 proceeding would be considered completed when there is either a final decision or a settlement of the retaliation complaint, or no additional administrative action is available.

g. DOE encourages its contractors to cooperate in resolving whistleblower complaints raised by contractor employees in a prompt and equitable manner. Accordingly, in deciding whether to initiate an enforcement action, the Director will take into account the extent to which a contractor cooperated in a Part 708 or sec. 211 proceeding, and, in particular, whether the contractor resolved the matter promptly without the need for an adjudication hearing.

h. In considering whether to initiate an enforcement action and, if so, what remedy is appropriate, the Director will also consider the egregiousness of the particular case including the level of management involved in the alleged retaliation and the specificity of the acts of retaliation.

i. In egregious cases, the Director has the discretion to proceed with an enforcement action, including an investigation with respect to alleged retaliation irrespective of the completion status of the Part 708 or sec. 211 proceeding. Egregious cases would include: (1) Cases involving credible allegations for willful or intentional violations of DOE rules, regulations, orders or Federal statutes which, if proven, would warrant criminal referrals to the U.S. Department of Justice for prosecutorial review; and (2) cases where an alleged retaliation suggests widespread, high-level managerial involvement and raises significant public health and safety concerns.

j. When the Director undertakes an investigation of an allegation of DOE contractor retaliation against an employee under Part 820, the Director will apprise persons interviewed and interested parties that the

investigative activity is being taken pursuant to the nuclear safety procedures of Part 820 and not pursuant to the procedures of Part 708. k. At any time, the Director may begin an investigation of a noncompliance of the substantive nuclear safety rules based on the underlying nuclear safety concerns raised by the employee regardless of the status of completion of any related whistleblower retaliation proceedings. The nuclear safety rules include: 10 CFR part 830 (nuclear safety management); 10 CFR part 835 (occupational radiation protection); and 10 CFR part 820.11 (information accuracy requirements).

Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Labor (Employee protection) October 21, 1998

Summary: The Nuclear Regulatory Commission and the Department of Labor entered into a revised Memorandum of Understanding (MOU), effective September 9, 1998. The purpose of the MOU is to facilitate coordination and cooperation concerning the employee protection provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851. Both agencies agree that administrative efficiency and sound enforcement policies will be maximized by this cooperation and the timely exchange of information in areas of mutual interest. The text of the MOU is set forth below.

FOR FURTHER INFORMATION CONTACT: Mr. Edward T. Baker, telephone 301-415-8529. Office of Nuclear Reactor Regulation, MS O-5E-7, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

Dated at Rockville, Maryland, this 21st day of October 1998.

For the Nuclear Regulatory Commission.

Edward T. Baker III,

Agency Allegation Advisor, Office of Nuclear Reactor Regulation.

1. Purpose

The U.S. Nuclear Regulatory Commission (NRC) and the Department of Labor (DOL) enter into this agreement to facilitate coordination and cooperation concerning the employee protection provisions of Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. 5851.

2. Background

Section 211 of the ERA prohibits any employer, including a Nuclear Regulatory Commission licensee, license applicant or a contractor or subcontractor of a Commission licensee or applicant, from discriminating against any employee with respect to his or her compensation, terms, conditions or privileges of employment because the employee assisted or participated, or is about to assist or participate in any manner in any action to carry out the purposes of either the ERA or the Atomic Energy Act of 1954 (AEA), as amended, 42 U.S.C. 2011 et sec.

The NRC and DOL have complementary responsibilities in the area of employee protection. DOL has the responsibility under Section 211 of the ERA to investigate employee complaints of discrimination and may, after an investigation or hearing, order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her former position with back pay, and award compensatory damages, including attorney fees. NRC, although without authority to provide a remedy to an employee, has independent authority under the AEA to take appropriate enforcement action against Commission applicants and licensees and their contractors that violate the AEA or Commission requirements, (i.e., 10 CFR 50.7 and similar requirements in other parts of Title 10 of the Code of Federal Regulations) which prohibit discrimination against employees based on their engaging in protected activities. NRC enforcement action may include issuance of a Notice of Violation to the responsible applicant, licensee, contractor, and/or individual; imposition of a civil penalty; issuance of an order removing the responsible individual from licensed activities; and/or license denial, suspension, modification or revocation.

Although each agency will carry out its statutory responsibilities independently, the agencies agree that administrative efficiency and sound enforcement policies will be maximized by cooperation and the timely exchange of information in areas of mutual interest.

3. Areas of Cooperation

a**.** DOL agrees to promptly notify NRC of any complaint filed with DOL alleging discrimination within the scope of Section 211 of the ERA by a Commission licensee, applicant or a contractor or subcontractor of a Commission licensee or applicant. DOL will provide a quarterly listing of Section 211 complaints received. DOL will promptly provide NRC a copy of all complaints, decisions made prior to a hearing, investigation reports, and orders associated with any hearing or administrative appeal on the complaint. DOL will also cooperate with the NRC and shall keep the NRC informed on the status of any judicial proceedings seeking review of an order of DOL's Administrative Review Board issued in a proceeding under Section 211 of the ERA.

b. NRC and DOL agree to cooperate with each other to the fullest extent possible in every case of alleged discrimination involving employees of Commission licensees, license applicants, or contractors or subcontractors of Commission licensees or applicants. Every agency agrees to share all information it obtains concerning a particular complaint of discrimination and, to the extent permitted by law, will protect information identified as sensitive that has been supplied to it by the other agency. This cooperation does not require either agency to share information gathered during an investigation until the investigation is complete.

c. For cases in which the NRC completes its investigation of a Section 211 complaint, and DOL's investigation is still ongoing, the NRC will provide the results of its investigation to the appropriate Occupational Safety & Health Administration (OSHA) contact, subject to Department of Justice (DOJ) constraints on the timing of the release of NRC

investigation material. NRC will take all reasonable steps to assist DOL in obtaining access to licensed facilities and any necessary security clearances. Consistent with relevant statutes, NRC regulations, and the availability of NRC resources, the NRC will cooperate with DOL and make available information, agency positions, and agency witnesses as necessary to assist DOL in completing the adjudication record on complaints filed under Section 211.

d. If the NRC receives a complaint concerning a possible violation of Section 211, it will inform the complainant that a personal remedy is available only through DOL and that the person must personally contact DOL in order to file a complaint. NRC will provide the complainant the local address and phone number of the OSHA office and advise the complainant that OSHA must receive the complaint within 180 days of the alleged discrimination.

e. Each agency shall designate and maintain points of contact within its headquarters and regional offices for purposes of implementation of the MOU. Matters affecting program and policy issues will be handled by the headquarters offices of the agencies.

4. Implementation

The NRC official responsible for implementation of this agreement is the Chairman of the NRC. The DOL official responsible for implementation of this agreement is the Secretary of Labor.

5. Amendment and Termination

This Agreement may be amended or modified upon written agreement by both parties to the Agreement. The Agreement may be terminated upon ninety (90) days written notice by either party.

6. Effective Date

This agreement is effective when signed by both parties.

Shirley Ann Jackson,
Chairman, U.S. Nuclear Regulatory Commission.
Dated: September 1, 1998.
Alexis Herman,
Secretary of Labor, U.S. Department of Labor.
Dated: September 9, 1998.

Nuclear Regulatory Commission
Policy Statement
Freedom of employees in the nuclear industry to raise safety concerns without fear of retaliation
May 14, 1996

Summary**:** The Nuclear Regulatory Commission (NRC) is issuing this policy statement to set forth its expectation that licensees and other employers subject to NRC authority will establish and maintain safety-conscious environments in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation. The responsibility for maintaining such an environment rests with each NRC licensee, as well as with contractors, subcontractors and employees in the nuclear industry. This policy statement is applicable to

NRC regulated activities of all NRC licensees and their contractors and subcontractors.

FOR FURTHER INFORMATION CONTACT:

James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission,Washington, DC 20555-0001, (301) 415-2741.

SUPPLEMENTARY INFORMATION:

Background: NRC licensees have the primary responsibility to ensure the safety of nuclear operations. Identification and communication of potential safety concerns and the freedom of employees to raise such concerns is an integral part of carrying out this responsibility.1) Throughout this Policy Statement the terms ``concerns,'' ``safety concerns'' and ``safety problem'' refer to potential or actual issues within the Commission's jurisdiction involving operations, radiological releases, safeguards, radiation protection, and other matters relating to NRC-regulated activities. In the past, employees have raised important issues and as a result, the public health and safety has benefited. Although the Commission recognizes that not every concern raised by employees is safety significant or, for that matter, is valid, the Commission concludes that it is important that licensees' management establish an environment in which safety issues are promptly identified and effectively resolved and in which employees feel free to raise concerns. Although hundreds of concerns are raised and resolved daily in the nuclear industry, the Commission, on occasion, receives reports of individuals being retaliated against for raising concerns. This retaliation is unacceptable and unlawful. In addition to the hardship caused to the individual employee, the perception by fellow workers that raising concerns has resulted in retaliation can generate a chilling effect that may discourage other workers from raising concerns. A reluctance on the part of employees to raise concerns is detrimental to nuclear safety. As a result of questions raised about NRC's efforts to address retaliation against individuals who raise health and safety concerns, the Commission established a review team in 1993 to reassess the NRC's program for protecting allegers against retaliation. In its report (NUREG-1499, ``Reassessment of the NRC's Program for Protecting Allegers Against Retaliation,'' January 7, 1994) the review team made numerous recommendations, including several recommendations involving issuing a policy statement to address the need to encourage responsible licensee action with regard to fostering a quality-conscious environment in which employees are free to raise safety concerns without fear of retribution (recommendations II.A-1, II.A-2, and II.A-4). On February 8, 1995, the Commission after considering those recommendations and the bases for them published for comment a proposed policy statement, ``Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation,'' in the Federal Register (60 FR 7592, February 8, 1995). The proposed policy statement generated comments from private citizens and representatives of the industry concerning both the policy statement and NRC and Department of Labor (DOL) performance. The more significant comments related to the contents of the policy statement included:1. The policy statement would discourage employees from

bringing their concerns to the NRC because it provided that employees should normally provide concerns to the licensee prior to or contemporaneously with coming to the NRC.2. The use of a holding period should be at the discretion of the employer and not be considered by the NRC in evaluating the reasonableness of the licensee's action.3. The policy statement is not needed to establish an environment to raise concerns if NRC uses its authority to enforce existing requirements by pursuing civil and criminal sanctions against those who discriminate.4. The description of employee concerns programs and the oversight of contractors was too prescriptive; the expectations concerning oversight of contractors were perceived as the imposition of new requirements without adherence to the Administrative Procedure Act and the NRC's Backfit Rule, 10 CFR 50.109.5. The need for employee concerns programs (ECPs) was questioned, including whether the ECPs fostered the development of a strong safety culture.6. The suggestion for involvement of senior management in resolving discrimination complaints was too prescriptive and that decisions on senior management involvement should be decided by licensees. In addition, two public meetings were held with representatives of the Nuclear Energy Institute (NEI) to discuss the proposed policy statement. Summaries of these meetings along with a revised policy statement proposed by NEI were included with the comments to the policy statement filed in the Public Document Room (PDR). This policy statement is being issued after considering the public comments and coordination with the Department of Labor. The more significant changes included:1. The policy statement was revised to clarify that senior management is expected to take responsibility for assuring that cases of alleged discrimination are appropriately investigated and resolved as opposed to being personally involved in the resolution of these matters.2. References to maintenance of a ``quality-conscious environment'' have been changed to ``safety-conscious environment'' to put the focus on safety.3. The policy statement has been revised to emphasize that while alternative programs for raising concerns may be helpful for a safety-conscious environment, the establishment of alternative programs is not a requirement.4. The policy statement continues to emphasize licensees' responsibility for their contractors. This is not a new requirement. However, the policy statement was revised to provide that enforcement decisions against licensees for discriminatory conduct of their contractors would consider such things as the relationship between the licensee and contractor, the reasonableness of the licensee's oversight of the contractor's actions and its attempts to investigate and resolve the matter.5. To avoid the possibility suggested by some commenters that the policy statement might discourage employees from raising concerns to the NRC if the employee is concerned about retaliation by the employer, the statement that reporting concerns to the Commission ``except in limited fact-specific situations'' would not absolve employees of the duty to inform the employer of matters that could bear on public, including worker, health and safety has been deleted. However, the policy statement expresses the Commission's expectation that employees, when coming to

the NRC, should normally have provided the concern to the employer prior to or contemporaneously with coming to the NRC.

Statement of Policy

The purpose of this Statement of Policy is to set forth the Nuclear Regulatory Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety-conscious work environment in which employees feel free to raise concerns both to their own management and the NRC without fear of retaliation. A safety-conscious work environment is critical to a licensee's ability to safely carry out licensed activities.

This policy statement and the principles set forth in it are intended to apply to licensed activities of all NRC licensees and their contractors, although it is recognized that some of the suggestions, programs, or steps that might be taken to improve the quality of the work environment (e.g., establishment of a method to raise concerns outside the normal management structure such as an employee concerns program) may not be practical for very small licensees that have only a few employees and a very simple management structure.2) Throughout this Notice, the term ``licensee'' includes licensees and applicants for licenses. It also refers to holders of certificates of compliance under 10 CFR Part 76. The term ``contractor'' includes contractors and subcontractors of NRC licensees and applicants defined as employers by section 211(a)(2) of the Energy Reorganization Act of 1974, as amended. The Commission believes that the most effective improvements to the environment for raising concerns will come from within a licensee's organization (or the organization of the licensee's contractor) as communicated and demonstrated by licensee and contractor management. Management should recognize the value of effective processes for problem identification and resolution, understand the negative effect produced by the perception that employee concerns are unwelcome, and appreciate the importance of ensuring that multiple channels exist for raising concerns. As the Commission noted in its 1989 Policy Statement on the Conduct of Nuclear Power Plant Operations (54 FR 3424, January 24, 1989), management must provide the leadership that nurtures and maintains the safety environment. In developing this policy statement, the Commission considered the need for:(1) Licensees and their contractors to establish work environments, with effective processes for problem identification and resolution, where employees feel free to raise concerns, both to their management and to the NRC, without fear of retaliation;(2) Improving contractors' awareness of their responsibilities in this area;(3) Senior management of licensees and contractors to take the responsibility for assuring that cases of alleged discrimination are appropriately investigated and resolved; and(4) Employees in the regulated industry to recognize their responsibility to raise safety concerns to licensees and their right to raise concerns to the NRC. This policy statement is directed to all employers, including licensees and their contractors, subject to NRC authority, and their employees. It is intended to reinforce the principle to all licensees and other employers subject to NRC authority that an act of retaliation or discrimination against an employee for raising a potential safety concern

is not only unlawful but may adversely impact safety. The Commission emphasizes that employees who raise concerns serve an important role in addressing potential safety issues. Thus, the NRC cannot and will not tolerate retaliation against employees who attempt to carry out their responsibility to identify potential safety issues.

3) An employee who believes he or she has been discriminated against for raising concerns may file a complaint with the Department of Labor if the employee seeks a personal remedy for the discrimination. The person may also file an allegation of discrimination with the NRC. The NRC will focus on licensee actions and does not obtain personal remedies for the individual. Instructions for filing complaints with the DOL and submitting allegations can be found on NRC Form 3 which licensees are required to post.

Under the Atomic Energy Act of 1954, as amended, the NRC has the authority to investigate allegations that employees of licensees or their contractors have been discriminated against for raising concerns and to take enforcement action if discrimination is substantiated. The Commission has promulgated regulations to prohibit discrimination (see, e.g., 10 CFR 30.7 and 50.7). Under Section 211 of the Energy Reorganization Act of 1974, as amended, the Department of Labor also has the authority to investigate complaints of discrimination and to provide a personal remedy to the employee when discrimination is found to have occurred. The NRC may initiate an investigation even though the matter is also being pursued within the DOL process. However, the NRC's determination of whether to do so is a function of the priority of the case which is based on its potential merits and its significance relative to other ongoing NRC investigations.

4) The NRC and DOL have entered into a Memorandum of Understanding to facilitate cooperation between the agencies. (47 FR 54585; December 3, 1982). *Effective Processes for Problem Identification and Resolution*

Licensees bear the primary responsibility for the safe use of nuclear materials in their various licensed activities. To carry out that responsibility, licensees need to receive prompt notification of concerns as effective problem identification and resolution processes are essential to ensuring safety. Thus, the Commission expects that each licensee will establish a safety-conscious environment where employees are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees. A safety-conscious environment is reinforced by a management attitude that promotes employee confidence in raising and resolving concerns. Other attributes of a work place with this type of an environment may include well-developed systems or approaches for prioritizing problems and directing resources accordingly; effective communications among various departments or elements of the licensee's organization for openly sharing information and analyzing the root causes of identified problems; and employees and managers with an open and questioning attitude, a focus on safety, and a positive orientation

toward admitting and correcting personnel errors. Initial and periodic training (including contractor training) for both employees and supervisors may also be an important factor in achieving a work environment in which employees feel free to raise concerns. In addition to communicating management expectations, training can clarify for both supervisors and employees options for problem identification. This would include use of licensee's internal processes as well as providing concerns directly to the NRC. Training of supervisors may also minimize the potential perception that efforts to reduce operating and maintenance costs may cause supervisors to be less receptive to employee concerns if identification and resolution of concerns involve significant costs or schedule delays.5) Training of supervisors in the value of raising concerns and the use of alternative internal processes may minimize the conflict that can be created when supervisors, especially first line supervisors, perceive employees as ``problem employees'' if the employees, in raising concerns, bypass the ``chain of command.'' Incentive programs may provide a highly visible method for demonstrating management's commitment to safety, by rewarding ideas not based solely on their cost savings but also on their contribution to safety. Credible self assessments of the environment for raising concerns can contribute to program effectiveness by evaluating the adequacy and timeliness of problem resolution. Self-assessments can also be used to determine whether employees believe their concerns have been adequately addressed and whether employees feel free to raise concerns. When problems are identified through self-assessment, prompt corrective action should be taken. Licensees and their contractors should clearly identify the processes that employees may use to raise concerns and employees should be encouraged to use them. The NRC appreciates the value of employees using normal processes (e.g., raising issues to the employee supervisors or managers or filing deficiency reports) for problem identification and resolution. However, it is important to recognize that the fact that some employees do not desire to use the normal line management processes does not mean that these employees do not have legitimate concerns that should be captured by the licensee's resolution processes. Nor does it mean that the normal processes are not effective. Even in a generally good environment, some employees may not always be comfortable in raising concerns through the normal channels. From a safety perspective, no method of raising potential safety concerns should be discouraged. Thus, in the interest of having concerns raised, the Commission encourages each licensee to have a dual focus: (1) On achieving and maintaining an environment where employees feel free to raise their concerns directly to their supervisors and to licensee management, and (2) on ensuring that alternate means of raising and addressing concerns are accessible, credible, and effective.NUREG-1499 may provide some helpful insights on various alternative approaches. The Commission recognizes that what works for one licensee may not be appropriate for another. Licensees have in the past used a variety of different approaches, such as:(1) An ``open-door'' policy that allows the employee to bring the concern to a higher-level

manager;(2) A policy that permits employees to raise concerns to the licensee's quality assurance group;(3) An ombudsman program; or(4) Some form of an employee concerns program. The success of a licensee alternative program for concerns may be influenced by how accessible the program is to employees, prioritization processes, independence, provisions to protect the identity of employees including the ability to allow for reporting issues with anonymity, and resources. However, the prime factors in the success of a given program appear to be demonstrated management support and how employees perceive the program. Therefore, timely feedback on the follow-up and resolution of concerns raised by employees may be a necessary element of these programs. This Policy Statement should not be interpreted as a requirement that every licensee establish alternative programs for raising and addressing concerns. Licensees should determine the need for providing alternative methods for raising concerns that can serve as internal ``escape valves'' or ``safety nets.'' Considerations might include the number of employees, the complexity of operations, potential hazards, and the history of allegations made to the NRC or licensee. While effective alternative programs for identifying and resolving concerns may assist licensees in maintaining a safety-conscious environment, the Commission, by making the suggestion for establishing alternative programs, is not requiring licensees to have such programs. In the absence of a requirement imposed by the Commission, the establishment and framework of alternative programs are discretionary.6) In developing these programs, it is important for reactor licensees to be able to capture all potential safety concerns, not just concerns related to ``safety-related'' activities covered by 10 CFR Part 50, Appendix B. For example, concerns relating to environmental, safeguards, and radiation protection issues should also be captured. *Improving Contractors' Awareness of Their Responsibilities*

The Commission's long-standing policy has been and continues to be to hold its licensees responsible for compliance with NRC requirements, even if licensees use contractors for products or services related to licensed activities. Thus, licensees are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation. Nevertheless, certain NRC requirements apply directly to contractors of licensees (see, for example, the rules on deliberate misconduct, such as 10 CFR 30.10 and 50.5 and the rules on reporting of defects and noncompliances in 10 CFR Part 21). In particular, the Commission's prohibition on discriminating against employees for raising safety concerns applies to the contractors of its licensees, as well as to licensees (see, for example, 10 CFR 30.7 and 50.7). Accordingly, if a licensee contractor discriminates against one of its employees in violation of applicable Commission rules, the Commission intends to consider enforcement action against both the licensee, who remains responsible for the environment maintained by its contractors, and the employer who actually discriminated against the employee. In considering whether enforcement actions should be taken against licensees for contractor actions, and the nature of such actions,

the NRC intends to consider, among other things, the relationship of the contractor to the particular licensee and its licensed activities; the reasonableness of the licensee's oversight of the contractor environment for raising concerns by methods such as licensee's reviews of contractor policies for raising and resolving concerns and audits of the effectiveness of contractor efforts in carrying out these policies, including procedures and training of employees and supervisors; the licensee's involvement in or opportunity to prevent the discrimination; and the licensee's efforts in responding to the particular allegation of discrimination, including whether the licensee reviewed the contractor's investigation, conducted its own investigation, or took reasonable action to achieve a remedy for any discriminatory action and to reduce potential chilling effects. Contractors of licensees have been involved in a number of discrimination complaints that are made by employees. In the interest of ensuring that their contractors establish safety-conscious environments, licensees should consider taking action so that:(1) Each contractor involved in licensed activities is aware of the applicable regulations that prohibit discrimination;(2) Each contractor is aware of its responsibilities in fostering an environment in which employees feel free to raise concerns related to licensed activities;(3) The licensee has the ability to oversee the contractor's efforts to encourage employees to raise concerns, prevent discrimination, and resolve allegations of discrimination by obtaining reports of alleged contractor discrimination and associated investigations conducted by or on behalf of its contractors; conducting its own investigations of such discrimination; and, if warranted, by directing that remedial action be undertaken; and(4) Contractor employees and management are informed of (a) the importance of raising safety concerns and (b) how to raise concerns through normal processes, alternative internal processes, and directly to the NRC. Adoption of contract provisions covering the matters discussed above may provide additional assurance that contractor employees will be able to raise concerns without fear of retaliation. *Involvement of Senior Management in Cases of Alleged Discrimination* The Commission reminds licensees of their obligation both to ensure that personnel actions against employees, including personnel actions by contractors, who have raised concerns have a well-founded, non-discriminatory basis and to make clear to all employees that any adverse action taken against an employee was for legitimate, non-discriminatory reasons. If employees allege retaliation for engaging in protected activities, senior licensee management should be advised of the matter and assure that the appropriate level of management is involved, reviewing the particular facts and evaluating or reconsidering the action. The intent of this policy statement is to emphasize the importance of licensee management taking an active role to promptly resolve situations involving alleged discrimination. Because of the complex nature of labor-management relations, any externally-imposed resolution is not as desirable as one achieved internally. The Commission emphasizes that internal resolution is the licensee's responsibility, and that early resolution without government involvement is less likely to disrupt the work place and is in

the best interests of both the licensee and the employee. For these reasons, the Commission's enforcement policy provides for consideration of the actions taken by licensees in addressing and resolving issues of discrimination when the Commission develops enforcement sanctions for violations involving discrimination. (59 FR 60697; November 28, 1994).In some cases, management may find it desirable to use a holding period, that is, to maintain or restore the pay and benefits of the employee alleging retaliation, pending reconsideration or resolution of the matter or pending the outcome of an investigation by the Department of Labor (DOL). This holding period may calm feelings on-site and could be used to demonstrate management encouragement of an environment conducive to raising concerns. By this approach, management would be acknowledging that although a dispute exists as to whether discrimination occurred, in the interest of not discouraging other employees from raising concerns, the employee involved in the dispute will not lose pay and benefits while the action is being reconsidered or the dispute is being resolved. However, inclusion of the holding period approach in this policy statement is not intended to alter the existing rights of either the licensee or the employee, or be taken as a direction by, or an expectation of, the Commission, for licensees to adopt the holding period concept. For both the employee and the employer, participation in a holding period under the conditions of a specific case is entirely voluntary.

A licensee may conclude, after a full review, that an adverse action against an employee is warranted. The Commission recognizes the need for licensees to take action when justified. Commission regulations do not render a person who engages in protected activity immune from discharge or discipline stemming from non-prohibited considerations (see, for example, 10 CFR 50.7(d)). The Commission expects licensees to make personnel decisions that are consistent with regulatory requirements and that will enhance the effectiveness and safety of the licensee's operations.7) When other employees know that the individual who was the recipient of an adverse action may have engaged in protected activities, it may be appropriate for the licensee to let the other employees know, consistent with privacy and legal considerations, that (1) management reviewed the matter and determined that its action was warranted, (2) the action was not in retaliation for engaging in protected activity and the reason why, and (3) licensee management continues to encourage them to raise issues. This may reduce any perception that retaliation occurred. *Responsibilities of Employers and Employees*

As emphasized above, the responsibility for maintaining a safety-conscious environment rests with licensee management. However, employees in the nuclear industry also have responsibilities in this area. As a general principle, the Commission normally expects employees in the nuclear industry to raise safety and compliance concerns directly to licensees, or indirectly to licensees through contractors, because licensees, and not the Commission, bear the primary responsibility for safe operation of nuclear facilities and safe use of nuclear materials. The licensee, and not the NRC, is usually in the best position and has the

detailed knowledge of the specific operations and the resources to deal promptly and effectively with concerns raised by employees. This is another reason why the Commission expects licensees to establish an environment in which employees feel free to raise concerns to the licensees themselves.

8) The expectation that employees provide safety and compliance concerns to licensees is not applicable to concerns of possible wrongdoing by NRC employees or NRC contractors. Such concerns are subject to investigation by the NRC Office of Inspector General. Concerns related to fraud, waste or abuse in NRC operations or NRC programs including retaliation against a person for raising such issues should be reported directly to the NRC Office of the Inspector General. The Inspector General's toll-free hotline is 800-233-3497.

Employers have a variety of means to express their expectations that employees raise concerns to them, such as employment contracts, employers' policies and procedures, and certain NRC requirements. In fact, many employees in the nuclear industry have been specifically hired to fulfill NRC requirements that licensees identify deficiencies, violations and safety issues. Examples of these include many employees who conduct surveillance, quality assurance, radiation protection, and security activities. In addition to individuals who specifically perform functions to meet monitoring requirements, the Commission encourages all employees to raise concerns to licensees if they identify safety issues so that licensees can address them before an event with safety consequences occurs.

9) Except for the reporting of defects under 10 CFR Part 21 and in the area of radiological working conditions, the Commission has not codified this expectation. Licensees are required by 10 CFR 19.12 to train certain employees in their responsibility to raise issues related to radiation safety.

The Commission's expectation that employees will normally raise safety concerns to their employers does not mean that employees may not come directly to the NRC. The Commission encourages employees to come to the NRC at any time they believe that the Commission should be aware of their concerns. But, while not required, the Commission does expect that employees normally will have raised the issue with the licensee either prior to or contemporaneously with coming to the NRC. The Commission cautions licensees that complaints that adverse action was taken against an employee for not bringing a concern to his or her employer, when the employee brought the concern to the NRC, will be closely scrutinized by the NRC to determine if enforcement action is warranted for discrimination.

10) The Commission intends to protect the identity of individuals who come to the NRC to the greatest extent possible. See ``Statement of Policy on Protecting the Identity of Allegers and Confidential Sources." Retaliation against employees engaged in protected activities, whether they have raised concerns to their employers or to the NRC, will not be tolerated. If adverse action is found to have occurred because the employee raised a concern to either the NRC or the licensee, civil and

criminal enforcement action may be taken against the licensee and the person responsible for the discrimination. Summary The Commission expects that NRC licensees will establish safety-conscious environments in which employees of licensees and licensee contractors are free, and feel free, to raise concerns to their management and to the NRC without fear of retaliation.

Licensees must ensure that employment actions against employees who have raised concerns have a well-founded, non-discriminatory basis.

When allegations of discrimination arise in licensee, contractor, or subcontractor organizations, the Commission expects that senior licensee management will assure that the appropriate level of management is involved to review the particular facts, evaluate or reconsider the action, and, where warranted, remedy the matter. Employees also have a role in contributing to a safety-conscious environment. Although employees are free to come to the NRC at any time, the Commission expects that employees will normally raise concerns with the involved licensee because the licensee has the primary responsibility for safety and is normally in the best position to promptly and effectively address the matter. The NRC should normally be viewed as a safety valve and not as a substitute forum for raising safety concerns. This policy statement has been issued to highlight licensees' existing obligation to maintain an environment in which employees are free to raise concerns without retaliation. The expectations and suggestions contained in this policy statement do not establish new requirements. However, if a licensee has not established a safety-conscious environment, as evidenced by retaliation against an individual for engaging in a protected activity, whether the activity involves providing information to the licensee or the NRC, appropriate enforcement action may be taken against the licensee, its contractors, and the involved individual supervisors, for violations of NRC requirements.

The Commission recognizes that the actions discussed in this policy statement will not necessarily insulate an employee from retaliation, nor will they remove all personal cost should the employee seek a personal remedy. However, these measures, if adopted by licensees, should improve the environment for raising concerns. Dated at Rockville, Maryland, this 8th day of May, 1996.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Secretary of the Commission.

SECTION 5
TRANSPORTATION/AIRLINE SAFETY

Aviation Investment and Reform Act
for the 21st Century (AIR 21)
49 U.S.C. § 42121

§ 42121. Protection of employees providing air safety information
(a) *Discrimination Against Airline Employees*. No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)
(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
(3) testified or is about to testify in such a proceeding; or
(4) assisted or participated or is about to assist or participate in such a proceeding.
(b) *Department of Labor Complaint Procedure*. (1) *Filing And Notification*. A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).
(2) *Investigation; Preliminary Order*.
(A) *In General*. Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation

of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30- day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) *Requirements*.

(i) *Required Showing by Complainant*. The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) *Showing by Employer*. Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) *Criteria For Determination by Secretary*. The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) *Prohibition*. Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) *Final Order*.

(A) *Deadline For Issuance; Settlement Agreements*. Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) *Remedy*. If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.
If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.
(C) *Frivolous Complaints*. If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorneys fee not exceeding $1,000.
(4) *Review*.
(A) *Appeal to Court of Appeals*. Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.
(B) *Limitation on Collateral Attack*. An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.
(5) *Enforcement of Order by Secretary of Labor*. Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.
(6) *Enforcement of Order by Parties*.
(A) *Commencement of Action*. A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.
(B) *Attorney Fees*. The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.
(C) *Mandamus*. Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.
(d) *Nonapplicability to Deliberate Violations*. Subsection (a) shall not apply

with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such persons agent), deliberately causes a violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States.
(e) *Contractor Defined*. In this section, the term contractor means a company that performs safety-sensitive functions by contract for an air carrier.

Coast Guard Whistleblower Protection Provision
Protection of seamen against discrimination
46 U.S.C. § 2114

(a) An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.
(b) A seaman discharged or otherwise discriminated against in violation of this section may bring an action in an appropriate district court of the United States. In that action, the court may order any appropriate relief, including —
(1) restraining violations of this section; and
(2) reinstatement to the seaman's former position with back pay.

Railway Safety Labor Act
Employee Protection
49 U.S.C. § 20109

(a) Filing Complaints and Testifying
A railroad carrier engaged in interstate or_foreign commerce may not discharge or in any way discriminate against an employee because the employee, whether acting for the employee or as a representative, has -
(1) filed a complaint or brought or caused to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety, chapter 51 or 57 of this title; or
(2) testified or will testify in that proceeding.
(b) Refusing To Work Because of Hazardous Conditions.
(1) A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if-
(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
(B) a reasonable individual in the circumstances then
confronting the employee would conclude that -
(i) the hazardous condition presents an imminent danger of death or serious injury; and
(ii) the urgency of the situation does not allow sufficient time to eliminate

the danger through regular statutory means; and
(C) the employee, where possible, has notified the carrier of the hazardous condition and the intention not to perform further work unless the condition is corrected immediately.
(2) This subsection does not apply to security personnel employed by a carrier to protect individuals and property transported by railroad.
(c) Dispute Resolution.
A dispute, grievance, or claim arising under this section is subject to resolution under section 3 of the Railway Labor Act (45 U.S.C. 153). In a proceeding by the National Railroad Adjustment Board, a division or delegate of the Board, or another board of adjustment established under section 3 to resolve the dispute, grievance, or claim, the proceeding shall be expedited and the dispute, grievance, or claim shall be resolved not later than 180 days after it is filed. If the violation is a form of discrimination that does not involve discharge, suspension, or another action affecting pay, and no other remedy is available under this subsection, the Board, division, delegate, or other board of adjustment may award the employee reasonable damages, including punitive damages, of not more than $20,000.
(d) Election of Remedies.
An employee of a railroad carrier may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the carrier.
(e) Disclosure of Identity.
(1) Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation may not disclose the name of an employee of a railroad carrier who has provided information about an alleged violation of this part or, as applicable to railroad safety, chapter 51 or 57 of this title or a regulation prescribed or order issued under any of those provisions.
(2) The Secretary shall disclose to the Attorney General the name of an employee described in paragraph (1) of this subsection if the matter is referred to the Attorney General for enforcement.

Safe Containers for International Cargo Act,
Employee Protection Provision
46 U.S.C. § 1506

(a) *Discrimination against a reporting employee prohibited*. No person shall discharge or in any manner discriminate against an employee because the employee has reported the existence of an unsafe container or reported a violation of this chapter to the Secretary or his agents.
(b) *Complaint alleging discrimination*. An employee who believes that he has been discharged or discriminated against in violation of this section may, within 60 days after the violation occurs, file a complaint alleging discrimination with the Secretary of Labor.
(c) *Investigation by Secretary of Labor; judicial relief*. The Secretary of Labor may investigate the complaint and, if he determines that this section has been violated, bring an action in an appropriate United States district court. The district court shall have jurisdiction to restrain violations of subsection (a) of this section and to order appropriate relief, including rehiring and reinstatement of the employee to his former position with back pay.
(d) *Notification to complainant of intended action.* Within 30 days after the receipt of a complaint filed under this section the Secretary of Labor shall notify the complainant of his intended action regarding the complaint.

Surface Transportation Assistance Act
49 U.S.C. §§ 31101, 31105

§ 31101. Definitions
In this subchapter —
(1) "*commercial motor vehicle*" means (except in section 31106) a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle—
(A) has a gross vehicle weight rating of at least 10,000 pounds;
(B) is designed to transport more than 10 passengers including the driver; or
(C) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title.
(2) "*employee*" means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who—
(A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and
(B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.
(3) "*employer*"—
(A) means a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but
(B) does not include the Government, a State, or a political subdivision of

a State.
(4) "*State*" means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.
§ 31105. Employee Protections
(a) *Prohibitions.*
(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
(B) the employee refuses to operate a vehicle because—
(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.
(b) *Filing Complaints and Procedures.*
(1) An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred. On receiving the complaint, the Secretary shall notify the person alleged to have committed the violation of the filing of the complaint.
(2)(A) Not later than 60 days after receiving a complaint, the Secretary shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify the complainant and the person alleged to have committed the violation of the findings. If the Secretary decides it is reasonable to believe a violation occurred, the Secretary shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection.
(B) Not later than 30 days after the notice under subparagraph (A) of this paragraph, the complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of objections does not stay a reinstatement ordered in the preliminary order. If a hearing is not requested within the 30 days, the preliminary order is final and not subject to judicial review.
(C) A hearing shall be conducted expeditiously. Not later than
120 days after the end of the hearing, the Secretary shall issue a final order. Before the final order is issued, the proceeding may be ended by a

settlement agreement made by the Secretary, the complainant, and the person alleged to have committed the violation.
(3)(A) If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to (i) take affirmative action to abate the violation; (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (iii) pay compensatory damages, including back pay.
(B) If the Secretary issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint. The Secretary shall determine the costs that reasonably were incurred.
(c) *Judicial Review and Venue.* A person adversely affected by an order issued after a hearing under subsection (b) of this section may file a petition for review, not later than 60 days after the order is issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation. The review shall be heard and decided expeditiously. An order of the Secretary subject to review under this subsection is not subject to judicial review in a criminal or other civil proceeding.
(d) *Civil Actions To Enforce.* If a person fails to comply with an order issued under subsection (b) of this section, the Secretary shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

Occupational Safety and Health Administration
Department of Labor Part 1978
Rules for Implementing Section 405 of the
Surface Transportation Assistance Act of 1982 (STAA)
29 C.F.R. Part 1987

AUTHORITY: 29 U.S.C. 657(g)(2); 29 U.S.C. 660(c)(2); 49 U.S.C. 31101 and 31105; Secretary of Labor's Order No. 1–90, 55 FR 9033.
SOURCE: 53 FR 47681, Nov. 25, 1988, unless otherwise noted.

Complaints, investigations, findings, and preliminary orders

§ 1978.100 Purpose and scope.

(a) This subpart implements the procedural aspects of section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. 2305, which provides for employee protection from discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters.

(b) Procedures are established by this subpart pursuant to the statutory provision set forth above for the expeditious handling of complaints of discrimination made by employees, or persons acting on their behalf. These rules, together with those rules set forth at 29 CFR part 18, set forth the procedures for submission of complaints under section 405, investigations, issuance of findings and preliminary orders, objections thereto, litigation before administrative law judges, post-hearing administrative review, withdrawals and settlements, judicial review and enforcement, and deferral to other forums.

§ 1978.101 Definitions.

(a) Act means the Surface Transportation Assistance Act of 1982 (STAA) (49 U.S.C. 2301 et seq.).

(b) Secretary means Secretary of Labor or persons to whom authority under the Act has been delegated.

(c) Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.

(d) Employee means (1) a driver of a commercial motor vehicle (including an independent contractor while in the course of personally operating a commercial motor vehicle); (2) a mechanic;

(3) a freight handler; or (4) any individual other than an employer; who is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety, but such term does not include an employee of the United States, any State, or a political subdivision of a State who is acting within the course of such employment.

(e) Commercial motor carrier means a person who meets the definition of motor carrier found at 49 U.S.C. 10102(13) (Supp. 1987) and motor private carrier found at 49 U.S.C. 10102(16) (Supp. 1987).

(f) OSHA means the Occupational Safety and Health Administration.

(g) Complainant means the employee who filed a section 405 complaint or on whose behalf a complaint was filed.

(h) Named person means the person alleged to have violated section 405.

(i) Person means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons.
§ 1978.102 Filing of discrimination complaint.
(a) Who may file. An employee may file, or have filed by any person on the employee's behalf, a complaint alleging a violation of section 405.
(b) Nature of filing. No particular form of complaint is required.
(c) Place of filing. The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but filing with any OSHA officer or employee is sufficient. Addresses and telephone numbers for these officials are set forth in local directories.
(d) Time for filing.
(1) Section 405(c)(1) provides that an employee who believes that he has been discriminated against in violation of section 405 (a) or (b) ''* * * may, within one hundred and eighty days after such alleged violation occurs,'' file or have filed by any person on the employee's behalf a complaint with the Secretary.
(2) A major purpose of the 180-day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 180 days of an alleged violation will ordinarily be considered to be untimely.
(3) However, there are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, e.g., where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period. The Assistant Secretary will not ordinarily investigate complaints which are determined to be untimely.
(e) Relationship to section 11(c) complaints.
A complaint filed by an employee within thirty days of the alleged violation or otherwise timely filed pursuant to section 11(c) of the OSHA Act, which alleges discrimination relating to safety or health, shall be deemed to be a complaint filed under both section 405 and section 11(c). Normal procedures for investigations under both sections will be followed, except as otherwise provided.
(f) Upon receipt of a valid complaint, OSHA shall notify the named person of the filing of the complaint by providing a copy of the complaint, sanitized to protect witness confidentiality if necessary, and shall also notify the named person of his or her rights under 29 CFR 1978.103 (b) and (c).
§ 1978.103 Investigation.
(a) OSHA shall investigate and gather data concerning the case as it deems appropriate.
(b) Within twenty days of his or her receipt of the complaint the named person may submit to OSHA a written statement and any affidavits or documents explaining or defending his or her position. Within the same twenty days the named person may request a meeting with OSHA to present his or her position. The meeting will be held before the issuance of any

findings or preliminary order. At the meeting the named person may be accompanied by counsel and by any persons with information relating to the complaint, who may make statements concerning the case. At such meeting OSHA may present additional allegations of violations which may have been discovered in the course of its investigation.

(c) If, on the basis of information gathered under paragraphs (a) and (b) of this section, OSHA has reasonable cause to believe that the named person has violated the Act and that temporary reinstatement is warranted, prior to the issuance of findings and preliminary order as provided for in § 1978.104, OSHA shall again contact the named person to give him or her notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. The named person shall be given the opportunity to submit a written response, to meet with the investigators and to present statements from rebuttal witnesses. The named person shall present this rebuttal evidence within five days of OSHA's notification pursuant to this subsection, or as soon thereafter as OSHA and the named person can agree, if the interests of justice so require.

§ 1978.104 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within sixty days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the named person or others have discriminated against the complainant in violation of section 405 (a) or (b). If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief prescribed in section 405(c)(2)(B). Such order will include, where appropriate, a requirement that the named person abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages. At the complainant's request the order may also assess against the named party the complainant's costs and expenses (including attorney's fees) reasonably incurred in filing the complaint.

(b) The findings and the preliminary order shall be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order shall inform the parties of the right to object to the findings and/or the order and shall give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary shall file with the Chief Administrative Law Judge, U.S. Department of Labor, the original complaint and a copy of the findings and/or order.

(c) Upon the issuance of findings that there is reasonable cause to believe that a violation has occurred, any pending section 11(c) complaint will be suspended until the section 405 proceeding is completed. When the section 405 proceeding is completed the Assistant Secretary will determine what action, if any, is appropriate on the section 11(c) complaint. If the Assistant Secretary's findings indicate that a violation has occurred, the Assistant Secretary shall make a separate determination as to whether section 11(c) has been violated.

§ 1978.105 Objections to the findings and the preliminary order.

(a) Basic procedures. Within thirty days of receipt of the findings or preliminary order the named person or the complainant, or both, may file objections to the findings or preliminary order providing relief or both and request a hearing on the record. The objection and request shall be in writing and shall state whether the objection is to the findings or the preliminary order or both. Such objection shall also be considered a request for a hearing. The date of the postmark shall be considered to be the date of filing. Objections shall be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC and copies of the objections shall be mailed at the same time to the other parties of record, including the Assistant Secretary's designee who issued the findings and order.

(b) Effective date of findings and preliminary order and failure to object.

(1)The findings and the preliminary order shall be effective thirty days after the named person's receipt thereof, or on the compliance date set forth in the preliminary order, whichever is later, unless an objection to the findings or preliminary order has been timely filed. However, the portion of any preliminary order requiring reinstatement shall be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections thereto.

(2) If no timely objection is filed with respect to either the findings or the preliminary order, such findings or preliminary order, as the case may be, shall become final and not subject to judicial review.

Litigation

§ 1978.106 Scope of rules; applicability of other rules; notice of hearing.

(a) Except as otherwise noted, hearings shall be conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges promulgated at 29 CFR part 18, 48 FR 32538 (July 15, 1983), amended at 49 FR 2739 January 20, 1984. Hearings shall be conducted as hearings de novo.

(b) Upon receipt of an objection, the Chief Administrative Law Judge shall immediately assign the case to a judge who shall, within seven days following the receipt of the objection, notify the parties, by certified mail, of the day, time, and place of hearing. The hearing shall commence within 30 days of the filing of the objection, except upon a showing of good cause or unless otherwise agreed to by the parties.

(c) If both complainant and the named person object to the findings and/or order, the objections shall be consolidated and a single hearing shall be conducted. If the objections are not received simultaneously, the hearing shall commence within 30 days of the receipt of the later objection.

(d) At the time the hearing order issues, the judge may order the prosecuting party to file a pre-hearing statement of position, which shall briefly set forth the issues involved in the proceeding and the remedy requested. Such pre-hearing statement shall be filed within three days of the receipt of the hearing order and shall be served on all parties by certified mail. Thereafter, within three days of receipt of the prosecuting party's pre-hearing statement, the other parties to the proceeding shall file pre-hearing statements of position.

§ 1978.107 Parties.

(a) In any case in which only the named person objects to the findings or the preliminary order the Assistant Secretary ordinarily shall be the prosecuting party. In such a case the complainant shall also be a party and may engage in discovery, present evidence or otherwise act as a party. The named person shall be the party-respondent. If, at any time after the named person files objections, the Assistant Secretary and complainant agree, the complainant may present the case to the judge. Under such circumstances the case will be handled as if it had arisen under paragraph (b) of this section.
(b) In any case in which only the complainant objects to findings that the complaint lacks merit, to the preliminary order, or to both, the complainant shall be the prosecuting party. The Assistant Secretary may as of right intervene as a party at any time in proceedings under this paragraph. The named person shall be the party-respondent.
(c) In any case in which both the complainant and the named person object to the preliminary order the Assistant Secretary shall be the prosecuting party. The complainant and the named person shall be the party-respondents. In any such case, if the named person also objected to the findings the Assistant Secretary, complainant, and named party shall each have the party status, rights, and responsibilities set forth in paragraph (a) of this section with respect to the findings.
§ 1978.108 Captions, titles of cases.
(a) Cases described in § 1978.107(a) shall be titled: Assistant Secretary of Labor for Occupational Safety and Health, Prosecuting Party and (Name of Complainant), Complainant v. (Name of named person), Respondent.
(b) Cases described in § 1978.107(b) shall be titled: (Name of complainant), Complainant v. (Name of named person), Respondent.
(c) Cases described in § 1978.107(c) shall be titled: Assistant Secretary of Labor for Occupational Safety and Health, Prosecuting Party v. (Name of named person), Respondent. (Name of complainant), Complainant v. (Name of named person), Respondent.
(d) The titles listed in paragraphs (a), (b), and (c) of this section shall appear at the left upper portion of the initial page of any pleading or document (other than exhibits) filed.
§ 1978.109 Decision and orders.
(a) Administrative Law Judge decisions.
The administrative law judge shall issue a decision within 30 days after the close of the record. The close of the record shall occur no later than 30 days after the filing of the objection, except upon a showing of good cause or unless otherwise agreed to by the parties. For the purposes of the statute the issuance of the judge's decision shall be deemed the conclusion of the hearing. The decision shall contain appropriate findings, conclusions, and an order pertaining to the remedy which, among other things, may provide for reinstatement of a discharged employee and also may include an award of the complainant's costs and expenses (including attorney's fees) reasonably incurred in bringing and litigating the case, if the complainant's position has prevailed. The decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee. The decision shall be served upon all parties to the

proceeding.
(b) The administrative law judge's decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision by the named person. All other portions of the judge's order are stayed pending review by the Secretary.
(c) Final order.
(1) Within 120 days after issuance of the administrative law judge's decision and order, the Administrative Review Board, United States Department of Labor, shall issue a final decision and order based on the record and the decision and order of the administrative law judge.
(2) The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to the administrative law judge's decision and order within thirty days of the issuance of that decision unless the Administrative Review Board, United States Department of Labor, upon notice to the parties, establishes a different briefing schedule.
(3) The findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive.
(4) Where the Administrative Review Board, United States Department of Labor, determines that the named party has not violated the law, the final order shall deny the complaint.
(5) The final decision and order of the Administrative Review Board, United States Department of Labor, shall be served upon all parties to the proceeding. [53 FR 47681, Nov. 25, 1988, as amended at 61 FR 19986, May 3, 1996]

§ 1978.110 Judicial review.

(a) Within 60 days after the issuance of a final order under § 1978.109, any person adversely affected or aggrieved by such order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the person resided on the date of the violation (49 U.S.C. 2305(d)(1)).
(b) A final order of the Administrative Review Board, United States Department of Labor, shall not be subject to judicial review in any criminal or other civil proceedings (49 U.S.C. 2305(d)(2)).
(c) The record of a case, including the record of proceedings before the administrative law judge, shall be transmitted by the Administrative Review Board, United States Department of Labor, to the appropriate court pursuant to the rules of such court.
[53 FR 47681, Nov. 25, 1988, as amended at 61 FR 19986, May 3, 1996]

§ 1978.111 Withdrawal of section 405 complaints, objections, and findings; settlement.

(a) At any time prior to the filing of objections to the findings or preliminary order, an employee may withdraw his or her section 405 complaint by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary shall thereafter determine whether the withdrawal shall be approved. The Assistant Secretary shall notify the named person of the approval of any withdrawal.
(b) The Assistant Secretary may withdraw his findings or a preliminary

order at any time before the expiration of the 30-day objection period, provided that no objection has yet been filed, and substitute new findings or preliminary order. The date of the receipt of the substituted findings or order shall begin a new 30-day objection period.

(c) At any time before the findings or order become final, a party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Administrative Review Board, United States Department of Labor. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.

(d)(1) Investigative settlements. At anytime after the filing of a section 405 complaint by an employee and before the finding and/or order are objected to, or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.

(2) Adjudicatory settlement. At any time after the filing of objections to the Assistant Secretary's findings and/ or order, the case may be settled if the participating parties agree to a settlement and such settlement is approved by the Administrative Review Board, United States Department of Labor, or the ALJ. A copy of the settlement shall be filed with the ALJ or the Administrative Review Board, United States Department of Labor as the case may be.

(3) If, under paragraph (d)(1) or (2) of this section the named person makes an offer to settle the case which the Assistant Secretary, when acting as the prosecuting party, deems to be a fair and equitable settlement of all matters at issue and the complainant refuses to accept the offer, the Assistant Secretary may decline to assume the role of prosecuting party as set forth in § 1978.107(a). In such circumstances, the Assistant Secretary shall immediately notify the complainant that his review of the settlement offer may cause the Assistant Secretary to decline the role of prosecuting party. After the Assistant Secretary has reviewed the offer and when he or she has decided to decline the role of prosecuting party, the Assistant Secretary shall immediately notify all parties of his or her decision in writing and, if the case is before the administrative law judge, or the Administrative Review Board, United States Department of Labor on review, a copy of the notice shall be sent to the appropriate official. Upon receipt of the Assistant Secretary's notice, the parties shall assume the roles set forth in § 1978.107(b).

[53 FR 47681, Nov. 25, 1988, as amended at 61 FR 19986, May 3, 1996]

Miscellaneous provisions

§ 1978.112 Arbitration or other proceedings.

(a) General.

(1) An employee who files a complaint under section 405 of the Act may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board. The Secretary's jurisdiction to entertain section 405 complaints, to investigate, and to determine whether discrimination has occurred, is

independent of the jurisdiction of other agencies or bodies. The Secretary may proceed with the investigation and the issuance of findings and orders regardless of the pendency of other proceedings.

(2) However, the Secretary also recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to section 405 complaints.

(3) Where complainant is in fact pursuing remedies other than those provided by section 405, the Secretary may, in his or her discretion, postpone a determination of the section 405 complaint and defer to the results of such proceedings.

(b) Postponement of determination. When a complaint is under investigation pursuant to § 1978.103, postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under section 405 and those proceedings are not likely to violate rights guaranteed by section 405. The factual issues in such proceedings must be substantially the same as those raised by a section 405 complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination.

(c) Deferral to outcome of other proceedings. A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-by-case basis, after careful scrutiny of all available information. Before the Assistant Secretary or the Secretary defers to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the section 405 complaint.

§ 1978.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to occur.

§ 1978.114 Statutory time periods.

The time requirements imposed on the Secretary by these regulations are directory in nature. While every effort will be made to meet these requirements, there may be instances when it is not possible to meet these requirements. Failure to meet these requirements does not invalidate any action by the Assistant Secretary or Secretary under section 405.

§ 1978.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the judge or the Secretary on review may, upon application, after three days notice to all parties and intervenors, waive any rule or issue such orders as justice or the administration of section 405 requires.

Coast Guard
Rules and Regulations
Department of Transportation
33 CFR Part 53
Coast Guard Whistleblower Protection
Agency: Office of the Secretary, DOT.
Action: Final rule.
56 *Federal Register* 13404 (April 2, 1991)

SUMMARY: This final rule implements the whistleblower protection provisions contained in Public Law 100-456. The rule applies to the United States Coast Guard, the Board for Correction of Military Records of the Coast Guard, and the Department of Transportation's Inspector General. It establishes procedures to ensure that members of the United States Coast Guard are protected from reprisals for making, or preparing to make, lawful communications to a Member of Congress or an Inspector General. In addition, the rule specifically requires the reporting and investigation of reprisal allegations, and provides for remedies when reprisal is found, including disciplinary action against any person taking reprisal and the correction of military records when appropriate.
DATES: Effective May 2, 1991.
SUPPLEMENTARY INFORMATION: Public Law 100-456 sets forth specific protections to be afforded to members of the Armed Forces who make lawful communications to a Member of Congress or to an Inspector General. Public Law 101-225, a technical correction, clarifies that, when the Coast Guard is not operating as a service in the Navy, Coast Guard members must submit complaints under this Act to the Inspector General of the Department of Transportation, and that the Secretary of Transportation may, if necessary, provide final review of the action.
Members of the Armed Forces who become aware of information evidencing wrongdoing or waste of funds generally have a duty to report such information through the chain of command. Public Law 100-456 establishes that those individuals also have the right to communicate directly with a Member of Congress or an Inspector General, unless the communication is unlawful under applicable law or regulation. When these individuals make lawful disclosures, the statute mandates that they be protected from adverse personnel consequences, or the threat of such consequences. These individuals have the right to a prompt investigation and administrative review of claims of reprisals. If any claim of reprisal is found meritorious, the Secretary of Transportation is required to initiate appropriate corrective action, and the Board for Correction of Military Records should entertain any application for correction of records submitted by an aggrieved member. The Department published a notice of proposed rulemaking (NPRM) to implement these statutory changes on June 26, 1990 (55 FR 25983). The NPRM, which contains an extensive discussion of the statute and proposed regulatory language, provided a 60-day comment period, which closed on August 27, 1990. No comments were filed in response to the NPRM. The Department is therefore adopting the notice as proposed with minor clarifying changes that more closely track the statutory

language.
List of Subjects in 33 CFR Part 53
Administrative practice and procedure, Fraud, Investigations, Military personnel, Whistleblowing.
Accordingly, title 33 of the Code of Federal Regulations is amended to add part 53 as follows:
PART 53--COAST GUARD WHISTLEBLOWER PROTECTION
53.1 Purpose.
53.3 Applicability.
53.5 Definitions.
53.7 Requirements.
53.9 Responsibilities.
53.11 Procedures.
Authority: 10 U.S.C. 1034, Pub. L. 100-456, Pub. L. 101-225.
§ 53.1 Purpose.
This part:
(a) Establishes policy and implements section 1034 of title 10 of the United States Code to provide protection against reprisal to members of the Coast Guard for making a lawful communication to a Member of Congress or an Inspector General.
(b) Assigns responsibilities and delegates authority for such protection and prescribes operating procedures.
§ 53.3 Applicability.
This part applies to members of the United States Coast Guard, the Board for Correction of Military Records of the Coast Guard, and the Department of Transportation's Office of the Inspector General.
§ 53.5 Definitions.
As used in this part, the following terms shall have the meaning stated, except as otherwise provided: Board for Correction of Military Records of the Coast Guard. The Department of Transportation Board for Correction of Military Records of the Coast Guard (Board) is empowered under 10 U.S.C. 1552 to make corrections of Coast Guard military records. The Board is part of the Office of the General Counsel in the Office of the Secretary of Transportation. Corrective Action. Any action deemed necessary to make the complainant whole, changes in agency regulations or practices, and/or administrative or disciplinary action against offending personnel, or referral to the U.S. Attorney General or courtmartial convening authority of any evidence of criminal violation. Inspector General. The Inspector General in the Office of Inspector General of the Department of Transportation, as appointed under the Inspector General Act of 1978.Law Specialist. A commissioned officer of the Coast Guard designated for special duty (law). Member of the Coast Guard. Any past or present Coast Guard uniformed personnel, officer or enlisted, regular or reserve. This definition includes cadets of the Coast Guard Academy.
Member of Congress. In addition to a Representative or a Senator, the term includes any Delegate or Resident Commissioner to Congress. Personnel Action. Any action taken regarding a member of the Coast Guard that adversely affects or has the potential to adversely affect the member's position or his or her career. Such actions include, but are not limited to, a

disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; or a decision concerning a promotion, pay, benefits, awards, or training. Reprisal. Taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action against a member of the Coast Guard for making or preparing to make a communication to a Member of Congress or an Inspector General. Secretary. The Secretary of Transportation or his or her delegate.

§ 53.7 Requirements.

(a) No person within the Department of Transportation may restrict a member of the Coast Guard from lawfully communicating with a Member of Congress or an Inspector General.

(b) Members of the Coast Guard shall be free from reprisal for making or preparing to make lawful communications to Members of Congress or an Inspector General.

(c) Any employee or member of the Coast Guard who has the authority to take, direct others to take, or recommend or approve any personnel action shall not, under such authority, take, withhold, threaten to take, or threaten to withhold a personnel action regarding any member of the Coast Guard in reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General.

§ 53.9 Responsibilities.

(a) The Inspector General, Department of Transportation shall:

(1) Expeditiously investigate any allegation, if such allegation is submitted, that a personnel action has been taken (or threatened) in reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General concerning a complaint or disclosure of information that the member reasonably believes constitutes evidence of a violation of law or regulation, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. No investigation is required when such allegation is submitted more than 60 days after the Coast Guard member became aware of the personnel action that is the subject of the allegation.

(2) Initiate a separate investigation of the information the Coast Guard member believes evidences wrongdoing if such investigation has not already been initiated. The Inspector General is not required to make such an investigation if the information that the Coast Guard member believes evidences wrongdoing relates to actions that took place during combat.

(3) Complete the investigation of the allegation of reprisal and issue a report not later than 90 days after receipt of the allegation, which shall include a thorough review of the facts and circumstances relevant to the allegation, the relevant documents acquired during the investigation, and summaries of interviews conducted. The Inspector General may forward a recommendation as to the disposition of the complaint.

(4) Submit a copy of the investigation report to the Secretary of Transportation and to the Coast Guard member making the allegation not later than 30 days after the completion of the investigation. The copy of the report issued to the Coast Guard member may exclude any information not otherwise available to the Coast Guard member under the Freedom of

Information Act (5 U.S.C. 552).
(5) If a determination is made that the report cannot be issued within 90 days of receipt of the allegation, notify the Secretary and the Coast Guard member making the allegation of the reasons why the report will not be submitted within that time, and state when the report will be submitted.
(6) At the request of the Board, submit a copy of the investigative report to the Board.
(7) After the final action with respect to an allegation filed under this part, whenever possible, interview the person who made the allegation to determine *13406 the views of that person concerning the disposition of the matter.
(b) The Board shall, in accordance with its regulations (33 CFR part 52):
(1) Consider under 10 U.S.C. 1552 and 33 CFR part 52 an application for the correction of records made by a Coast Guard member who has filed a timely complaint with the Inspector General, alleging that a personnel action was taken in reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General. This may include oral argument, examining and cross-examining witnesses, taking depositions, and conducting an evidentiary hearing at the Board's discretion.
(2) Review the report of any investigation by the Inspector General into the Coast Guard member's allegation of reprisal.
(3) As deemed necessary, request the Inspector General to gather further evidence and issue a further report to the Board.
(4) Issue a final decision concerning the application for the correction of military records under this part not later than 180 days after receipt of a complete application.
(c) If the Board elects to hold an administrative hearing, the Coast Guard member may be represented by a Coast Guard law specialist if:
(1) The Inspector General, in the report of the investigation, finds there is probable cause to believe that a personnel action was taken, withheld, or threatened in reprisal for the Coast Guard member making or preparing to make a lawful communication to a Member of Congress or an Inspector General;
(2) The Chief Counsel of the Coast Guard determines that the case is unusually complex or otherwise requires the assistance of a law specialist to ensure proper presentation of the legal issues in the case; and
(3) The Coast Guard member is not represented by outside counsel chosen by the member.
(d) If the Board elects to hold an administrative hearing, the Board must ensure that the Coast Guard member may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence in the Inspector General investigatory record but not included in the report released to the member.
(e) If the Board determines that a personnel action was taken in reprisal for a Coast Guard member making or preparing to make a lawful communication to a Member of Congress or an Inspector General, the Board may forward its recommendation to the Secretary for the institution of appropriate administrative or disciplinary action against the individual or individuals found to have taken reprisal, and direct any appropriate correction of the member's records.

(f) The Board shall notify the Inspector General of the Board's decision concerning an application for the correction of military records of a Coast Guard member who alleged reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General, and of any recommendation to the Secretary for appropriate administrative or disciplinary action against the individual or individuals found to have taken reprisal.
(g) When reprisal is found, the Secretary shall ensure that appropriate corrective action is taken.
§ 53.11 Procedures.
(a) Any member of the Coast Guard, who reasonably believes a personnel action (including the withholding of an action) was taken or threatened in reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General, may file a complaint with the DOT Inspector General Hotline under this part. Such a complaint may be filed by telephone, or by letter addressed to the Department of Transportation, Office of Inspector General, Hotline Center, P.O. Box 23178, Washington, D.C. 20026-0178. Telephone Numbers: 1-800-424-9071, FTS 8-366-1461. The commercial number is (202) 366-1461.
(b) The complaint should include the name, address, and telephone number of the complainant; the name and location of the activity where the alleged violation occurred; the personnel action taken, or threatened, that is alleged to be motivated by reprisal; the individual(s) believed to be responsible for the personnel action; the date when the alleged reprisal occurred; and any information that suggests or evidences a connection between the communication and reprisal. The complaint should also include a description of the communication to a Member of Congress or an Inspector General including a copy of any written communication and a brief summary of any oral communication showing date of communication, subject matter, and the name of the person or official to whom the communication was made.
(c) A member of the Coast Guard who is alleging reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General, may submit an application for the correction of military records to the Board, in accordance with regulations governing the Board. See 33 CFR part 52.
(d) An application submitted under paragraph (c) of this section shall be considered in accordance with regulations governing the Board. See 33 CFR part 52.
Issued in Washington, DC, on March 26, 1991.
Samuel K. Skinner,
Secretary

Memorandum of Understanding Between the Federal Aviation Administration (FAA) and the Occupational Safety and Health Administration(OSHA)
Friday, August 30, 2002
67 *Federal Register* 55883 (August 30, 2002)

AGENCIES: Occupational Safety and Health Administration, Department of Labor and Federal Aviation Administration, Department of Transportation.
SUMMARY: The Federal Aviation Administration (FAA) and the Occupational Safety and Health Administration (OSHA) entered into a Memorandum of Understanding (MOU), effective March 22, 2002. The purpose of the MOU is to facilitate coordination and cooperation concerning the employee protection provisions of the Aviation Whistleblower Protection Program, 49 U.S.C. 42121. Both agencies agree that administrative efficiency and sound enforcement policies will be maximized by this cooperation and the timely exchange of information in areas of mutual interest. The text of the MOU is set forth below.
Authority: 49 U.S.C. 42121; Secretary of Labor's Order No. 3-2000, 65 FR 50017 (August 16, 2000).
Signed at Washington, DC, this 15 day of August, 2002.
For the Occupational Safety and Health Administration.
John L. Henshaw,
Assistant Secretary, Occupational Safety and Health Administration.
Memorandum of Understanding Between The Federal Aviation Administration, U.S. Department of Transportation and The Occupational Safety and Health Administration, U.S. Department of Labor
I. Purpose
The purpose of this Memorandum of Understanding (MOU) is to facilitate coordination and cooperation concerning the protection of employees who provide air safety information under the provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121.
II. Background
The Aviation Whistleblower Protection Program, 49 U.S.C. 42121, prohibits air carriers, air carrier contractors, and air carrier subcontractors from discharging an employee or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--(1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of FAA or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.
FAA and the Secretary of Labor, through the Occupational Safety and Health Administration (OSHA), both have responsibilities related to 49 U.S.C. 42121. FAA has responsibility to investigate complaints related to air carrier safety and has authority under the FAA's statute to enforce air

safety regulations and issue sanctions to airmen and air carriers for noncompliance with these regulations. FAA enforcement action may include air carrier and/or airman certificate suspension and/or revocation and/or the imposition of civil penalties. Additionally, FAA may issue civil penalties for violations of 49 U.S.C. 42121. OSHA has the responsibility to investigate employee complaints of discrimination and may order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her former position with back pay, and award compensatory damages, including attorney fees.

Although FAA and OSHA will carry out their statutory responsibilities independently, the agencies agree that administrative efficiency and sound enforcement policies will be maximized by cooperation and the timely exchange of information in areas of mutual interest.

III. Process for Coordination

This MOU sets forth a process that FAA and OSHA agree to follow.

FAA and OSHA will establish a procedure for coordinating and supporting enforcement of 49 U.S.C. 42121. OSHA agrees to promptly notify the FAA national headquarters Whistleblower Protection Program point of contact of any discrimination complaints *55884 filed with the Department of Labor (DOL) under 49 U.S.C. 42121. OSHA will promptly provide FAA with a copy of the complaint, findings and preliminary orders, investigation reports, and orders associated with any hearing or administrative appeal related to the complaint. OSHA will also keep FAA currently informed of the status of any administrative or judicial proceeding seeking review of an order of DOL issued under 49 U.S.C. 42121.

When an individual directly notifies FAA of alleged discrimination that involves air carrier safety, FAA will investigate the safety complaint and will provide OSHA with a copy of the individual's allegations. FAA will inform the individual that a personal remedy for discrimination is available only through DOL and that the individual should personally contact DOL. FAA will provide the individual with the local address and telephone number of the nearest OSHA office and advise the individual that the law requires that complaints be filed with OSHA within ninety (90) days of the alleged discrimination. FAA and OSHA agree to cooperate with each other to the fullest extent possible in every case of alleged discrimination involving an employee of air carrier or air carrier contractor or subcontractor of an air carrier. Each agency agrees to share all information it obtains relating to each complaint of discrimination and will adopt mutually agreeable procedures for the protection of information that either agency deems confidential. Each agency shall designate and maintain points of contact within its national headquarters and regional offices for purposes of implementation of this MOU and continued program oversight. A national headquarters Aviation Whistleblower Protection Program point of contact will be established and identified by each agency within ten (10) days after the effective date of this agreement. Regional office points of contact for each agency will be identified within six (6) months after the effective date of this agreement. Matters affecting program procedures and policy issues will be handled by the respective national headquarters office of each agency.

IV. Implementation

The FAA official responsible for implementation of this Agreement is the FAA Administrator; the DOL official responsible for implementation of this Agreement is the OSHA Assistant Secretary.

V. Amendment and Termination

This Agreement may be amended or modified upon written agreement by both parties to the Agreement. The Agreement may be terminated upon ninety (90) days written notice by either party.

VI. Legal Effect

Nothing in this MOU is intended to diminish or otherwise affect the authority of either agency to implement its respective statutory functions, including the OSHA authority under the Occupational Safety and Health Act, 29 U.S.C. 651 et seq., nor is it intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any other person. This MOU is effective upon signature by both parties.

Dated: March 11, 2002.

Jane F. Garvey,

Administraton, Federal Aviation Administration, U.S. Department of Transportation.

Dated: March 22, 2002.

John L. Henshaw,

Assistant Secretary, Occupational Safety and Health, U.S. Department of Labor.

DEPARTMENT OF LABOR
Occupational Safety and Health Administration
29 CFR Part 1979
Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century
ACTION: Final Rule
68 *Federal Register* 14099 (March 21, 2003)

Authority: 49 U.S.C. 42121; Secretary of Labor's Order 5-2002, 67 FR 65008 (October 22, 2002).
Subpart A - Complaints, Investigations, Findings and Preliminary Orders
§1979.100 Purpose and scope.
(a) This part implements procedures under section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121 ("AIR21"), which provides for employee protection from discrimination by air carriers or contractors or subcontractors of air carriers because the employee has engaged in protected activity pertaining to a violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.
(b) This part establishes procedures pursuant to AIR21 for the expeditious handling of discrimination complaints made by employees, or by persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints under AIR21, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges, post-hearing administrative review, and withdrawals and settlements.
§1979.101 Definitions.

"Act" or "AIR21" means section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, April 5, 2000, 49 U.S.C. 42121.
"Air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.
"Assistant Secretary" means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.
"Complainant" means the employee who filed a complaint under the Act or on whose behalf a complaint was filed.
"Contractor" means a company that performs safety-sensitive functions by contract for an air carrier.
"Employee" means an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.
"Named person" means the person alleged to have violated the Act.
"OSHA" means the Occupational Safety and Health Administration of the United States Department of Labor.
"Person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons.
"Secretary" means the Secretary of Labor or persons to whom authority under the Act has been delegated.
§1979.102 Obligations and prohibited acts.
(a) No air carrier or contractor or subcontractor of an air carrier may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section.
(b) It is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has:
(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States;
(2) filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code, or under any other law of the United States;

(3) testified or is about to testify in such a proceeding; or
(4) assisted or participated or is about to assist or participate in such a proceeding. * *FR Page14108*
(c) This part shall have no application to any employee of an air carrier, contractor, or subcontractor who, acting without direction from an air carrier, contractor, or subcontractor (or such person's agent) deliberately causes a violation of any requirement relating to air carrier safety under Subtitle VII Aviation Programs of Title 49 of the United States Code or any other law of the United States.
§1979.103 Filing of discrimination complaint.
(a) *Who may file*. An employee who believes that he or she has been discriminated against by an air carrier or contractor or subcontractor of an air carrier in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.
(b) *Nature of filing*. No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.
(c) *Place of filing*. The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: www.osha.gov.
(d) *Time for filing*. Within 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.
(e) *Relationship to section 11(c) complaints.* A complaint filed under AIR21 that alleges facts which would constitute a violation of section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), shall be deemed to be a complaint filed under both AIR21 and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would constitute a violation of AIR21 shall be deemed to be a complaint filed under both AIR21 and section 11(c). Normal procedures and timeliness requirements for investigations under the respective laws and regulations will be followed.
§1979.104 Investigation.
(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the named person of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identity of any confidential informants). The Assistant Secretary will also notify the named person of his or her rights under paragraphs (b) and (c) of this

section and paragraph (e) of §1979.110. A copy of the notice to the named person will also be provided to the Federal Aviation Administration.

(b) A complaint of alleged violation will be dismissed unless the complainant has made a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.

(1) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a *prima facie* showing as follows:

(i) The employee engaged in a protected activity or conduct;

(ii) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;

(iii) The employee suffered an unfavorable personnel action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

(2) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action. Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If the required showing has not been made, the complainant will be so advised and the investigation will not commence.

(c) Notwithstanding a finding that a complainant has made a *prima facie* showing, as required by this section, an investigation of the complaint will not be conducted if the named person, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. Within 20 days of receipt of the notice of the filing of the complaint, the named person may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating his or her position. Within the same 20 days the named person may request a meeting with the Assistant Secretary to present his or her position.

(d) If the named person fails to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the behavior protected by the Act, the Assistant Secretary will conduct an investigation. Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with 29 CFR Part 70.

(e) Prior to the issuance of findings and a preliminary order as provided for in §1979.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the named person has violated the Act and that preliminary reinstatement is

warranted, the Assistant Secretary will again contact the named person to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The named person shall be given the opportunity to submit a written response, to meet with the investigators to present statements from witnesses in support of his or her position, and to present legal and factual arguments. The named person shall present this evidence within ten business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the named person * *FR Page14109* can agree, if the interests of justice so require.

§1979.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include, where appropriate, a requirement that the named person abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages. Where the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge), a preliminary order of reinstatement would not be appropriate. At the complainant's request the order shall also assess against the named person the complainant's costs and expenses (including attorney's and expert witness fees) reasonably incurred in connection with the filing of the complaint.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and the preliminary order will be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order will inform the parties of their right to file objections and to request a hearing, and of the right of the named person to request attorney's fees from the administrative law judge, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. The letter also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and order.

(c) The findings and the preliminary order shall be effective 30 days after

receipt by the named person pursuant to paragraph (b) of this section, unless an objection and a request for a hearing has been filed as provided at §1979.106. However, the portion of any preliminary order requiring reinstatement shall be effective immediately upon receipt of the findings and preliminary order.

Subpart B - Litigation

§1979.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to paragraph (b) of §1979.105. The objection or request for attorney's fees and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

(b)(1) If a timely objection is filed, all provisions of the preliminary order shall be stayed, except for the portion requiring preliminary reinstatement. The portion of the preliminary order requiring reinstatement shall be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order.

(2) If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order, as the case may be, shall become the final decision of the Secretary, not subject to judicial review.

§1979.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of 29 CFR Part 18.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted as hearings *de novo*, on the record. Administrative law judges shall have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the named person object to the findings and/or order, the objections will be consolidated and a single hearing will

be conducted.
(d) Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence shall be applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.
§1979.108 Role of Federal agencies.
(a)(1) The complainant and the named person shall be parties in every proceeding. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or may participate as *amicus curiae* at any time in the proceedings. This right to participate shall include, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a decision based on a settlement agreement between complainant and the named person, to dismiss a complaint or to issue an order encompassing the terms of the settlement.
(2) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.
(b) The FAA may participate as *amicus curiae* at any time in the proceedings, at the FAA's discretion. At the request of the FAA, copies of all pleadings in a case must be sent to the FAA, whether or not the FAA is participating in the proceeding
§1979.109 Decision and orders of the administrative law judge.
(a) The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in * *FR Page14110* paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to §1979.104(b) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge shall hear the case on the merits.
(b) If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorney's and expert

witness fees) reasonably incurred. If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.

(c) The decision will be served upon all parties to the proceeding. Any administrative law judge's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary shall be effective immediately upon receipt of the decision by the named person, and may not be stayed. All other portions of the judge's order shall be effective ten business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

§1979.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board ("the Board"), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge shall become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the administrative law judge shall become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. The Board will review the factual determinations of the administrative law judge under the substantial evidence standard.

(c) The final decision of the Board shall be issued within 120 days of the conclusion of the hearing, which shall be deemed to be the conclusion of all proceedings before the administrative law judge -- *i.e.*, ten business days after the date of the decision of the administrative law judge unless a motion

for reconsideration has been filed with the administrative law judge in the interim. The decision will be served upon all parties and the Chief Administrative Law Judge by mail to the last known address. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210, even if the Assistant Secretary is not a party.

(d) If the Board concludes that the party charged has violated the law, the final order shall order the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

(e) If the Board determines that the named person has not violated the law, an order shall be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was brought in bad faith, the Board may award to the named person a reasonable attorney's fee, not exceeding $1,000.

Subpart C - Miscellaneous Provisions

§1979.111 Withdrawal of complaints, objections, and findings; settlement.

(a) At any time prior to the filing of objections to the findings or preliminary order, a complainant may withdraw his or her complaint under the Act by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether the withdrawal will be approved. The Assistant Secretary will notify the named person of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement shall be approved in accordance with paragraph (d) of this section.

(b) The Assistant Secretary may withdraw his or her findings or a preliminary order at any time before the expiration of the 30-day objection period described in §1979.106, provided that no objection has yet been filed, and substitute new findings or preliminary order. The date of the receipt of the substituted findings or * *FR Page14111* order will begin a new 30-day objection period.

(c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether the withdrawal will be approved. If the objections are withdrawn because of settlement, the settlement shall be approved in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements*. At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.

(2) *Adjudicatory settlements*. At any time after the filing of objections to the

Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement shall be filed with the administrative law judge or the Board, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board, shall constitute the final order of the Secretary and may be enforced pursuant to §1979.113.

§1979.112 Judicial review.

(a) Within 60 days after the issuance of a final order by the Board under §1979.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. A final order of the Board is not subject to judicial review in any criminal or other civil proceeding.

(b) If a timely petition for review is filed, the record of a case, including the record of proceedings before the administrative law judge, will be transmitted by the Board to the appropriate court pursuant to the rules of the court.

§1979.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

§1979.114 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Board on review may, upon application, after three days notice to all parties and interveners, waive any rule or issue any orders that justice or the administration of the Act requires.

Department of Transportation
Federal Motor Carrier Safety Administration
Minimum Training Requirements
49 CFR Part 380
Friday, May 21, 2004
Final Rule

§ 380.503 Entry-level driver training requirements.
Entry-level driver training must include instruction addressing the following four areas: (d) Whistleblower protection. The right of an employee to question the safety practices of an employer without the employee's risk of losing a job or being subject to reprisals simply for stating a safety concern (29 CFR part 1978).

§ 380.505 Proof of training.
An employer who uses an entry-level driver must ensure the driver has received a training certificate containing all the information contained in § 380.513 from the training provider.

Coast Guard Board For Correction of Military Records, Procedural Regulation
69 Federal Register 34532
March 3, 2003
Final Rule§
52.23 Counsel.
(a) Applicants may be represented by counsel at their own expense. Applicants whose cases are processed under the Whistleblower Protection Act and who are granted a hearing by the Board may be entitled to representation by a Coast Guard law specialist. 2.10 U.S.C. 1034(f)(3)(A). (b) As used in this part, the term "counsel" includes attorneys who are members in good standing of any bar; accredited representatives of veterans' organizations recognized by the Secretary of Veterans Affairs pursuant to 38 U.S.C. 5902; and other persons who, in the opinion of the Chair, are competent to represent the applicant for correction. Whenever the term "applicant" is used in these rules, except in § 52.21(c), the term shall mean an applicant or his or her counsel.
§ 52.54 Expenses.
No expenses of any nature whatsoever incurred by an applicant, his or her counsel, witnesses, or others acting on behalf of the applicant shall be paid by the Government, except that an applicant may be entitled to representation by a Coast Guard law specialist if the case has been processed under the Whistleblower Protection Act. 10 U.S.C. 1034(f)(3)(A).

SECTION 6
WORKPLACE HEALTH AND SAFETY

Asbestos School Hazard Abatement,
Whistleblower Provision
20 U.S.C. § 4018

No State or local educational agency receiving assistance under this subchapter may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee has brought to the attention of the public information concerning any asbestos problem in the school buildings within the jurisdiction of such agency.

Asbestos School Hazard Detection and Control,
Employee Protection Provision
20 U.S.C. § 3608

No State or local educational agency receiving assistance under this chapter may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee has brought to the attention of the public information concerning any asbestos problem in the school buildings within the jurisdiction of such agency.

Mine Health and Safety Act,
Nonretaliation Act
30 U.S.C. § 815(c)

(c) *Discrimination or interference prohibited; complaint; investigation; determination; hearing.* (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to [t]his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as

determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 816 of this title. Violations by any person of paragraph (1) shall be subject to the provisions of sections 818 and 820(a) of this title.

Occupational Safety and Health Act,
Nonretaliation Provision
29 U.S.C. § 660(c)

(c) *Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief.*
(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.
(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.
(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

Occupational Safety and Health Administration
Department of Labor, Part 1977
Discrimination Against Employees for
Exercising Rights under the Williams-Steiger
Occupational Safety and Health Act of 1970
29 C.F.R. Part 1977

AUTHORITY: Secs. 8, 11, Occupational Safety and Health Act of 1970 (29 U. S. C. 657, 660); Secretary of Labor's Order No. 12– 71 (36 FR 8754).

SOURCE: 38 FR 2681, Jan. 29, 1973, unless otherwise noted.

General

§ 1977.1 Introductory statement.

(a) The Occupational Safety and Health Act of 1970 (29 U. S. C. 651, et seq.), hereinafter referred to as the Act, is a Federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and healthier workplaces throughout the Nation. By terms of the Act, every person engaged in a business affecting commerce who has employees is required to furnish each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm, and, further, to comply with occupational safety and health standards promulgated under the Act. See part 1975 of this chapter concerning coverage of the Act.

(b) The Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, and recordkeeping requirements. Enforcement procedures initiated by the Department of Labor, review proceedings before an independent quasi-

judicial agency (the Occupational Safety and Health Review Commission), and express judicial review are provided by the Act. In addition, States which desire to assume responsibility for development and enforcement of standards which are at least as effective as the Federal standards published in this chapter may submit plans for such development and enforcement of the Secretary of Labor.

(c) Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity.

(d) This part deals essentially with the rights of employees afforded under section 11(c) of the Act. Section 11(c) of the Act prohibits reprisals, in any form, against employees who exercise rights under the Act.

§ 1977.2 Purpose of this part.

The purpose of this part is to make available in one place interpretations of the various provisions of section 11(c) of the Act which will guide the Secretary of Labor in the performance of his duties thereunder unless and until otherwise directed by authoritative decisions of the courts, or concluding, upon reexamination of an interpretation, that it is incorrect.

§ 1977.3 General requirements of section 11(c) of the Act.

Section 11(c) provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has:

(a) Filed any complaint under or related to the Act;

(b) Instituted or caused to be instituted any proceeding under or related to the Act;

(c) Testified or is about to testify in any proceeding under the Act or related to the Act; or

(d) Exercised on his own behalf or on behalf of others any right afforded by the Act. Any employee who believes that he has been discriminated against in violation of section 11(c) of the Act may, within 30 days after such violation occurs, lodge a complaint with the Secretary of Labor alleging such violation. The Secretary shall then cause appropriate investigation to be made. If, as a result of such investigation, the Secretary determines that the provisions of section 11(c) have been violated civil action may be instituted in any appropriate United States district court, to restrain violations of section 11(c)(1) and to obtain other appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay. Section 11(c) further provides for notification of complainants by the Secretary of determinations made pursuant to their complaints.

§ 1977.4 Persons prohibited from discriminating.

Section 11(c) specifically states that “no person shall discharge or in any manner discriminate against any employee’’ because the employee has exercised rights under the Act. Section 3(4) of the Act defines “person’’ as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons.’’

Consequently, the prohibitions of section 11(c) are not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee of another person. Section 11(c) would extend to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee. See, Meek v. United States, 136 F. 2d 679 (6th Cir., 1943); Bowe v. Judson C. Burns, 137 F. 2d 37 (3rd Cir., 1943).

§ 1977.5 Persons protected by section 11(c).

(a) All employees are afforded the full protection of section 11(c). For purposes of the Act, an employee is defined as ‘‘an employee of an employer who is employed in a business of his employer which affects commerce.’’ The Act does not define the term ‘‘employ.’’ However, the broad remedial nature of this legislation demonstrates a clear congressional intent that the existence of an employment relationship, for purposes of section 11(c), is to be based upon economic realities rather than upon common law doctrines and concepts. See, U. S. v. Silk, 331 U. S. 704 (1947); Rutherford Food Corporation v. McComb, 331 U. S. 722 (1947).

(b) For purposes of section 11(c), even an applicant for employment could be considered an employee. See, NLRB v. Lamar Creamery, 246 F. 2d 8 (5th Cir., 1957). Further, because section 11(c) speaks in terms of any employee, it is also clear that the employee need not be an employee of the discriminator. The principal consideration would be whether the person alleging discrimination was an ‘‘ employee’’ at the time of engaging in protected activity.

(c) In view of the definitions of ‘‘employer’’ and ‘‘employee’’ contained in the Act, employees of a State or political subdivision thereof would not ordinarily be within the contemplated coverage of section 11(c).

§ 1977.6 Unprotected activities distinguished.

(a) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of section 11(c) apply when the adverse action occurs because the employee has engaged in protected activities. An employee’s engagement in activities protected by the Act does not automatically render him immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non- prohibited considerations. See, NLRB v. Dixie Motor Coach Corp., 128 F. 2d 201 (5th Cir., 1942).

(b) At the same time, to establish a violation of section 11(c), the employee’s engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place ‘‘but for’’ engagement in protected activity, section 11(c) has been violated. See, Mitchell v. Goodyear Tire & Rubber Co., 278 F. 2d 562 (8th Cir., 1960); Goldberg v. Bama Manufacturing, 302 F. 2d 152 (5th Cir., 1962). Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

Specific protections

§ 1977.9 Complaints under or related to the Act.

(a) Discharge of, or discrimination against, an employee because the employee has filed ‘‘any complaint * * * under or related to this Act * * *’’ is prohibited by section 11(c). An example of a complaint made ‘‘under’’ the Act would be an employee request for inspection pursuant to section 8(f). However, this would not be the only type of complaint protected by section 11(c). The range of complaints ‘‘ related to’’ the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power. (See Cong. Rec., vol. 116 p. P. 42206 Dec. 17, 1970).

(b) Complaints registered with other Federal agencies which have the authority to regulate or investigate occupational safety and health conditions are complaints ‘‘related to’’ this Act. Likewise, complaints made to State or local agencies regarding occupational safety and health conditions would be ‘‘related to’’ the Act. Such complaints, however, must relate to conditions at the workplace, as distinguished from complaints touching only upon general public safety and health.

(c) Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. (Section 2(1), (2), and (3)). Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

§ 1977.10 Proceedings under or related to the Act.

(a) Discharge of, or discrimination against, any employee because the employee has ‘‘instituted or caused to be instituted any proceeding under or related to this Act’’ is also prohibited by section 11(c). Examples of proceedings which could arise specifically under the Act would be inspections of worksites under section 8 of the Act, employee contest of abatement date under section 10(c) of the Act, employee initiation of proceedings for promulgation of an occupational safety and health standard under section 6(b) of the Act and part 1911 of this chapter, employee application for modification of revocation of a variance under section 6(d) of the Act and part 1905 of this chapter, employee judicial challenge to a standard under section 6(f) of the Act and employee appeal of an Occupational Safety and Health Review Commission order under section 11(a) of the Act. In determining whether a ‘‘proceeding’’ is “related to’’ the Act, the considerations discussed in § 1977.9 would also be applicable.

(b) An employee need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under or related to the Act.

§ 1977.11 Testimony.

Discharge of, or discrimination against, any employee because the employee “has testified or is about to testify’’ in proceedings under or related to the Act is also prohibited by section 11(c). This protection would of course not be limited to testimony in proceedings instituted or caused to be instituted by the employee, but would extend to any

statements given in the course of judicial, quasi- judicial, and administrative proceedings, including inspections, investigations, and administrative rule making or adjudicative functions. If the employee is giving or is about to give testimony in any proceeding under or related to the Act, he would be protected against discrimination resulting from such testimony.

§ 1977.12 Exercise of any right afforded by the Act.

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act.'' Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (section 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

[38 FR 2681, Jan. 29, 1973, as amended at 38 FR 4577, Feb. 16, 1973]

Procedures

§ 1977.15 Filing of complaint for discrimination.
(a) Who may file. A complaint of section 11(c) discrimination may be filed by the employee himself, or by a representative authorized to do so on his behalf.
(b) Nature of filing. No particular form of complaint is required.
(c) Place of filing. Complaint should be filed with the Area Director (Occupational Safety and Health Administration) responsible for enforcement activities in the geographical area where the employee resides or was employed.
(d) Time for filing.
(1) Section 11(c)(2) provides that an employee who believes that he has been discriminated against in violation of section 11(c)(1) "may, within 30 days after such violation occurs,'' file a complaint with the Secretary of Labor.
(2) A major purpose of the 30- day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 30 days of an alleged violation will ordinarily be presumed to be untimely.
(3) However, there may be circumstances which would justify tolling of the 30- day period on recognized equitable principles or because of strongly extenuating circumstances, e. g., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance- arbitration proceedings or filing with another agency, among others, are circumstances which do not justify tolling the 30- day period. In the absence of circumstances justifying a tolling of the 30- day period, untimely complaints will not be processed.
[38 FR 2681, Jan. 29, 1973, as amended at 50 FR 32846, Aug. 15, 1985]
§ 1977.16 Notification of Secretary of Labor's determination.
Section 11(c)(3) provides that the Secretary is to notify a complainant within 90 days of the complaint of his determination whether prohibited discrimination has occurred. This 90- day provision is considered directory in nature. While every effort will be made to notify complainants of the Secretary's determination within 90 days, there may be instances when it is not possible to meet the directory period set forth in section 11(c)(3).
§ 1977.17 Withdrawal of complaint.
Enforcement of the provisions of section 11(c) is not only a matter of protecting rights of individual employees, but also of public interest. Attempts by an employee to withdraw a previously filed complaint will not necessarily result in termination of the Secretary's investigation. The Secretary's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee. However, a voluntary and uncoerced request from a complainant to withdraw his complaint will be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.
§ 1977.18 Arbitration or other agency proceedings.
(a) General.

(1) An employee who files a complaint under section 11(c) of the Act may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board. The Secretary's jurisdiction to entertain section 11(c) complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The Secretary may file action in U. S. district court regardless of the pendency of other proceedings.

(2) However, the Secretary also recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements. See, e. g., Boy's Markets, Inc. v. Retail Clerks, 398 U. S. 235 (1970); Republic Steel Corp. v. Maddox, 379 U. S. 650 (1965); Carey v. Westinghouse Electric Co., 375 U. S. 261 (1964); Collier Insulated Wire, 192 NLRB No. 150 (1971). By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to section 11(c) complaints.

(3) Where a complainant is in fact pursuing remedies other than those provided by section 11(c), postponement of the Secretary's determination and deferral to the results of such proceedings may be in order. See, Burlington Truck Lines, Inc., v. U. S., 371 U. S. 156 (1962).

(b) Postponement of determination. Postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under section 11(c) and those proceedings are not likely to violate the rights guaranteed by section 11(c). The factual issues in such proceedings must be substantially the same as those raised by section 11(c) complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination. See Rios v. Reynolds Metals Co., F. 2d (5th Cir., 1972), 41 U. S. L. W. 1049 (Oct. 10, 1972); Newman v. Avco Corp., 451 F. 2d 743 (6th Cir., 1971).

(c) Deferral to outcome of other proceedings. A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case- to- case basis, after careful scrutiny of all available information. Before deferring to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the section 11(c) complaint.

Some specific subjects

§ 1977.22 Employee refusal to comply with safety rules.

Employees who refuse to comply with occupational safety and health standards or valid safety rules implemented by the employer in furtherance of the Act are not exercising any rights afforded by the Act. Disciplinary measures taken by employers solely in response to

employee refusal to comply with appropriate safety rules and regulations, will not ordinarily be regarded as discriminatory action prohibited by section 11(c). This situation should be distinguished from refusals to work, as discussed in § 1977.12.

§ 1977.23 State plans.
A State which is implementing its own occupational safety and health enforcement program pursuant to section 18 of the Act and parts 1902 and 1952 of this chapter must have provisions as effective as those of section 11(c) to protect employees from discharge or discrimination. Such provisions do not divest either the Secretary of Labor or Federal district courts of jurisdiction over employee complaints of discrimination. However, the Secretary of Labor may refer complaints of employees adequately protected by State Plans' provisions to the appropriate state agency. The basic principles outlined in § 1977.18, supra will be observed as to deferrals to findings of state agencies.

Federal Mine Safety and Health Review Commission
Complaints of Discharge, Discrimination and Interference
29 C.F.R. Part 2700

AUTHORITY: 30 U.S.C. 815, 820 and 823.
SOURCE: 58 FR 12164, Mar. 3, 1993, unless otherwise noted.

Subpart D - Complaints for Compensation
§ 2700.35 Time to file.
A complaint for compensation under section 111 of the Act, 30 U.S.C. 821, shall be filed within 90 days after the beginning of the period during which the complainants are idled or would have been idled by the order that gives rise to the claim.
§ 2700.36 Contents of complaint.
A complaint for compensation shall include:
(a) A short and plain statement of the facts giving rise to the claim, including the period for which compensation is claimed;
(b) The total amount of the compensation claimed, if known; and
(c) A legible copy of any pertinent order of withdrawal or, if a legible copy is not available, the text of the order.

§ 2700.37 Answer.

Within 30 days after service of a complaint for compensation, the operator shall file an answer responding to each allegation of the complaint.

Subpart E - Complaints of Discharge, Discrimination or Interference

§ 2700.40 Who may file.

(a) The Secretary. A discrimination complaint under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), shall be filed by the Secretary if, after an investigation conducted pursuant to section 105(c)(2), the Secretary determines that a violation of section 105(c)(1), 30 U.S.C. 815(c)(1), has occurred.

(b) Miner, representative of miners, or applicant for employment. A discrimination complaint under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), have not been violated.

§ 2700.41 Time to file.

(a) The Secretary. A discrimination complaint shall be filed by the Secretary within 30 days after his written determination that a violation has occurred.

(b) Miner, representative of miners, or applicant for employment. A discrimination complaint may be filed by a complaining miner, representative of miners, or applicant for employment within 30 days after receipt of a written determination by the Secretary that no violation has occurred.

§ 2700.42 Contents of complaint.

A discrimination complaint shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.

§ 2700.43 Answer.

Within 30 days after service of a discrimination complaint, the respondent shall file an answer responding to each allegation of the complaint.

§ 2700.44 Petition for assessment of penalty in discrimination cases.

(a) Petition for assessment of penalty in Secretary's complaint. A discrimination complaint filed by the Secretary shall propose a civil penalty of a specific amount for the alleged violation of section 105(c) of the Act, 30 U.S.C. 815(c). The petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act. 30 U.S.C. 820(I).

(b) Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment. Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.

§ 2700.45 Temporary reinstatement proceedings.

(a) Service of pleadings. A copy of each document filed with the Commission in a temporary reinstatement proceeding shall be served on all parties either by personal delivery, including courier service, or by certified or registered mail, return receipt requested.

(b) Contents of application. An application for temporary reinstatement shall state the Secretary's finding that the miner's discrimination complaint was not frivolously brought and shall be accompanied by an affidavit setting forth the Secretary's reasons supporting his finding. The application also shall include a copy of the miner's complaint to the Secretary, and proof of notice to and service on the person against whom relief is sought by the most expeditious means of notice and delivery reasonably available.

(c) Request for hearing. Within 10 days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement. If a hearing on the application is requested, the hearing shall be held within 10 days following receipt of the request for hearing by the Commission's Chief Administrative Law Judge or his designee, unless compelling reasons are shown in an accompanying request for an extension of time.

(d) Hearing. The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

(e) Order on application. Within 7 days following the close of a hearing on an application for temporary reinstatement, the Judge shall issue a written order granting or denying the application. However, in extraordinary circumstances, the Judge's time for issuing an order may be extended as deemed necessary by the Judge. The Judge's order shall include findings and conclusions supporting the determination as to whether the miner's complaint has been frivolously brought. The parties shall be notified of his determination by the most expeditious means reasonably available. Service of the order granting or denying the application shall be by certified or registered mail, return receipt requested.

(f) Review of order. Review by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition for review with supporting arguments within 5 days following receipt of the Judge's written order. The opposing party shall be served simultaneously. The filing of a petition for review shall not stay the effect of the Judge's order unless the Commission so directs. Any response shall be filed within 5 days following receipt of a petition. The Commission's ruling on a petition for review shall be rendered within 10 days following receipt of any response or the expiration of the period for filing such response. In extraordinary circumstances, the Commission's time for decision may be extended.

(g) Dissolution of order. If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and § 2700.40(b) of these rules.

SECTION 7
CRIMINAL PROHIBITION
AGAINST RETALIATION

Obstruction of Justice
Retaliation Against Informants..
18 U.S.C. § 1513(e)

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

Obstruction of Justice
Tampering with a witness, victim,
or an informant
18 U.S.C. § 1512(b)(c)(d) and (e)

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
(1) influence, delay, or prevent the testimony of any person in an official proceeding;
(2) cause or induce any person to—
(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
(D) be absent from an official proceeding to which such person has been summoned by legal process; or
(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than ten years, or both.
(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—
(1) attending or testifying in an official proceeding;
(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
(3) arresting or seeking the arrest of another person in connection with a Federal offense; or
(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or

proceeding; or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.
(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.
(e) For the purposes of this section—
(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

Racketeer and Corrupt Organizations Act (Civil RICO) 18 U.S.C. § § 1961, 1962 and 1964

18 U.S.C. § 1961. Definitions
As used in this chapter--
(1) "racketeering activity" means . . .(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant)

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity

* * *

§ 1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity* * *
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection

* * *

(c) of this section.

§ 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee * * *
(d)A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Retaliation for Exercise of Civil Rights
Conspiracy
18 U.S.C. § 241

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured -
They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

UNITED STATES SENTENCING COMMISSION,

Guidelines Manual

Section 8B2.1 (Nov. 1, 2004)

EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

§8B2.1. Effective Compliance and Ethics Program

(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

(1) exercise due diligence to prevent and detect criminal conduct; and

(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

"Compliance and ethics program" means a program designed to prevent and detect criminal conduct.

"Governing authority" means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

"High-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).

"Standards and procedures" means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

2. Factors to Consider in Meeting Requirements of this Guideline.—

(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be

considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.

(B) Applicable Governmental Regulation and Industry Practice.—An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.

(C) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.

(ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.

(iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and (IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

(D) Recurrence of Similar Misconduct .—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes

of this subdivision, "similar misconduct" has the meaning given that term in the Commentary to §8A1.2 (Application Instructions - Organizations).

3. Application of Subsection (b)(2).—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.

4. Application of Subsection (b)(3) .—

(A) Consistency with Other Law .—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(B) Implementation .—In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's illegal activities and other misconduct (i.e., other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.

5. Application of Subsection (b)(6).—Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

6. Application of Subsection (c) .—To meet the requirements of subsection (c), an organization shall:

(A) Assess periodically the risk that criminal conduct will occur, including assessing the following:

(i) The nature and seriousness of such criminal conduct.

(ii) The likelihood that certain criminal conduct may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and procedures designed to prevent and detect fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.

(B) Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.

(C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.

Background: This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

SECTION 8
FEDERAL CONTRACTOR FRAUD AND WHISTLEBLOWER PROTECTION MANDATES

False Claims Act
31 U.S.C. § § 3729-3732

§ 3729. False claims
(a) Liability for Certain Acts. Any person who—
(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—
(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
(B) such person fully cooperated with any Government investigation of such violation; and
(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence

of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

b) *Knowing and Knowingly Defined.* For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) *Claim Defined.* For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a

contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption From Disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the

complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.
(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—
(A) proceed with the action, in which case the action shall be conducted by the Government; or
(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.
(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.
(c) *Rights of the Parties to Qui Tam Actions.* (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).
(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.
(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.
(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—
(i) limiting the number of witnesses the person may call; (ii) limiting the length of the testimony of such witnesses; (iii) limiting the person's cross-examination of witnesses; or (iv) otherwise limiting the participation by the person in the litigation.
(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.
(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's

investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) *Award to Qui Tam Plaintiff.*

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) *Certain Actions Barred.*

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) *Government Not Liable for Certain Expenses.* The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) *Fees and Expenses to Prevailing Defendant.* In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.
(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.
§ 3731. False claims procedure
(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.
(b) A civil action under section 3730 may not be brought—
(1) more than 6 years after the date on which the violation of section 3729 is committed, or
(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.
(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.
(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.
§ 3732. False claims jurisdiction.
(a) *Actions Under Section 3730.* Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.
(b) *Claims Under State Law.* The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of

funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

Department of Health and Human Services
Office of Research Integrity
42 U.S.C. § 289b

(a) In general,
(1) Establishment of Office.
Not later than 90 days after June 10, 1993, the Secretary shall establish an office to be known as the Office of Research Integrity (referred to in this section as the "Office"), which shall be established as an independent entity in the Department of Health and Human Services.
(2) Appointment of Director
The Office shall be headed by a Director, who shall be appointed by the Secretary, be experienced and specially trained in the conduct of research, and have experience in the conduct of investigations of research misconduct. The Secretary shall carry out this section acting through the Director of the Office. The Director shall report to the Secretary.
(3)Definitions
(A) The Secretary shall by regulation establish a definition for the term "research misconduct" for purposes of this section.
(B) For purposes of this section, the term "financial assistance" means a grant, contract, or cooperative agreement.
(b) Existence of administrative processes as condition of funding for research
The Secretary shall by regulation require that each entity that applies for financial assistance under this chapter for any project or program that involves the conduct of biomedical or behavioral research submit in or with its application for such assistance--
(1) assurances satisfactory to the Secretary that such entity has established and has in effect (in accordance with regulations which the Secretary shall prescribe) an administrative process to review reports of research misconduct in connection with biomedical and behavioral research conducted at or sponsored by such entity;
(2) an agreement that the entity will report to the Director any investigation of alleged research misconduct in connection with projects for which funds have been made available under this chapter that appears substantial; and(3) an agreement that the entity will comply with regulations issued under this section.
(c) Process for response of Director
The Secretary shall by regulation establish a process to be followed by the Director for the prompt and appropriate--
(1) response to information provided to the Director respecting research misconduct in connection with projects for which funds have been made available under this chapter;
(2) receipt of reports by the Director of such information from recipients of funds under this chapter;
(3) conduct of investigations, when appropriate; and

(4) taking of other actions, including appropriate remedies, with respect to such misconduct.
(d) Monitoring by Director
The Secretary shall by regulation establish procedures for the Director to monitor administrative processes and investigations that have been established or carried out under this section.
(e) Protection of whistleblowers
(1) In general
In the case of any entity required to establish administrative processes under subsection (b) of this section, the Secretary shall by regulation establish standards for preventing, and for responding to the occurrence of retaliation by such entity, its officials or agents, against an employee in the terms and conditions of employment in response to the employee having in good faith--
(A) made an allegation that the entity, its officials or agents, has engaged in or failed to adequately respond to an allegation of research misconduct; or
(B) cooperated with an investigation of such an allegation.
(2) Monitoring by Secretary. The Secretary shall by regulation establish procedures for the Director to monitor the implementation of the standards established by an entity under paragraph (1) for the purpose of determining whether the procedures have been established, and are being utilized, in accordance with the standards established under such paragraph.
(3)Noncompliance. The Secretary shall by regulation establish remedies for noncompliance by an entity, its officials or agents, which has engaged in retaliation in violation of the standards established under paragraph (1). Such remedies may include termination of funding provided by the Secretary for such project or recovery of funding being provided by the Secretary for such project, or other actions as appropriate.

Department of Health and Human Services
Examination and treatment for emergency medical conditions
42 U.S.C. § 1395dd(i)

(i)Whistleblower protections. A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

Major Frauds Act
18 U.S.C. § 1031

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent - (1) to defraud the United States; or
(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.
(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and (1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or
(2) the offense involves a conscious or reckless risk of serious personal injury.
(c) The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10,000,000.
(d) Nothing in this section shall preclude a court from imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).
(e) In determining the amount of the fine, the court shall consider the factors set forth in 18 U.S.C. sections 3553 and 3572, and the factors set forth in the guidelines and policy statements of the United States Sentencing Commission, including - (1) the need to reflect the seriousness of the offense, including the harm or loss to the victim and the gain to the defendant; (2) whether the defendant previously has been fined for a similar offense; and (3) any other pertinent equitable considerations.
(f) A prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time otherwise allowed by law.
(g) (1) In special circumstances and in his or her sole discretion, the Attorney General is authorized to make payments from funds appropriated to the Department of Justice to persons who furnish information relating to a possible prosecution under this section. The amount of such payment shall not exceed $250,000. Upon application by the Attorney General, the court may order that the Department shall be reimbursed for a payment from a criminal fine imposed under this section. (2) An individual is not eligible for such a payment if -
(A) that individual is an officer or employee of a Government agency who furnishes information or renders service in the performance of official duties;

(B) that individual failed to furnish the information to the individual's employer prior to furnishing it to law enforcement authorities, unless the court determines the individual has justifiable reasons for that failure;
(C) the furnished information is based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit or investigation, or from the news media unless the person is the original source of the information. For the purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government; or
(D) that individual participated in the violation of this section with respect to which such payment would be made.
(3) The failure of the Attorney General to authorize a payment shall not be subject to judicial review.
(h) Any individual who -
(1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution), and (2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

Public Contracts - Procurement Provisions
Contractor Employees: Protection From
Reprisal for Disclosure of Certain Information
41 U.S.C. § 265

(a) Prohibition of reprisals. An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).
(b)Investigation of complaints
A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) of this section may submit a complaint to the Inspector General of the executive agency. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency. In the case of an executive agency that does not have an Inspector General, the duties of

the Inspector General under this section shall be performed by an official designated by the head of the executive agency.
(c) Remedy and enforcement authority
(1) If the head of an executive agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a) of this section, the head of the executive agency may take one or more of the following actions:
(A) Order the contractor to take affirmative action to abate the reprisal.
(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.
(2) Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.
(3) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5.
(d)Construction
Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) of this section or to modify or derogate from a right or remedy otherwise available to the employee.
(e)Definitions
In this section:
(1) The term "contract" means a contract awarded by the head of an executive agency.
(2) The term "contractor" means a person awarded a contract with an executive agency.
(3) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978.

Deficit Reduction Act of 2005
Employee Education about False Claims Act Recovery
Public Law 109-171
42 U.S.C. 1396a(a)(68)

(a)Contents
A State plan for medical assistance must--

* * *

(68) provide that any entity that receives or makes annual payments under the State plan of at least $5,000,000, as a condition of receiving such payments, shall--
(A) establish written policies for all employees of the entity (including management), and of any contractor or agent of the entity, that provide detailed information about the False Claims Act established under sections 3729 through 3733 of title 31, United States Code, administrative remedies for false claims and statements established under chapter 38 of title 31, United States Code, any State laws pertaining to civil or criminal penalties for false claims and statements, and whistleblower protections under such laws, with respect to the role of such laws in preventing and detecting fraud, waste, and abuse in Federal health care programs (as defined in section 1128B(f));
(B) include as part of such written policies, detailed provisions regarding the entity's policies and procedures for detecting and preventing fraud, waste, and abuse; and
(C) include in any employee handbook for the entity, a specific discussion of the laws described in subparagraph (A), the rights of employees to be protected as whistleblowers, and the entity's policies and procedures for detecting and preventing fraud, waste, and abuse."
State false claims act requirements for increased state share of recoveries

Deficit Reduction Act of 2005
Encouraging the Enactment of State False Claims Acts
Public Law 109-171, Section 6031
42 U.S.C. 1396h

Sec. 1909. (a) In General.--Notwithstanding section 1905(b), if a State has in effect a law relating to false or fraudulent claims that meets the requirements of subsection (b), the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points.
(b) Requirements.--For purposes of subsection (a), the requirements of this subsection are that the Inspector General of the Department of Health and Human Services, in consultation with the Attorney General, determines that the State has in effect a law that meets the following requirements:
(1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in section 1903(a).

(2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code.
(3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.
(4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of title 31, United States Code.
(c) Deemed Compliance.--A State that, as of January 1, 2007, has a law in effect that meets the requirements of subsection (b) shall be deemed to be in compliance with such requirements for so long as the law continues to meet such requirements.
(d) No Preclusion of Broader Laws.--Nothing in this section shall be construed as prohibiting a State that has in effect a law that establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to programs in addition to the State program under this title, or with respect to expenditures in addition to expenditures described in section 1903(a), from being considered to be in compliance with the requirements of subsection (a) so long as the law meets such requirements.".

Federal Acquisition Regulations
Whistleblower Rules
48 CFR Subpart 3.9

3.900 Scope of subpart.
3.901 Definitions.
3.902 Applicability.
3.903 Policy.
3.904 Procedures for filing complaints.
3.905 Procedures for investigating complaints.
3.906 Remedies.
§ 3.900 Scope of subpart.
This subpart implements 10 U.S.C. 2409 and 41 U.S.C. 251, et seq., as amended by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355).
§3.901 Definitions.
Authorized official of an agency means an officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract. Authorized official of the Department of Justice means any person responsible for the investigation, enforcement, or prosecution of any law or regulation.
Inspector General means an Inspector General appointed under the Inspector General Act of 1978, as amended. In the Department of Defense that is the DOD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.
§ 3.902 Applicability.
This subpart applies to all Government contracts.

§ 3.903 Policy.

Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

§ 3.904 Procedures for filing complaints.

(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may file a complaint with the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain--

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The substantial violation of law giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act; and

(5) The specific nature and date of the reprisal.

§ 3.905 Procedures for investigating complaints.

(a) Upon receipt of a complaint, the Inspector General shall conduct an initial inquiry. If the Inspector General determines that the complaint is frivolous or for other reasons does not merit further investigation, the Inspector General shall advise the complainant that no further action on the complaint will be taken.

(b) If the Inspector General determines that the complaint merits further investigation, the Inspector General shall notify the complainant, contractor, and head of the contracting activity. The Inspector General shall conduct an investigation and provide a written report of findings to the head of the agency or designee.

(c) Upon completion of the investigation, the head of the agency or designee shall ensure that the Inspector General provides the report of findings to--

(1) The complainant and any person acting on the complainant's behalf;

(2) The contractor alleged to have committed the violation; and

(3) The head of the contracting activity.

(d) The complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the head of the agency or designee. Extensions of time to file a written response may be granted by the head of the agency or designee.

(e) At any time, the head of the agency or designee may request additional investigative work be done on the complaint.

§ 3.906 Remedies.

(a) If the head of the agency or designee determines that a contractor has subjected one of its employees to a reprisal for providing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, the head of the agency or designee may take one or more of the following actions:

(1) Order the contractor to take affirmative action to abate the reprisal.

(2) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation

(including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(b) Whenever a contractor fails to comply with an order, the head of the agency or designee shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(c) Any person adversely affected or aggrieved by an order issued under this section may obtain review of the order's conformance with the law, and this subpart, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency or designee. Review shall conform to Chapter 7 of Title 5, United States Code.

SECTION 9
FEDERAL EMPLOYEE
WHISTLEBLOWER PROTECTIONS

Civil Service Reform Act,
Prohibited Personnel Practices
5 U.S.C. § 2302

2302. Prohibited personnel practices
(a)(1) For purposes of this title, prohibited personnel practice means the following:
(A) Any action described in subsection (b) of this section.
(B) Any action or failure to act that is designated as a prohibited personnel action under section 1599c(a) of title 10.
(2) For the purpose of this section
(A) personnel action means
(i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of this title or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a re-employment; (viii) a performance evaluation under chapter 43 of this title; (ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;
(B) covered position means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action
(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; and
(C) agency means an Executive agency and the Government Printing Office, but does not include
(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8); (ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or (iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority
(1) discriminate for or against any employee or applicant for employment
(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);
(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));
(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or
(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;
(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of
(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
(B) an evaluation of the character, loyalty, or suitability of such individual;
(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;
(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;
(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;
(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;
(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;
(8) take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of
(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences
(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences
(i) a violation of any law, rule, or regulation, or
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of
(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);
(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
(D) for refusing to obey an order that would require the individual to violate a law;
(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or
(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title. This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.
(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.
(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;
(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;
(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;
(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or
(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

Civil Service Reform Act,
Whistleblower Protection Act,
5 U.S.C. §§ 1211-1215, 1218-1219, 1221-1222, 7703

Office of Special Counsel
Sec. 1211. Establishment
(a) There is established the Office of Special Counsel, which shall be headed by the Special Counsel. The Office shall have an official seal which shall be judicially noticed. The Office shall have its principal office in the District of Columbia and shall have field offices in other appropriate locations.
(b) The Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that the Special Counsel may not continue to serve for more than one year after the date on which the term of the Special Counsel would otherwise expire under this subsection. The Special Counsel shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of the Special Counsel's predecessor serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The Special Counsel may not hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President.
Sec. 1212. Powers and functions of the Office of Special Counsel
(a) The Office of Special Counsel shall - (1) in accordance with section1214(a) and other applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;
(2) receive and investigate allegations of prohibited personnel practices, and, where appropriate -
(A) bring petitions for stays, and petitions for corrective action, under section 1214; and
(B) file a complaint or make recommendations for disciplinary action under section 1215;

(3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213, disclosures of violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
(4) review rules and regulations issued by the Director of the Office of Personnel Management in carrying out functions under section 1103 and, where the Special Counsel finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice, file a written complaint with the Board; and
(5) investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in section 1216).
(b)(1) The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may administer oaths, examine witnesses, take depositions, and receive evidence.
(2) The Special Counsel may -
(A) issue subpoenas; and (B) order the taking of depositions and order response to written interrogatories; in the same manner as provided under section 1204.
(3) (A) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A), the Special Counsel may apply to the Merit Systems Protection Board to enforce the subpoena in court pursuant to section 1204(c).
(B) A subpoena under paragraph (2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in the manner referred to in subsection(d) of section 1204, and the United States District Court for the District of Columbia may, with respect to any such individual, compel compliance in accordance with such subsection.
(4) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.
(c) (1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.
(2) The Special Counsel may not intervene in an action brought by an individual under section 1221, or in an appeal brought by an individual under section 7701, without the consent of such individual.
(d)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.
(2) Any appointment made under this subsection shall be made in accordance with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).
(e) The Special Counsel may prescribe such regulations as maybe necessary to perform the functions of the Special Counsel. Such

regulations shall be published in the Federal Register.
(f) The Special Counsel may not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73).
(g)(1) The Special Counsel may not respond to any inquiry or disclose any information from or about any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.
(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any inquiry concerning an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any person described in paragraph (1) -(A) unless the consent of the individual as to whom the information pertains is obtained in advance; or
(B) except upon request of an agency which requires such information in order to make a determination concerning an individual's having access to the information unauthorized disclosure of which could be expected to cause exceptionally grave damage to the national security.
Sec. 1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters
(a) This section applies with respect to -
(1) any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant reasonably believes evidences -
(A) a violation of any law, rule, or regulation; or
(B) gross mismanagement, a gross waste of fund an abuse of authority, or a substantial and specific danger to public health or safety; if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; and (2) any disclosure by an employee, former employee, or applicant for employment to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee, former employee, or applicant reasonably believes evidences -
(A) a violation of any law, rule, or regulation; or
(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 15 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.
(c)(1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head - (A) conduct an investigation with respect to the

information and any related matters transmitted by the Special Counsel to the agency head; and
(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.
(2) The Special Counsel may require an agency head to conduct an investigation and submit a written report under paragraph (1) only if the information was transmitted to the Special Counsel by -
(A) an employee, former employee, or applicant for employment in the agency which the information concerns; or
(B) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities.
(d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include -
(1) a summary of the information with respect to which the investigation was initiated;
(2) a description of the conduct of the investigation;
(3) a summary of any evidence obtained from the investigation;
(4) a listing of any violation or apparent violation of any law, rule, or regulation; and
(5) a description of any action taken or planned as a result of the investigation, such as -
(A) changes in agency rules, regulations, or practices;
(B) the restoration of any aggrieved employee;
(C) disciplinary action against any employee; and
(D) referral to the Attorney General of any evidence of a criminal violation.
(e)(1) Any such report shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.
(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether -
(A) the findings of the head of the agency appear reasonable; and (B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.
(3) The Special Counsel shall transmit any agency report received pursuant to subsection (c) of this section, any comments provided by the complainant pursuant to subsection (e)(1), and any appropriate comments or recommendations by the Special Counsel to the President and the congressional committees with jurisdiction over the agency which the disclosure involves.
(4) Whenever the Special Counsel does not receive the report of the agency within the time prescribed in subsection (c)(2) of this section, the Special Counsel shall transmit a copy of the information which was transmitted to the agency head to the President and the congressional committees with jurisdiction over the agency which the disclosure

involves together with a statement noting the failure of the head of the agency to file the required report.
(f) In any case in which evidence of a criminal violation obtained by an agency in an investigation under subsection (c) of this section is referred to the Attorney General -
(1) the report shall not be transmitted to the complainant; and (2) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.
(g)(1) If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head. If the Special Counsel does not transmit the information to the head of the agency, the Special Counsel shall return any documents and other matter provided by the individual who made the disclosure.
(2) If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency which the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.
(3) If the Special Counsel does not transmit the information to the head of the agency under paragraph (2), the Special Counsel shall -
(A) return any documents and other matter provided by the individual who made the disclosure; and
(B) inform the individual of -
(i) the reasons why the disclosure may not be further acted on under this chapter; and
(ii) other offices available for receiving disclosures, should the individual wish to pursue the matter further.
(h) The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.
(i) Except as specifically authorized under this section, the provisions of this section shall not be considered to authorize disclosure of any information by any agency or any person which is -
(1) specifically prohibited from disclosure by any other provision of law; or

(2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.
(j) With respect to any disclosure of information described in subsection (a) which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate.
Sec. 1214. Investigation of prohibited personnel practices; corrective action
(a)(1) (A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.
(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that -
(i) the allegation has been received by the Special Counsel; and (ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.
(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall -
(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;
(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under lause (i); and (iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.
(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.
(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of -
(i) the termination of the investigation; (ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;
(iii) the reasons for terminating the investigation; and (iv) a response to any comments submitted under paragraph (1)(D).

(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A). (3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) from the Special Counsel and -

(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and (ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or (B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

(b)(1) (A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board -
(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or (ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.
(2)(A) (i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.
(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.
(B) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.
(C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.
(D) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.
(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.
(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for -
(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and (B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.
(4) (A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8), has occurred, exists, or is to be taken.

(B) (i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against the individual.
(ii) Corrective action under clause (i) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.
(c)
(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, former employee, or applicant for employment adversely affected by such order or decision.
(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).
(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.
(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless -
(A) the alleged violation has been reported to the Attorney General; and
(B) the Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.
(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states -
(1) that the head of the agency has personally reviewed the report; and (2) what action has been or is to be taken, and when the action will be completed.
(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.
(g) If the Board orders corrective action under this section, such corrective action may include -
(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and (2) reimbursement for attorney's fees, back pay and related

benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.

Sec. 1215. Disciplinary action

(a) (1) Except as provided in subsection (b), if the Special Counsel determines that disciplinary action should be taken against any employee for having -

(A) committed a prohibited personnel practice,

(B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216, or

(C) knowingly and willfully refused or failed to comply with an order of the Merit Systems Protection Board, the Special Counsel shall prepare a written complaint against the employee containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board, in accordance with this subsection.

(2) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under paragraph (1) is entitled to -

(A) a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer;

(B) be represented by an attorney or other representative;

(C) a hearing before the Board or an administrative law judge appointed under section 3105 and designated by the Board;

(D) have a transcript kept of any hearing under subparagraph (C); and (E) a written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.

(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.

(4) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this subsection may obtain judicial review of the order by filing a petition therefore with such court, and within such time, as provided for under section 7703(b).

(5) In the case of any State or local officer or employee under chapter 15, the Board shall consider the case in accordance with the provisions of such chapter.

(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (a)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (a).

(c) (1) In the case of members of the uniformed services and individuals employed by any person under contract with an agency to provide goods or services, the Special Counsel may transmit recommendations for disciplinary or other appropriate action (including the evidence on which such recommendations are based) to the head of the agency concerned.

(2) In any case in which the Special Counsel transmits recommendations to an agency head under paragraph (1), the agency head shall, within 60 days after receiving such recommendations, transmit a report to the Special Counsel on each recommendation and the action taken, or proposed to be taken, with respect to each such recommendation.

Sec. 1218. Annual report

The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i), and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.

Sec. 1219. Public information

(a) The Special Counsel shall maintain and make available to the public

(1) a list of noncriminal matters referred to heads of agencies under subsection (c) of section 1213, together with reports from heads of agencies under subsection (c)(1)(B) of such section relating to such matters;

(2) a list of matters referred to heads of agencies under section 1215(c)(2);

(3) a list of matters referred to heads of agencies under subsection (e) of section 1214, together with certifications from heads of agencies under such subsection; and (4) reports from heads of agencies under section 1213(g)(1).

(b) The Special Counsel shall take steps to ensure that any list or report made available to the public under this section does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

Sec. 1221. Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.
(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.
(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.
(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.
(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.
(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.
(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.
(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that -
(A) the official taking the personnel action knew of the
disclosure; and
(B) 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 under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.
(f) (1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.
(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.
(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice,

the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.
(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include -
(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited
personnel practice not occurred; and
(ii) back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.
(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).
(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.
(3) If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.
(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.
(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).
(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.
(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.
Sec. 1222. Availability of other remedies
Except as provided in section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23.
Sec. 7703. Judicial review of decisions of the Merit Systems Protection Board
(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.
(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.
(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.
(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be -
(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) obtained without procedures required by law, rule, or regulation having been followed; or
(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.
(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Homeland Security Act of 2002
Sec. 883.
Requirement to comply with laws protecting equal employment opportunity and providing whistleblower protections.
6 U.S.C. § 463

Nothing in this Act shall be construed as exempting the Department from requirements applicable with respect to executive agencies--
(1) to provide equal employment protection for employees of the Department (including pursuant to the provisions in section 2302(b)(1) of title 5, United States Code, and the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (Public Law 107-174)); or
(2) to provide whistleblower protections for employees of the Department (including pursuant to the provisions in section 2302(b)(8) and (9) of such title and the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002).

Lloyd LaFollette Act
Employee s right to petition Congress
5 U.S.C. § 7211

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

Inspector General Act
5 U.S.C. Appendix 1

Sec. 1. Short title
That this Act be cited as the "Inspector General Act of 1978".
Sec. 2. Purpose and establishment of Offices of Inspector General; departments and agencies involved
In order to create independent and objective units --
(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2);
(2) to provide leadership and coordination and recommend policies for activities designed
(A) to promote economy, efficiency, and effectiveness in the administration of, and
(B) to prevent and detect fraud and abuse in, such programs and operations; and
(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action;
there is hereby established in each of such establishments an office of Inspector General.

Sec. 3. Appointment of Inspector General; supervision; removal; political activities; appointment of Assistant Inspector General for Auditing and Assistant Inspector General for Investigations

(a) There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.

(b) An Inspector General may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress.

(c) For the purposes of section 7324 of title 5, United States Code, no Inspector General shall be considered to be an employee who determines policies to be pursued by the United States in the nationwide administration of Federal laws.

* * *

Sec. 4. Duties and responsibilities; report of criminal violations to Attorney General

(a) It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established -

* * *

(5) to keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.

* * *

(d) In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.

Sec 5. Semiannual reports; transmittal to Congress; availability to public; immediate report on serious or flagrant problems

* * *

(d) Each Inspector General shall report immediately to the head of the establishment involved whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate.
(e) (1) Nothing in this section shall be construed to authorize the public disclosure of information which is -
(A) specifically prohibited from disclosure by any other provision of law;
(B) specifically required by Executive order to be protected from disclosure in the interest of national defense or national security or in the conduct of foreign affairs; or
(C) a part of an ongoing criminal investigation.
(2) Notwithstanding paragraph (1)(C), any report under this section may be disclosed to the public in a form which includes information with respect to a part of an ongoing criminal investigation if such information has been included in a public record.
(3) Except to the extent and in the manner provided under section 6103(f) of the Internal Revenue Code of 1986 (26 U.S.C. 6103(f)), nothing in this section or in any other provision of this Act shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof.
(f) As used in this section -
(1) the term "questioned cost" means a cost that is questioned by the Office because of -
(A) an alleged violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the expenditure of funds;
(B) a finding that, at the time of the audit, such cost is not supported by adequate documentation; or
(C) a finding that the expenditure of funds for the intended purpose is unnecessary or unreasonable;
(2) the term "unsupported cost" means a cost that is questioned by the Office because the Office found that, at the time of the audit, such cost is not supported by adequate documentation;
(3) the term "disallowed cost" means a questioned cost that management, in a management decision, has sustained or agreed should not be charged to the Government;
(4) the term "recommendation that funds be put to better use" means a recommendation by the Office that funds could be used more efficiently if management of an establishment took actions to implement and complete the recommendation, including -
(A) reductions in outlays;
(B) deobligation of funds from programs or operations;
(C) withdrawal of interest subsidy costs on loans or loan guarantees, insurance, or bonds;

(D) costs not incurred by implementing recommended improvements related to the operations of the establishment, a contractor or grantee;
(E) avoidance of unnecessary expenditures noted in preaward reviews of contract or grant agreements; or
(F) any other savings which are specifically identified;
(5) the term "management decision" means the evaluation by the management of an establishment of the findings and recommendations included in an audit report and the issuance of a final decision by management concerning its response to such findings and recommendations, including actions concluded to be necessary; and
(6) the term "final action" means -
(A) the completion of all actions that the management of an establishment has concluded, in its management decision, are necessary with respect to the findings and recommendations included in an audit report; and
(B) in the event that the management of an establishment concludes no action is necessary, final action occurs when a management decision has been made.

Sec. 6. Authority of Inspector General; information and assistance from Federal agencies; unreasonable refusal; office space and equipment
(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized
(1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act;
(2) to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable;
(3) to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State, or local governmental agency or unit thereof;
(4) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: Provided, That procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from Federal agencies;
(5) to administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the functions assigned by this Act, which oath, affirmation, or affidavit when administered or taken by or before an employee of an Office of Inspector General designated by the Inspector General shall have the same force and effect as if administered or taken by or before an officer having a seal;

(6) to have direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act;
(7) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;
(8) to obtain services as authorized by section 3109 of title 5, United States Code, at daily rates not to exceed the equivalent rate prescribed for grade GS-18 of the General Schedule by section 5332 of title 5, United States Code; and
(9) to the extent and in such amounts as may be provided in advance by appropriations Acts, to enter into contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act.
(b) (1) Upon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested, furnish to such Inspector General, or to an authorized designee, such information or assistance.
(2) Whenever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay.

* * *

Sec. 7. Complaints by employees; disclosure of identity; reprisals
(a) The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.
(b) The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.
(c) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

Sec. 8. Additional provisions with respect to the Inspector General of the Department of Defense

(a) No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.

(b) (1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Secretary of Defense with respect to audits or investigations, or the issuance of subpoenas, which require access to information concerning -

(A) sensitive operational plans;

(B) intelligence matters;

(C) counterintelligence matters;

(D) ongoing criminal investigations by other administrative units of the Department of Defense related to national security; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described in paragraph (1) the Secretary of Defense may prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena, after the Inspector General has decided to initiate, carry out or complete such audit or investigation or to issue such subpoena, if the Secretary determines that such prohibition is necessary to preserve the national security interests of the United States.

(3) If the Secretary of Defense exercises any power under paragraph (1) or (2), the Inspector General shall submit a statement concerning such exercise within thirty days to the Committees on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and Government Operations of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(4) The Secretary shall, within thirty days after submission of a statement under paragraph (3), transmit a statement of the reasons for the exercise of power under paragraph (1) or (2) to the Committees on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and Government Operations of the House of Representatives and to other appropriate committees or subcommittees.

(c) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall -

(1) be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department;

(2) initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate;

(3) provide policy direction for audits and investigations relating to fraud, waste, and abuse and program effectiveness;

(4) investigate fraud, waste, and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate;

(5) develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs;

(6) monitor and evaluate the adherence of Department auditors to internal audit, contract audit, and internal review principles, policies, and procedures;
(7) develop policy, evaluate program performance, and monitor actions taken by all components of the Department in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States;
(8) request assistance as needed from other audit, inspection, and investigative units of the Department of Defense (including military departments); and
(9) give particular regard to the activities of the internal audit, inspection, and investigative units of the military departments with a view toward avoiding duplication and insuring effective coordination and cooperation.
(d) Notwithstanding section 4(d), the Inspector General of the Department of Defense shall expeditiously report suspected or alleged violations of chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to the Secretary of the military department concerned or the Secretary of Defense.
(e) For the purposes of section 7, a member of the Armed Forces shall be deemed to be an employee of the Department of Defense, except that, when the Coast Guard operates as a service of another department or agency of the Federal Government, a member of the Coast Guard shall be deemed to be an employee of such department or agency.

* * *

Sec. 8A. Special provisions relating to the Agency for International Development
(a) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Agency for International Development-
(1) shall supervise, direct, and control all security activities relating to the programs and operations of that Agency, subject to the supervision of the Administrator of that Agency; and
(2) to the extent requested by the Director of the United States International Development Cooperation Agency (after consultation with the Administrator of the Agency for International Development), shall supervise, direct, and control all audit, investigative, and security activities relating to programs and operations within the United States International Development Cooperation Agency.
(b) In addition to the Assistant Inspector Generals provided for in section 3(d) of this Act, the Inspector General of the Agency for International Development shall, in accordance with applicable laws and regulations governing the civil service, appoint an Assistant Inspector General for Security who shall have the responsibility for supervising the performance of security activities relating to programs and operations of the Agency for International Development.

* * *

Sec. 8D. Special provisions concerning the Department of the Treasury
(a) (1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Secretary of the Treasury with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information concerning -
(A) ongoing criminal investigations or proceedings;
(B) undercover operations;
(C) the identity of confidential sources, including protected witnesses;
(D) deliberations and decisions on policy matters, including documented information used as a basis for making policy decisions, the disclosure of which could reasonably be expected to have a significant influence on the economy or market behavior;
(E) intelligence or counterintelligence matters; or
(F) other matters the disclosure of which would constitute a serious threat to national security or to the protection of any person or property authorized protection by section 3056 of title 18, United States Code, section 202 of title 3, United States Code, or any provision of the Presidential Protection Assistance Act of 1976 (18 U.S.C. 3056 note; Public Law 94-524).
(2) With respect to the information described under paragraph (1), the Secretary of the Treasury may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpoena, if the Secretary determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent significant impairment to the national interests of the United States.
(3) If the Secretary of the Treasury exercises any power under paragraph (1) or (2), the Secretary of the Treasury shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Operations and Ways and Means of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.
(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of the Treasury shall have oversight responsibility for the internal investigations performed by the Office of Internal Affairs of the Bureau of Alcohol, Tobacco and Firearms, the Office of Internal Affairs of the United States Customs Service, and the Office of Inspections of the United States Secret Service, and the internal audits and internal investigations performed by the Office of Assistant Commissioner (Inspection) of the Internal Revenue Service. The head of each such office shall promptly report to the Inspector General the significant activities being carried out by such office.
(c) Notwithstanding subsection (b), the Inspector General may initiate, conduct and supervise such audits and investigations in the Department of the Treasury (including the bureaus and services referred to in subsection (b) as the Inspector General considers appropriate.

(d) If the Inspector General initiates an audit or investigation under subsection (c) concerning a bureau or service referred to in subsection (b), the Inspector General may provide the head of the office of such bureau or service referred to in subsection (b) with written notice that the Inspector General has initiated such an audit or investigation. If the Inspector General issues a notice under the preceding sentence, no other audit or investigation shall be initiated into the matter under audit or investigation by the Inspector General and any other audit or investigation of such matter shall cease.
(e) (1) The Inspector General shall have access to returns and return information, as defined in section 6103(b) of the Internal Revenue Code of 1986 (26 U.S.C. 6103(b)), only in accordance with the provisions of section 6103 of such Code (26 U.S.C. 6103) and this Act.
(2) Access by the Inspector General to returns and return information under section 6103(h)(1) of such Code (26 U.S.C. 6103(h)(1)) shall be subject to the following additional requirements:
(A) In order to maintain internal controls over access to returns and return information, the Inspector General, or in the absence of the Inspector General, the Acting Inspector General, the Deputy Inspector General, the Assistant Inspector General for Audits, or the Assistant Inspector General for Investigations, shall provide to the Assistant Commissioner (Inspection) of the Internal Revenue Service written notice of the Inspector General's intent to access returns and return information. If the Inspector General determines that the Inspection Service of the Internal Revenue Service should not be made aware of a notice of access to returns and return information, such notice shall be provided to the Senior Deputy Commissioner of Internal Revenue.

* * *

(g) Notwithstanding section 4(d), in matters involving chapter 75 of the Internal Revenue Code of 1986 (26 U.S.C. 7201 et seq.), the Inspector General shall report expeditiously to the Attorney General only offenses under section 7214 of such Code (26 U.S.C. 7214), unless the Inspector General obtains the consent of the Commissioner of Internal Revenue to exercise additional reporting authority with respect to such chapter.
(h) Any report required to be transmitted by the Secretary of the Treasury to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Operations and Ways and Means of the House of Representatives.

Sec. 8E. Special provisions concerning the Department of Justice
(a) (1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information concerning -
(A) ongoing civil or criminal investigations or proceedings;
(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;
(D) intelligence or counterintelligence matters; or
(E) other matters the disclosure of which would constitute a serious threat to national security.
(2) With respect to the information described under paragraph (1), the Attorney General may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpoena, if the Attorney General determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent the significant impairment to the national interests of the United States.
(3) If the Attorney General exercises any power under paragraph (1) or (2), the Attorney General shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Judiciary of the Senate and the Committees on Government Operations and Judiciary of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.
(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of Justice -
(1) may initiate, conduct and supervise such audits and investigations in the Department of Justice as the Inspector General considers appropriate;
(2) shall give particular regard to the activities of the Counsel, Office of Professional Responsibility of the Department and the audit, internal investigative, and inspection units outside the Office of Inspector General with a view toward avoiding duplication and insuring effective coordination and cooperation; and
(3) shall refer to the Counsel, Office of Professional Responsibility of the Department for investigation, information or allegations relating to the conduct of an officer or employee of the Department of Justice employed in an attorney, criminal investigative, or law enforcement position that is or may be a violation of law, regulation, or order of the Department or any other applicable standard of conduct, except that no such referral shall be made if the officer or employee is employed in the Office of Professional Responsibility of the Department.
(c) Any report required to be transmitted by the Attorney General to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on the Judiciary and Governmental Affairs of the Senate and the Committees on the Judiciary and Government Operations of the House of Representatives.

* * *

Sec. 8G. Requirements for Federal entities and designated Federal entities
[Another section 8G is set out after this section.]
(a) Notwithstanding section 11 of this Act, as used in this section -

(1) the term "Federal entity" means any Government corporation (within the meaning of section 103(1) of title 5, United States Code), any Government controlled corporation (within the meaning of section 103(2) of such title), or any other entity in the Executive branch of the Government, or any independent regulatory agency, but does not include
(A) an establishment (as defined under section 11(2) of this Act) or part of an establishment;
(B) a designated Federal entity (as defined under paragraph (2) of this subsection) or part of a designated Federal entity;
(C) the Executive Office of the President;
(D) the Central Intelligence Agency;
(E) the General Accounting Office; or
(F) any entity in the judicial or legislative branches of the Government, including the Administrative Office of the United States Courts and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol;
(2) the term "designated Federal entity" means Amtrak, the Appalachian Regional Commission, the Board of Governors of the Federal Reserve System, the Board for International Broadcasting, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Corporation for Public Broadcasting, the Equal Employment Opportunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Election Commission, the Federal Housing Finance Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Legal Services Corporation, the National Archives and Records Administration, the National Credit Union Administration, the National Endowment for the Arts, the National Endowment for the Humanities, the National Labor Relations Board, the National Science Foundation, the Panama Canal Commission, the Peace Corps, the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission, the Smithsonian Institution, the Tennessee Valley Authority, the United States International Trade Commission, and the United States Postal Service;
(3) the term "head of the Federal entity" means any person or persons designated by statute as the head of a Federal entity, and if no such designation exists, the chief policymaking officer or board of a Federal entity as identified in the list published pursuant to subsection (h)(1) of this section;
(4) the term "head of the designated Federal entity" means any person or persons designated by statute as the head of a designated Federal entity and if no such designation exists, the chief policymaking officer or board of a designated Federal entity as identified in the list published pursuant to subsection (h)(1) of this section, except that with respect to the National Science Foundation, such term means the National Science Board;
(5) the term "Office of Inspector General" means an Office of Inspector General of a designated Federal entity; and
(6) the term "Inspector General" means an Inspector General of a designated Federal entity.

(b) No later than 180 days after the date of the enactment of this section (Oct. 18, 1988), there shall be established and maintained in each designated Federal entity an Office of Inspector General. The head of the designated Federal entity shall transfer to such office the offices, units, or other components, and the functions, powers, or duties thereof, that such head determines are properly related to the functions of the Office of Inspector General and would, if so transferred, further the purposes of this section. There shall not be transferred to such office any program operating responsibilities.
(c) Except as provided under subsection (f) of this section, the Inspector General shall be appointed by the head of the designated Federal entity in accordance with the applicable laws and regulations governing appointments within the designated Federal entity.
(d) Each Inspector General shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to, or be subject to supervision by, any other officer or employee of such designated Federal entity. The head of the designated Federal entity shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.
(e) If an Inspector General is removed from office or is transferred to another position or location within a designated Federal entity, the head of the designated Federal entity shall promptly communicate in writing the reasons for any such removal or transfer to both Houses of the Congress.
(f) (1) The Chief Postal Inspector of the United States Postal Service shall also hold the position of Inspector General of the United States Postal Service, and for purposes of this section, shall report to, and be under the general supervision of, the Postmaster General of the United States Postal Service. The Postmaster General, in consultation with the Governors of the United States Postal Service, shall appoint the Chief Postal Inspector. The Postmaster General, with the concurrence of the Governors of the United States Postal Service, shall have power to remove the Chief Postal Inspector or transfer the Chief Postal Inspector to another position or location within the United States Postal Service. If the Chief Postal Inspector is removed or transferred in accordance with this subsection, the Postmaster General shall promptly notify both Houses of the Congress in writing of the reasons for such removal or transfer.

* * *

Sec. 11. Definitions
As used in this Act -
(1) the term "head of the establishment" means the Secretary of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Labor, State, Transportation, or the Treasury; the Attorney General; the Administrator of the Agency for International Development, Environmental Protection, General Services, National Aeronautics and Space, Small Business, or Veterans' Affairs; the Director of the Federal Emergency Management Agency, the Office of Personnel Management or the United States

Information Agency; the Chairman of the Nuclear Regulatory Commission or the Railroad Retirement Board; the Chairperson of the Thrift Depositor Protection Oversight Board; the Chief Executive Officer of the Corporation for National and Community Service; and the chief executive officer of the Resolution Trust Corporation; and the Chairperson of the Federal Deposit Insurance Corporation; as the case may be;
(2) the term "establishment" means the Department of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, or the Treasury; the Agency for International Development, the Environmental Protection Agency, the Federal Emergency Management Agency, the General Services Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Office of Personnel Management, the Railroad Retirement Board, the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the Small Business Administration, the United States Information Agency, the Corporation for National and Community Service,, or the Veterans' Administration; as the case may be;
(3) the term "Inspector General" means the Inspector General of an establishment;
(4) the term "Office" means the Office of Inspector General of an establishment; and
(5) the term "Federal agency" means an agency as defined in section 552(e) of title 5 (including an establishment as defined in paragraph (2)), United States Code, but shall not be construed to include the General Accounting Office.

Inspector General Act Amendments
(passed in 1998 and 2002)
5 USCA APP. 3 § 8H

8H. Additional Provisions with Respect to Inspectors General of the Intelligence Community--(a)(1)(A) An employee of the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Reconnaissance Office, or the National Security Agency, or of a contractor of any of those Agencies, who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the Inspector General of the Department of Defense (or designee).(B) An employee of the Federal Bureau of Investigation, or of a contractor of the Bureau, who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the Inspector General of the Department of Justice (or designee).(C) Any other employee of, or contractor to, an executive agency, or element or unit thereof, determined by the President under section 2302(a)(2)(C)(ii) of title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities, who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the appropriate Inspector General (or

designee) under this Act or section 17 of the Central Intelligence Agency Act of 1949 [
50 U.S.C.A. 403a et seq.].(2) If a designee of an Inspector General under this section receives a complaint or information of an employee with respect to an urgent concern, that designee shall report the complaint or information to the Inspector General within 7 calendar days of receipt.(b) Not later than the end of the 14-calendar day period beginning on the date of receipt of an employee complaint or information under subsection (a), the Inspector General shall determine whether the complaint or information appears credible. Upon making such a determination, the Inspector General shall transmit to the head of the establishment notice of that determination, together with the complaint or information.(c) Upon receipt of a transmittal from the Inspector General under subsection (b), the head of the establishment shall, within 7 calendar days of such receipt, forward such transmittal to the intelligence committees, together with any comments the head of the establishment considers appropriate.(d)(1) If the Inspector General does not find credible under subsection (b) a complaint or information submitted to the Inspector General under subsection (a), or does not transmit the complaint or information to the head of the establishment in accurate form under subsection (b), the employee (subject to paragraph (2)) may submit the complaint or information to Congress by contacting either or both of the intelligence committees directly.(2) The employee may contact the intelligence committees directly as described in paragraph (1) only if the employee--(A) before making such a contact, furnishes to the head of the establishment, through the Inspector General, a statement of the employee's complaint or information and notice of the employee's intent to contact the intelligence committees directly; and(B) obtains and follows from the head of the establishment, through the Inspector General, direction on how to contact the intelligence committees in accordance with appropriate security practices.(3) A member or employee of one of the intelligence committees who receives a complaint or information under paragraph (1) does so in that member or employee's official capacity as a member or employee of that committee.(e) The Inspector General shall notify an employee who reports a complaint or information under this section of each action taken under this section with respect to the complaint or information. Such notice shall be provided not later than 3 days after any such action is taken.(f) An action taken by the head of an establishment or an Inspector General under subsections (a) through (e) shall not be subject to judicial review.
(h) In this section:(l) The term "urgent concern" means any of the following:(A) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.(B) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity.(C) An action, including a personnel action described in section 2302(a)(2)(A) of Title 5, constituting reprisal or threat of reprisal prohibited under section 7(c) in response to an employee's reporting an urgent concern in accordance

with this section.(2) The term "intelligence committees" means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

Inspector General Act Amendment of 1998
Congressional Findings
Pub.L. 105-277, Title VII, § 701(b), Oct. 20, 1998
112 Stat. 2413,

The Congress finds that--(1) national security is a shared responsibility, requiring joint efforts and mutual respect by Congress and the President;(2) the principles of comity between the branches of Government apply to the handling of national security information;(3) Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community;(4) no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community;(5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and(6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting.

Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002
P.L. 107-174 (May 15, 2002)
[5 U.S.C. § 2301 Note]

TITLE I--GENERAL PROVISIONS
SEC. 101. Findings.
Congress finds that--
(1) Federal agencies cannot be run effectively if those agencies practice or tolerate discrimination;
(2) Congress has heard testimony from individuals, including representatives of the National Association for the Advancement of Colored People and the American Federation of Government Employees, that point to chronic problems of discrimination and retaliation against Federal employees;
(3) in August 2000, a jury found that the Environmental Protection Agency had discriminated against a senior social scientist, and awarded that scientist $600,000;
(4) in October 2000, an Occupational Safety and Health Administration investigation found that the Environmental Protection Agency had retaliated against a senior scientist for disagreeing with that agency on a

matter of science and for helping Congress to carry out its oversight responsibilities;
(5) there have been several recent class action suits based on discrimination brought against Federal agencies, including the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the Immigration and Naturalization Service, the United States Marshals Service, the Department of Agriculture, the United States Information Agency, and the Social Security Administration;
(6) notifying Federal employees of their rights under discrimination and whistleblower laws should increase Federal agency compliance with the law;
(7) requiring annual reports to Congress on the number and severity of discrimination and whistleblower cases brought against each Federal agency should enable Congress to improve its oversight over compliance by agencies with the law; and
(8) requiring Federal agencies to pay for any discrimination or whistleblower judgment, award, or settlement should improve agency accountability with respect to discrimination and whistleblower laws.
SEC. 102. Sense of Congress.
It is the sense of Congress that--
(1) Federal agencies should not retaliate for court judgments or settlements relating to discrimination and whistleblower laws by targeting the claimant or other employees with reductions in compensation, benefits, or workforce to pay for such judgments or settlements;
(2) the mission of the Federal agency and the employment security of employees who are blameless in a whistleblower incident should not be compromised;
(3) Federal agencies should not use a reduction in force or furloughs as means of funding a reimbursement under this Act;
(4)(A) accountability in the enforcement of employee rights is not furthered by terminating--
(i) the employment of other employees; or
(ii) the benefits to which those employees are entitled through statute or contract; and
(B) this Act is not intended to authorize those actions;
(5)(A) nor is accountability furthered if Federal agencies react to the increased accountability under this Act by taking unfounded disciplinary actions against managers or by violating the procedural rights of managers who have been accused of discrimination; and
(B) Federal agencies should ensure that managers have adequate training in the management of a diverse workforce and in dispute resolution and other essential communication skills; and
(6)(A) Federal agencies are expected to reimburse the General Fund of the Treasury within a reasonable time under this Act; and
(B) a Federal agency, particularly if the amount of reimbursement under this Act is large relative to annual appropriations for that agency, may need to extend reimbursement over several years in order to avoid--
(i) reductions in force;
(ii) furloughs;

(iii) other reductions in compensation or benefits for the workforce of the agency; or
(iv) an adverse effect on the mission of the agency.
SEC. 103. Definitions.
For purposes of this Act--
(1) the term `applicant for Federal employment' means an individual applying for employment in or under a Federal agency;
(2) the term `basis of alleged discrimination' shall have the meaning given such term under section 303;
(3) the term `Federal agency' means an Executive agency (as defined in section 105 of title 5, United States Code), the United States Postal Service, or the Postal Rate Commission;
(4) the term `Federal employee' means an individual employed in or under a Federal agency;
(5) the term `former Federal employee' means an individual formerly employed in or under a Federal agency; and
(6) the term `issue of alleged discrimination' shall have the meaning given such term under section 303.
SEC. 104. Effective Date
This Act and the amendments made by this Act shall take effect on the 1st day of the 1st fiscal year beginning more than 180 days after the date of the enactment of this Act.

TITLE II--FEDERAL EMPLOYEE DISCRIMINATION AND RETALIATION
SEC. 201. Reimbursement Requirement
(a) APPLICABILITY- This section applies with respect to any payment made in accordance with section 2414, 2517, 2672, or 2677 of title 28, United States Code, and under section 1304 of title 31, United States Code (relating to judgments, awards, and compromise settlements) to any Federal employee, former Federal employee, or applicant for Federal employment, in connection with any proceeding brought by or on behalf of such employee, former employee, or applicant under--(1) any provision of law cited in subsection (c); or
(2) any other provision of law which prohibits any form of discrimination, as identified under rules issued under section 204.
(b) REQUIREMENT- An amount equal to the amount of each payment described in subsection (a) shall be reimbursed to the fund described in section 1304 of title 31, United States Code, out of any appropriation, fund, or other account (excluding any part of such appropriation, of such fund, or of such account available for the enforcement of any Federal law) available for operating expenses of the Federal agency to which the discriminatory conduct involved is attributable as determined under section 204.
(c) SCOPE- The provisions of law cited in this subsection are the following:
(1) Section 2302(b) of title 5, United States Code, as applied to discriminatory conduct described in paragraphs (1) and (8), or described in paragraph (9) of such section as applied to discriminatory conduct described in paragraphs (1) and (8), of such section.

(2) The provisions of law specified in section 2302(d) of title 5, United States Code.

SEC. 202. Notification Requirement

(a) IN GENERAL- Written notification of the rights and protections available to Federal employees, former Federal employees, and applicants for Federal employment (as the case may be) in connection with the respective provisions of law covered by paragraphs (1) and (2) of section 201(a) shall be provided to such employees, former employees, and applicants--

(1) in accordance with otherwise applicable provisions of law; or

(2) if, or to the extent that, no such notification would otherwise be required, in such time, form, and manner as shall under section 204 be required in order to carry out the requirements of this section.

(b) POSTING ON THE INTERNET- Any written notification under this section shall include, but not be limited to, the posting of the information required under paragraph (1) or (2) (as applicable) of subsection (a) on the Internet site of the Federal agency involved.

(c) EMPLOYEE TRAINING- Each Federal agency shall provide to the employees of such agency training regarding the rights and remedies applicable to such employees under the laws cited in section 201(c).

SEC. 203. Reporting Requirement

(a) ANNUAL REPORT- Subject to subsection (b), not later than 180 days after the end of each fiscal year, each Federal agency shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Committee on Governmental Affairs of the Senate, the Committee on Government Reform of the House of Representatives, each committee of Congress with jurisdiction relating to the agency, the Equal Employment Opportunity Commission, and the Attorney General an annual report which shall include, with respect to the fiscal year--

(1) the number of cases arising under each of the respective provisions of law covered by paragraphs (1) and (2) of section 201(a) in which discrimination on the part of such agency was alleged;

(2) the status or disposition of cases described in paragraph (1);

(3) the amount of money required to be reimbursed by such agency under section 201 in connection with each of such cases, separately identifying the aggregate amount of such reimbursements attributable to the payment of attorneys' fees, if any;

(4) the number of employees disciplined for discrimination, retaliation, harassment, or any other infraction of any provision of law referred to in paragraph (1);

(5) the final year-end data posted under section 301(c)(1)(B) for such fiscal year (without regard to section 301(c)(2));

(6) a detailed description of--

(A) the policy implemented by that agency relating to appropriate disciplinary actions against a Federal employee who--

(i) discriminated against any individual in violation of any of the laws cited under section 201(a) (1) or (2); or

(ii) committed another prohibited personnel practice that was revealed in the investigation of a complaint alleging a violation of any of the laws cited under section 201(a) (1) or (2); and

(B) with respect to each of such laws, the number of employees who are disciplined in accordance with such policy and the specific nature of the disciplinary action taken;
(7) an analysis of the information described under paragraphs (1) through (6) (in conjunction with data provided to the Equal Employment Opportunity Commission in compliance with part 1614 of title 29 of the Code of Federal Regulations) including--
(A) an examination of trends;
(B) causal analysis;
(C) practical knowledge gained through experience; and
(D) any actions planned or taken to improve complaint or civil rights programs of the agency; and
(8) any adjustment (to the extent the adjustment can be ascertained in the budget of the agency) to comply with the requirements under section 201.
(b) FIRST REPORT- The 1st report submitted under subsection (a) shall include for each item under subsection (a) data for each of the 5 immediately preceding fiscal years (or, if data are not available for all 5 fiscal years, for each of those 5 fiscal years for which data are available).
SEC. 204. RULES AND GUIDELINES.
(a) ISSUANCE OF RULES AND GUIDELINES- The President (or the designee of the President) shall issue--
(1) rules to carry out this title;
(2) rules to require that a comprehensive study be conducted in the executive branch to determine the best practices relating to the appropriate disciplinary actions against Federal employees who commit the actions described under clauses (i) and (ii) of section 203(a)(6)(A); and
(3) based on the results of such study, advisory guidelines incorporating best practices that Federal agencies may follow to take such actions against such employees.
(b) AGENCY NOTIFICATION REGARDING IMPLEMENTATION OF GUIDELINES- Not later than 30 days after the issuance of guidelines under subsection (a), each Federal agency shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Equal Employment Opportunity Commission, and the Attorney General a written statement specifying in detail--
(1) whether such agency has adopted and will fully follow such guidelines;
(2) if such agency has not adopted such guidelines; the reasons for the failure to adopt such guidelines; and
(3) if such agency will not fully follow such guidelines, the reasons for the decision not to fully follow such guidelines and an explanation of the extent to which such agency will not follow such guidelines.
SEC. 205. CLARIFICATION OF REMEDIES.
Consistent with Federal law, nothing in this title shall prevent any Federal employee, former Federal employee, or applicant for Federal employment from exercising any right otherwise available under the laws of the United States.
SEC. 206. STUDIES BY GENERAL ACCOUNTING OFFICE ON EXHAUSTION OF ADMINISTRATIVE REMEDIES AND ON

ASCERTAINMENT OF CERTAIN DEPARTMENT OF JUSTICE COSTS.

(a) STUDY ON EXHAUSTION OF ADMINISTRATIVE REMEDIES-

(1) STUDY-

(A) IN GENERAL- Not later than 180 days after the date of enactment of this Act, the General Accounting Office shall conduct a study relating to the effects of eliminating the requirement that Federal employees aggrieved by violations of any of the laws specified under section 201(c) exhaust administrative remedies before filing complaints with the Equal Employment Opportunity Commission.

(B) CONTENTS- The study shall include a detailed summary of matters investigated, information collected, and conclusions formulated that lead to determinations of how the elimination of such requirement will--

(i) expedite handling of allegations of such violations within Federal agencies and will streamline the complaint-filing process;

(ii) affect the workload of the Commission;

(iii) affect established alternative dispute resolution procedures in such agencies; and

(iv) affect any other matters determined by the General Accounting Office to be appropriate for consideration.

(2) REPORT- Not later than 90 days after completion of the study required by paragraph (1), the General Accounting Office shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Equal Employment Opportunity Commission, and the Attorney General a report containing the information required to be included in such study.

(b) STUDY ON ASCERTAINMENT OF CERTAIN COSTS OF THE DEPARTMENT OF JUSTICE IN DEFENDING DISCRIMINATION AND WHISTLEBLOWER CASES-

(1) STUDY- Not later than 180 days after the date of enactment of this Act, the General Accounting Office shall conduct a study of the methods that could be used for, and the extent of any administrative burden that would be imposed on, the Department of Justice to ascertain the personnel and administrative costs incurred in defending in each case arising from a proceeding identified under section 201(a) (1) and (2).

(2) REPORT- Not later than 90 days after completion of the study required by paragraph (1), the General Accounting Office shall submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report containing the information required to be included in the study.

(c) STUDIES ON STATUTORY EFFECTS ON AGENCY OPERATIONS-

(1) IN GENERAL- Not later than 18 months after the date of enactment of this Act, the General Accounting Office shall conduct--

(A) a study on the effects of section 201 on the operations of Federal agencies; and

(B) a study on the effects of section 13 of the Contract Disputes Act of 1978 (41 U.S.C. 612) on the operations of Federal agencies.

(2) CONTENTS- Each study under paragraph (1) shall include, with respect to the applicable statutes of the study--

(A) a summary of the number of cases in which a payment was made in accordance with section 2414, 2517, 2672, or 2677 of title 28, United States Code, and under section 1304 of title 31, United States Code;
(B) a summary of the length of time Federal agencies used to complete reimbursements of payments described under subparagraph (A); and
(C) conclusions that assist in making determinations on how the reimbursements of payments described under subparagraph (A) will affect--
(i) the operations of Federal agencies;
(ii) funds appropriated on an annual basis;
(iii) employee relations and other human capital matters;
(iv) settlements; and
(v) any other matter determined by the General Accounting Office to be appropriate for consideration.
(3) REPORTS- Not later than 90 days after the completion of each study under paragraph (1), the General Accounting Office shall submit a report on each study, respectively, to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Committee on Governmental Affairs of the Senate, the Committee on Government Reform of the House of Representatives, and the Attorney General.

Executive Order 12731
of October 17, 1990
Principles of Ethical Conduct for Government
Officers and Employees
55 Federal Register 42547 (October 19, 1990)

Section 101.

* * *

(a) Public service is a trust requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.

* * *

(k) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

* * *

Office of Government Ethics Part 2635
Standards of Ethical Conduct for Employees
of the Executive Branch
5 C.F.R. § 2635.101

Basic obligation of public service. (a) Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations. (b) General principles. The following general principles apply to every employee and may form

the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper. (1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain. * * * (11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities. * * *

Office of Government Ethics
Standards of Ethical Conduct for Employees
of the Executive Branch
Final Rule
57 Federal Register 35006 (August 7, 1992)

Subpart A-General Provisions
Subsection 2635.101
Basic Obligations of Public Service

* * *

Five agencies suggested changes to 2635.101(b)(11), the principle requiring disclosure of fraud, waste, abuse and corruption. The recommendation by two agencies to change shall to should was not adopted. 2635.101(b)(11) is a verbatim restatement of the principle enunciated in the Executive order and the recommenced substitution of precatory for mandatory language would change the principle. The Office of Government Ethics does not share those agencies concern that the principle will elicit frivolous reporting. The Government s interest in curbing waste, fraud, abuse and corruption is better served by overreporting, and the authorities to whom such disclosures are to be made can best determine the merits of allegations and ensure that harm does not result from any that are spurious.

The suggestion by two agencies to specify agency Inspectors General as an appropriate authority for reporting required by 2635.101(b)(11) was also rejected. The Executive order requires employees to report waste, fraud, abuse and corruption to an appropriate authority. Adoption of this suggestion might be viewed as limiting an employee s reporting options. The Office of Government Ethics also did not adopt the recommendation by one agency to revise 2635.101(b)(11) to include references to legal definitions of fraud and corruption. Such references would tend to suggest that an employee is responsible for applying complex legal principles in determining whether improprieties should be reported. The purpose of the principle is to elicit disclosures of improprieties, and the terms waste and abuse are sufficiently broad that an employee should not hesitate to report activities or conduct that he or she believes involve fraud or corruption as those terms are commonly used. The Office of Government Ethics also rejected the suggestion by one agency to expand upon the statement of the ethical principle at 2635.101(b)(11) to state that employees shall cooperate with Inspectors General.

Whistleblower Protection Act
Coverage for FBI Employees
5 U.S.C.A. § 2303

(a) Any employee of the Federal Bureau of Investigation 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 a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes 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.
For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).
(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.
(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.

Whistleblower Protection Act
Delegation of Responsibilities Concerning FBI Employees
Under the Civil Service Reform Act of 1978
Memorandum of the President of the United States
62 Federal Register 23123 (April 28, 1997)

Memorandum for the Attorney General
By the authority vested in me by the Constitution and laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to the Attorney General the functions concerning employees of the Federal Bureau of Investigation vested in the President by section101(a) of the Civil Service Reform Act of 1978 (Public Law 95–454), as amended by the Whistleblower Protection Act of 1989 (Public Law 101–12), and codified at section 2303(c) of title 5, United States Code, and direct the Attorney General to establish appropriate processes within the Department of Justice to carry out these functions. Not later than March 1 of each year, the Attorney General shall provide a report to the President stating the number of allegations of reprisal received during the preceding calendar year, the disposition of each allegation resolved during the preceding calendar year, and the number of unresolved allegations pending as of the end of the calendar year. All of the functions vested in the President by section 2303(c) of title 5, United States Code, and delegated to the Attorney General, may be

redelegated, as appropriate, provided that such functions may not be redelegated to the Federal Bureau of Investigation. You are authorized and directed to publish this memorandum in the Federal Register.

Justice Department Part
Office of Inspector General
Whistleblower Protection for
Federal Bureau of Investigation Employees
28 C.F.R. § 27

PART 27_WHISTLEBLOWER PROTECTION FOR FEDERAL BUREAU OF INVESTIGATION
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 Recruitment and 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). Source: Order No. 2264-99, 64 FR 58786, Nov. 1, 1999, unless otherwise noted
(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) Any office or official (other than the OIG or OPR) receiving a protected disclosure shall promptly report such disclosure to the OIG or OPR for investigation. The OIG and OPR shall proceed in accordance with procedures establishing their respective jurisdiction. The OIG or OPR may refer such allegations to FBI-OPR for investigation unless the Deputy Attorney General determines that such referral shall not be made.
[Order No. 2264-99, 64 FR 58786, Nov. 1, 1999, as amended by Order No. 2492-2001, 66 FR 37904, July 20, 2001]
Sec. 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
Sec. 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.
Subpart B_Investigating Reprisal Allegations and Ordering Corrective Action
Sec. 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 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.

Subpart B_Investigating Reprisal Allegations and Ordering Corrective Action

Sec. 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.

Sec. 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.

OFFICE OF SPECIAL COUNSEL PART 1800 - FILING OF COMPLAINTS AND ALLEGATIONS
5 C.F.R. §§ 1800

AUTHORITY: 5 U.S.C. 1212(e).

1800.1 Filing complaints of prohibited personnel practices or other prohibited activities.

(a) Complaints of prohibited personnel practices or other prohibited activities within the investigative authority of the Special Counsel (including complaints of political activities prohibited by 5 U.S.C. 7321 7324) should be submitted to the Office of Special Counsel, Complaints Examining Unit, 1730 M Street, NW., Suite 300, Washington, DC 20036-4505.

(b) Complaints, allegations, and information may be submitted in any written form, but should include:

(1) The name, mailing address, and telephone number(s) of the complainant(s), and a time when the person(s) making the disclosure(s) can be safely contacted, unless the matter is submitted anonymously;

(2) The department or agency, location, and organizational unit complained of;

(3) A concise description of the actions complained about, names and positions of employees who took these actions, if known to the complainant, and dates, preferably in chronological order, together with any documentary evidence the complainant may have;

(4) In the case of any allegation of a prohibited personnel practice, the personnel action that has been taken or is proposed or threatened to be taken, and the date of the action, proposal, or threat;

(5) In the case of action taken because of an individual s disclosure of information, the information believed to evidence violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety and when, to whom, and how or in what form it was disclosed; and

(6) A statement as to whether the complainant consents to the disclosure of his or her identity to the agency by the Special Counsel for the purpose of further investigation. [54 FR 47341, Nov. 14, 1989, as amended at 55 FR 47839, Nov. 16, 1990; 59 FR 64843, Dec. 16, 1994]

1800.2 Filing disclosures of information.

(a) Employees, former employees, or applicants for employment having information evidencing violations of law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety should be submitted to the Office of Special Counsel, Disclosure Unit, 1730 M Street, NW., Suite 300, Washington, DC 20036-4505.

(b) Information may be submitted in any written form, but should include:

(1) The name, mailing address, and telephone number(s) of the person(s) making the disclosure(s), and a time when that person(s) can be safely contacted by this agency, unless the matter is submitted anonymously;
(2) The department or agency, location and organizational unit complained of;
(3) A statement as to whether the complainant consents to the disclosure of his or her identity to the agency by the Special Counsel in connection with referral to the appropriate agency.
[54 FR 47341, Nov. 14, 1989, as amended at 55 FR 47839, Nov. 16, 1990; 59 FR 64843, Dec. 16, 1994]

1800.3 Advisory opinions.

The Special Counsel is authorized to issue advisory opinions only concerning Chapter 15 of Title 5, United States Code (dealing with political activity of State or local officers and employees) and Subchapter III of Chapter 73 of Title 5, United States Code (dealing with political activity of Federal officers and employees). Requesters may telephone the Office of Special Counsel toll free at 1 800 872 9855, or (202)/FTS 653 7143 in the Washington, DC, area, or make such requests in writing to the Office of Special Counsel, 1730 M Street, NW., Suite 300, Washington, DC 20036-4505. [54 FR 47341, Nov. 14, 1989, as amended at 59 FR 64843, Dec. 16, 1994]

OFFICE OF SPECIAL COUNSEL PART 1810 - INVESTIGATIVE AUTHORITY OF THE SPECIAL COUNSEL
5 C.F.R. § 1810

AUTHORITY: 5 U.S.C. 1212(e).

1810.1 Investigative policy in discrimination complaints.

The Special Counsel is authorized to investigate allegations of discrimination prohibited by law, as defined in 5 U.S.C. 2302(b)(1). Since procedures for investigating discrimination complaints have already been established in the agencies and the Equal Employment Opportunity Commission, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiating an independent investigation. [54 FR 47342, Nov. 14, 1989]

Office of Special Counsel
Rules and Regulations
5 CFR Part 1800
RIN 3255-ZA00
Filing Complaints of Prohibited Personnel Practice or Other Prohibited Activity; Filing Disclosures of Information
65 Federal Register 64881(October 31, 2000)Final rule

AGENCY: Office of Special Counsel. ACTION: SUMMARY: The Office of Special Counsel (OSC) is issuing a final rule amending its regulations at 5 CFR part 1800 to: provide basic information about OSC jurisdiction over complaints of improper employment practices, and over disclosures of information of wrongdoing in federal agencies (also known as "whistleblower disclosures"); implement a requirement that complaint filers use an OSC form to submit allegations of improper employment practices (other than alleged Hatch Act violations); outline procedures to be followed by OSC when filers submit complaints (other than Hatch Act allegations) in formats other than an OSC complaint form; revise and update descriptions of information needed by OSC to process both complaints alleging Hatch Act violations and whistleblower disclosures; and update contact information for sending complaints and disclosures to OSC, and for obtaining OSC complaint and disclosure forms. DATES: This rule is effective on December 1, 2000.FOR FURTHER INFORMATION CONTACT: Kathryn Stackhouse, Attorney, Planning and Advice Division, by telephone at (202) 653-8971, or by fax at (202) 653-5161. Information on the rule is also available on OSC's Web site (at www.osc.gov).SUPPLEMENTARY INFORMATION:I. Rulemaking History On August 16, 2000, OSC published for comment a proposed rule revising agency regulations at 5 CFR part 1800. See 65 FR 49949. OSC issued the proposed rule pursuant to 5 U.S.C. 1212(e), which authorizes the Special Counsel to prescribe and publish such regulations as may be necessary to perform the functions of the office. A brief outline of the purposes for which OSC has revised part 1800 follows:(1) To provide basic information about OSC jurisdiction over complaints of improper employment practices and whistleblower disclosures. Sections 1800.1 and 1800.2 currently outline procedures for filing complaints and disclosures with OSC, with no reference to its basic jurisdiction. The revision of Part 1800 outlines matters within OSC's jurisdiction under each section as an aid to persons considering filing a complaint or disclosure.(2) To implement a requirement that complaint filers use an OSC complaint form to submit allegations of improper employment practices (other than alleged Hatch Act violations). Most complaints received by OSC consist of allegations of improper employment practices other than Hatch Act violations. Section 1800.1, at paragraphs (b)(1)-(6), currently outlines the types of information that should be provided in a complaint, and indicates that complaints can be submitted in any written format. Given this latitude, there have been considerable disparities in the way complaint information is presented to OSC. Mandatory use of the revised Form OSC-11, rather than any written format chosen by a complaint filer, will help: (a) Enable complainants to obtain useful information about OSC jurisdiction and

procedures before filing the complaint; (b) produce more complete and consistent presentations of facts needed by OSC to review, follow up on, and investigate complaints of improper employment practices; and (c) make more efficient use of OSC's limited resources, by reducing the time spent by staff in answering threshold questions about jurisdiction and procedures, and in soliciting basic information about allegations in complaints.(3) To outline procedures to be followed by OSC when filers submit complaints (other than Hatch Act allegations) in formats other than Form OSC- 11. Under the revision of 1800.1, if a person uses a format other than the required OSC form to file a complaint (other than a Hatch Act allegation), the material submitted will be returned to the filer with a blank Form OSC-11 to fill out and return to OSC. Processing of the complaint will begin upon OSC's receipt of the completed Form OSC-11.(4) To revise and update descriptions of information needed by OSC to process both complaints alleging Hatch Act violations and whistleblower disclosures. OSC will continue to permit filers of complaints alleging Hatch Act violations, and filers of whistleblower disclosures, to submit such matters to OSC in any written format, including OSC's complaint and disclosure forms (Forms OSC-11 and OSC-12, respectively). Sections 1800.1 and 1800.2 currently describe information needed by OSC to review and evaluate complaints and disclosures. The revision of 1800.1 tailors the description to Hatch Act allegations, for filers who submit them in formats other than an OSC complaint form. The revision of 1800.2 updates the description of information needed in whistleblower disclosures to OSC, for filers who submit them in a format other than the OSC disclosure form.(5) To update contact information for sending complaints and disclosures to OSC, and for obtaining OSC complaint and disclosure forms. Since OSC's current regulations were published, its mailing address for complaints and disclosures has changed, and a Web site, at which many OSC forms and publications are available to the public, has been established. The revision of 1800.1 and 1800.2 updates both sections with current mailing and Web site address information. Following OSC's publication of the notice of proposed rulemaking, the Office of Management and Budget (OMB) approved a revised complaint form (Form OSC-11), along with a revised form for whistleblower disclosures (Form OSC-12), as a collection of information (OMB Control No. 3255-0002) under the Paperwork Reduction Act. See 65 FR 41512 (July 5, 2000) for a description of the revisions to both forms. *64882 II. Summary of Comments The proposed rule provided a 60-day comment period, and invited comments from current and former Federal employees, employee representatives, other Federal agencies, and the general public. OSC also posted the notice of proposed rulemaking on its Web site. Timely comments were received from two sources, an individual and an executive branch agency. After carefully considering the comments and making appropriate modifications, OSC is publishing this final rule pursuant to 5 U.S.C. 1212(e).The individual respondent stated that making use of OSC's complaint form mandatory would further discourage federal employees from reporting unlawful and wasteful actions by federal agencies. He suggested that OSC could simply provide the form and the information requested to complainants, and request that

they respond. OSC has implemented a variant of this suggestion over the years--either accepting and acting on complaints in whatever form submitted, or offering persons who inquired the option of submitting their complaints on an OSC complaint form. As described in the notice of proposed rulemaking, this led to considerable disparities in the way complaint information was presented to OSC. In addition, due to a lack of awareness about or misunderstanding of its role and jurisdiction, OSC received many complaints about matters that it had no legal authority to pursue.OSC has concluded that mandatory use of its revised complaint form will be more efficient, effective, and useful, both for complaint filers and OSC. As outlined in the Rulemaking History section, above, mandatory use of the OSC form, rather than any written format chosen by a filer, will help: (a) Enable complainants to obtain useful information about OSC jurisdiction and procedures before filing a complaint (including information about matters outside OSC's jurisdiction, election of remedies, OSC deferral policies, legal elements required to establish reprisal for whistleblowing, and certain appeal rights to the Merit Systems Protection Board ("the Board"); (b) produce more complete and consistent presentations of facts needed by OSC to review, follow up on, and investigate complaints of improper employment practices; and (c) make more efficient use of OSC's limited resources, by reducing the time spent by staff in answering threshold questions about jurisdiction and procedures, and in soliciting basic information about allegations in complaints.The respondent's comment, however, led OSC to conclude that the final rule should state more clearly the procedures that OSC will follow when allegations are received in a format other than an OSC complaint form. Therefore, OSC is revising the final regulation, at 1800.1(f), to indicate that: (a) When allegations are received in a format other than an OSC complaint form, the material submitted will be returned to the filer with a blank Form OSC-11 to complete and return to OSC; and (b) the complaint will be considered to be filed on the date on which OSC receives the completed Form OSC-11.OSC anticipates that the return of allegations and supporting material may be required more frequently for some months after use of the complaint form becomes mandatory on December 1, 2000. After information about mandatory use of the Form OSC-11 becomes more widely known, however, OSC believes that this will occur less often. OSC also believes that, with increasing access to the Internet, its complaint form and information about its complaint procedures will be more readily available to potential filers. OSC's planned implementation of procedures permitting electronic filing of complaints by October 2003 will make that process even easier. OSC does not intend in any way to discourage federal employees from filing complaints, nor does OSC believe that this regulatory change will produce that result. Rather, OSC believes that this change will help employees make more informed decisions about whether and what to report to OSC, and will result in greater efficiencies in the complaint process. The second comment was received from an executive branch agency, which agreed with the proposal as written, and asked that OSC ensure that its complaint form comply with Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency). The executive order requires agencies to develop and begin

implementing a plan to improve access to federally conducted and federally assisted programs and activities, and to submit the plan to the Department of Justice by December 11, 2000. OSC is reviewing its programs and activities to identify those that may be subject to the executive order. Should compliance with the executive order entail any revision to the complaint form, OSC will proceed accordingly. Technical, non-substantive corrections have been made to the final version of 1800.1(e) (to correct a disagreement in the text of the proposed rule between plural and singular references to the OSC complaint form); 1800.1(g)(1) (to substitute "complaint(s)" for an erroneous reference to "disclosure(s)"); and to 1800.2(c)(2) (to conform the text more closely to that used in 1800.1(e)).III. Matters of Regulatory Procedure Procedural determinations were published in the notice of proposed rulemaking for the Regulatory Flexibility Act; the Paperwork Reduction Act; the Unfunded Mandates Reform Act; the National Environmental Policy Act; Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Property Rights); Executive Order 12866 (Regulatory Planning and Review); Executive Order 12988 (Civil Justice Reform); Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks); and Executive Order 13132 (Federalism). There have been no changes in these procedural determinations. List of Subjects in 5 CFR Part 1800Administrative practice and procedure, Government employees, Investigations, Law enforcement, Political activities (Government employees), Reporting and recordkeeping requirements, Whistleblowing. For the reasons set forth in the preamble, the Office of Special Counsel is amending title 5, chapter VIII, Part 1800 as follows: PART 1800—
FILING OF COMPLAINTS AND DISCLOSURES1. The authority citation for 5 CFR Part 1800 continues to read as follows: Authority: 5 U.S.C. 1212(e).2. Section 1800.1 is revised to read as follows: 1800.1 Filing complaints of prohibited personnel practices or other prohibited activities.(a) The Office of Special Counsel (OSC) has investigative jurisdiction over the following prohibited personnel practices against current or former Federal employees and applicants for Federal employment:(1) Discrimination, including discrimination based on marital status or political affiliation (see 1810.1 of this chapter for information about OSC's deferral policy);(2) Soliciting or considering improper recommendations or statements about individuals requesting, or under consideration for, personnel actions; *64883 (3) Coercing political activity, or engaging in reprisal for refusal to engage in political activity;(4) Deceiving or obstructing anyone with respect to competition for employment;(5) Influencing anyone to withdraw from competition to improve or injure the employment prospects of another;(6) Granting an unauthorized preference or advantage to improve or injure the employment prospects of another;(7) Nepotism;(8) Reprisal for whistleblowing (whistleblowing is generally defined as the disclosure of information about a Federal agency by an employee or applicant who reasonably believes that the information shows a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety);(9) Reprisal for:(i) Exercising certain appeal rights;(ii) Providing

testimony or other assistance to persons exercising appeal rights;(iii) Cooperating with the Special Counsel or an Inspector General; or(iv) Refusing to obey an order that would require the violation of law;(10) Discrimination based on personal conduct not adverse to job performance;(11) Violation of a veterans' preference requirement; and(12) Taking or failing to take a personnel action in violation of any law, rule, or regulation implementing or directly concerning merit system principles at 5 U.S.C. 2302(b)(1).(b) OSC also has investigative jurisdiction over allegations of the following prohibited activities:(1) Violation of the Federal Hatch Act at title 5 of the U.S. Code, chapter 73, subchapter III;(2) Violation of the state and local Hatch Act at title 5 of the U.S. Code, chapter 15;(3) Arbitrary and capricious withholding of information prohibited under the Freedom of Information Act at 5 U.S.C. 552 (except for certain foreign and counterintelligence information);(4) Activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking;(5) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action (unless the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure); and(6) Violation of uniformed services employment and reemployment rights under 38 U.S.C. 4301, et seq.(c) Complaints of prohibited personnel practices or other prohibited activities within OSC's investigative jurisdiction should be sent to: U.S. Office of Special Counsel, Complaints Examining Unit, 1730 M Street, NW, Suite 201, Washington, DC 20036-4505.(d) Complaints alleging a prohibited personnel practice, or a prohibited activity other than a Hatch Act violation, must be submitted on Form OSC-11 ("Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity").(1) The form includes a section (Part 2) that must be completed in connection with allegations of reprisal for whistleblowing, including identification of:(i) Each disclosure involved;(ii) The date of each disclosure;(iii) The person to whom each disclosure was made; and(iv) The type and date of any personnel action that occurred because of each disclosure.(2) If a complainant who has alleged reprisal for whistleblowing seeks to supplement a pending OSC complaint by reporting a new disclosure or personnel action, then, at OSC's discretion:(i) The complainant will be required to document the disclosure or personnel action in the Part 2 format, or(ii) OSC will document the disclosure or personnel action in the Part 2 format, a copy of which will be provided to the complainant upon OSC's closure of the complaint.(e) Form OSC-11 is available by writing to OSC at the address shown in paragraph (c) of this section; by calling OSC at (1) (800) 872-9855; or by printing the form from OSC's Web site (at http://www.osc.gov).(f) Except for complaints alleging only a Hatch Act violation, OSC will not process a complaint submitted in any format other than a completed Form OSC- 11. If a person uses a format other than the required OSC form to file a complaint (other than a Hatch Act allegation), the material received by OSC will be returned to the filer with a blank Form OSC-11 to complete and return to OSC. The complaint will be considered to be filed on the date on which OSC

receives the completed Form OSC-11.(g) Complaints alleging only a Hatch Act violation may be submitted in any written form to the address shown in paragraph (c) of this section, but should include:(1) The name, mailing address, and telephone number(s) of the complainant(s), and a time when the person(s) making the complaint(s) can be safely contacted, unless the matter is submitted anonymously;(2) The department or agency, location, and organizational unit complained of; and(3) A concise description of the actions complained about, names and positions of employees who took these actions, if known to the complainant, and dates, preferably in chronological order, together with any documentary evidence the complainant may have.3. Section 1800.2 is revised to read as follows: 1800.2 Filing disclosures of information.(a) OSC is authorized by law (at 5 U.S.C. 1213) to provide an independent and secure channel for use by current or former Federal employees and applicants for Federal employment in disclosing information that they reasonably believe shows wrongdoing by a Federal agency. The law requires OSC to determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. If so, OSC must refer the information to the agency head involved for investigation and a written report on the findings to the Special Counsel. The law does not give OSC jurisdiction to investigate the disclosure.(b) Employees, former employees, or applicants for employment wishing to file a whistleblower disclosure with OSC should send the information to: U.S. Office of Special Counsel, Disclosure Unit, 1730 M Street, NW, Suite 201, Washington, DC 20036-4505.(c) A disclosure of the type of information described in paragraph (a) of this section should be submitted in writing, using any of the following formats:(1) Filers may use Form OSC-12 ("Disclosure of Information"), which provides more information about OSC jurisdiction and procedures for processing whistleblower disclosures. This form is available from OSC by writing to the address shown in paragraph (b) of this section; by calling OSC at (1) (800) 572-2249; or by printing the form from OSC's Web site (at http://www.osc.gov).(2) Filers may use another written format, but the submission should include: *64884 (i) The name, mailing address, and telephone number(s) of the person(s) making the disclosure(s), and a time when that person(s) can be safely contacted by OSC;(ii) The department or agency, location and organizational unit complained of; and(iii) A statement as to whether the filer consents to the disclosure of his or her identity to the agency by OSC in connection with any referral to the appropriate agency.Dated: October 25, 2000.Elaine Kaplan,Special Counsel.

DEPARTMENT OF HOMELAND SECURITY
Office of the Secretary
6 CFR Part 29.Sec. 8 and 9
Title 6, Vol. 1 (Revised as of January 1, 2005)
Procedures for Handling Critical Infrastructure Information
Final Rule

PART 29--PROTECTED CRITICAL INFRASTRUCTURE INFORMATION—

Sec. 29.8 Disclosure of Protected Critical Infrastructure Information.

***

(f) Access by Congress and whistleblower protection. (1) Exceptions for disclosure.

(i) Pursuant to section 214(a)(1)(D) of the CII Act of 2002, Protected CII shall not, without the written consent of the person or entity submitting such information, be used or disclosed by any officer or employee of the United States for purposes other than the purposes of the CII Act of 2002, except--

(A) In furtherance of an investigation or the prosecution of a criminal act; or

(B) When disclosure of the information is made--

(1) To either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee thereof or subcommittee of any such joint committee; or

(2) To the Comptroller General, or any authorized representative of the Comptroller General, in the course of the performance of the duties of the General Accounting Office.

(ii) If any officer or employee of the United States makes any disclosure pursuant to these exceptions, contemporaneous written notification must be provided to the Department through the Protected CII Program Manager.

(2) Consistent with the authority to disclose information for any purpose described in Sec. 29.2, disclosure of Protected CII may be made, without the written consent of the person or entity submitting such information, to the DHS Inspector General, or to any other employee designated by the Secretary of Homeland Security.

(3) Subject to the limitations of title 5 U.S.C., section 1213 (the ``Whistleblower Protection Act''), disclosure of Protected CII may be made by any officer or employee of the United States who reasonably believes that such information:

(i) Evidences an employee's or agency's conduct in violation of criminal law, or any other law, rule, or regulation, affecting or relating to the protection of the critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, or reconstitution or

(ii) Evidences mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety affecting or relating to the protection of the critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, or reconstitution.

(4) Disclosures of all of the information cited in paragraphs (f)(1) through (3) of this section, including under paragraph (f)(1)(i)(A), are authorized by law and therefore are not subject to penalty under section 214(f) of the Homeland Security Act of 2002.

OFFICE OF PERSONNEL MANAGEMENT
Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002
5 CFR PART 724 (July 20, 2006)
Final Rule

PART 724—Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002

Subpart A—Reimbursement of Judgment Fund

Authority:
Sec. 204 of Pub. L. 107–174, 116 Stat. 566; Presidential Memorandum dated July 8, 2003, ''Delegation of Authority Under Section 204(a) of the Notification and Federal employee antidiscrimination Act of 2002.''

Subpart A—Reimbursement of Judgment Fund

§ 724.101 Purpose and scope.
This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of Federal agencies to reimburse the Judgment Fund for payments. The regulations describe agency obligations and the procedures for reimbursement and compliance.

§ 724.102 Definitions.
In this part:
Agency means an Executive agency as defined in 5 U.S.C. 105, the United States Postal Service, or the Postal Rate Commission;
Applicant for Federal employment means an individual applying for employment in or under a Federal agency;
Employee means an individual employed in or under a Federal agency;
Former Employee means an individual formerly employed in or under a Federal agency;
Judgment Fund means the Judgment Fund established by 31 U.S.C. 1304;
No FEAR Act means the ''Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002;''

Payment, subject to the following exception, means a disbursement from the Judgment Fund on or after October 1, 2003, to an employee, former employee, or applicant for Federal employment, in accordance with 28 U.S.C. 2414, 2517, 2672, 2677 or with 31 U.S.C. 1304, that involves alleged discriminatory or retaliatory conduct described in 5 U.S.C. 2302(b)(1) and (b)(8) or (b)(9) as applied to conduct described in 5 U.S.C. 2302(b)(1) and/or (b)(8) or conduct described in 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791 and 42 U.S.C. 2000e-16. For a proceeding involving more than one disbursement from the Judgment Fund, however, this term shall apply only if the first disbursement occurred on or after October 1, 2003.

§ 724.103 Agency obligations.
A Federal agency (or its successor agency) must reimburse the Judgment Fund for payments covered by the No FEAR Act. Such reimbursement must be made within a reasonable time as described in § 724.104.

§ 724.104 Procedures.
(a) The procedures that agencies must use to reimburse the Judgment Fund are those prescribed by the Financial Management Service (FMS), the Department of the Treasury, in Chapter 3100 of the Treasury Financial Manual. All reimbursements to the Judgment Fund covered by the No FEAR Act are expected to be fully collectible from the agency. FMS will provide written notice to the agency's Chief Financial Officer within 15 business days after payment from the Judgment Fund.
(b) Within 45 business days of receiving the FMS notice, agencies must reimburse the Judgment Fund or contact FMS to make arrangements in writing for reimbursement.

§ 724.105 Compliance.
An agency's failure to reimburse the Judgment Fund, to contact FMS within 45 business days after receipt of an FMS notice for reimbursement under§ 724.104 will be recorded on an annual basis and posted on the FMS Web site. After an agency meets the requirements of § 724.104, the recording will be eliminated no later than the next annual posting process.

§ 724.106 Effective date.
This subpart is effective on October 1, 2003.

OFFICE OF SPECIAL COUNSEL
5 CFR Part 1800
Revision of Regulations To Describe Filing Requirements and Options, Including
Electronic Filing
68 Federal Register 66695-01 (November 28, 2003)
Final rule

PART 1800-FILING OF COMPLAINTS AND ALLEGATIONS

1. The authority citation for Part 1800 continues to read as follows:
Authority: 5 U.S.C. 1212(e). 2. Section 1800.1 is revised to read as follows: § 1800.1 Filing complaints of prohibited personnel practices or other prohibited activities.
(a) Prohibited personnel practices. The Office of Special Counsel (OSC) has investigative jurisdiction over the following prohibited personnel practices committed against current or former Federal employees and applicants for Federal employment:(1) Discrimination, including discrimination based on marital status or political affiliation (see § 1810.1 of this chapter for information about OSC's deferral policy);
(2) Soliciting or considering improper recommendations or statements about individuals requesting, or under consideration for, personnel actions;
(3) Coercing political activity, or engaging in reprisal for refusal to engage in political activity;
(4) Deceiving or obstructing anyone with respect to competition for employment;
(5) Influencing anyone to withdraw from competition to improve or injure the employment prospects of another;
(6) Granting an unauthorized preference or advantage to improve or injure the employment prospects of another;
(7) Nepotism;
(8) Reprisal for whistleblowing (whistleblowing is generally defined as the disclosure of information about a Federal agency by an employee or applicant who reasonably believes that the information shows a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety);
(9) Reprisal for:
(i) Exercising certain appeal rights;
(ii) Providing testimony or other assistance to persons exercising appeal rights;
(iii) Cooperating with the Special Counsel or an Inspector General; or
(iv) Refusing to obey an order that would require the violation of law;
(10) Discrimination based on personal conduct not adverse to job performance;
(11) Violation of a veterans' preference requirement; and
(12) Taking or failing to take a personnel action in violation of any law, rule, or regulation implementing or directly concerning merit system principles at 5 U.S.C. 2301(b).

(b) Other prohibited activities. OSC also has investigative jurisdiction over allegations of the following prohibited activities:
(1) Violation of the Federal Hatch Act at title 5 of the U.S. Code, chapter 73, subchapter III;
(2) Violation of the state and local Hatch Act at title 5 of the U.S. Code, chapter 15;
(3) Arbitrary and capricious withholding of information prohibited under the Freedom of Information Act at YPERLINK "_top" 5 U.S.C. 552 (except for certain foreign and counterintelligence information);
(4) Activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking;
(5) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action (unless the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure); and
(6) Violation of uniformed services employment and reemployment rights under 38 U.S.C. 4301, et seq.
(c) Procedures for filing complaints alleging prohibited personnel practices or other prohibited activities (other than the Hatch Act).
(1) Current or former Federal employees, and applicants for Federal employment, may file a complaint with OSC alleging one or more prohibited personnel practices, or other prohibited activities within OSC's investigative jurisdiction. Form OSC-11 ("Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity") must be used to file all such complaints (except those limited to an allegation or allegations of a Hatch Act violation - see paragraph (d) of this section for information on filing Hatch Act complaints).
(2) Part 2 of Form OSC-11 must be completed in connection with allegations of reprisal for whistleblowing, including identification of:
(i) Each disclosure involved;
(ii) The date of each disclosure;
(iii) The person to whom each disclosure was made; and
(iv) The type and date of any personnel action that occurred because of each disclosure.
(3) Except for complaints limited to alleged violation(s) of the Hatch Act, OSC will not process a complaint filed in any format other than a completed Form OSC-11. If a filer does not use Form OSC-11 to submit a complaint, OSC will provide the filer with information about the form. The complaint will be considered to be filed on the date on which OSC receives a completed Form OSC-11.
(4) Form OSC-11 is available:
(i) By writing to OSC, at: Office of Special Counsel, Complaints Examining Unit, 1730 M Street NW., Suite 218, Washington, DC 20036-4505;
(ii) By calling OSC, at: (800) 872-9855 (toll-free), or (202) 653-7188 (in the Washington, DC area); or
(iii) Online, at: http://www.osc.gov (to print out and complete on paper, or to complete online).

(5) A complainant can file a completed Form OSC-11 with OSC by any of the following methods:
(i) By mail, to: Office of Special Counsel, Complaints Examining Unit, 1730 M Street NW., Suite 218, Washington, DC 20036-4505;
(ii) By fax, to: (202) 653-5151; or
(iii) Electronically, at: http://www.osc.gov.
(d) Procedures for filing complaints alleging violation of the Hatch Act.
(1) Complaints alleging a violation of the Hatch Act may be submitted in any written form, but should include:
(i) The complainant's name, mailing address, telephone number, and a time when OSC can contact that person about his or her complaint (unless the matter is submitted anonymously);
(ii) The department or agency, location, and organizational unit complained of; and
(iii) A concise description of the actions complained about, names and positions of employees who took the actions, if known to the complainant, and dates of the actions, preferably in chronological order, together with any documentary evidence that the complainant can provide.(2) A written Hatch Act complaint can be filed with OSC by any of the methods listed in paragraph (c)(5)(i)-(iii) of this section.
3. Section 1800.2 is revised to read as follows:
§ 1800.2 Filing disclosures of information.
(a) General. OSC is authorized by law (at 5 U.S.C. 1213) to provide an independent and secure channel for use by current or former Federal employees and applicants for Federal employment in disclosing information that they reasonably believe shows wrongdoing by a Federal agency. OSC must determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. If it does, the law requires OSC to refer the information to the agency head involved for investigation and a written report on the findings to the Special Counsel. The law *66697 does not authorize OSC to investigate the subject of a disclosure.
(b) Procedures for filing disclosures. Current or former Federal employees, and applicants for Federal employment, may file a disclosure of the type of information described in paragraph (a) of this section with OSC. Such disclosures must be filed in writing (including electronically - see paragraph (b)(3)(iii) of this section).
(1) Filers are encouraged to use Form OSC-12 ("Disclosure of Information") to file a disclosure of the type of information described in paragraph (a) of this section with OSC. This form provides more information about OSC jurisdiction, and procedures for processing whistleblower disclosures. Form OSC-12 is available:
(i) By writing to OSC, at: Office of Special Counsel, Disclosure Unit, 1730 M Street NW., Suite 218, Washington, DC 20036-4505;
(ii) By calling OSC, at: (800) 572-2249 (toll-free), or (202) 653-9125 (in the Washington, DC area); or(iii) Online, at: http://www.osc.gov (to print out and complete on paper, or to complete online).
(2) Filers may use another written format to submit a disclosure to OSC, but the submission should include:

(i) The name, mailing address, and telephone number(s) of the person(s) making the disclosure(s), and a time when OSC can contact that person about his or her disclosure;
(ii) The department or agency, location and organizational unit complained of; and
(iii) A statement as to whether the filer consents to disclosure of his or her identity by OSC to the agency involved, in connection with any OSC referral to that agency.
(3) A disclosure can be filed in writing with OSC by any of the following methods:
(i) By mail, to: Office of Special Counsel, Disclosure Unit, 1730 M Street NW., Suite 218, Washington, DC 20036-4505;
(ii) By fax, to: (202) 653-5151; or
(iii) Electronically, at: http://www.osc.gov.
4. Section 1800.3 is revised to read as follows:
§ 1800.3 Advisory opinions.
The Special Counsel is authorized to issue advisory opinions only about political activity of state or local officers and employees (under title 5 of the United States Code, at chapter 15), and political activity of Federal officers and employees (under title 5 of the United States Code, at chapter 73, subchapter III). A person can seek an advisory opinion from OSC by any of the following methods:
(a) By phone, at: (800) 854-2824 (toll-free), or (202) 653-7143 (in the Washington, DC area);
(b) By mail, to: Office of Special Counsel, Hatch Act Unit, 1730 M Street NW., Suite 218, Washington, DC 20036-4505;
(c) By fax, to: (202) 653-5151; or
(d) By e-mail, to: hatchact@osc.gov.

SECTION 10
WORKPLACE DISCRIMINATION

Age Discrimination in Employment Act,
Nonretaliation Provision
29 U.S.C. § 623(d)

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Americans With Disabilities Act
42 U.S.C. § 12203

(a) *Retaliation*. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
(b) *Interference, coercion, or intimidation.* It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.
(c) *Remedies and procedures*. The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

Civil Rights Act 1964, Title VII,
42 U.S.C. § 2000e-3(a)

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on the job training programs, to discriminate against any individual or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he

has made a charge, testified, assisted or participate in any manor in an investigation, proceeding, or hearing under this subchapter.

Civil Rights Act of 1871
Conspiracy to interfere with civil rights
42 U.S.C. § 1985(3)

(3) * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Family and Medical Leave Act
29 U.S.C. §§ 2615(a) and (b), and 2617

(a) *Interference with rights*.
(1) *Exercise of rights*. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.
(2) *Discrimination*. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.
(b) *Interference with proceedings or inquiries*. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—
(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;
(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or
(3) has testified, or is about to testify, in any inquiry or
proceeding relating to any right provided under this subchapter.
§ 2617. Enforcement
(a) *Civil action by employees*.
(1) *Liability*. Any employer who violates section 2615 of this title shall be liable to any eligible employee affected.
(A) for damages equal to—
(i) the amount of—
(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;
(ii) the interest on the amount described in clause (i) calculated at the

prevailing rate; and
(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and
(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.
(2) *Right of action*. An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—
(A) the employees; or
(B) the employees and other employees similarly situated.
(3) *Fees and costs*. The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.
(4) *Limitations*. The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate—
(A) on the filing of a complaint by the Secretary in an action under subsection (d) of this section in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or
(B) on the filing of a complaint by the Secretary in an action under subsection (b) of this section in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1), unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.
(b) *Action by Secretary.*
(1) *Administrative action*. The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title.
(2) *Civil action*. The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A) of this section.
(3) *Sums recovered*. Sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) *Limitation.*
(1) In general Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.
(2) *Willful violation*. In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.
(3) *Commencement*. In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.
(d) *Action for injunction by Secretary*. The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary—
(1) to restrain violations of section 2615 of this title, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or
(2) to award such other equitable relief as may be appropriate,
including employment, reinstatement, and promotion.
(e) *Solicitor of Labor*. The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.
(f) *General Accounting Office and Library of Congress*. In the case of the General Accounting Office and the Library of Congress, the authority of the Secretary of Labor under this subchapter shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

SECTION 11
LABOR RIGHTS

Employee Retirement Income Security Act
Interference with protected rights
29 U.S.C. § 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. In the case of a multiemployer plan, it shall be unlawful for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under this Act or for giving information or testifying in any inquiry or proceeding relating to this Act before Congress. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Fair Labor Standards Act/
Equal Pay Act
Nonretaliation Provision
29 U.S.C. § 215(a)(3)

(a)After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person— * * *
(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Fair Labor Standards Act/
Equal Pay Act
Penalties and Damages
29 U.S.C. § 216

(a) Fines and imprisonment
Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action * * * *
Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

Fair Labor Standards Act/
Equal Pay Act
Statute of limitations
29 U.S.C. § 255.

Any action commenced * * * to enforce any cause of action * * * under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.] * * * may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued * * *

Job Training and Partnership Act,
Nonretaliation Provision
29 U.S.C. § 1574(g)

(g) *Secretary's action against harassment of complainants.* If the Secretary determines that any recipient under this chapter has discharged or in any other manner discriminated against a participant or against any individual in connection with the administration of the program involved, or against any individual because such individual has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or investigation under or related to this chapter, or otherwise unlawfully denied to any individual a benefit to which that individual is entitled under the provisions of this chapter or the Secretary's regulations, the Secretary shall, within thirty days, take such action or order such corrective measures, as necessary, with respect to the recipient or the aggrieved individual, or both.

Longshore and Harbor Workers' Compensation Act
Discrimination against employees who bring proceedings
33 U.S.C. § 948a

It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. The discharge or refusal to employ a person who has been adjudicated to have filed a fraudulent claim for compensation is not a violation of this section. Any employer who violates this section shall be liable to a penalty of not less than $1,000 or more than $5,000, as may be determined by the deputy commissioner. All such penalties shall be paid to the deputy commissioner for deposit in the special fund as described in section 944 of this title, and if not paid may be recovered in a civil action brought in the appropriate United States district court. Any employee so discriminated against shall be restored to his employment and shall be

compensated by his employer for any loss of wages arising out of such discrimination: Provided, that if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation. The employer alone and not his carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from the liability for such penalties and payments shall be void.

Migrant and Seasonal Agricultural Workers Protection Act, Nonretaliation Provision
29 U.S.C. § 1855

(a) Prohibited activities. No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this chapter.
(b) Proceedings for redress of violations. A migrant or seasonal agricultural worker who believes, with just cause, that he has been discriminated against by any person in violation of this section may, within 180 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this section have been violated, the Secretary shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown, to restrain violation of subsection (a) of this section and order all appropriate relief, including rehiring or reinstatement of the worker, with back pay, or damages.

National Labor Relations Act,
Nonretaliation Provision, Unfair labor practices
29 U.S.C. § 158(a)(4)

(a) *Unfair labor practices by employer.* It shall be an unfair labor practice for an employer—
(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.

Employee Polygraph Protection,
Employee Protection Provision
29 U.S.C. § 2002

Except as provided in sections 2006 and 2007 of this title, it shall be unlawful for any employer engaged in or affecting commerce or in the production of goods for commerce—
(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;
(2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;
(3) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against—
(A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test, or
(B) any employee or prospective employee on the basis of the results of any lie detector test; or
(4) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against, any employee or prospective employee because—
(A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter,
(B) such employee or prospective employee has testified or is about to testify in any such proceeding, or
(C) of the exercise by such employee or prospective employee, on behalf of such employee or another person, of any right afforded by this chapter.

SECTION 12
MILITARY WHISTLEBLOWER PROTECTION

Military Law–Armed Forces/ Protected Communications; prohibition of retaliatory personnel actions
10 U.S.C. § 1034

(a) Restricting Communications With Members of Congress and Inspector General Prohibited.
(1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.
(2) Paragraph (1) does not apply to a communication that is unlawful.
(b) Prohibition of Retaliatory Personnel Actions.
(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing
(A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or
(B) a communication that is described in subsection and that is made (or prepared to be made) to -
(i) a Member of Congress;
(ii) an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;
(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; or
(iv) any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications.
(2) Any action prohibited by paragraph (1) (including the threat to take any action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.
(c) Inspector General Investigation of Allegations of Prohibited Personnel Actions.
(1) If a member of the armed forces submits to an Inspector General an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall take the action required under paragraph (3).
(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:
(A) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.
(B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
(3)(A) An Inspector General receiving an allegation as described in paragraph (1) shall expeditiously determine whether there is sufficient evidence to warrant an investigation of the allegation.

(B) If the Inspector General receiving such an allegation is an Inspector General within a military department, that Inspector General shall promptly notify the Inspector General of the Department of Defense of the allegation. Such notification shall be made in accordance with regulations prescribed under subsection (h).
(C) If an allegation under paragraph (1) is submitted to an Inspector General within a military department and if the determination of that Inspector General under subparagraph (A) is that there is not sufficient evidence to warrant an investigation of the allegation, that Inspector General shall forward the matter to the Inspector General of the Department of Defense for review.
(D) Upon determining that an investigation of an allegation under paragraph (1) is warranted, the Inspector General making the determination shall expeditiously investigate the allegation. In the case of a determination made by the Inspector General of the Department of Defense, that Inspector General may delegate responsibility for the investigation to an appropriate Inspector General within a military department.
(E) In the case of an investigation under subparagraph (D) within the Department of Defense, the results of the investigation shall be determined by, or approved by, the Inspector General of the Department of Defense (regardless of whether the investigation itself is conducted by the Inspector General of the Department of Defense or by an Inspector General within a military department).
(4) Neither an initial determination under paragraph (3)(A) nor an investigation under paragraph (3)(D) is required in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.
(5) The Inspector General of the Department of Defense, or the Inspector General of the Department of Homeland Security (in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy), shall ensure that the Inspector General conducting the investigation of an allegation under this subsection is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.
(d) Inspector General Investigation of Underlying Allegations.
Upon receiving an allegation under subsection (c), the Inspector General receiving the allegation shall conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing (as described in subparagraph (A) or (B) of subsection (c)(2)) if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate. In the case of an allegation received by the Inspector General of the Department of Defense, the Inspector General may delegate that responsibility to the Inspector General of the armed force concerned.

(e) Reports on Investigations.
(1) After completion of an investigation under subsection (c) or (d) or, in

the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(3)(E), the Inspector General conducting the investigation shall submit a report on the results of the investigation to the Secretary of Defense (or to the Secretary of Homeland Security in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and shall transmit a copy of the report on the results of the investigation to the member of the armed forces who made the allegation investigated. The report shall be transmitted to the Secretary, and the copy of the report shall be transmitted to the member, not later than 30 days after the completion of the investigation or, in the case of an investigation under subsection (c) by an Inspector General within a military department, after approval of the report of that investigation under subsection (c)(3)(E).

(2) In the copy of the report transmitted to the member, the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under section 552 of title 5. However, the copy need not include summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member.

(3) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (1) within 180 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense (or to the Secretary of Homeland Security in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice -

(A) of that determination (including the reasons why the report may not be submitted within that time); and

(B) of the time when the report will be submitted.

(4) The report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.

(f) Correction of Records When Prohibited Action Taken.

(1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.

(2) In resolving an application described in paragraph (1), a correction board -

(A) shall review the report of the Inspector General submitted under

subsection (e)(1);
(B) may request the Inspector General to gather further evidence; and
C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.
(3) If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1) -
(A) may be provided with representation by a judge advocate if -
(i) the Inspector General, in the report under subsection (e)(1), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);
(ii) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and
(iii) the member is not represented by outside counsel chosen by the member; and
(B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (e)(1).
(4) The Secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.
(5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).
(6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.
(g) Review by Secretary of Defense.
Upon the completion of all administrative review under subsection (f), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

(h) Regulations.
The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations to carry out this section.
(i) Definitions.
In this section:

(1) The term "Member of Congress" includes any Delegate or Resident Commissioner to Congress.
(2) The term "Inspector General" means the following:
(A) The Inspector General of the Department of Defense.
(B) The Inspector General of the Department of Homeland Security, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy.
(C) The Inspector General of the Army, in the case of a member of the Army.
(D) The Naval Inspector General, in the case of a member of the Navy.
(E) The Inspector General of the Air Force, in the case of a member of the Air Force.
(F) The Deputy Naval Inspector General for Marine Corps Matters, in the case of a member of the Marine Corps.
(G) An officer of the armed forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the armed forces.
(3) The term "unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin.

Military Law—Procurement/ Contractor Employees: protection from reprisal for disclosure of certain information
10 U.S.C. § 2409

(a) Prohibition of reprisals.
An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).
(b) Investigation of complaints.
A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of an agency. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.
(c) Remedy and enforcement authority.
(1) If the head of the agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a), the head of the agency may take one or more of the following actions:
(A) Order the contractor to take affirmative action to abate the reprisal.
(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
(C) Order the contractor to pay the complainant an amount equal to the

aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(2) Whenever a person fails to comply with an order issued under paragraph (1), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(3) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5.

(d) Construction.

Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(e) Definitions.

In this section:

(1) The term "agency" means an agency named in section 2303 of this title.

(2) The term "head of an agency" has the meaning provided by section 2302(1) of this title.

(3) The term "contract" means a contract awarded by the head of an agency.

(4) The term "contractor" means a person awarded a contract with an agency.

(5) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978.

SECTION 13
IRS/TAX RULE APPLICABLE TO WHISTLEBLOWER REWARDS AND TAXATION OF DAMAGES

IRS PAYMENT FOR DETECTION OF FRAUD

26 U.S.C.A. § 7623 (to be newly codified, effective December 20, 2006)
Expenses of detection of underpayments and fraud, etc.
(Incorporating the amendments contained in Section 406 of the Tax Relief Act of 2006, H.R. 611, enacted into law in 2006)

(a) In General –The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for–
(1) detecting underpayments of tax, or
(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.
(b) Awards to Whistleblowers-
(1) IN GENERAL- If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action. The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.
(2) AWARD IN CASE OF LESS SUBSTANTIAL CONTRIBUTION-
(A) IN GENERAL- In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action, taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.
(B) NONAPPLICATION OF PARAGRAPH WHERE INDIVIDUAL IS ORIGINAL SOURCE OF INFORMATION- Subparagraph (A) shall not

apply if the information resulting in the initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1).
(3) REDUCTION IN OR DENIAL OF AWARD- If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.
(4) APPEAL OF AWARD DETERMINATION- Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).
(5) APPLICATION OF THIS SUBSECTION- This subsection shall apply with respect to any action--
(A) against any taxpayer, but in the case of any individual, only if such individual's gross income exceeds $200,000 for any taxable year subject to such action, and
(B) if the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000.
(6) ADDITIONAL RULES-
(A) NO CONTRACT NECESSARY- No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection.
(B) REPRESENTATION- Any individual described in paragraph (1) or (2) may be represented by counsel.
(C) SUBMISSION OF INFORMATION- No award may be made under this subsection based on information submitted to the Secretary unless such information is submitted under penalty of perjury.'.
(2) ASSIGNMENT TO SPECIAL TRIAL JUDGES-
(A) IN GENERAL- Section 7443A(b) (relating to proceedings which may be assigned to special trial judges) is amended by striking `and' at the end of paragraph (5), by redesignating paragraph (6) as paragraph (7), and by inserting after paragraph (5) the following new paragraph:
(6) any proceeding under section 7623(b)(4), and'.
(B) CONFORMING AMENDMENT- Section 7443A(c) is amended by striking `or (5)' and inserting `(5), or (6)'.
(3) DEDUCTION ALLOWED WHETHER OR NOT TAXPAYER ITEMIZES- Subsection (a) of section 62 (relating to general rule defining adjusted gross income) is amended by inserting after paragraph (20) the following new paragraph:
(21) ATTORNEYS FEES RELATING TO AWARDS TO WHISTLEBLOWERS- Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any award under section 7623(b) (relating to awards to whistleblowers). The preceding sentence shall not apply to any deduction in excess of the amount includible in the taxpayer's gross income for the taxable year on account of such award.'.

(b) Whistleblower Office-
(1) IN GENERAL- Not later than the date which is 12 months after the date of the enactment of this Act, the Secretary of the Treasury shall issue guidance for the operation of a whistleblower program to be administered in the Internal Revenue Service by an office to be known as the `Whistleblower Office' which--
(A) shall at all times operate at the direction of the Commissioner of Internal Revenue and coordinate and consult with other divisions in the Internal Revenue Service as directed by the Commissioner of Internal Revenue,
(B) shall analyze information received from any individual described in section 7623(b) of the Internal Revenue Code of 1986 and either investigate the matter itself or assign it to the appropriate Internal Revenue Service office, and
(C) in its sole discretion, may ask for additional assistance from such individual or any legal representative of such individual.
(2) REQUEST FOR ASSISTANCE- The guidance issued under paragraph (1) shall specify that any assistance requested under paragraph (1)(C) shall be under the direction and control of the Whistleblower Office or the office assigned to investigate the matter under paragraph (1)(A). No individual or legal representative whose assistance is so requested may by reason of such request represent himself or herself as an employee of the Federal Government.
(c) Report by Secretary- The Secretary of the Treasury shall each year conduct a study and report to Congress on the use of section 7623 of the Internal Revenue Code of 1986, including--
(1) an analysis of the use of such section during the preceding year and the results of such use, and
(2) any legislative or administrative recommendations regarding the provisions of such section and its application.
(d) Effective Date- The amendments made by subsection (a) shall apply to information provided on or after the date of the enactment of this Act.

REWARDS FOR INFORMATION RELATING TO VIOLATION OF INTERNAL REVENUE LAWS.
26 CFR Part 7623-1
(This does not incorporate the 2006 amendments to section 7623)

Sec. 301.7623-1 Rewards for information relating to violations of internal revenue laws.
(a) In general. In cases where rewards are not otherwise provided for by law, a district or service center director may approve a reward, in a suitable amount, for information that leads to the detection of under payments of tax, or the detection and bringing to trial and punishment of persons guilty of violating the internal revenue laws or conniving at the same. The rewards provided for by section 7623 and this section will be paid from the proceeds of amounts (other than interest) collected by reason of the information provided. For purposes of section 7623 and this section, proceeds of

amounts (other than interest) collected by reason of the information provided include both additional amounts collected because of the information provided and amounts collected prior to receipt of the information if the information leads to the denial of a claim for refund that otherwise would have been paid.

(b) Eligibility to file claim for reward--(1) In general. Any person, other than certain present or former federal employees described in paragraph (b)(2) of this section, that submits, in the manner described in paragraph (d) of this section, information relating to the violation of an internal revenue law is eligible to file a claim for reward under section 7623 and this section.

(2) Federal employees. No person who was an officer or employee of the Department of the Treasury at the time the individual came into possession of information relating to violations of the internal revenue laws, or at the time the individual divulged such information, is eligible for a reward under section 7623 and this section. Any other current or former federal employee is eligible to file a claim for reward if the information provided came to the individual's knowledge other than in the course of the individual's official duties.

(3) Deceased informants. A claim for reward may be filed by an executor, administrator, or other legal representative on behalf of a deceased informant if, prior to the informant's death, the informant was eligible to file a claim for such reward under section 7623 and this section. Certified copies of the letters testamentary, letters of administration, or other similar evidence must be attached to the claim for reward on behalf of a deceased informant in order to show the authority of the legal representative to file the claim.

(c) Amount and payment of reward. All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, will be taken into account by a district or service center director in determining whether a reward will be paid, and, if so, the amount of the reward. The amount of a reward will represent what the district or service center director deems to be adequate compensation in the particular case, generally not to exceed fifteen percent of the amounts (other than interest) collected by reason of the information. Payment of a reward will be made as promptly as the circumstances of the case permit, but not until the taxes, penalties, or fines involved have been collected. However, if the informant waives any claim for reward with respect to an uncollected portion of the taxes, penalties, or fines involved, the claim may be immediately processed. Partial reward payments, without waiver of the uncollected portion of the taxes, penalties, or fines involved, may be made when a criminal fine has been collected prior to completion of the civil aspects of a case, and also when there are multiple tax years involved and the deficiency for one or more of the years has been paid in full. No person is authorized under this section to make any offer, or promise, or otherwise to bind a district or service center director with respect to the payment of any reward or the amount of the reward.

(d) Submission of information. A person that desires to claim a reward under section 7623 and this section may submit information relating to violations of the internal revenue laws, in person, to the office of a district

director, preferably to a representative of the Criminal Investigation Division. Such information may also be submitted in writing to the Commissioner of Internal Revenue, Attention: Assistant Commissioner (Criminal Investigation), 1111 Constitution Avenue, NW., Washington, DC 20224, to any district director, Attention: Chief, Criminal Investigation Division, or to any service center director. If the information is submitted in person, either orally or in writing, the name and official title of the person to whom it is submitted and the date on which it is submitted must be included in the formal claim for reward.

(e) Identification of informant. No unauthorized person will be advised of the identity of an informant.

(f) Filing claim for reward. An informant that intends to claim a reward under section 7623 and this section should notify the person to whom the information is submitted of such intention, and must file a formal claim on Form 211, Application for Reward for Original Information, signed by the informant in the informant's true name, as soon as practicable after the submission of the information. If other than the informant's true name was used in furnishing the information, satisfactory proof of identity as that of the informant must be included with the claim for reward.

(g) Effective date. This section is applicable with respect to rewards paid after January 29, 1997.

CIVIL RIGHTS TAX RELIEF
26 USCA § 62 (a) (20) and (e)

(a) DEDUCTION ALLOWED WHETHER OR NOT TAXPAYER ITEMIZES OTHER DEDUCTIONS- Subsection (a) of section 62 (defining adjusted gross income) is amended by inserting after paragraph (18) the following new item:

(19) COSTS INVOLVING DISCRIMINATION SUITS, ETC- Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination (as defined in subsection (e)) or a claim of a violation of subchapter III of chapter 37 of title 31, United States Code or a claim made under section 1862(b)(3)(A) of the Social Security Act (42 U.S.C. 1395y(b)(3)(A)). The preceding sentence shall not apply to any deduction in excess of the amount includible in the taxpayer's gross income for the taxable year on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) resulting from such claim.'.

(b) UNLAWFUL DISCRIMINATION DEFINED- Section 62 is amended by adding at the end the following new subsection:

(e) UNLAWFUL DISCRIMINATION DEFINED- For purposes of subsection (a)(19), the term `unlawful discrimination' means an act that is unlawful under any of the following:

(1) Section 302 of the Civil Rights Act of 1991 (2 U.S.C. 1202).

(2) Section 201, 202, 203, 204, 205, 206, or 207 of the Congressional Accountability Act of 1995 (2 U.S.C. 1311, 1312, 1313, 1314, 1315, 1316, or 1317).

(3) The National Labor Relations Act (29 U.S.C. 151 et seq.).
(4) The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).
(5) Section 4 or 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623 or 633a).
(6) Section 501 or 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791 or 794).
(7) Section 510 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1140).
(8) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 etseq.).
(9) The Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 et seq.).
(10) The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2102 et seq.).
(11) Section 105 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2615).
(12) Chapter 43 of title 38, United States Code (relating to employment and reemployment rights of members of the uniformed services).
(13) Section 1977, 1979, or 1980 of the Revised Statutes (42 U.S.C. 1981, 1983, or 1985).
(14) Section 703, 704, or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2, 2000e-3, or 2000e-16).
(15) Section 804, 805, 806, 808, or 818 of the Fair Housing Act (42 U.S.C. 3604, 3605, 3606, 3608, or 3617).
(16) Section 102, 202, 302, or 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112, 12132, 12182, or 12203).
(17) Any provision of Federal law (popularly known as whistleblower protection provisions) prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted under Federal law.
(18) Any provision of Federal, State, or local law, or common law claims permitted under Federal, State, or local law--
(i) providing for the enforcement of civil rights, or
(ii) regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law.'.
(c) EFFECTIVE DATE- The amendments made by this section shall apply to fees and costs paid after the date of the enactment of this Act with respect to any judgment or settlement occurring after such date.

ANNUITY/DEFERRED COMPENSATION PAYMENTS

Internal Revenue Service (I.R.S.)
Field Service Advisory
Issue: December 21, 2001
July 5, 2001
Section 451—General Rule for Taxable Year of Inclusion (Year Received v. Not Year Received)451.00-00 General Rule for Taxable Year of Inclusion (Year Received v. Not Year Received)
MEMORANDUM FOR AREA COUNSEL, SAN JOSE, CALIFORNIAFROM: Associate Chief Counsel CC:ITASUBJECT: Constructive Receipt

* * *

Constructive ReceiptIncome although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. Treas. Reg. § 1.451- 2(a)**.**Thus, taxable income of a cash basis taxpayer is money or other property that is subject to taxpayer's unfettered will and control; that the taxpayer is free to enjoy at his own option; that exists and is available to taxpayer; and that except for taxpayer's own volition, can immediately be reduced to his possession. The doctrine prevents a taxpayer from deferring income when earlier receipt is prevented solely by taxpayer's own will. Gertzman, supra at 3-22. On the other hand, where attorneys entered into a structured settlement which called for deferred payments of their fee, and the settlement was entered into prior to obtaining an unconditional right to compensation for their legal services, the court held that they had not constructively received income upon the purchase of the annuity contracts meant to provide payment for the legal services fee. Childs v. Commissioner, 103 T.C. 634 (1994);1959;1959. See also Reed v. Commissioner, 723 F.2d 138 (1st Cir. (1983) (Sale proceeds deposited into escrow account; seller did not constructively receive income where the account set up by agreement between parties entered into before seller had any right to the funds; and seller was not entitled to any economic benefits prior to scheduled disbursement.)These cases demonstrate that if the income is not unqualifiedly subject to the taxpayer's demand, it has not been constructively received. Furthermore, with respect to the issue of restrictions or limitations, precluding taxpayer from obtaining income through his own free will, any restriction or limitation must exist prior to the time the right to receive the income occurs. Courts have identified numerous factors that must be evaluated to determine whether any restrictions or limitations preclude application of the constructive receipt doctrine. Such factors include: consistent policies of the obligor, Lacy Contracting Co. v. Commissioner, 56 T.C. 464 (1971), oral or informal understandings among the parties concerning under what circumstances amounts due a taxpayer may be withdrawn or received, Evans v.

Commissioner, 55 T.C.M. 902 (1988), and the fact that the consent of another is required before a taxpayer may obtain funds. Wolder v. Commissioner, 493 F.2d 608 (2d Cir. 1974), cert.denied, 419 U.S. 828 (1974). Where a countersignature is required to obtain funds, the courts do not find constructive receipt, even where the taxpayer is the majority stockholder and could have exercised such power to obtain the funds. Evans, supra; Gertzman, supra at 3-23 to 3-25.Lastly, constructive receipt is never appropriate where the obligor does not have the financial ability to pay what is owed. For example, unsecured promissory notes received as compensation for personal services from a corporation in a bad financial condition, were found to have no fair market value. Board v. Commissioner, 18 B.T.A. 650 (1930). Constructive receipt always requires the obligor to have the financial ability to pay the amounts in question. Basila v. Commissioner, 36 T.C. 111 (1961), acq. 1962-1 C.B. 3. Also, a controversy between the principals of a company or the particular history and nature of their relationship may preclude authorized amounts from being paid or constructively received. Radom & Neidorff, Inc. v. United States, 281 F.2d 461 (Ct. Cl. 1960), cert. denied, 365 U.S. 815 (1961).

* * *

By: Gerald M. HoranSenior Technician Reviewer Income Tax & Accounting Branch 6This document may not be used or cited as precedent.

SECTION 14
MERIT SYSTEM PROTECTION BOARD PROCEDURES FOR ADJUDICATING WHISTLEBLOWER CASES

TITLE 5--ADMINISTRATIVE PERSONNEL -CHAPTER II--MERIT SYSTEMS PROTECTION BOARD PART 1201--PRACTICES AND PROCEDURES
5 C.F.R. Part 1201

Sec. 1201.1 General.
The Board has two types of jurisdiction, original and appellate.

Sec. 1201.2 Original jurisdiction.
The Board's original jurisdiction includes the following cases:
(a) Actions brought by the Special Counsel under 5 U.S.C. 1214, 1215, and 1216;
(b) Requests, by persons removed from the Senior Executive Service for performance deficiencies, for informal hearings; and
(c) Actions taken against administrative law judges under 5 U.S.C. 7521.

Sec. 1201.3 Appellate jurisdiction.
(a) Generally. The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions:
(1) Reduction in grade or removal for unacceptable performance (5 CFR part 432; 5 U.S.C. 4303(e));
(2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 CFR part 752, subparts C and D; 5 U.S.C. 7512);
(3) Removal, or suspension for more than 14 days, of a career appointee in the Senior Executive Service (5 CFR part 752, subparts E and F; 5 U.S.C. 7541-7543);
(4) Reduction-in-force action affecting a career appointee in the Senior Executive Service (5 U.S.C. 3595);
(5) Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 CFR 531.410; 5 U.S.C. 5335(c));
(6) Determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employees' Retirement System (5 CFR parts 831, 842, and 844; 5 U.S.C. 8347(d)(1)-(2) and 8461 (e)(1));
(7) Disqualification of an employee or applicant because of a suitability determination (5 CFR 731.103(d) and 731.501);
(8) Termination of employment during probation or the first year of a veterans readjustment appointment when:
(i) The employee alleges discrimination because of partisan political reasons or marital status; or

(ii) The termination was based on conditions arising before appointment and the employee alleges that the action is procedurally improper (5 CFR 315.806, 38 U.S.C. 4214(b)(1)(E));
(9) Termination of appointment during a managerial or supervisory probationary period when the employee alleges discrimination because of partisan political affiliation or marital status (5 CFR 315.908(b));
(10) Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901);
(11) Furlough of a career appointee in the Senior Executive Service (5 CFR 359.805);
(12) Failure to restore, improper restoration of, or failure to return following a leave of absence an employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) following partial or full recovery from a compensable injury (5 CFR 353.304);
(13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force action, or after partial or full recovery from a compensable injury (5 CFR 302.501, 5 CFR 330.209);
(14) Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961 (5 CFR 352.508); (15) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR 352.209); (16) Failure to re-employ a former employee after detail or transfer to an international organization (5 CFR 352.313);
(17) Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 CFR 352.707);
(18) Failure to re-employ a former employee after service under the Taiwan Relations Act (5 CFR 352.807);
(19) Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104);
(20) Removal of a career appointee from the Senior Executive Service for failure to be recertified (5 U.S.C. 3592(a)(3), 5 CFR 359.304); and
(21) Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011).
(b)(1) Appeals under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act. Appeals filed under the Uniformed Services Employment and Reemployment Rights Act (Public Law 103-353), as amended, and the Veterans Employment Opportunities Act (Public Law 105-339) are governed by part 1208 of this title. The provisions of subparts A, B, C, and F of part 1201 apply to appeals governed by part 1208 unless other specific provisions are made in that part. The provisions of subpart H of this part regarding awards of attorney fees apply to appeals governed by part 1208 of this title.
(2) Appeals involving an allegation that the action was based on appellant's ``whistleblowing.'' Appeals of actions appealable to the Board under any law, rule, or regulation, in which the appellant alleges that the action was taken because of the appellant's ``whistleblowing'' a violation of the prohibited personnel practice described in 5 U.S.C. 2302(b)(8)),

are governed by part 1209 of this title. The provisions of subparts B, C, E, F, and G of part 1201 apply to appeals and stay requests governed by part 1209 unless other specific provisions are made in that part. The provisions of subpart H of this part regarding awards of attorney fees and consequential damages under 5 U.S.C. 1221(g) apply to appeals governed by part 1209 of this chapter.

(c) Limitations on appellate jurisdiction, collective bargaining agreements, and election of procedures:

(1) For an employee covered by a collective bargaining agreement under 5 U.S.C. 7121, the negotiated grievance procedures contained in the agreement are the exclusive procedures for resolving any action that could otherwise be appealed to the Board, with the following exceptions:

(i) An appealable action involving discrimination under 5 U.S.C. 2302(b)(1), reduction in grade or removal under 5 U.S.C. 4303, or adverse action under 5 U.S.C. 7512, may be raised under the Board's appellate procedures, or under the negotiated grievance procedures, but not under both;

(ii) An appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) may be raised under not more than one of the following procedures:

(A) The Board's appellate procedures;

(B) The negotiated grievance procedures; or

(C) The procedures for seeking corrective action from the Special Counsel under subchapters II and III of chapter 12 of title 5 of the United States Code.

(iii) Except for actions involving discrimination under 5 U.S.C. 2302(b)(1) or any other prohibited personnel practice, any appealable action that is excluded from the application of the negotiated grievance procedures may be raised only under the Board's appellate procedures.

(2) Choice of procedure. When an employee has an option of pursuing an action under the Board's appeal procedures or under negotiated grievance procedures, the Board considers the choice between those procedures to have been made when the employee timely files an appeal with the Board or timely files a written grievance, whichever event occurs first. When an employee has the choice of pursuing an appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) in accordance with paragraph (c)(1)(ii) of this section, the Board considers the choice among those procedures to have been made when the employee timely files an appeal with the Board, timely files a written grievance under the negotiated grievance procedure, or seeks corrective action from the Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1), whichever event occurs first.

(3) Review of discrimination grievances. If an employee chooses the negotiated grievance procedure under paragraph (c)(2) of this section and alleges discrimination as described at 5 U.S.C. 2302(b)(1), then the employee, after having obtained a final decision under the negotiated grievance procedure, may ask the Board to review that final decision. The request must be filed with the Clerk of the Board in accordance with Sec. 1201.154.

Sec. 1201.4 General definitions.

(a) Judge. Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board.

(b) Pleading. Written submission setting out claims, allegations, arguments, or evidence. Pleadings include briefs, motions, petitions, attachments, and responses.

(c) Motion. A request that a judge take a particular action.

(d) Appropriate regional or field office. The regional or field office of the Board that has jurisdiction over the area where the appellant's duty station was located when the agency took the action. Appeals of Office of Personnel Management reconsideration decisions concerning retirement benefits, and appeals of adverse suitability determinations under 5 CFR part 731, must be filed with the regional or field office that has jurisdiction over the area where the appellant lives. Appendix II of these regulations lists the geographic areas over which each of the Board's regional and field offices has jurisdiction. Appeals, however, may be transferred from one regional or field office to another.

(e) Party. A person, an agency, or an intervenor, who is participating in a Board proceeding. This term applies to the Office of Personnel Management and to the Office of Special Counsel when those organizations are participating in a Board proceeding.

(f) Appeal. A request for review of an agency action.

(g) Petition for review. A request for review of an initial decision of a judge.

(h) Day. Calendar day.

(i) Service. The process of furnishing a copy of any pleading to Board officials, other parties, or both, either by mail, by facsimile, by personal delivery, or by commercial overnight delivery.

(j) Date of service. The date on which documents are served on other parties.

(k) Certificate of Service. A document certifying that a party has served copies of pleadings on the other parties.

(l) Date of filing. A document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the Board is closed for business) before its receipt. The date of filing by commercial overnight delivery is the date the document was delivered to the commercial overnight delivery service.

Sec. 1201.11 Scope and policy.

General The regulations in this subpart apply to Board appellate proceedings except as otherwise provided in Sec. 1201.13. The regulations in this subpart apply also to appellate proceedings and stay requests covered by part 1209 unless other specific provisions are made in that part. These regulations also apply to original jurisdiction proceedings of the Board except as otherwise provided in subpart D. It is

the Board's policy that these rules will be applied in a manner that expedites the processing of each case, with due regard to the rights of all parties.

Sec. 1201.12 Revocation, amendment, or waiver of rules.
The Board may revoke, amend, or waive any of these regulations. A judge may, for good cause shown, waive a Board regulation unless a statute requires application of the regulation. The judge must give notice of the waiver to all parties, but is not required to give the parties an opportunity to respond.

Sec. 1201.13 Appeals by Board employees.
Appeals by Board employees will be filed with the Clerk of the Board and will be assigned to an administrative law judge for adjudication under this subchapter. The Board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. Accordingly, the Board will not disturb initial decisions in those cases unless the party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law. In addition, the Board, as a matter of policy, will not rule on any interlocutory appeals or motions to disqualify the administrative law judge assigned to those cases until the initial decision has been issued.

Sec. 1201.21 Notice of appeal rights.
When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:
(a) Notice of the time limits for appealing to the Board, the requirements of Sec. 1201.22(c), and the address of the appropriate Board office for filing the appeal;
(b) A copy, or access to a copy, of the Board's regulations;
(c) A copy of the appeal form in appendix I of this part; and
(d) Notice of any right the employee has to file a grievance, including:
(1) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board;
(2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and
(3) Whether there is any right to request Board review of a final decision on a grievance in accordance with Sec. 1201.154(d).

Sec. 1201.22 Filing an appeal and responses to appeals.
(a) Place of filing. Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See Sec. 1201.4(d) of this part.
(b) Time of filing.
(1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed no later than 30 days after the effective date, if any, of the action

being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. Where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days--for a total of 60 days. A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order. The time for filing a submission under this section is computed in accordance with Sec. 1201.23 of this part.

(2) The time limit prescribed by paragraph (b)(1) for filing an appeal does not apply where a law or regulation establishes a different time limit or where there is no applicable time limit. No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (Public Law 103-353), as amended; see part 1208 of this title. See part 1208 of this title for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Public Law 105-339). See part 1209 of this title for the statutory filing time limits applicable to whistleblower appeals and stay requests.

(c) Timeliness of appeals. If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

(d) Method of filing. Filing must be made with the appropriate Board office by personal delivery, by facsimile, by mail, or by commercial overnight delivery.

Sec. 1201.23 Computation of time.

In computing the number of days allowed for filing a submission, the first day counted is the day after the event from which the time period begins to run. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date. Example: If an employee receives a decision notice that is effective on July 1, the 30-day period for filing an appeal starts to run on July 2. The filing ordinarily would be timely only if it is made by July 31. If July 31 is a Saturday, however, the last day for filing would be Monday, August 2.

Sec. 1201.24 Content of an appeal; right to hearing.

(a) Content. Only an appellant, his or her designated representative, or a party properly substituted under Sec. 1201.35 may file an appeal. Appeals may be in any format, including letter form, but they must contain the following:

(1) The name, address, and telephone number of the appellant, and the name and address of the agency that took the action;

(2) A description of the action the agency took and its effective date;

(3) A request for hearing if the appellant wants one;

(4) A statement of the reasons why the appellant believes the agency action is wrong;

(5) A statement of the action the appellant would like the judge to order;

(6) The name, address, and telephone number of the appellant's representative, if the appellant has a representative;
(7) The notice of the decision to take the action being appealed, along with any relevant documents;
(8) A statement telling whether the appellant or anyone acting on his or her behalf has filed a grievance or a formal discrimination complaint with any agency regarding this matter; and
(9) The signature of the appellant or, if the appellant has a representative, of the representative.
(b) An appellant may raise a claim or defense not included in the appeal at any time before the end of the conference(s) held to define the issues in the case. An appellant may not raise a new claim or defense after that time, except for good cause shown. However, a claim or defense not included in the appeal may be excluded if a party shows that including it would result in undue prejudice.
(c) Use of Board form. An appellant may comply with paragraph (a) of this section, and with Sec. 1201.31 of this part, by completing the form in Appendix I of this part.
(d) Right to hearing. Under 5 U.S.C. 7701, an appellant has a right to a hearing.
(e) Timely request. The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

Sec. 1201.25 Content of agency response.
The agency response to an appeal must contain the following:
(a) The name of the appellant and of the agency whose action the appellant is appealing;
(b) A statement identifying the agency action taken against the appellant and stating the reasons for taking the action;
(c) All documents contained in the agency record of the action;
(d) Designation of and signature by the authorized agency representative; and
(e) Any other documents or responses requested by the Board.

Sec. 1201.26 Number of pleadings, service, and response.
(a) Number. The appellant must file two copies of both the appeal and all attachments with the appropriate Board office.
(b) Service--
(1) Service by the Board. The appropriate office of the Board will mail a copy of the appeal to each party to the proceeding other than the appellant. It will attach to each copy a service list, consisting of a list of the names and addresses of the parties to the proceeding or their designated representatives.
(2) Service by the parties. The parties must serve on each other one copy of each pleading, as defined by Sec. 1201.4(b), and all documents submitted with it, except for the initial appeal. They may do so by mail, by facsimile, by personal delivery, or by commercial overnight delivery to each party and to each representative. A certificate of service stating how and when service was made must accompany each pleading. The

parties must notify the appropriate Board office and one another, in writing, of any changes in the names or addresses on the service list.
(c) Paper size. Pleadings and attachments must be filed on 8 1/2 by 11-inch paper, except for good cause shown. This requirement enables the Board to comply with standards established for U.S. courts.

Sec. 1201.27 Class appeals.
(a) Appeal. One or more employees may file an appeal as representatives of a class of employees. The judge will hear the case as a class appeal if he or she finds that a class appeal is the fairest and most efficient way to adjudicate the appeal and that the representative of the parties will adequately protect the interests of all parties. When a class appeal is filed, the time from the filing date until the judge issues his or her decision under paragraph (b) of this section is not counted in computing the time limit for individual members of the potential class to file individual appeals.
(b) Procedure. The judge will consider the appellant's request and any opposition to that request, and will issue an order within 30 days after the appeal is filed stating whether the appeal is to be heard as a class appeal. If the judge denies the request, the appellants affected by the decision may file individual appeals within 30 days after the date of receipt of the decision denying the request to be heard as a class appeal. Each individual appellant is responsible for either filing an individual appeal within the original time limit, or keeping informed of the status of a class appeal and, if the class appeal is denied, filing an individual appeal within the additional 35-day period.
(c) Standards. In determining whether it is appropriate to treat an appeal as a class action, the judge will be guided but not controlled by the applicable provisions of the Federal Rules of Civil Procedure.

Sec. 1201.31 Representatives.
(a) A party to an appeal may be represented in any matter related to the appeal. The parties must designate their representatives, if any, in writing. Any change in representation, and any revocation of a designation of representative, also must be in writing. Notice of the change must be filed and served on the other parties in accordance with Sec. 1201.26 of this part.
(b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the judge within 15 days after the date of service of the notice of designation. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one.
(c) The judge, on his or her own motion, may disqualify a party' representative on the grounds described in paragraph (b) of this section.

(d)(1) A judge may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious misconduct or conduct that is prejudicial to the administration of justice.
(2) When a judge determines that a person should be excluded from participation in a proceeding, the judge shall inform the person of this determination through issuance of an order to show cause why he or she should not be excluded. The show cause order shall be delivered to the person by the most expeditious means of delivery available, including issuance of an oral order on the record where the determination to exclude the person is made during a hearing. The person must respond to the judge's show cause order within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the order, unless the judge provides a different time limit, or forfeit the right to seek certification of a subsequent exclusion order as an interlocutory appeal to the Board under paragraph (d)(3) of this section.
(3) When, after consideration of the person's response to the show cause order, or in the absence of a response to the show cause order, the judge determines that the person should be excluded from participation in the proceeding, the judge shall issue an order that documents the reasons for the exclusion. The person may obtain review of the judge's ruling by filing, within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the ruling, a motion that the ruling be certified to the Board as an interlocutory appeal. The judge shall certify an interlocutory appeal to the Board within one day (excluding Saturdays, Sundays, and Federal holidays) of receipt of such a motion. Only the provisions of this paragraph apply to interlocutory appeals of rulings excluding a person from a proceeding; the provisions of Secs. 1201.91 through 1201.93 of this part shall not apply.

(4) A proceeding will not be delayed because the judge excludes a person from the proceeding, except that:
(i) Where the judge excludes a party's representative, the judge will give the party a reasonable time to obtain another representative; and
(ii) Where the judge certifies an interlocutory appeal of an exclusion ruling to the Board, the judge or the Board may stay the proceeding sua sponte or on the motion of a party for a stay of the proceeding.
(5) The Board, when considering a petition for review of a judge's initial decision under subpart C of this part, will not be bound by any decision of the judge to exclude a person from the proceeding below.

Sec. 1201.32 Witnesses; right to representation.
Witnesses have the right to be represented when testifying. The representative of a nonparty witness has no right to examine the witness at the hearing or otherwise participate in the development of testimony.

Sec. 1201.33 Federal witnesses.
(a) Every Federal agency or corporation must make its employees or personnel available to furnish sworn statements or to appear as witnesses at the hearing when ordered by the judge to do so. When providing those statements or appearing at the hearing, Federal employee witnesses will

be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate).
(b) A Federal employee who is denied the official time required by paragraph (a) of this section may file a written request that the judge order the employing agency to provide such official time. The judge will act on such a request promptly and, where warranted, will order the agency to comply with the requirements of paragraph (a) of this section.(c) An order obtained under paragraph (b) of this section may be enforced as provided under subpart F of this part.

Sec. 1201.34 Intervenors and amicus curiae.
(a) Explanation of Intervention. Intervenors are organizations or persons who want to participate in a proceeding because they believe the proceeding, or its outcome, may affect their rights or duties. Intervenors as a ``matter of right'' are those parties who have a statutory right to participate. ``Permissive'' intervenors are those parties who may be permitted to participate if the proceeding will affect them directly and if intervention is otherwise appropriate under law. A request to intervene may be made by motion filed with the judge.
(b) Intervenors as a matter of right.
(1) The Director of the Office of Personnel Management may intervene as a matter of right under 5 U.S.C. 7701(d)(1). The motion to intervene must be filed at the earliest practicable time.
(2)(i) Except as provided in
paragraph (b)(2)(ii) of this section, the Special Counsel may intervene as a matter of right under 5 U.S.C. 1212(c). The motion to intervene must be filed at the earliest practicable time.
(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.
(c) Permissive intervenors.
(1) Any person, organization or agency may, by motion, ask the judge for permission to intervene. The motion must explain the reason why the person, organization or agency should be permitted to intervene.
(2) A motion for permission to intervene will be granted where the requester will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may request permission to intervene. A judge's denial of a motion for permissive intervention may be appealed to the Board under Sec. 1201.91 of this part.
(d) Role of intervenors. Intervenors have the same rights and duties as parties, with the following two exceptions:
(1) Intervenors do not have an independent right to a hearing; and
(2) Permissive intervenors may participate only on the issues affecting them. The judge is responsible for determining the issues on which permissive intervenors may participate.
(e) Amicus curiae. An amicus curiae is a person or organization that, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge regarding an appeal. Any person or organization,

including those who do not qualify as intervenors, may, in the discretion of the judge, be granted permission to file an amicus curiae brief.

Sec. 1201.35 Substituting parties.
(a) If an appellant dies or is otherwise unable to pursue the appeal, the processing of the appeal will only be completed upon substitution of a proper party. Substitution will not be permitted where the interests of the appellant have terminated because of the appellant's death or other disability.
(b) The representative or proper party must file a motion for substitution within 90 days after the death or other disabling event, except for good cause shown.
(c) In the absence of a timely substitution of a party, the processing of the appeal may continue if the interests of the proper party will not be prejudiced.

Sec. 1201.36 Consolidating and joining appeals.
(a) Explanation.
(1) Consolidation occurs when the appeals of two or more parties are united for consideration because they contain identical or similar issues. For example, individual appeals rising from a single reduction in force might be consolidated.

(2) Joinder occurs when one person has filed two or more appeals and they are united for consideration. For example, a judge might join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent dismissal if the same appellant filed both appeals.
(b) Action by judge. A judge may consolidate or join cases on his or her own motion or on the motion of a party if doing so would:
(1) Expedite processing of the cases; and
(2) Not adversely affect the interests of the parties.
(c) Any objection to a motion for consolidation or joinder must be filed within 10 days of the date of service of the motion.

Sec. 1201.37 Witness fees.
(a) Federal employees. Employees of a Federal agency or corporation testifying in any Board proceeding or making a statement for the record will be in official duty status and will not receive witness fees.
(b) Other witnesses. Other witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.
(c) Payment of witness fees and travel costs. The party requesting the presence of a witness must pay that witness' fees. Those fees must be paid or offered to the witness at the time the subpoena is served, or, if the witness appears voluntarily, at the time of appearance. A Federal agency or corporation is not required to pay or offer witness fees in advance.

Sec. 1201.41 Judges.

(a) Exercise of authority. Judges may exercise authority as provided in paragraphs (b) and (c) of this section on their own motion or on the motion of a party, as appropriate.

(b) Authority. Judges will conduct fair and impartial hearings and will take all necessary action to avoid delay in all proceedings. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges' powers include, but are not limited to, the authority to:

(1) Administer oaths and affirmations;

(2) Issue subpoenas under Sec. 1201.81 of this part;

(3) Rule on offers of proof and receive relevant evidence;

(4) Rule on discovery motions under Sec. 1201.73 of this part;

(5) After notice to the parties, order a hearing on his or her own initiative if the judge determines that a hearing is necessary:

(i) To resolve an important issue of credibility;

(ii) To ensure that the record on significant issues is fully developed; or

(iii) To otherwise ensure a fair and just adjudication of the case;

(6) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum, and exclude any disruptive persons from the hearing;

(7) Exclude any person from all or any part of the proceeding before him or her as provided under Sec. 1201.31(d) of this part;

(8) Rule on all motions, witness and exhibit lists, and proposed findings;

(9) Require the parties to file memoranda of law and to present oral argument with respect to any question of law;

(10) Order the production of evidence and the appearance of witnesses whose testimony would be relevant, material, and nonrepetitious;

(11) Impose sanctions as provided under Sec. 1201.43 of this part;

(12) Hold prehearing conferences for the settlement and simplification of issues;

(13) Require that all persons who can be identified from the record as being clearly and directly affected by a pending retirement-related case be notified of the appeal and of their right to request intervention so that their interests can be considered in the adjudication;

(14) Issue any order that may be necessary to protect a witness or other individual from harassment and provide for enforcement of such order in accordance with subpart F;

(15) Issue initial decisions; and

(16) Determine, in decisions in which the appellant is the prevailing party, whether the granting of interim relief is appropriate.

(c) Settlement–

(1) Settlement discussion. The judge may initiate attempts to settle the appeal informally at any time. The parties may agree to waive the prohibitions against ex parte communications during settlement discussions, and they may agree to any limits on the waiver.

(2) Agreement. If the parties agree to settle their dispute, the settlement agreement is the final and binding resolution of the appeal, and the judge will dismiss the appeal with prejudice.

(i) If the parties offer the agreement for inclusion in the record, and if the judge approves the agreement, it will be made a part of the record, and

the Board will retain jurisdiction to ensure compliance with the agreement.
(ii) If the agreement is not entered into the record, the Board will not retain jurisdiction to ensure compliance.

Sec. 1201.42 Disqualifying a judge.
(a) If a judge considers himself or herself disqualified, he or she will withdraw from the case, state on the record the reasons for doing so, and immediately notify the Board of the withdrawal.
(b) A party may file a motion asking the judge to withdraw on the basis of personal bias or other disqualification. This motion must be filed as soon as the party has reason to believe there is a basis for disqualification. The reasons for the request must be set out in an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.)
(c) If the judge denies the motion, the party requesting withdrawal may request certification of the issue to the Board as an interlocutory appeal under Sec. 1201.91 of this part. Failure to request certification is considered a waiver of the request for withdrawal.

Sec. 1201.43 Sanctions.
The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, the circumstances set forth in paragraphs (a), (b), and (c) of this section.
(a) Failure to comply with an order. When a party fails to comply with an order, the judge may:
(1) Draw an inference in favor of the requesting party with regard to the information sought;
(2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;
(3) Permit the requesting party to introduce secondary evidence concerning the information sought; and
(4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.
(b) Failure to prosecute or defend appeal. If a party fails to prosecute or defend an appeal, the judge may dismiss the appeal with prejudice or rule in favor of the appellant.
(c) Failure to make timely filing. The judge may refuse to consider any motion or other pleading that is not filed in a timely fashion in compliance with this subpart.

Sec. 1201.51 Scheduling the hearing.
(a) The hearing will be scheduled not earlier than 15 days after the date of the hearing notice unless the parties agree to an earlier date. The agency, upon request of the judge, must provide appropriate hearing space.
(b) The judge may change the time, date, or place of the hearing, or suspend, adjourn, or continue the hearing. The change will not require the 15-day notice provided in paragraph (a) of this section.
(c) Either party may file a motion for postponement of the hearing. The motion must be made in writing and must either be accompanied by an

affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.) The affidavit or sworn statement must describe the reasons for the request. The judge will grant the request for postponement only upon a showing of good cause.
(d) The Board has established certain approved hearing locations, which are published as a Notice in the Federal Register. See appendix III. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board.

Sec. 1201.52 Public hearings.
Hearings are open to the public. The judge may order a hearing or any part of a hearing closed, however, when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the judge's decision. Any objections to the order will be made a part of the record.

Sec. 1201.53 Record of proceedings.
(a) Preparation. A word-for-word record of the hearing is made under the judge's guidance. It is kept in the Board's copy of the appeal file and it is the official record of the hearing. Only hearing tape recordings or written transcripts prepared by the official hearing reporter will be accepted by the Board as the official record of the hearing. When the judge assigned to the case tape records a hearing (for example, a telephonic hearing in a retirement appeal), the judge is the ``official hearing reporter'' under this section.
(b) Copies. When requested and when costs are paid, a copy of the official record of the hearing will be provided to a party. A party must send a request for a copy of a hearing tape recording or written transcript to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. A request for a copy of a hearing tape recording or written transcript sent by a non-party is controlled by the Board's rules at 5 CFR part 1204 (Freedom of Information Act). Requests for hearing tape recordings or written transcripts under the Freedom of Information Act must be sent to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC.
(c) Exceptions to payment of costs. A party may not have to pay for a hearing tape recording or written transcript if he has a good reason. If a party believes he has a good reason and the request is made before the judge issues and initial decision, the party must sent the request for an exception to the judge. If the request is made after the judge issues an initial decision, the request must be sent to the Clerk of the Board. The party must clearly state the reason for the request in an affidavit or sworn statement.
(d) Corrections to written transcript. Corrections to the official written transcript may be made on motion by a party or on the judge's own motion. Motions for corrections must be filed within 10 days after the

receipt of a written transcript. Corrections of the official written transcript will be made only when substantive errors are found and only with the judge's approval.
(e) Official record. Exhibits, the official hearing record, if a hearing is held, all papers filed, and all orders and decisions of the judge and the Board, make up the official record of the case.

Sec. 1201.55 Motions.
(a) Form. All motions, except those made during a prehearing conference or a hearing, must be in writing. All motions must include a statement of the reasons supporting them. Written motions must be filed with the judge or the Board, as appropriate, and must be served upon all other parties in accordance with Sec. 1201.26(b)(2) of this part. A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.
(b) Objection. Unless the judge provides otherwise, any objection to a written motion must be filed within 10 days from the date of service of the motion. Judges, in their discretion, may grant or deny motions for extensions of time to file pleadings without providing any opportunity to respond to the motions.
(c) Motions for extension of time. Motions for extension of time will be granted only on a showing of good cause.
(d) Motions for protective orders. A motion for an order under 5 U.S.C. 1204(e)(1)(B) to protect a witness or other individual from harassment must be filed as early in the proceeding as practicable. The party seeking a protective order must include a concise statement of reasons justifying the motion, together with any relevant documentary evidence. An agency, other than the Office of Special Counsel, may not request such an order with respect to an investigation by the Special Counsel during the Special Counsel's investigation. An order issued under this paragraph may be enforced in the same manner as provided under subpart F for Board final decisions and orders.

Sec. 1201.56 Burden and degree of proof; affirmative defenses.
(a) Burden and degree of proof–
(1) Agency: Under 5 U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (b) of this section, the agency action must be sustained if:
(i) It is brought under 5 U.S.C. 3592(a)(3), 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence; or
(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.
(2) Appellant. The appellant has the burden of proof, by a preponderance of the evidence, with respect to:
(i) Issues of jurisdiction;
(ii) The timeliness of the appeal; and
(iii) Affirmative defenses. In appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving,

by a preponderance of the evidence, entitlement to the benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment.
(b) Affirmative defenses of the appellant. Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant:
(1) Shows harmful error in the application of the agency's procedures in arriving at its decision;
(2) Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or
(3) Shows that the decision was not in accordance with law.
(c) Definitions. The following definitions apply to this part:
(1) Substantial evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.
(2) Preponderance of the evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.
(3) Harmful error. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

Sec. 1201.57 Order of hearing.
(a) In cases in which the agency has taken an action against an employee, the agency will present its case first.
(b) The appellant will proceed first at hearings convened on the issues of:
(1) Jurisdiction;
(2) Timeliness; or
(3) Office of Personnel Management disallowance of retirement benefits, when the appellant applied for those benefits.
(c) The judge may vary the normal order of presenting evidence.

Sec. 1201.58 Closing the record.
(a) When there is a hearing, the record ordinarily will close at the conclusion of the hearing. When the judge allows the parties to submit argument, briefs, or documents previously identified for introduction into evidence, however, the record will remain open for as much time as the judge grants for that purpose.
(b) If the appellant waives the right to a hearing, the record will close on the date the judge sets as the final date for the receipt or filing of submissions of the parties.
(c) Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed. The judge will include in the

record, however, any supplemental citations received from the parties or approved corrections of the transcript, if one has been prepared.

Sec. 1201.61 Exclusion of evidence and testimony.
Any evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.

Sec. 1201.62 Producing prior statements.
After an individual has given evidence in a proceeding, any party may request a copy of any prior signed statement made by that individual that is relevant to the evidence given. If the party refuses to furnish the statement, the judge may exclude the evidence given.

Sec. 1201.63 Stipulations.
The parties may stipulate to any matter of fact. The stipulation will satisfy a party's burden of proving the fact alleged.

Sec. 1201.64 Official notice.
Official notice is the Board's or judge's recognition of certain facts without requiring evidence to be introduced establishing those facts. The judge, on his or her own motion or on the motion of a party, may take official notice of matters of common knowledge or matters that can be verified. The parties may be given an opportunity to object to the taking of official notice. The taking of official notice of any fact satisfies a party's burden of proving that fact.

Sec. 1201.71 Purpose of discovery.
Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected to start and complete discovery with a minimum of Board intervention.

Sec. 1201.72 Explanation and scope of discovery.
(a) Explanation. Discovery is the process, apart from the hearing, by which a party may obtain relevant information, including the identification of potential witnesses, from another person or a party, that the other person or party has not otherwise provided. Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence. This information is obtained to assist the parties in preparing and presenting their cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board. Those rules, however, are instructive rather than controlling.
(b) Scope. Discovery covers any nonprivileged matter that is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of

relevant facts. Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal.
(c) Methods. Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission.

Sec. 1201.73 Discovery procedures.
(a) Discovery from a party. A party seeking discovery from another party must start the process by serving a request for discovery on the representative of the other party or the party if there is no representative. The request for discovery must state the time limit for responding, as prescribed in Sec. 1201.73(d), and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to an officer or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency.
(b) Discovery from a nonparty, including a nonparty Federal agency. Parties should try to obtain voluntary discovery from nonparties whenever possible. A party seeking discovery from a nonparty Federal agency or employee must start the process by serving a request for discovery on the nonparty Federal agency or employee. A party may begin discovery from other nonparties by serving a request for discovery on the nonparty directly. If the party seeking the information does not make that request, or if it does so but fails to obtain voluntary cooperation, it may obtain discovery from a nonparty by filing a written motion with the judge, showing the relevance, scope, and materiality of the particular information sought. If the party seeks to take a deposition, it should state in the motion the date, time, and place of the proposed deposition. An authorized official of the Board will issue a ruling on the motion, and will serve the ruling on the moving party. That official also will provide that party with a subpoena, if approved, that is directed to the individual or entity from which discovery is sought. The subpoena will specify the manner in which the party may seek compliance with it, and it will specify the time limit for seeking compliance. The party seeking the information is responsible for serving any Board-approved discovery request and subpoena on the individual or entity, or for arranging for their service.
(c) Responses to discovery requests.
(1) A party, or a Federal agency that is not a party, must answer a discovery request within the time provided under paragraph (d)(2) of this section, either by furnishing to the requesting party the information or testimony requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for the objection.
(2) If a party fails or refuses to respond in full to a discovery request, or if a nonparty fails or refuses to respond in full to a Board-approved discovery order, the requesting party may file a motion to compel

discovery. The requesting party must file the motion with the judge, and must serve a copy of the motion on the other party and on any nonparty entity or person from whom the discovery was sought. The motion must be accompanied by:
(i) A copy of the original request and a statement showing that the information sought is relevant and material; and
(ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the statement. (See appendix IV.)
(3) The other party and any other entity or person from whom discovery was sought may respond to the motion to compel discovery within the time limits stated in paragraph (d)(4) of this section.
(d) Time limits.
(1) Parties who wish to make discovery requests or motions must serve their initial requests or motions within 25 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response.
(2) A party or nonparty must file a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place.
(3) Any motion to depose a nonparty (along with a request for a subpoena) must be submitted to the judge within the time limits stated in paragraph (d)(1) of this section or as the judge otherwise directs.
(4) Any motion for an order to compel discovery must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel discovery must be filed with the judge within 10 days of the date of service of the motion.
(5) Discovery must be completed within the time the judge designates.

Sec. 1201.74 Orders for discovery.
(a) Motion for an order compelling discovery. Motions for orders compelling discovery and motions for the appearance of nonparties must be filed with the judge in accordance with Sec. 1201.73(c)(2) and (d)(4).
(b) Content of order. Any order issued will include, where appropriate:
(1) A provision that the person to be deposed must be notified of the time and place of the deposition;
(2) Any conditions or limits concerning the conduct or scope of the proceedings or the subject matter that may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment, or oppression;
(3) Limits on the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and
(4) Other restrictions upon the discovery process that the judge sets.

(c) Noncompliance. The judge may impose sanctions under Sec. 1201.43 of this part for failure to comply with an order compelling discovery.

Sec. 1201.75 Taking depositions.

Depositions may be taken by any method agreed upon by the parties. The person providing information is subject to penalties for intentional false statements.

Sec. 1201.81 Requests for subpoenas.

(a) Request. Parties who wish to obtain subpoenas that would require the attendance and testimony of witnesses, or subpoenas that would require the production of documents or other evidence under 5 U.S.C. 1204(b)(2)(A), should file their motions for those subpoenas with the judge. Subpoenas are not ordinarily required to obtain the attendance of Federal employees as witnesses.

(b) Form. Parties requesting subpoenas must file their requests, in writing, with the judge. Each request must identify specifically the books, papers, or testimony desired.

(c) Relevance. The request must be supported by a showing that the evidence sought is relevant and that the scope of the request is reasonable.

(d) Rulings. Any judge who does not have the authority to issue subpoenas will refer the request to an official with authority to rule on the request, with a recommendation for decision. The official to whom the request is referred will rule on the request promptly. Judges who have the authority to rule on these requests themselves will do so directly.

Sec. 1201.82 Motions to quash subpoenas.

Any person to whom a subpoena is directed, or any party, may file a motion to quash or limit the subpoena. The motion must be filed with the judge, and it must include the reasons why compliance with the subpoena should not be required or the reasons why the subpoena's scope should be limited.

Sec. 1201.83 Serving subpoenas.

(a) Any person who is at least 18 years of age and who is not a party to the appeal may serve a subpoena. The means prescribed by applicable state law are sufficient. The party who requested the subpoena, and to whom the subpoena has been issued, is responsible for serving the subpoena.

(b) A subpoena directed to an individual outside the territorial jurisdiction of any court of the United States may be served in the manner described by the Federal Rules of Civil Procedure for service of a subpoena in a foreign country.

Sec. 1201.84 Proof of service.

The person who has served the subpoena must certify that he or she did so:

(a) By delivering it to the witness in person,

(b) By registered or certified mail, or

(c) By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended. The

document in which the party makes this certification also must include a statement that the prescribed fees have been paid or offered.

Sec. 1201.85 Enforcing subpoenas.

(a) If a person who has been served with a Board subpoena fails or refuses to comply with its terms, the party seeking compliance may file a written motion for enforcement with the judge or make an oral motion for enforcement while on the record at a hearing. That party must present the document certifying that the subpoena was served and, except where the witness was required to appear before the judge, must submit an affidavit or sworn statement under 28 U.S.C. 1746 (see appendix IV) describing the failure or refusal to obey the subpoena. The Board, in accordance with 5 U.S.C. 1204(c), may then ask the appropriate United States district court to enforce the subpoena. If the person who has failed or refused to comply with a Board subpoena is located in a foreign country, the U.S. District Court for the District of Columbia will have jurisdiction to enforce compliance, to the extent that a U.S. court can assert jurisdiction over an individual in the foreign country.

(b) Upon application by the Special Counsel, the Board may seek court enforcement of a subpoena issued by the Special Counsel in the same manner in which it seeks enforcement of Board subpoenas, in accordance with 5 U.S.C. 1212(b)(3).

Sec. 1201.91 Explanation.

An interlocutory appeal is an appeal to the Board of a ruling made by a judge during a proceeding. The judge may permit the appeal if he or she determines that the issue presented in it is of such importance to the proceeding that it requires the Board's immediate attention. Either party may make a motion for certification of an interlocutory appeal. In addition, the judge, on his or her own motion, may certify an interlocutory appeal to the Board. If the appeal is certified, the Board will decide the issue and the judge will act in accordance with the Board's decision.

Sec. 1201.92 Criteria for certifying interlocutory appeals.

The judge will certify a ruling for review only if the record shows that:

(a) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and

(b) An immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public.

Sec. 1201.93 Procedures.

(a) Motion for certification. A party seeking the certification of an interlocutory appeal must file a motion for certification within 10 days of the date of the ruling to be appealed. The motion must be filed with the judge, and must state why certification is appropriate and what the Board should do and why. The opposing party may file objections within 10 days of the date of service of the motion, or within any other time period that the judge may designate.

(b) Certification and review. The judge will grant or deny a motion for certification within five days after receiving all pleadings or, if no response is filed, within 10 days after receiving the motion. If the judge grants the motion for certification, he or she will refer the record to the Board. If the judge denies the motion, the party that sought certification may raise the matter at issue in a petition for review filed after the initial decision is issued, in accordance with Secs. 1201.113 and 1201.114 of this part.
(c) Stay of hearing. The judge has the authority to proceed with or to stay the hearing while an interlocutory appeal is pending with the Board. Despite this authority, however, the Board may stay a hearing on its own motion while an interlocutory appeal is pending with it.

Sec. 1201.101 Explanation and definitions.
(a) Explanation. An ex parte communication is an oral or written communication between a decision-making official of the Board and an interested party to a proceeding, when that communication is made without providing the other parties to the appeal with a chance to participate. Not all ex parte communications are prohibited. Those that involve the merits of the case, or those that violate rules requiring submissions to be in writing, are prohibited. Accordingly, interested parties may ask about such matters as the status of a case, when it will be heard, and methods of submitting evidence to the Board. Parties may not ask about matters such as what defense they should use or whether their evidence is adequate, and they may not make a submission orally if that submission is required to be made in writing.
(b) Definitions for purposes of this section.
(1) Interested party includes:
(i) Any party or representative of a party involved in a proceeding before the Board; and
(ii) Any other person who might be affected by the outcome of a proceeding before the Board.
(2) Decision-making official means any judge, officer or other employee of the Board designated to hear and decide cases.

Sec. 1201.102 Prohibition on ex parte communications.
Except as otherwise provided in Sec. 1201.41(c)(1) of this part, ex parte communications that concern the merits of any matter before the Board for adjudication, or that otherwise violate rules requiring written submissions, are prohibited from the time the persons involved know that the Board may consider the matter until the time the Board has issued a final decision on the matter.

Sec. 1201.103 Placing communications in the record; sanctions.
(a) Any communication made in violation of Sec. 1201.102 of this part will be made a part of the record. If the communication was oral, a memorandum stating the substance of the discussion will be placed in the record.
(b) If there has been a violation of Sec. 1201.102 of this part, the judge or the Clerk of the Board, as appropriate, will notify the parties in writing

that the regulation has been violated, and will give the parties 10 days to file a response.
(c) The following sanctions are available:
(1) Parties. The offending party may be required to show why, in the interest of justice, the claim or motion should not be dismissed, denied, or otherwise adversely affected.
(2) Board personnel. Offending Board personnel will be treated in accordance with the Board's standards of conduct.
(3) Other persons. The Board may invoke appropriate sanctions against other offending parties.

Sec. 1201.111 Initial decision by judge.
(a) The judge will prepare an initial decision after the record closes, and will serve that decision on the Clerk of the Board, on the Director of the Office of Personnel Management, and on all parties to the appeal, including named parties, permissive intervenors, and intervenors of right.

(b) Each initial decision will contain:
(1) Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record;
(2) The reasons or bases for those findings and conclusions;
(3) An order making final disposition of the case, including appropriate relief;
(4) A statement, if the appellant is the prevailing party, as to whether interim relief is provided effective upon the date of the decision, pending the outcome of any petition for review filed by another party under subpart C of this part;
(5) The date upon which the decision will become final (a date that, for purposes of this section, is 35 days after issuance); and
(6) A statement of any further process available, including, as appropriate, a petition for review under Sec. 1201.114 of this part, a petition for enforcement under Sec. 1201.182, a motion for attorney fees under Sec. 1201.203, a motion to initiate an addendum proceeding for consequential damages or compensatory damages under Sec. 1201.204, and a petition for judicial review.
(c) Interim relief.
(1) Under 5 U.S.C. 7701(b)(2), if the appellant is the prevailing party, the initial decision will provide appropriate interim relief to the appellant effective upon the date of the initial decision and remaining in effect until the date of the final order of the Board on any petition for review, unless the judge determines that the granting of interim relief is not appropriate. The agency may decline to return the appellant to his or her place of employment if it determines that the return or presence of the appellant will be unduly disruptive to the work environment. However, pay and benefits must be provided.
(2) An initial decision that orders interim relief shall include a section which will provide the appellant specific notice that the relief ordered in the decision must be provided by the agency effective as of the date of the decision if a party files a petition for review. If the relief ordered in the initial decision requires the agency to effect an appointment, the notice required by this section will so state, will specify the title and

grade of the appointment, and will specifically advise the appellant of his right to receive pay and benefits while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

Sec. 1201.112 Jurisdiction of judge.

(a) After issuing the initial decision, the judge will retain jurisdiction over a case only to the extent necessary to:

(1) Correct the transcript, when one is obtained;

(2) Rule on motions for exception to the requirement that a party seeking a transcript must pay for it;

(3) Rule on a request by the appellant for attorney fees, consequential damages, or compensatory damages under subpart H of this part;

(4) Process any petition for enforcement filed under subpart F of this part;

(5) Vacate an initial decision before that decision becomes final under Sec. 1201.113 in order to accept a settlement agreement into the record.

(b) Nothing is this section affects the time limits prescribed in Sec. 1201.113 regarding the finality of an initial decision or the time allowed for filing a petition for review.

Sec. 1201.113 Finality of decision.

The initial decision of the judge will become final 35 days after issuance. Initial decisions are not precedential.

(a) Exceptions. The initial decision will not become final if any party files a petition for review within the time limit for filing specified in Sec. 1201.114 of this part, or if the Board reopens the case on its own motion.

(b) Petition for review denied. If the Board denies all petitions for review, the initial decision will become final when the Board issues its last decision denying a petition for review.

(c) Petition for review granted or case reopened. If the Board grants a petition for review or a cross petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire action.

(d) Extensions. The Board may extend the time limit for filing a petition for good cause shown as specified in Sec. 1201.114 of this part.

(e) Exhaustion. Administrative remedies are exhausted when a decision becomes final in accordance with this section.

Sec. 1201.114 Filing petition and cross petition for review.

(a) Who may file. Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel may file a petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative.

(b) Cross petition for review. If a party, the Director of OPM, or the Special Counsel files a timely petition for review, any other party, the Director of OPM, or the Special Counsel may file a timely cross petition for review. The Board normally will consider only issues raised in a

timely filed petition for review or in a timely filed cross petition for review.

(c) Place for filing. A petition for review, cross petition for review, responses to those petitions, and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, by personal delivery, by facsimile, by mail, or by commercial overnight delivery.

(d) Time for filing. Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition.

(e) Extension of time to file. The Board will grant a motion for extension of time to file a petition for review, a cross petition, or a response only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted.

(f) Late filings. Any petition for review, cross petition for review, or response that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (e) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.) The affidavit or sworn statement must include:

(1) The reasons for failing to request an extension before the deadline for the submission; and

(2) A specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence.

Any response to the motion may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (d) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely.

(g) Intervention–

(1) By Director of OPM. The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d). The notice of intervention is timely if it is filed with the Clerk of the Board

within 45 days of the date the petition for review was filed. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties.
(2) By Special Counsel.
(i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (g)(2)(ii) of this section. The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties.
(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.
(3) Permissive intervenors. Any person, organization or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization or agency should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene.
(h) Service. A party submitting a pleading must serve a copy of it on each party and on each representative as provided in Sec. 1201.26(b)(2).
(i) Closing the record. The record closes on expiration of the period for filing the response to the petition for review, or to the cross petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

Sec. 1201.115 Contents of petition for review.
(a) The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.
(b)(1) If the appellant was the prevailing party in the initial decision, and the decision granted the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).
(2) If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the

agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission.
(3) If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).
(4) Failure by an agency to provide the certification required by paragraph (b)(1) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraph (b)(2) or (b)(3) of this section, may result in the dismissal of the agency's petition or cross petition for review.
(c) Nothing in paragraph (b) of this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final.
(d) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:
(1) New and material evidence is available that, despite due diligence, was not available when the record closed; or
(2) The decision of the judge is based on an erroneous interpretation of statute or regulation.

Sec. 1201.116 Appellant requests for enforcement of interim relief.
(a) Before a final decision is issued. If the agency files a petition for review or a cross petition for review and has not provided required interim relief, the appellant may request dismissal of the agency's petition. Any such request must be filed with the Clerk of the Board within 25 days of the date of service of the agency's petition. A copy of the response must be served on the agency at the same time it is filed with the Board. The agency may respond with evidence and argument to the appellant's request to dismiss within 15 days of the date of service of the request. If the appellant files a motion to dismiss beyond the time limit, the Board will dismiss the motion as untimely unless the appellant shows that it is based on information not readily available before the close of the time limit.
(b) After a final decision is issued. If the appellant is not the prevailing party in the final Board order, and if the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition with the regional office under Sec. 1201.182. The appellant must file this petition within 20 days of learning of the agency's failure to provide full interim relief. If the appellant prevails in the final Board order, then any interim relief enforcement motion filed will be treated as a motion for enforcement of the final decision. Petitions under this subsection will be processed under Sec. 1201.183.

Sec. 1201.117 Procedures for review or reopening.
(a) In any case that is reopened or reviewed, the Board may:
(1) Issue a single decision that denies or grants a petition for review, reopens the appeal, and decides the case;
(2) Hear oral arguments;
(3) Require that briefs be filed;
(4) Remand the appeal so that the judge may take further testimony or evidence or make further findings or conclusions; or
(5) Take any other action necessary for final disposition of the case.
(b) The Board may affirm, reverse, modify, or vacate the decision of the judge, in whole or in part. Where appropriate, the Board will issue a final decision and order a date for compliance with that decision.

Sec. 1201.118 Board reopening of case and reconsideration of initial decision.
The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part.

Sec. 1201.119 OPM petition for reconsideration.
(a) Criteria. Under 5 U.S.C. 7703(d), the Director of the Office of Personnel Management may file a petition for reconsideration of a Board final order if he or she determines:
(1) That the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and
(2) That the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.
(b) Time limit. The Director must file the petition for reconsideration within 35 days after the date of service of the Board's final order.
(c) Briefs. After the petition is filed, the Board will make the official record relating to the petition for reconsideration available to the Director for review. The Director's brief in support of the petition for reconsideration must be filed within 20 days after the Board makes the record available for review. Any party's opposition to the petition for reconsideration must be filed within 25 days from the date of service of the Director's brief.
(d) Stays. If the Director of OPM files a petition for reconsideration, he or she also may ask the Board to stay its final order. An application for a stay, with a supporting memorandum, must be filed at the same time as the petition for reconsideration.

Sec. 1201.120 Judicial review.
Any employee or applicant for employment who is adversely affected by a final order or decision of the Board under the provisions of 5 U.S.C. 7703 may obtain judicial review in the United States Court of Appeals for the Federal Circuit. As Sec. 1201.175 of this part provides, an appropriate United States district court has jurisdiction over a request for judicial review of cases involving the kinds of discrimination issues described in 5 U.S.C. 7702.

Sec. 1201.121 Scope of jurisdiction; application of subparts B, F, and H. Source: 62 FR 48451, Sept. 16, 1997, unless otherwise noted.
General (a) Scope. The Board has original jurisdiction over complaints filed by the Special Counsel seeking corrective or disciplinary action (including complaints alleging a violation of the Hatch Political Activities Act), requests by the Special Counsel for stays of certain personnel actions, proposed agency actions against administrative law judges, and removals of career appointees from the Senior Executive Service for performance reasons.
(b) Application of subparts B, F, and H.
(1) Except as otherwise expressly provided by this subpart, the regulations in subpart B of this part applicable to appellate case processing also apply to original jurisdiction cases processed under this subpart.
(2) Subpart F of this part applies to enforcement proceedings in connection with Special Counsel complaints and stay requests, and agency actions against administrative law judges, decided under this subpart.
(3) Subpart H of this part applies to requests for attorney fees or compensatory damages in connection with Special Counsel corrective and disciplinary action complaints, and agency actions against administrative law judges, decided under this subpart. Subpart H of this part also applies to requests for consequential damages in connection with Special Counsel corrective action complaints decided under this subpart.
(c) The provisions of this subpart do not apply to appeals alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services, in which the Special Counsel appears as the designated representative of the appellant. Such appeals are governed by part 1208 of this title.

Sec. 1201.122 Filing complaint; serving documents on parties.
(a) Place of filing. A Special Counsel complaint seeking disciplinary action under 5 U.S.C. 1215(a)(1) (including a complaint alleging a violation of the Hatch Political Activities Act) must be filed with the Clerk of the Board.
(b) Initial filing and service. The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The Special Counsel must serve a copy of the complaint on each party or the party's representative, as shown on the certificate of service.
(c) Subsequent filings and service. Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by Sec. 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is

responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.
(d) Method of filing and service. Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the Clerk of the Board. Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

Sec. 1201.123 Contents of complaint.
(a) If the Special Counsel determines that the Board should take any of the actions listed below, he or she must file a written complaint in accordance with Sec. 1201.122 of this part, stating with particularity any alleged violations of law or regulation, along with the supporting facts.
(1) Action to discipline an employee alleged to have committed a prohibited personnel practice, 5 U.S.C. 1215(a)(1)(A);
(2) Action to discipline an employee alleged to have violated any law, rule, or regulation, or to have engaged in prohibited conduct, within the jurisdiction of the Special Counsel under 5 U.S.C. 1216 (including an alleged violation by a Federal or District of Columbia government employee involving political activity prohibited under 5 U.S.C. 7324), 5 U.S.C. 1215(a)(1)(B), 1216(a), and 1216(c);
(3) Action to discipline a State or local government employee for an alleged violation involving prohibited political activity, 5 U.S.C. 1505; or
(4) Action to discipline an employee for an alleged knowing and willful refusal or failure to comply with an order of the Board, 5 U.S.C. 1215(a)(1)(C).
(b) The administrative law judge to whom the complaint is assigned may order the Special Counsel and the responding party to file briefs, memoranda, or both in any disciplinary action complaint the Special Counsel brings before the Board.

Sec. 1201.124 Rights; answer to complaint.
(a) Responsibilities of Clerk of the Board. The Clerk of the Board shall furnish a copy of the applicable Board regulations to each party that is not a Federal, State, or local government agency and shall inform such a party of the party's rights under paragraph (b) of this section and the requirements regarding the timeliness and content of an answer to the Special Counsel's complaint under paragraphs (c) and (d), respectively, of this section.
(b) Rights. When the Special Counsel files a complaint proposing a disciplinary action against an employee under 5 U.S.C. 1215(a)(1), the employee has the right:
(1) To file an answer, supported by affidavits and documentary evidence;
(2) To be represented;
(3) To a hearing on the record before an administrative law judge;
(4) To a written decision, issued at the earliest practicable date, in which the administrative law judge states the reasons for his or her decision; and

(5) To a copy of the administrative law judge's decision and subsequent final decision by the Board, if any.
(c) Filing and default. A party named in a Special Counsel disciplinary action complaint may file an answer with the Clerk of the Board within 35 days of the date of service of the complaint. If a party fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations may be considered admitted and may form the basis of the administrative law judge's decision.
(d) Content. An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent has no knowledge of a fact, he or she must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer may be considered true.

Sec. 1201.125 Administrative law judge.
(a) An administrative law judge will hear a disciplinary action complaint brought by the Special Counsel.
(b) Except as provided in paragraph (c)(1) of this section, the administrative law judge will issue an initial decision on the complaint pursuant to 5 U.S.C. 557. The applicable provisions of Secs. 1201.111, 1201.112, and 1201.113 of this part govern the issuance of initial decisions, the jurisdiction of the judge, and the finality of initial decisions. The initial decision will be subject to the procedures for a petition for review by the Board under subpart C of this part.
(c)(1) In a Special Counsel complaint seeking disciplinary action against a Federal or District of Columbia government employee for a violation of 5 U.S.C. 7324, where the administrative law judge finds that the violation does not warrant removal, the administrative law judge will issue a recommended decision to the Board in accordance with 5 U.S.C. 557.
(2) The parties may file with the Clerk of the Board any exceptions they may have to the recommended decision of the administrative law judge. Those exceptions must be filed within 35 days after the date of service of the recommended decision or, if the filing party shows that the recommended decision was received more than 5 days after the date of service, within 30 days after the date the filing party received the recommended decision.
(3) The parties may file replies to exceptions within 25 days after the date of service of the exceptions, as that date is determined by the certificate of service.
(4) No additional evidence will be accepted with a party's exceptions or with a reply to exceptions unless the party submitting it shows that the evidence was not readily available before the administrative law judge closed the record. (5) The Board will consider the recommended decision of the administrative law judge, together with any exceptions and replies to exceptions filed by the parties, and will issue a final written decision.

Sec. 1201.126 Final decisions.

(a) In any action to discipline an employee, except as provided in paragraphs (b) or (c) of this section, the administrative law judge, or the Board on petition for review, may order a removal, a reduction in grade, a debarment (not to exceed five years), a suspension, a reprimand, or an assessment of civil penalty not to exceed $1,100. 5 U.S.C. 1215(a)(3).

(b) In any action in which the administrative law judge, or the Board on petition for review, finds under 5 U.S.C. 1505 that a State or local government employee has violated the Hatch Political Activities Act and that the employee's removal is warranted, the administrative law judge, or the Board on petition for review, will issue a written decision notifying the employing agency and the employee that the employee must be removed and not reappointed within 18 months of the date of the decision. If the agency fails to remove the employee, or if it reappoints the employee within 18 months, the administrative law judge, or the Board on petition for review, may order the Federal entity administering loans or grants to the agency to withhold funds from the agency as provided under 5 U.S.C. 1506.

(c) In any Hatch Act action in which the administrative law judge, or the Board on petition for review, finds that a Federal or District of Columbia government employee has violated 5 U.S.C. 7324 and that the violation warrants removal, the administrative law judge, or the Board on petition for review, will issue a written decision ordering the employee's removal. If the administrative law judge determines that removal is not warranted, the judge will issue a recommended decision under Sec. 1201.125(c)(1) of this part. If the Board finds by unanimous vote that the violation does not warrant removal, it will impose instead a penalty of not less than 30 days suspension without pay. If the Board finds by majority vote that the violation warrants removal, it will order the employee's removal.

Sec. 1201.127 Judicial review.

(a) An employee subject to a final Board decision imposing disciplinary action under 5 U.S.C. 1215 may obtain judicial review of the decision in the United States Court of Appeals for the Federal Circuit, except as provided under paragraph (b) of this section. 5 U.S.C. 1215(a)(4).

(b) A party aggrieved by a determination or order of the Board under 5 U.S.C. 1505 (governing alleged violations of the Hatch Political Activities Act by State or local government employees) may obtain judicial review in an appropriate United States district court. 5 U.S.C. 1508.

Sec. 1201.128 Filing complaint; serving documents on parties.

(a) Place of filing. A Special Counsel complaint seeking corrective action under 5 U.S.C. 1214 must be filed with the Clerk of the Board. After the complaint has been assigned to a judge, subsequent pleadings must be filed with the Board office where the judge is located.

(b) Initial filing and service. The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative, and each person on whose behalf

the corrective action is brought. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative, and each person on whose behalf the corrective action is brought. The Special Counsel must serve a copy of the complaint on the agency or its representative, and each person on whose behalf the corrective action is brought, as shown on the certificate of service.

(c) Subsequent filings and service. Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by Sec. 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(d) Method of filing and service. Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the office determined under paragraph (a) of this section. Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

Sec. 1201.129 Contents of complaint.

(a) If the Special Counsel determines that the Board should take action to require an agency to correct a prohibited personnel practice (or a pattern of prohibited personnel practices) under 5 U.S.C. 1214(b)(4), he or she must file a written complaint in accordance with Sec. 1201.128 of this part, stating with particularity any alleged violations of law or regulation, along with the supporting facts.

(b) If the Special Counsel files a corrective action with the Board on behalf of an employee, former employee, or applicant for employment who has sought corrective action from the Board directly under 5 U.S.C. 1214(a)(3), the Special Counsel must provide evidence that the employee, former employee, or applicant has consented to the Special Counsel's seeking corrective action. 5 U.S.C. 1214(a)(4).

(c) The judge to whom the complaint is assigned may order the Special Counsel and the respondent agency to file briefs, memoranda, or both in any corrective action complaint the Special Counsel brings before the Board.

Sec. 1201.130 Rights; answer to complaint.

(a) Rights.

(1) A person on whose behalf the Special Counsel brings a corrective action has a right to request intervention in the proceeding in accordance with the regulations in Sec. 1201.34 of this part. The Clerk of the Board shall notify each such person of this right.

(2) When the Special Counsel files a complaint seeking corrective action, the judge to whom the complaint is assigned shall provide an opportunity for oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management. 5 U.S.C. 1214(b)(3)(A).

(3) The judge to whom the complaint is assigned shall provide a person alleged to have been the subject of any prohibited personnel practice alleged in the complaint the opportunity to make written comments, regardless of whether that person has requested and been granted intervenor status. 5 U.S.C. 1214(b)(3)(B).
(b) Filing and default. An agency named as respondent in a Special Counsel corrective action complaint may file an answer with the judge to whom the complaint is assigned within 35 days of the date of service of the complaint. If the agency fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations may be considered admitted and may form the basis of the judge's decision.
(c) Content. An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent agency has no knowledge of a fact, it must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer may be considered true.

Sec. 1201.131 Judge.
(a) The Board will assign a corrective action complaint brought by the Special Counsel under this subpart to a judge, as defined at Sec. 1201.4(a) of this part, for hearing.
(b) The judge will issue an initial decision on the complaint pursuant to 5 U.S.C. 557. The applicable provisions of Secs. 1201.111, 1201.112, and 1201.113 of this part govern the issuance of initial decisions, the jurisdiction of the judge, and the finality of initial decisions. The initial decision will be subject to the procedures for a petition for review by the Board under subpart C of this part.

Sec. 1201.132 Final decisions.
(a) In any Special Counsel complaint seeking corrective action based on an allegation that a prohibited personnel practice has been committed, the judge, or the Board on petition for review, may order appropriate corrective action. 5 U.S.C. 1214(b)(4)(A).
(b)(1) Subject to the provisions of paragraph (b)(2) of this section, in any case involving an alleged prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the judge, or the Board on petition for review, will order appropriate corrective action if the Special Counsel demonstrates that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was taken or will be taken against the individual.
(2) Corrective action under paragraph (b)(1) of this section may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 5 U.S.C. 1214(b)(4)(B).

Sec. 1201.133 Judicial review.
An employee, former employee, or applicant for employment who is adversely affected by a final Board decision on a corrective action complaint brought by the Special Counsel may obtain judicial review of the decision in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 1214(c).

Sec. 1201.134 Deciding official; filing stay request; serving documents on parties.
(a) Request to stay personnel action. Under 5 U.S.C. 1214(b)(1), the Special Counsel may seek to stay a personnel action if the Special Counsel determines that there are reasonable grounds to believe that the action was taken or will be taken as a result of a prohibited personnel practice.
(b) Deciding official. Any member of the Board may delegate to an administrative law judge the authority to decide a Special Counsel request for an initial stay. The Board may delegate to a member of the Board the authority to rule on any matter related to a stay that has been granted to the Special Counsel, including a motion for extension or termination of the stay.
(c) Place of filing. A Special Counsel stay request must be filed with the Clerk of the Board.
(d) Initial filing and service. The Special Counsel must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The Special Counsel must serve a copy of the request on the agency or its representative, as shown on the certificate of service.
(e) Subsequent filings and service. Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by Sec. 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.
(f) Method of filing and service. Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the Clerk of the Board. Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

Sec. 1201.135 Contents of stay request.
The Special Counsel, or that official's representative, must sign each stay request, and must include the following information in the request:
(a) The names of the parties;

(b) The agency and officials involved;
(c) The nature of the action to be stayed;
(d) A concise statement of facts justifying the charge that the personnel action was or will be the result of a prohibited personnel practice; and
(e) The laws or regulations that were violated, or that will be violated if the stay is not issued.

Sec. 1201.136 Action on stay request.
(a) Initial stay. A Special Counsel request for an initial stay of 45 days will be granted within three working days after the filing of the request, unless, under the facts and circumstances, the requested stay would not be appropriate. Unless the stay is denied within the 3- day period, it is considered granted by operation of law.
(b) Extension of stay. Upon the Special Counsel's request, a stay granted under 5 U.S.C. 1214(b)(1)(A) may be extended for an appropriate period of time, but only after providing the agency with an opportunity to comment on the request. Any request for an extension of a stay under 5 U.S.C. 1214(b)(1)(B) must be received by the Board and the agency no later than 15 days before the expiration date of the stay. A brief describing the facts and any relevant legal authority that should be considered must accompany the request for extension. Any response by the agency must be received by the Board no later than 8 days before the expiration date of the stay.
(c) Evidence of compliance with a stay. Within five working days from the date of a stay order or an order extending a stay, the agency ordered to stay a personnel action must file evidence setting forth facts and circumstances demonstrating compliance with the order.
(d) Termination of stay. A stay may be terminated at any time, except that a stay may not be terminated:
(1) On the motion of an agency, or on the deciding official's own motion, without first providing notice and opportunity for oral or written comments to the Special Counsel and the individual on whose behalf the stay was ordered; or
(2) On the motion of the Special Counsel without first providing notice and opportunity for oral or written comments to the individual on whose behalf the stay was ordered. 5 U.S.C. 1214(b)(1)(D).
(e) Additional information. At any time, where appropriate, the Special Counsel, the agency, or both may be required to appear and present further information or explanation regarding a request for a stay, to file supplemental briefs or memoranda, or to supply factual information needed to make a decision regarding a stay.

Sec. 1201.137 Covered actions; filing complaint; serving documents on parties.
(a) Covered actions. The jurisdiction of the Board under 5 U.S.C. 7521 and this subpart with respect to actions against administrative law judges is limited to proposals by an agency to take any of the following actions against an administrative law judge:

(1) Removal;
(2) Suspension;
(3) Reduction in grade;
(4) Reduction in pay; and
(5) Furlough of 30 days or less.
(b) Place of filing. To initiate an action against an administrative law judge under this subpart, an agency must file a complaint with the Clerk of the Board.
(c) Initial filing and service. The agency must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The agency must serve a copy of the complaint on each party or the party's representative, as shown on the certificate of service.
(d) Subsequent filings and service. Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by Sec. 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.
(e) Method of filing and service. Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the Clerk of the Board. Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

Sec. 1201.138 Contents of complaint.
A complaint filed under this section must describe with particularity the facts that support the proposed agency action.

Sec. 1201.139 Rights; answer to complaint.
(a) Responsibilities of Clerk of the Board. The Clerk of the Board shall furnish a copy of the applicable Board regulations to each administrative law judge named as a respondent in the complaint and shall inform each respondent of his or her rights under paragraph (b) of this section and the requirements regarding the timeliness and content of an answer to the agency's complaint under paragraphs (c) and (d), respectively, of this section.
(b) Rights. When an agency files a complaint proposing an action against an administrative law judge under 5 U.S.C. 7521 and this subpart, the administrative law judge has the right:
(1) To file an answer, supported by affidavits and documentary evidence;
(2) To be represented;
(3) To a hearing on the record before an administrative law judge;
(4) To a written decision, issued at the earliest practicable date, in which the administrative law judge states the reasons for his or her decision; and

(5) To a copy of the administrative law judge's decision and subsequent final decision by the Board, if any.
(c) Filing and default. A respondent named in an agency complaint may file an answer with the Clerk of the Board within 35 days of the date of service of the complaint. If a respondent fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations may be considered admitted and may form the basis of the administrative law judge's decision.
(d) Content. An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent has no knowledge of a fact, he or she must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer may be considered true.

Sec. 1201.140 Judge; requirement for finding of good cause.
(a) Judge.
(1) An administrative law judge will hear an action brought by an employing agency under this subpart against a respondent administrative law judge.
(2) The judge will issue an initial decision pursuant to 5 U.S.C. 557. The applicable provisions of Secs. 1201.111, 1201.112, and 1201.113 of this part govern the issuance of initial decisions, the jurisdiction of the judge, and the finality of initial decisions. The initial decision will be subject to the procedures for a petition for review by the Board under subpart C of this part.
(b) Requirement for finding of good cause. A decision on a proposed agency action under this subpart against an administrative law judge will authorize the agency to take a disciplinary action, and will specify the penalty to be imposed, only after a finding of good cause as required by 5 U.S.C. 7521 has been made.

Sec. 1201.141 Judicial review.
An administrative law judge subject to a final Board decision authorizing a proposed agency action under 5 U.S.C. 7521 may obtain judicial review of the decision in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703.

Sec. 1201.142 Actions filed by administrative law judges.
An administrative law judge who alleges that an agency has interfered with the judge's qualified decisional independence so as to constitute an unauthorized action under 5 U.S.C. 7521 may file a complaint with the Board under this subpart. The filing and service requirements of Sec. 1201.137 apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.

Sec. 1201.143 Right to hearing; filing complaint; serving documents on parties.

(a) Right to hearing. If an agency proposes to remove a career appointee from the Senior Executive Service under 5 U.S.C. 3592(a) (2) and 5 CFR 359.502, and to place that employee in another civil service position, the appointee may request an informal hearing before an official designated by the Board. Under 5 CFR 359.502, the agency proposing the removal must provide the appointee 30 days advance notice and must advise the appointee of the right to request a hearing. If the appointee files the request at least 15 days before the effective date of the proposed removal, the request will be granted.

(b) Place of filing. A request for an informal hearing under paragraph (a) of this section must be filed with the Clerk of the Board. After the request has been assigned to a judge, subsequent pleadings must be filed with the Board office where the judge is located.

(c) Initial filing and service. The appointee must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the agency proposing the appointee's removal or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The appointee must serve a copy of the request on the agency or its representative, as shown on the certificate of service.

(d) Subsequent filings and service. Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by Sec. 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(e) Method of filing and service. Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the office determined under paragraph (b) of this section. Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

Sec. 1201.144 Hearing procedures; referring the record.

(a) The official designated to hold an informal hearing requested by a career appointee whose removal from the Senior Executive Service has been proposed under 5 U.S.C. 3592(a)(2) and 5 CFR 359.502 will be a judge, as defined at Sec. 1201.4(a) of this part.

(b) The appointee, the appointee's representative, or both may appear and present arguments in an informal hearing before the judge. A verbatim record of the proceeding will be made. The appointee has no other procedural rights before the judge or the Board.

(c) The judge will refer a copy of the record to the Special Counsel, the Office of Personnel Management, and the employing agency for whatever action may be appropriate.

Sec. 1201.145 No appeal.
There is no right under 5 U.S.C. 7703 to appeal the agency's action or any action by the judge or the Board in cases arising under Sec. 1201.143(a) of this part. The removal action will not be delayed as a result of the hearing.

Sec. 1201.146 Requests for protective orders by the Special Counsel.
(a) Under 5 U.S.C. 1204(e)(1)(B), the Board may issue any order that may be necessary to protect a witness or other individual from harassment during an investigation by the Special Counsel or during the pendency of any proceeding before the Board, except that an agency, other than the Office of the Special Counsel, may not request a protective order with respect to an investigation by the Special Counsel during such investigation.
(b) Any motion by the Special Counsel requesting a protective order must include a concise statement of reasons justifying the motion, together with any relevant documentary evidence. Where the request is made in connection with a pending Special Counsel proceeding, the motion must be filed as early in the proceeding as practicable.
(c) Where there is a pending Special Counsel proceeding, a Special Counsel motion requesting a protective order must be filed with the judge conducting the proceeding, and the judge will rule on the motion. Where there is no pending Special Counsel proceeding, a Special Counsel motion requesting a protective order must be filed with the Clerk of the Board, and the Board will designate a judge, as defined at Sec. 1201.4(a) of this part, to rule on the motion.

Sec. 1201.147 Requests for protective orders by persons other than the Special Counsel. Requests for protective orders by persons other than the Special Counsel in connection with pending original jurisdiction proceedings are governed by Sec. 1201.55(d) of this part.

Sec. 1201.148 Enforcement of protective orders.
A protective order issued by a judge or the Board under this subpart may be enforced in the same manner as provided under subpart F of this part for Board final decisions and orders.

Sec. 1201.151 Scope and policy.
(a) Scope.
(1) The rules in this subpart implement 5 U.S.C. 7702. They apply to any case in which an employee or applicant for employment alleges that a personnel action appealable to the Board was based, in whole or in part, on prohibited discrimination.
(2) ``Prohibited discrimination,'' as that term is used in this subpart, means discrimination prohibited by:
(i) Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(a));
(ii) Section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d));

(iii) Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791);
(iv) Sections 12 and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 631, 633a); or
(v) Any rule, regulation, or policy directive prescribed under any provision of law described in paragraphs (a)(2) (i) through (iv) of this section.
(b) Policy. The Board's policy is to adjudicate impartially, thoroughly, and fairly all issues raised under this subpart.

Sec. 1201.152 Compliance with subpart B procedures.
Unless this subpart expressly provides otherwise, all actions involving allegations of prohibited discrimination must comply with the regulations that are included in subpart B of this part.

Sec. 1201.153 Contents of appeal.
(a) Contents. An appeal raising issues of prohibited discrimination must comply with Sec. 1201.24 of this part, with the following exceptions:
(1) The appeal must state that there was discrimination in connection with the matter appealed, and it must state specifically how the agency discriminated against the appellant; and
(2) The appeal must state whether the appellant has filed a formal discrimination complaint or a grievance with any agency. If he or she has done so, the appeal must state the date on which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance.
(b) Use of form. Completing the form in appendix I of these regulations constitutes compliance with paragraph (a) of this section.

Sec. 1201.154 Time for filing appeal; closing record in cases involving grievance decisions.
Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:
(a) Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision on the appealable action, whichever is later.
(b) If the appellant has filed a timely formal complaint of discrimination with the agency:
(1) An appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue; or
(2) If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days.

(c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under Sec. 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

(d) This paragraph does not apply to employees of the Postal Service or to other employees excluded from the coverage of the federal labor-management relations laws at chapter 71 of title 5, United States Code. If the appellant has filed a grievance with the agency under a negotiated grievance procedure, he may ask the Board to review the final decision on the grievance if he alleges before the Board that he is the victim of prohibited discrimination. Usually, the final decision on a grievance is the decision of an arbitrator. A full description of an individual's right to pursue a grievance and to request Board review of a final decision on the grievance is found at 5 U.S.C. 7121 and 7702. The appellant's request for Board review must be filed within 35 days after the date of issuance of the decision or, if the appellant shows that the decision was received more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision. The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain:

(1) A statement of the grounds on which review is requested;

(2) References to evidence of record or rulings related to the issues before the Board;

(3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and

(4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or tape recording of the hearing.

(e) The record will close upon expiration of the period for filing the response to the petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

Sec. 1201.155 Remand of allegations of discrimination.

If the parties file a written agreement that the discrimination issue should be remanded to the agency for consideration, and if the judge determines that action would be in the interest of justice, the judge may take that action. The remand order will specify a time period within which the agency action must be completed. In no instance will that time period exceed 120 days. While the issue is pending with the agency, the judge will retain jurisdiction over the appeal.

Sec. 1201.156 Time for processing appeals involving allegations of discrimination.

(a) Issue raised in appeal. When an appellant alleges prohibited discrimination in the appeal, the judge will decide both the issue of discrimination and the appealable action within 120 days after the appeal is filed.

(b) Issue not raised in appeal. When an appellant has not alleged prohibited discrimination in the appeal, but has raised the issue later in the proceeding, the judge will decide both the issue of discrimination and the appealable action within 120 days after the issue is raised.

(c) Discrimination issue remanded to agency. When the judge remands an issue of discrimination to the agency, adjudication will be completed within 120 days after the agency completes its action and returns the case to the Board.

Sec. 1201.157 Notice of right to judicial review.

Any final decision of the Board under 5 U.S.C. 7702 will notify the appellant of his or her right, within 30 days after receiving the Board's final decision, to petition the Equal Employment Opportunity Commission to consider the Board's decision, or to file a civil action in an appropriate United States district court. If an appellant elects to waive the discrimination issue, an appeal may be filed with the United States Court of Appeals for the Federal Circuit as stated in Sec. 1201.120 of this part.

Sec. 1201.161 Action by the Equal Employment Opportunity Commission; judicial review.

(a) Time limit for determination. In cases in which an appellant petitions the Equal Employment Opportunity Commission (Commission) for consideration of the Board's decision under 5 U.S.C. 7702(b)(2), the Commission will determine, within 30 days after the date of the petition, whether it will consider the decision.

(b) Judicial review. The Board's decision will become judicially reviewable on:

(1) The date on which the decision is issued, if the appellant does not file a petition with the Commission under 5 U.S.C. 7702(b)(1); or

(2) The date of the Commission's decision that it will not consider the petition filed under 5 U.S.C. 7702(b)(2).

(c) Commission processing and time limits. If the Commission decides to consider the decision of the Board, within 60 days after making its decision it will complete its consideration and either:

(1) Concur in the decision of the Board; or

(2) Issue in writing and forward to the Board for its action under Sec. 1201.162 of this subpart another decision, which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law:

(i) The decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive related to prohibited discrimination; or
(ii) The evidence in the record as a whole does not support the decision involving that provision.
(d) Transmittal of record. The Board will transmit a copy of its record to the Commission upon request.
(e) Development of additional evidence. When asked by the Commission to do so, the Board or a judge will develop additional evidence necessary to supplement the record. This action will be completed within a period that will permit the Commission to make its decision within the statutory 60-day time limit referred to in paragraph (c) of this section. The Board or the judge may schedule additional proceedings if necessary in order to comply with the Commission's request.
(f) Commission concurrence in Board decision. If the Commission concurs in the decision of the Board under 5 U.S.C. 7702(b)(3)(A), the appellant may file suit in an appropriate United States district court.

Sec. 1201.162 Board action on the Commission decision; judicial review.
(a) Board decision. Within 30 days after receipt of a decision of the Commission issued under 1201.161(c)(2), the Board shall consider the decision and:
(1) Concur and adopt in whole the decision of the Commission; or
(2) To the extent that the Board finds that, as a matter of law:
(i) The Commission decision is based on an incorrect interpretation of any provision of any civil service law, rule, regulation, or policy directive, or
(ii) The evidence in the record as a whole does not support the Commission decision involving that provision, it may reaffirm the decision of the Board. In doing so, it may make revisions in the decision that it determines are appropriate.
(b) Judicial review. If the Board concurs in or adopts the decision of the Commission under paragraph (a)(1) of this section, the decision of the Board is a judicially reviewable action.

Sec. 1201.171 Referral of case to Special Panel.
If the Board reaffirms its decision under Sec. 1201.162(a)(2) of this part with or without modification, it will certify the matter immediately to a Special Panel established under 5 U.S.C. 7702(d). Upon certification, the Board, within 5 days (excluding Saturdays, Sundays, and Federal holidays), will transmit the administrative record in the proceeding to the Chairman of the Special Panel and to the Commission. That record will include the following:
(a) The factual record compiled under this section, which will include a transcript of any hearing;
(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

Sec. 1201.172 Organization of Special Panel; designation of members.
(a) A Special Panel is composed of:
(1) A Chairman, appointed by the President with the advice and consent of the Senate, whose term is six (6) years;
(2) One member of the Board, designated by the Chairman of the Board each time a Panel is convened;

(3) One member of the Commission, designated by the Chairman of the Commission each time a Panel is convened.
(b) Designation of Special Panel members–
(1) Time of designation. Within 5 days of certification of a case to a Special Panel, the Chairman of Board and the Chairman of the Commission each will designate one member from his or her agency to serve on the Special Panel.
(2) Manner of designation. Letters designating the Panel members will be served on the Chairman of the Panel and on the parties to the appeal.

Sec. 1201.173 Practices and procedures of Special Panel.
(a) Scope. The rules in this subpart apply to proceedings before a Special Panel.
(b) Suspension of rules. Unless a rule is required by statute, the Chairman of a Special Panel may suspend the rule, in the interest of expediting a decision or for other good cause shown, and may conduct the proceedings in a manner he or she directs. The Chairman may take this action at the request of a party, or on his or her own motion.
(c) Time limit for proceedings. In accordance with 5 U.S.C. 7702(d)(2)(A), the Special Panel will issue a decision within 45 days after a matter has been certified to it.
(d) Administrative assistance to the Special Panel.
(1) The Board and the Commission will provide the Panel with the administrative resources that the Chairman of the Special Panel determines are reasonable and necessary.
(2) Assistance will include, but is not limited to, processing vouchers for pay and travel expenses.
(3) The Board and the Commission are responsible for all administrative costs the Special Panel incurs, and, to the extent practicable, they will divide equally the costs of providing administrative assistance. If the Board and the Commission disagree on the manner in which costs are to be divided, the Chairman of the Special Panel will resolve the disagreement.
(e) Maintaining the official record. The Board will maintain the official record of the appeal. It will transmit two copies of each submission that is filed to each member of the Special Panel in an expeditious manner.
(f) Filing and service of pleadings.
(1) The parties must file the original and six copies of each submission with the Clerk, Merit Systems Protection Board, 1615 M Street, NW.,

Washington, DC 20419. The Office of the Clerk will serve one copy of each submission on the other parties.
(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.
(3) Service may be made by mail or by personal delivery during the Board's normal business hours (8:30 a.m. to 5:00 p.m.). Because of the short statutory time limit for processing these cases, parties must file their submissions by overnight Express Mail, provided by the U.S. Postal Service, if they file their submissions by mail.

(4) A submission filed by Express Mail is considered to have been filed on the date of the Express Mail Order. A submission that is delivered personally is considered to have been filed on the date the Office of the Clerk of the Board receives it.
(g) Briefs and responsive pleadings. If the parties wish to submit written argument, they may file briefs with the Special Panel within 15 days after the date of the Board's certification order. Because of the short statutory time limit for processing these cases, the Special Panel ordinarily will not permit responsive pleadings.
(h) Oral argument. The parties have the right to present oral argument. Parties wishing to exercise this right must indicate this desire when they file their briefs or, if no briefs are filed, within 15 days after the date of the Board's certification order. Upon receiving a request for argument, the Chairman of the Special Panel will determine the time and place for argument and the amount of time to be allowed each side, and he or she will provide this information to the parties.
(i) Postargument submission. Because of the short statutory time limit for processing these cases, the parties may not file postargument submissions unless the Chairman of the Special Panel permits those submissions.
(j) Procedural matters. Any procedural matters not addressed in these regulations will be resolved by written order of the Chairman of the Special Panel.

Sec. 1201.174 Enforcing the Special Panel decision.
The Board, upon receipt of the decision of the Special Panel, will order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board apply to this matter. These regulations are set out in subpart F of this part.

Sec. 1201.175 Judicial review of cases decided under 5 U.S.C. 7702.
(a) Place and type of review. The appropriate United States district court is authorized to conduct all judicial review of cases decided under 5 U.S.C. 7702. Those cases include appeals from actions taken under the following provisions: Section 717(c) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(c)); section 15(c) of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C.

633a(c)); and section 15(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)).
(b) Time for filing request. Regardless of any other provision of law, requests for judicial review of all cases decided under 5 U.S.C. 7702 must be filed within 30 days after the appellant received notice of the judicially reviewable action.

Sec. 1201.181 Authority and explanation.
(a) Under 5 U.S.C. 1204(a)(2), the Board has the authority to order any Federal agency or employee to comply with decisions and orders issued under its jurisdiction, and the authority to enforce compliance with its orders and decisions. The parties are expected to cooperate fully with each other so that compliance with the Board's orders and decisions can be accomplished promptly and in accordance with the laws, rules, and regulations that apply to individual cases. The Board's decisions and orders will contain a notice of the Board's enforcement authority.
(b) In order to avoid unnecessary petitions under this subpart, the agency must inform the appellant promptly of the actions it takes to comply, and it must tell the appellant when it believes it has completed its compliance. The appellant must provide all necessary information that the agency requests in order to comply, and, if not otherwise notified, he or she should, from time to time, ask the agency about its progress.

Sec. 1201.182 Petition for enforcement.
(a) Appellate jurisdiction. Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction. The petition must be filed promptly with the regional or field office that issued the initial decision; a copy of it must be served on the other party or that party's representative; and it must describe specifically the reasons the petitioning party believes there is noncompliance. The petition also must include the date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition.
(b) Original jurisdiction. Any party seeking enforcement of a final Board decision or order issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance.
(c) Petition by an employee other than a party.
(1) Under 5 U.S.C. 1204(e)(2)(B), any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board for enforcement. Except for a petition filed under paragraph (c)(2) or (c)(3) of this section, the Board will entertain a petition for enforcement from an aggrieved employee who is not a party only if the employee seeks and is granted party status as a permissive

intervenor under Sec. 1201.34(c) of this part. The employee must file a motion to intervene at the time of filing the petition for enforcement. The petition for enforcement must describe specifically why the petitioner believes there is noncompliance and in what way the petitioner is aggrieved by the noncompliance. The motion to intervene will be considered in accordance with Sec. 1201.34(c) of this part.
(2) Under Sec. 1201.33(c) of this part, a nonparty witness who has obtained an order from a judge that his or her employing agency provide the witness with official time may petition the Board for enforcement of the order.

(3) Under Sec. 1201.55(d) of this part, a nonparty witness or other individual who has obtained a protective order from a judge during the course of a Board proceeding for protection from harassment may petition the Board for enforcement of the order.
(4) A petition for enforcement under paragraph (c)(1), (c)(2), or (c)(3) of this section must be filed promptly with the regional or field office that issued the order or, if the order was issued by the Board, with the Clerk of the Board. The petitioner must serve a copy of the petition on each party or the party's representative. If the petition is filed under paragraph (c)(1) of this section, the motion to intervene must be filed and served with the petition.

Sec. 1201.183 Procedures for processing petitions for enforcement.
(a) Initial Processing.
(1) When a party has filed a petition for enforcement of a final decision, the alleged noncomplying party must file one of the following within 15 days of the date of service of the petition:
(i) Evidence of compliance, including a narrative explanation of the calculation of back pay and other benefits, and supporting documents;
(ii) Evidence as described in paragraph (a)(1)(i) of this section of the compliance actions that the party has completed, and a statement of the actions that are in process and the actions that remain to be taken, along with a reasonable schedule for full compliance; or
(iii) A statement showing good cause for the failure to comply completely with the decision of the Board. The party that filed the petition may respond to that submission within 10 days after the date of service of the submission. The parties must serve copies of their pleadings on each other as required under Sec. 1201.26(b)(2) of this part.
(2) If the agency is the alleged noncomplying party, it shall submit the name and address of the agency official charged with complying with the Board's order, even if the agency asserts it has fully complied. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President by and with the consent of the Senate is charged with compliance.
(3) The judge may convene a hearing if one is necessary to resolve matters at issue.
(4) If the judge finds that there has been compliance or a good faith effort to take all actions required to be in compliance with the final decision, he

or she will state those findings in a decision. That decision will be subject to the procedures for petitions for review by the Board under subpart C of this part, and subject to judicial review under Sec. 1201.120 of this part. (5) If the judge finds that:
(i) The alleged noncomplying party has not taken, or has not made a good faith effort to take, any action required to be in compliance with the final decision, or
(ii) The party has taken or made a good faith effort to take one or more, but not all, actions required to be in compliance with the final decision; he or she will issue a recommendation containing his or her findings, a statement of the actions required by the party to be in compliance with the final decision, and a recommendation that the Board enforce the final decision.
(6) If a recommendation described under paragraph (a)(5) of this section is issued, the alleged noncomplying party must do one of the following:
(i) If it decides to take the actions required by the recommendation, it must submit to the Clerk of the Board, within 15 days after the issuance of the recommendation, evidence that it has taken those actions.
(ii) If it decides not to take any of the actions required by the recommendation, it must file a brief supporting its nonconcurrence in the recommendation. The brief must be filed with the Clerk of the Board within 30 days after the recommendation is issued and, if it is filed by the agency, it must identify by name, title, and grade the agency official responsible for the failure to take the actions required by the recommendation for compliance.
(iii) If the party decides to take one or more, but not all, actions required by the recommendation, it must submit both evidence of the actions it has taken and, with respect to the actions that it has not taken, a brief supporting its disagreement with the recommendation. The evidence and brief must be filed with the Clerk of the Board within 30 days after issuance of the recommendation and, if it is filed by the agency, it must contain the identifying information required by paragraph (a)(6)(ii) of this section.
(7) The petitioner may file a brief that responds to the submission described in paragraph (a)(6) of this section, and that asks the Board to review any finding in the recommendation, made under paragraph (a)(5)(ii) of this section, that the other party is in partial compliance with the final decision. The petitioner must file this brief with the Clerk of the Board within 20 days of the date of service of the submission described in paragraph (a)(6) of this section.
(b) Consideration by the Board.
(1) The Board will consider the recommendation, along with the submissions of the parties, promptly. When appropriate, the Board may require the alleged noncomplying party, or that party's representative, to appear before the Board to show why sanctions should not be imposed under 5 U.S.C. 1204(a)(2) and 1204(e)(2)(A). The Board also may require the party or its representative to make this showing in writing, or to make it both personally and in writing.

(2) The Board may hold a hearing on an order to show cause, or it may issue a decision without a hearing.
(3) The Board's final decision on the issues of compliance is subject to judicial review under Sec. 1201.120 of this part.
(c) Certification to the Comptroller General. When appropriate, the Board may certify to the Comptroller General of the United States, under 5 U.S.C. 1204(e)(2)(A), that no payment is to be made to a certain Federal employee. This order may apply to any Federal employee, other than a Presidential appointee subject to confirmation by the Senate, who is found to be in noncompliance with the Board's order.
(d) Effect of Special Counsel's action or failure to act. Failure by the Special Counsel to file a complaint under 5 U.S.C. 1215(a)(1)(C) and subpart D of this part will not preclude the Board from taking action under this subpart.

Sec. 1201.191 Savings provisions.
(a) Civil Service Reform Act of 1978 (Pub.L. 95-454)--
(1) Scope. All executive orders, rules and regulations relating to the Federal service that were in effect prior to the effective date of the Civil Service Reform Act shall continue in effect and be applied by the Board in its adjudications until modified, terminated, superseded, or repealed by the President, Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, as appropriate.
(2) Administrative proceedings and appeals therefrom. No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. ``Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.
(3) Explanation. Mr. X was advised of agency's intention to remove him for abandonment of position, effective December 29, 1978. Twenty days later Mr. X appealed the agency action to the Merit Systems Protection Board. The Merit Systems Protection Board docketed Mr. X's appeal as an ``old system case," i.e., one to which the savings clause applied. The appropriate regional office processed the case, applying the substantive laws, rules and regulations in existence prior to the enactment of the Act. The decision, dated February 28, 1979, informed Mr. X that he is entitled to judicial review if he files a timely notice of appeal in the appropriate United States district court or the United States Court of Claims under the statute of limitations applicable when the adverse action was taken.
(b) Whistleblower Protection Act of 1989 (Pub. L. 101-12)--
(1) Scope. All orders, rules, and regulations issued by the Board and the Special Counsel before the effective date of the Whistleblower Protection Act of 1989 shall continue in effect, according to their terms,

until modified, terminated, superseded, or repealed by the Board or the Special Counsel, as appropriate.
(2) Administrative proceedings and appeals therefrom. No provision of the Whistleblower Protection Act of 1989 shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. ``Pending'' is considered to encompass existing agency proceedings, including personnel actions that were proposed, threatened, or taken before July 9, 1989, the effective date of the Whistleblower Protection Act of 1989, and appeals before the Board or its predecessor agencies that were subject to judicial review on that date. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

Sec. 1201.201 Statement of purpose.
Source: 63 FR 41179, Aug. 3, 1998, unless otherwise noted.
(a) This subpart governs Board proceedings for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, and compensatory damages.
(b) There are seven statutory provisions covering attorney fee awards. Because most MSPB cases are appeals under 5 U.S.C. 7701, most requests for attorney fees will be governed by Sec. 1201.202(a)(1). There are, however, other attorney fee provisions that apply only to specific kinds of cases. For example, Sec. 1201.202(a)(4) applies only to certain whistleblower appeals. Sections 1201.202(a)(5) and (a)(6) apply only to corrective and disciplinary action cases brought by the Special Counsel. Section 1201.202(a)(7) applies only to appeals brought under the Uniformed Services Employment and Reemployment Rights Act.
(c) An award of consequential damages is authorized in only two situations: Where the Board orders corrective action in a whistleblower appeal under 5 U.S.C. 1221, and where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214. Consequential damages include such items as medical costs and travel expenses, and other costs as determined by the Board through case law.
(d) The Civil Rights Act of 1991 (42 U.S.C. 1981a) authorizes an award of compensatory damages to a prevailing party who is found to have been intentionally discriminated against based on race, color, religion, sex, national origin, or disability. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

Sec. 1201.202 Authority for awards.
(a) Awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable). The Board is authorized by various statutes to order payment of attorney fees and, where applicable, costs, expert witness fees, and litigation expenses. These statutory authorities include, but are not limited to, the following authorities to order payment of:
(1) Attorney fees, as authorized by 5 U.S.C. 7701(g)(1), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C.

7701 or an agency action against an administrative law judge under 5 U.S.C. 7521, and an award is warranted in the interest of justice;
(2) Attorney fees, as authorized by 5 U.S.C. 7701(g)(2), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701, a request to review an arbitration decision under 5 U.S.C. 7121(d), or an agency action against an administrative law judge under 5 U.S.C. 7521, and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1);
(3) Attorney fees and costs, as authorized by 5 U.S.C.1221(g)(2), where the appellant is the prevailing party in an appeal under 5 U.S.C. 7701 and the Board's decision is based on a finding of a prohibited personnel practice;
(4) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(1)(B), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies;
(5) Attorney fees, as authorized by 5 U.S.C. 1214(g)(2) or 5 U.S.C. 7701(g)(1), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214;
(6) Attorney fees, as authorized by 5 U.S.C. 1204(m), where the respondent is the prevailing party in a Special Counsel complaint for disciplinary action under 5 U.S.C. 1215;
(7) Attorney fees, expert witness fees, and litigation expenses, as authorized by the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324(c)(4); and
(8) Attorney fees, expert witness fees, and other litigation expenses, as authorized by the Veterans Employment Opportunities Act; 5 U.S.C. 3330c(b).
(b) Awards of consequential damages. The Board may order payment of consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages:
(1) As authorized by 5 U.S.C. 1221(g)(1)(A)(ii), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies; and
(2) As authorized by 5 U.S.C. 1214(g)(2), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214.
(c) Awards of compensatory damages. The Board may order payment of compensatory damages, as authorized by section 102 of the Civil Rights Act of 1991 (42 U.S.C. 1981a), based on a finding of unlawful intentional discrimination but not on an employment practice that is unlawful because of its disparate impact under the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.
(d) Definitions. For purposes of this subpart:
(1) A proceeding on the merits is a proceeding to decide an appeal of an agency action under 5 U.S.C. 1221 or 7701, an appeal under 38 U.S.C. 4324, an appeal under 5 U.S.C. 3330a, a request to review an arbitration decision under 5 U.S.C. 7121(d), a Special Counsel complaint under 5

U.S.C. 1214 or 1215, or an agency action against an administrative law judge under 5 U.S.C. 7521.
(2) An addendum proceeding is a proceeding conducted after issuance of a final decision in a proceeding on the merits, including a decision accepting the parties' settlement of the case. The final decision in the proceeding on the merits may be an initial decision of a judge that has become final under Sec. 1201.113 of this part or a final decision of the Board.

Sec. 1201.203 Proceedings for attorney fees.
(a) Form and content of request. A request for attorney fees must be made by motion, must state why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. Evidence supporting a motion for attorney fees must include at a minimum:
(1) Accurate and current time records;
(2) A copy of the terms of the fee agreement (if any);
(3) A statement of the attorney's customary billing rate for similar work, with evidence that that rate is consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices; and
(4) An established attorney-client relationship.
(b) Addendum proceeding. A request for attorney fees will be decided in an addendum proceeding.
(c) Place of filing. Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, a motion for attorney fees must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, a motion for attorney fees must be filed with the Clerk of the Board.
(d) Time of filing. A motion for attorney fees must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final.
(e) Service. A copy of a motion for attorney fees must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.
(f) Hearing; applicability of subpart B. The judge may hold a hearing on a motion for attorney fees and may apply appropriate provisions of subpart B of this part to the addendum proceeding.
(g) Initial decision; review by the Board. The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

Sec. 1201.204 Proceedings for consequential damages and compensatory damages.

(a) Time for making request.

(1) A request for consequential damages or compensatory damages must be made during the proceeding on the merits, no later than the end of the conference(s) held to define the issues in the case.

(2) The judge or the Board, as applicable, may waive the time limit for making a request for consequential damages or compensatory damages for good cause shown. The time limit will not be waived if a party shows that such waiver would result in undue prejudice.

(b) Form and content of request. A request for consequential damages or compensatory damages must be made in writing and must state the amount of damages sought and the reasons why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard.

(c) Service. A copy of a request for consequential damages or compensatory damages must be served on the other parties or their representatives when the request is made. A party may file a pleading responding to the request within the time limit established by the judge or the Board, as applicable.

(d) Addendum proceeding.

(1) A request for consequential damages or compensatory damages will be decided in an addendum proceeding.

(2) A judge may waive the requirement of paragraph (d)(1), either on his or her own motion or on the motion of a party, and consider a request for damages in a proceeding on the merits where the judge determines that such action is in the interest of the parties and will promote efficiency and economy in adjudication.

(e) Initiation of addendum proceeding.

(1) A motion for initiation of an addendum proceeding to decide a request for consequential damages or compensatory damages must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final. Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, the motion must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, the motion must be filed with the Clerk of the Board.

(2) A copy of a motion for initiation of an addendum proceeding to decide a request for consequential damages or compensatory damages must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(f) Hearing; applicability of subpart B. The judge may hold a hearing on a request for consequential damages or compensatory damages and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) Initial decision; review by the Board. The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.
(h) Request for damages first made in proceeding before the Board. Where a request for consequential damages or compensatory damages is first made on petition for review of a judge's initial decision on the merits and the Board waives the time limit for making the request in accordance with paragraph (a)(2) of this section, or where the request is made in a case where the only MSPB proceeding is before the 3-member Board, including, for compensatory damages only, a request to review an arbitration decision under 5 U.S.C. 7121(d), the Board may:

(1) Consider both the merits and the request for damages and issue a final decision;
(2) Remand the case to the judge for a new initial decision, either on the request for damages only or on both the merits and the request for damages; or
(3) Where there has been no prior proceeding before a judge, forward the request for damages to a judge for hearing and a recommendation to the Board, after which the Board will issue a final decision on both the merits and the request for damages.
(i) EEOC review of decision on compensatory damages. A final decision of the Board on a request for compensatory damages pursuant to the Civil Rights Act of 1991 shall be subject to review by the Equal Employment Opportunity Commission as provided under subpart E of this part.

MERIT SYSTEM PROTECTION BOARD PART 1209 - PRACTICES AND PROCEDURES FOR APPEAL AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING
5 C.F.R. Part 1209

1209.13Referral of findings to the Special Counsel.
AUTHORITY: 5 U.S.C. 1204, 1221, 2302(b)(8), and 7701.
SOURCE: 55 FR 28592, July 12, 1990, unless otherwise noted.

Subpart A - Jurisdiction and Definitions
§ 1209.1 Scope.
This part governs any appeal or stay request filed with the Board by an employee, former employee, or applicant for employment where the appellant alleges that a personnel action defined in 5 U.S.C. 2302(a)(2) was threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. Included are individual right of action appeals authorized by 5 U.S.C. 1221(a), appeals of otherwise appealable actions allegedly based on the appellant's whistleblowing activities, and requests for stays of personnel actions allegedly based on whistleblowing.
§ 1209.2 Jurisdiction.
(a) Under 5 U.S.C. 1214(a)(3), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.
(b) The Board exercises jurisdiction over:
(1) Individual right of action appeals. These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in § 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board. *Example:* Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Mr. X believes that the agency has rated him ''minimally satisfactory'' because of his whistleblowing activities. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an individual right of action appeal.
(2) *Otherwise appealable action appeals.* These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to appeal directly to the Board. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3 (a)(1) through (a)(19).) *Example:* Agency B removes Ms. Y for alleged misconduct under 5 U.S.C. 7513. Ms. Y believes that the agency removed her because of her whistleblowing activities. Because the removal action is appealable to the Board under some law, rule or regulation other than 5 U.S.C. 1221(a), Ms. Y may choose to file an appeal with the Board without first seeking corrective action from the Special Counsel or to seek corrective action from the Special Counsel and then appeal to the Board.

(3) *Stays.* Where the appellant alleges that a personnel action was or will be based on whistleblowing, the Board may, upon the appellant's request, order an agency to suspend that action.

§ 1209.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A, B, C, E, F, and G of 5 CFR part 1201 to appeals and stay requests governed by this part. The Board will apply the provisions of subpart H of part 1201 regarding awards of attorney fees and consequential damages under 5 U.S.C. 1221(g) to appeals governed by this part. [55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

§ 1209.4 Definitions.

(a) *Personnel action* means, as to individuals and agencies covered by 5 U.S.C. 2302:

(1) An appointment;

(2) A promotion;

(3) An adverse action under chapter 75 of title 5, United States Code or other disciplinary or corrective action;

(4) A detail, transfer, or reassignment;

(5) A reinstatement;

(6) A restoration;

(7) A reemployment;

(8) A performance evaluation under chapter 43 of title 5, United States Code;

(9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action;

(10) A decision to order psychiatric testing or examination; or

(11) Any other significant change in duties, responsibilities, or working conditions.

(b) *Whistleblowing* is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

(c) *Contributing factor* means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure.

(d) *Clear and convincing evidence* is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than ''preponderance of the evidence'' as defined in 5 CFR 1201.56(c)(2).[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

Subpart B - Appeals

§ 1209.5 Time of filing.

(a) *Individual right of action appeals*. The appellant must seek corrective action from the Special Counsel before appealing to the Board. Where the appellant has sought corrective action, the time limit for filing an appeal with the Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed:

(1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel's notification; or,

(2) If the Office of Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the date of filing of the request for corrective action, at any time after the expiration of 120 days.

(b) *Otherwise appealable action appeals.* The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to file the appeal directly with the Board. If the appellant seeks corrective action from the Special Counsel, the time limit for appealing is governed by paragraph (a) of this section. If the appellant appeals directly to the Board, the time limit for filing is governed by 5 CFR 1201.22(b).

(c) *Appeals after a stay request.* Where an appellant has filed a request for a stay with the Board without first filing an appeal of the action, the appeal must be filed within 30 days after the date the appellant receives the order ruling on the stay request. Failure to timely file the appeal will result in the termination of any stay that has been granted unless a good reason for the delay is shown. [55 FR 28592, July 12, 1990, as amended at 59 FR 31110, June 17, 1994; 62 FR 59993, Nov. 6, 1997]

§ 1209.6 Content of appeal; right to hearing.

(a) *Content.* Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file an appeal. Appeals may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24 (a)(1) through (a)(9);

(2) Where the appellant first sought corrective action from the Special Counsel, evidence that the appeal is timely filed;

(3) The name(s) and position(s) held by the employee(s) who took the action(s), and a chronology of facts concerning the action(s);

(4) A description of the appellant's disclosure evidencing whistleblowing as defined in § 1209.4(b) of this part; and

(5) Evidence or argument that:

(i) The appellant was or will be subject to a personnel action as defined in § 1209.4(a) of this part, or that the agency has threatened to take or not to take such a personnel action, together with specific indications giving rise to the appellant's apprehensions; and

(ii) The personnel action was or will be based wholly or in part on the appellant's whistleblowing, as described in § 1209.4(b) of this part.

(b) *Right to hearing.* An appellant has a right to a hearing.

(c) *Timely request.* The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

§ 1209.7 Burden and degree of proof.

(a) Subject to the exception stated in paragraph (b) of this section, in any case involving a prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant.

(b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure.

Subpart C - Stay Requests

§ 1209.8 Filing a request for a stay.

(a) *Time of filing.* An appellant may request a stay of a personnel action allegedly based on whistleblowing at any time after the appellant becomes eligible to file an appeal with the Board under § 1209.5 of this part, but no later than the time limit set for the close of discovery in the appeal. It may be filed prior to, simultaneous with, or after the filing of an appeal.

(b) *Place of filing.* Requests must be filed with the appropriate Board regional or field office as set forth in 5 CFR 1201.4(d).

(c) *Service of stay request.* A stay request must be simultaneously served upon the Board's regional or field office and upon the agency's local servicing personnel office or the agency's designated representative, if any. A certificate of service stating how and when service was made must accompany the stay request.

(d) *Method of filing.* A stay request must be filed with the appropriate Board regional or field office by personal delivery, by facsimile, by mail, or by commercial overnight delivery.[55 FR 28592, July 12, 1990, as amended at 58 FR 36345, July 7, 1993, 59 FR 65243, Dec. 19, 1994]

§ 1209.9 Content of stay request and response.

(a) Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file a stay request. The request may be in any format, and must contain the following:

(1) The name, address, and telephone number of the appellant, and the name and address of the acting agency;

(2) The name, address, and telephone number of the appellant's representative, if any;

(3) The signature of the appellant or, if the appellant has a representative, of the representative;

(4) A chronology of facts, including a description of the appellant's disclosure and the action that the agency has taken or intends to take;

(5) Where the appellant first sought corrective action from the Special Counsel, evidence that the stay request is timely filed;

(6) Evidence and/or argument showing that:

(i) The action threatened, proposed, taken, or not taken is a personnel action, as defined in § 1209.4(a) of this part;
(ii) The action complained of was based on whistleblowing, as defined in § 1209.4(b) of this part; and
(iii) There is a substantial likelihood that the appellant will prevail on the merits of the appeal;
(7) Evidence and/or argument addressing how long the stay should remain in effect; and
(8) Any documentary evidence that supports the stay request.
(b) An appellant may provide evidence and/or argument addressing the question of whether a stay would impose extreme hardship on the agency.
(c) *Agency response.*
(1) The agency's response to the stay request must be received by the appropriate Board regional or field office within five days (excluding Saturdays, Sundays, and Federal holidays) of the date of service of the stay request on the agency.
(2) The agency's response must contain the following:
(i) Evidence and/or argument addressing whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal;
(ii) Evidence and/or argument addressing whether the grant of a stay would result in extreme hardship to the agency; and
(iii) Any documentation relevant to the agency's position on these issues.
[55 FR 28592, July 12, 1990, as amended at 59 FR 65243, Dec. 19, 1994]
§ 1209.10 Hearing and order ruling on stay request.
(a) *Hearing.* The judge may hold a hearing on the stay request.
(b) *Order ruling on stay request.*
(1) The judge must rule upon the stay request within 10 days (excluding Saturdays, Sundays, and Federal holidays) after the request is received by the appropriate Board regional or field office.
(2) The judge's ruling on the stay request must set forth the factual and legal bases for the decision. The judge must decide whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal, and whether the stay would result in extreme hardship to the agency.
(3) If the judge grants a stay, the order must specify the effective date and duration of the stay. [55 FR 28592, July 12, 1990, as amended at 59 FR 65243, Dec. 19, 1994]
§ 1209.11 Duration of stay; interim compliance.
(a) *Duration of stay.* A stay becomes effective on the date specified in the judge's order. The stay will remain in effect for the time period set forth in the order or until the Board issues a final decision on the appeal of the underlying personnel action that was stayed, or until the Board vacates or modifies the stay, whichever occurs first.
(b) *Interim compliance.* An agency must immediately comply with an order granting a stay request. Although the order granting a stay request is not a final order, petitions for enforcement of such orders are governed by 5 CFR part 1201, subpart F.
Subpart D - Reports on Applications for Transfers
§ 1209.12 Filing of agency reports.

When an employee who has applied for a transfer to another position in an Executive agency under 5 U.S.C. 3352 asks the agency head to review a rejection of his or her application for transfer, the agency head must complete the review and provide a written statement of findings to the employee and the Clerk of the Board within 30 days after receiving the request.

Subpart E - Referrals to the Special Counsel

§ 1209.13 Referral of findings to the Special Counsel.

When the Board determines in a proceeding under this part that there is reason to believe that a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215. [62 FR 17048, Apr. 9, 1997]

Merit Systems Protection Board
Rules and Regulations
5 CFR Part 1209
Practices and Procedures for Appeals and Stay Requests of Personnel Actions
Allegedly Based on Whistleblowing
65 *Federal Register* 67607 (November 13, 2000)

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure in this part to permit an appellant who files a whistleblower appeal with MSPB after first seeking corrective action from the Office of Special Counsel (OSC) to satisfy certain requirements for the information to be included in the appeal by filing a copy of Part 2: Reprisal for Whistleblowing of the complaint form submitted to OSC, Form OSC-11 (Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity), as revised August 2000. On October 31, 2000, OSC amended its rules to require that, effective December 1, 2000, complaints of prohibited personnel practices or other prohibited activity (other than an alleged Hatch Act violation) be submitted on Form OSC-11. The amendment to the Board's rules is intended to assist appellants who file whistleblower appeals after first seeking corrective action from the Special Counsel to provide the information necessary for the Board to determine whether the appellant has satisfied the requirement to exhaust OSC procedures prior to filing with the Board.

EFFECTIVE DATE: November 13, 2000.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653-7200.

SUPPLEMENTARY INFORMATION: On October 31, 2000, the Office of Special Counsel amended its rules at 5 CFR 1800.1, effective December 1, 2000, to require an individual who files a complaint of a prohibited personnel practice or other prohibited activity (other than an alleged Hatch Act violation) to complete and submit Form OSC-11, Complaint of Possible Prohibited Personnel Practice or Other Prohibited

Activity (65 FR 64881). OSC revised the complaint form in August 2000 to group details of whistleblower reprisal allegations in a separate section of the form. That section, designated as Part 2: Reprisal for Whistleblowing, requires the complainant to describe each whistleblowing disclosure and to identify when and to whom the disclosure was made, the personnel action that was taken or threatened because of the whistleblowing disclosure, and the date of any such action or threat. The form is available on the OSC Web site (www.osc.gov).
Under the Whistleblower Protection Act, a Federal employee, former employee, or applicant for employment may file an appeal with the Board challenging a personnel action that the individual believes was taken or threatened because of whistleblowing activity. If the individual seeks to challenge a personnel action that is not directly appealable to the Board under another law, rule, or regulation, however, he must first seek corrective action from the Special Counsel. Such an individual may file an individual right of action (IRA) appeal with the Board only if the Special Counsel declines to seek corrective action from the Board or does not inform the individual within 120 days of the filing of the complaint that corrective action will be sought. 5 U.S.C. 1214(a)(3), 5 U.S.C. 1221(a), 5 CFR 1209.2(b)(1), 5 CFR 1209.5(a).
An individual who may appeal a personnel action directly to the Board under another law, rule, or regulation may file his appeal with the Board and raise the allegation that the personnel action was based on whistleblowing as a part of that appeal. 5 U.S.C. 1221(b), 5 CFR 1209.2(b)(2). Alternatively, such an individual may first file a complaint with the Special Counsel and subsequently file an otherwise appealable action (OAA) appeal with the Board after exhausting OSC procedures. 5 CFR 1209.5(b); also see Hartfield v. Department of Defense, 70 M.S.P.R. 20 (1996).
The U.S. Court of Appeals for the Federal Circuit held in Ward v. Merit Systems Protection Board, 981 F.2d 521, 526-27 (Fed. Cir. 1992), that in an IRA appeal, the Board may consider only those matters raised by the appellant in the complaint to the Special Counsel. By providing the Board a copy of Part 2 of Form OSC-11, describing each whistleblowing reprisal claim, an appellant who first sought corrective action from the Special Counsel will help ensure that the Board has sufficient information to determine whether the appellant has satisfied the statutory requirement of exhausting the OSC procedures with respect to all matters raised before the Special Counsel before filing an appeal with the Board.
Therefore, the Board is amending its rule at 5 CFR 1209.6 by adding a new subsection (a)(6) to permit an appellant who files a whistleblower appeal with the Board after first seeking corrective action from the Special Counsel to satisfy the requirements of subsections (a)(3) through (a)(5) of that section by filing a copy of Part 2 of Form OSC-11, together with a copy of any continuation sheet with answers to Part 2 questions filed with OSC, and any supplement to the original complaint filed with OSC or completed by OSC and furnished to the appellant.The Board is making two additional changes to reflect Board rulings that an appellant is protected by the Whistleblower Protection Act if a personnel action is taken against him because the agency believed he made whistleblowing

disclosures (Special Counsel v. Department of the Navy, 46 M.S.P.R. 274 (1990)) or because of his close relationship to a whistleblower (Duda v. Department of Veterans Affairs, 51 M.S.P.R. 444 (1991)). In § 1209.6(a)(4), "the appellant's disclosure" is replaced by "each disclosure." In § 1209.6(a)(5)(ii), "the appellant's whistleblowing" is replaced by "the whistleblowing disclosure."
The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).
List of Subjects in 5 CFR Part 1209
Administrative practice and procedure, Government employees.
Accordingly, the Board amends 5 CFR part 1209 as follows: *67608
PART 1209--PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING
1. The authority citation for part 1209 continues to read as follows:
Authority: 5 U.S.C. 1204, 1221, 2302(b)(8), and 7701.
2. Amend § 1209.6 at paragraph (a) by revising subparagraphs (a)(4) and (a)(5)(ii) and by adding new subparagraph (a)(6) to read as follows:
§ 1209.6 Content of appeal; right to hearing.
(a) * * *
(4) A description of each disclosure evidencing whistleblowing as defined in § 1209.4(b) of this part; and
(5) * * *
(ii) The personnel action was or will be based wholly or in part on the whistleblowing disclosure, as described in § 1209.4(b) of this part.
(6) An appellant who first sought corrective action from the Special Counsel may satisfy the requirements of paragraphs (a)(3) through (a)(5) of this section by filing with the appeal a copy of Part 2: Reprisal For Whistleblowing of the complaint form submitted to the Office of Special Counsel (Form OSC-11, Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity, Rev. 8/00), together with a copy of any continuation sheet with answers to Part 2 questions filed with the Office of Special Counsel, and any supplement to Part 2 of the original complaint filed with the Office of Special Counsel or completed by the Office of Special Counsel and furnished to the appellant.
Dated: November 6, 2000
Robert E. Taylor,
Clerk of the Board

SECTION 15
DEPARTMENT OF LABOR

ADJUDICATORY PROCEDURES FOR CORPORATE, ENVIRONMENTAL, NUCLEAR, AIRLINE AND TRANSPORTATION WHISTLEBLOWER STATUTES

Office of the Secretary of Labor
Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges
29 CFR PART 18

Subpart A—General

Subpart A—General

§ 18.1 Scope of rules.

(a) *General application.* These rules of practice are generally applicable to adjudicatory proceedings before the Office of Administrative Law Judges, United States Department of Labor. Such proceedings shall be conducted expeditiously and the parties shall make every effort at each stage of a proceeding to avoid delay. To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling. The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.

(b) *Waiver, modification, or suspension.* Upon notice to all parties, the administrative law judge may, with respect to matters pending before him or her, modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby. These rules may, from time to time, be suspended, modified or revoked in whole or part.

§ 18.2 Definitions.

For purposes of these rules:

(a) *Adjudicatory proceeding* means a judicial-type proceeding leading to the formulation of a final order;

(b) *Administrative law judge* means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105 (provisions of the rules in this part which refer to administrative law judges may be applicable to other Presiding Officers as well);

(c) *Administrative Procedure Act* means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559;

(d) *Complaint* means any document initiating an adjudicatory proceeding, whether designated a complaint, appeal or an order for proceeding or otherwise;

(e) *Hearing* means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission;

(f) *Order* means the whole or any part of a final procedural or substantive disposition of a matter by the administrative law judge in a matter other than rulemaking;

(g) *Party* includes a person or agency named or admitted as a party to a proceeding;

(h) *Person* includes an individual, partnership, corporation, association, exchange or other entity or organization;
(i) *Pleading* means the complaint, the answer to the complaint, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;
(j) *Respondent* means a party to an adjudicatory proceeding against whom findings may be made or who may be required to provide *relief or take remedial action;*
(k) *Secretary* means the Secretary of Labor and includes any administrator, commissioner, appellate body, board, or other official thereunder for purposes of appeal of recommended or final decisions of administrative law judges;
(l) *Complainant* means a person who is seeking relief from any act or omission in violation of a statute, executive order or regulation;
(m) The term *petition* means a written request, made by a person or party, for some affirmative action;
(n) The term *Consent Agreement* means any written document containing a specified proposed remedy or other relief acceptable to all parties;
(o) *Commencement of Proceeding* is the filing of a request for hearing, order of reference, or referral of a claim for hearing.

§ 18.3 Service and filing of documents.
(a) *Generally*. Except as otherwise provided in this part, copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of the matter. If the matter involves a program administered by the Office of Workers' Compensation Programs (OWCP), the document should contain the OWCP number in addition to the docket number. All documents to be filed shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges (OALJ), 800 K Street, NW., Suite 400, Washington, DC 20001–8002, or to the OALJ Regional Office to which the proceeding may have been transferred for hearing. Each document filed shall be clear and legible.
(b) *How made; by parties.* All documents shall be filed with the Office of Administrative Law Judges, except that notices of deposition, depositions, interrogatories, requests for admissions, and answers and responses thereto, shall not be so filed unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission. Whenever under this part service by a party is required to be made upon a party represented by an attorney or other representative the service shall be made upon the attorney or other representative unless service upon the party is ordered by the presiding administrative law judge. Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The person serving the document shall certify to the manner and date of service.
(c) *By the Office of Administrative Law Judges.* Service of notices, orders, decisions and all other documents, except complaints, shall be made by

regular mail to the last known address.
(d) *Service of complaints.* Service of complaints or charges in enforcement proceedings shall be made either: (1) By delivering a copy to the individual, partner, officer of a corporation, or attorney of record; (2) by leaving a copy at the principal office, place of business, or residence; (3) by mailing to the last known address of such individual, partner, officer or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by addressee.
(e) *Form of pleadings.* (1) Every pleading shall contain a caption setting forth the name of the agency under which the proceeding is instituted, the title of the proceeding, the docket number assigned by the Office of Administrative Law Judges, and a designation of the type of pleading or paper (e.g., complaint, motion to dismiss, etc.). The pleading or papers shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standard size (8 1 /2 x 11) paper, legal size (8 1 /2 x 14) paper will not be accepted after July 31, 1983.
(2) Illegible documents, whether handwritten, typewritten, photocopied, or otherwise will not be accepted. Papers may be reproduced by any duplicating process, provided all copies are clear and legible.
(f) *Filing and service by facsimile.*
(1) *Filing by a party; when permitted.*
Filings by a party may be made by facsimile (fax) when explicitly permitted by statute or regulation, or when directed or permitted by the administrative law judge assigned to the case. If prior permission to file by facsimile cannot be obtained because the presiding administrative law judge is not available, a party may file by facsimile and attach a statement of the circumstances requiring that the document be filed by facsimile rather than by regular mail. That statement does not ensure that the filing will be accepted, but will be considered by the presiding judge in determining whether the facsimile will be accepted *nunc pro tunc* as a filing.
(2) *Service by facsimile; when permitted.* Service upon a party by another party or by the administrative law judge may be made by facsimile (fax) when explicitly permitted by statute or regulation, or when the receiving party consents to service by facsimile.
(3) *Service sheet and proof of service.* Documents filed or served by facsimile (fax) shall include a service sheet which states the means by which filing and/or service was made. A facsimile transmission report generated by the sender's facsimile equipment and which indicates that the transmission was successful shall be presumed adequate proof of filing or service.
(4) *Cover sheet.* Filings or service by facsimile (fax) shall include a cover sheet that identifies the sender, the total number of pages transmitted, and the caption and docket number of the case, if known.
(5) *Originals.* Documents filed or served by facsimile (fax) shall be presumed to be accurate reproductions of the original document until proven otherwise. The party proffering the document shall retain the original in the event of a dispute over authenticity or the accuracy of the

transmission. The original document need not be submitted unless so ordered by the presiding judge, or unless an original signature is required by statute or regulation. If an original signature is required to be filed, the date of the facsimile transmission shall govern the effective date of the filing provided that the document containing the original signature is filed within ten calendar days of the facsimile transmission.

(6) *Length of document.* Documents filed by facsimile (fax) should not exceed 12 pages including the cover sheet, the service sheet and all accompanying exhibits or appendices, except that this page limitation may be exceeded if prior permission is granted by the presiding judge or if the document's length cannot be conformed because of statutory or regulatory requirements.

(7) *Hours for filing by facsimile.* Filings by facsimile (fax) should normally be made between 8:00 am and 5:00 pm, local time at the receiving location.

(g) *Filing and service by courier service.* Documents transmitted by courier service shall be deemed transmitted by regular mail in proceedings before the Office of Administrative Law Judges.

[48 FR 32538, July 15, 1983, as amended at 56 FR 54708, Oct. 22, 1991; 59 FR 41876, Aug. 15, 1994; 60 FR 26970, May 19, 1995]

§ 18.4 Time computations.

(a) *Generally*. In computing any period of time under these rules or in an order issued hereunder the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day. When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) *Date of entry of orders.* In computing any period of time involving the date of the entry of an order, the date of entry shall be the date the order is served by the Chief Docket Clerk.

(c) *Computation of time for delivery by mail.* (1) Documents are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges. However, when documents are filed by mail, five (5) days shall be added to the prescribed period.

(2) Service of all documents other than complaints is deemed effected at the time of mailing.

(3) Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.

(d) *Filing or service by facsimile.* Filing or service by facsimile (fax) is effective upon receipt of the entire document by the receiving facsimile machine. For purposes of filings by facsimile the time printed on the transmission by the facsimile equipment constitutes the date stamp of the Chief Docket Clerk.

[48 FR 32538, July 15, 1983, as amended at 59 FR 41877, Aug. 15, 1994]

§ 18.5 Responsive pleadings—answer and request for hearing.

(a) *Time for answer*. Within thirty (30) days after the service of a complaint, each respondent shall file an answer.
(b) *Default.* Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations of the complaint and to authorize the administrative law judge to find the facts as alleged in the complaint and to enter an initial or final decision containing such findings, appropriate conclusions, and order.
(c) *Signature required.* Every answer filed pursuant to these rules shall be signed by the party filing it or by at least one attorney, in his or her individual name, representing such party. The signature constitutes a certificate by the signer that he or she has read the answer; that to the best of his or her knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.
(d) *Content of answer*—(1) *Orders to show cause.* Any person to whom an order to show cause has been directed and served shall respond to the same by filing an answer in writing. Arguments opposing the proposed sanction should be supported by reference to specific circumstances or facts surrounding the basis for the order to show cause.
(2) *Complaints.* Any respondent contesting any material fact alleged in a complaint, or contending that the amount of a proposed penalty or award is excessive or inappropriate or contending that he or she is entitled to judgment as a matter of law, shall file an answer in writing. An answer shall include:
(i) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted;
(ii) A statement of the facts supporting each affirmative defense.
(e) *Amendments and supplemental pleadings.* If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The administrative law judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved.

§ 18.6 Motions and requests.
(a) *Generally.* Any application for an order or any other request shall be

made by motion which, unless made during a hearing or trial, shall be made in writing unless good cause is established to preclude such submission, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions or requests made during the course of any hearing or appearance before an administrative law judge shall be stated orally and made part of the transcript. Whether made orally or in writing, all parties shall be given reasonable opportunity to state an objection to the motion or request.

(b) *Answers to motions.* Within ten (10) days after a motion is served, or within such other period as the administrative law judge may fix, any party to the proceeding may file an answer in support or in opposition to the motion, accompanied by such affidavits or other evidence as he or she desires to rely upon. Unless the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed.

(c) *Oral arguments or briefs.* No oral argument will be heard on motions unless the administrative law judge otherwise directs. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the position taken.

(d) *Motion for order compelling answer: sanctions.* (1) A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his or her burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of these rules, he or she may order either that the matter is admitted or that an amended answer be served.

(2) If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;

(ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;

(iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(iv) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown.

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or

subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

§ 18.7 Pre-hearing statements.

(a) At any time prior to the commencement of the hearing, the administrative law judge may order any party to file a pre-hearing statement of position.

(b) A pre-hearing statement shall state the name of the party or parties on whose behalf it is presented and shall briefly set forth the following matters, unless otherwise ordered by the administrative law judge:

(1) Issues involved in the proceeding;

(2) Facts stipulated pursuant to the procedures together with a statement that the party or parties have communicated or conferred in a good faith effort to reach stipulation to the fullest extent possible;

(3) Facts in dispute;

(4) Witnesses, except to the extent that disclosure would be privileged, and exhibits by which disputed facts will be litigated;

(5) A brief statement of applicable law;

(6) The conclusion to be drawn;

(7) Suggested time and location of hearing and estimated time required for presentation of the party's or parties' case;

(8) Any appropriate comments, suggestions or information which might assist the parties in preparing for the hearing or otherwise aid in the disposition of the proceeding.

§ 18.8 Pre-hearing conferences.

(a) *Purpose and scope.* (1) Upon motion of a party or upon the administrative law judge's own motion, the judge may direct the parties or their counsel to participate in a conference at any reasonable time, prior to or during the course of the hearing, when the administrative law judge finds that the proceeding would be expedited by a pre-hearing conference. Such conferences normally shall be conducted by conference telephonic communication unless, in the opinion of the administrative law judge, such method would be impractical, or when such conferences can be conducted in a more expeditious or effective manner by correspondence or personal appearance. Reasonable notice of the time, place and manner of the conference shall be given.

(2) At the conference, the following matters shall be considered:

(i) The simplification of issues;

(ii) The necessity of amendments to pleadings;

(iii) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(iv) The limitation of the number of expert or other witnesses;

(v) Negotiation, compromise, or settlement of issues;

(vi) The exchange of copies of proposed exhibits;

(vii) The identification of documents or matters of which official notice may be requested;

(viii) A schedule to be followed by the parties for completion of the actions

decided at the conference; and
(ix) Such other matters as may expedite and aid in the disposition of the proceeding.
(b) *Reporting.* A pre-hearing conference will be stenographically reported, unless otherwise directed by the administrative law judge.
(c) *Order.* Actions taken as a result of a conference shall be reduced to a written order, unless the administrative law judge concludes that a stenographic report shall suffice, or, if the conference takes place within 7 days of the beginning of the hearing, the administrative law judge elects to make a statement on the record at the hearing summarizing the actions taken.

§ 18.9 Consent order or settlement; settlement judge procedure.
(a) *Generally.* At any time after the commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be in the discretion of the administrative law judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties and the probability of reaching an agreement which will result in a just disposition of the issues involved.
(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:
(1) That the order shall have the same force and effect as an order made after full hearing;
(2) That the entire record on which any order may be based shall consist solely of the complaint, order of reference or notice of administrative determination (or amended notice, if one is filed), as appropriate, and the agreement;
(3) A waiver of any further procedural steps before the administrative law judge; and
(4) A waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.
(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representative or their counsel may:
(1) Submit the proposed agreement containing consent findings and an order for consideration by the administrative law judge, or
(2) Notify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action, or
(3) Inform the administrative law judge that agreement cannot be reached.
(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the administrative law judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.
(e)(1) *Settlement judge procedure; purpose.* This paragraph establishes a voluntary process whereby the parties may use a settlement judge to

mediate settlement negotiations. A settlement judge is an active or retired administrative law judge who convenes and presides over settlement conferences and negotiations, confers with the parties jointly and/or individually, and seeks voluntary resolution of issues. Unlike a presiding judge, a settlement judge does not render a formal judgment or decision in the case; his or her role is solely to facilitate fair and equitable solutions and to provide an assessment of the relative merits of the respective positions of the parties.

(2) *How initiated*. A settlement judge may be appointed by the Chief Administrative Law Judge upon a request by a party or the presiding administrative law judge. The Chief Administrative Law Judge has sole discretion to decide whether to appoint a settlement judge, except that a settlement judge shall not be appointed when—

(i) A party objects to referral of the matter to a settlement judge;

(ii) Such appointment is inconsistent with a statute, executive order, or regulation;

(iii) The proceeding arises pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., and associated acts such as the District of Columbia Workmen's Compensation Act, 36 DC Code 501 et seq.; or

(iv) The proceeding arises pursuant to Title IV of the Federal Mine Safety and Health Act, 30 U.S.C. 901 et seq., also known as the Black Lung Benefits Act.

(3) *Selection of settlement judge.* (i) The selection of a settlement judge is at the sole discretion of the Chief Administrative Law Judge, provided that the individual selected—

(A) is an active or retired administrative law judge, and

(B) is not the administrative law judge assigned to hear and decide the case.

(ii) The settlement judge shall not be appointed to hear and decide the case.

(4) *Duration of proceeding.* Unless the Chief Administrative Law Judge directs otherwise, settlement negotiations under this section shall not exceed thirty days from the date of appointment of the settlement judge, except that with the consent of the parties, the settlement judge may request an extension from the Chief Administrative Law Judge. The negotiations will be terminated immediately if a party unambiguously indicates that it no longer wishes to participate, or if in the judgment of the settlement judge, further negotiations would be fruitless or otherwise inappropriate.

(5) *General powers of the settlement judge.* The settlement judge has the power to convene settlement conferences; to require that parties, or representatives of the parties having the authority to settle, participate in conferences; and to impose other reasonable requirements on the parties to expedite an amicable resolution of the case, provided that all such powers shall terminate immediately if negotiations are terminated pursuant to paragraph (e)(4).

(6) *Suspension of discovery.* Requests for suspension of discovery during the settlement negotiations shall be directed to the presiding administrative law judge who shall have sole discretion in granting or denying such requests.

(7) *Settlement conference.* In general the settlement judge should communi-

cate with the parties by telephone conference call. The settlement judge may, however, schedule a personal conference with the parties when:
(i) The settlement judge is scheduled to preside in other proceedings in a place convenient to all parties and representatives involved;
(ii) The offices of the attorneys or other representatives of the parties, and the settlement judge, are in the same metropolitan area; or
(iii) The settlement judge, with the concurrence of the Chief Administrative Law Judge, determines that a personal meeting is necessary for a resolution of substantial issues, and represents a prudent use of resources.
(8) *Confidentiality of settlement discussions.* All discussions between the parties and the settlement judge shall be off-the-record. No evidence regarding statements or conduct in the proceedings under this section is admissible in the instant proceeding or any subsequent administrative proceeding before the Department, except by stipulation of the parties. Documents disclosed in the settlement process may not be used in litigation unless obtained through appropriate discovery or subpoena. The settlement judge shall not discuss any aspect of the case with any administrative law judge or other person, nor be subpoenaed or called as a witness in any hearing of the case or any subsequent administrative proceedings before the Department with respect to any statement or conduct during the settlement discussions.
(9) *Contents of consent order or settlement agreement.* Any agreement disposing of all or part of the proceeding shall be written and signed by the parties. Such agreement shall conform to the requirements of paragraph (b) of this section.
(10) *Report of the settlement.* If a settlement is reached, the parties shall report to the presiding judge in writing within seven working days of the termination of negotiations. The report shall include a copy of the settlement agreement and/or proposed consent order. If a settlement is not reached, the parties shall report this to the presiding judge without further elaboration.
(11) *Review of agreement by presiding judge.* A settlement agreement arrived at with the help of a settlement judge shall be treated by the presiding judge as would be any other settlement agreement.
(12) *Non-reviewable decisions.* Decisions concerning whether a settlement judge should be appointed, the selection of a particular settlement judge, or the termination of proceedings under this section, are not subject to review by Department officials.
[48 FR 32538, July 15, 1983, as amended at 58 FR 38500, July 16, 1993]

§ 18.10 Parties, how designated.
(a) The term *party* whenever used in these rules shall include any natural person, corporation, association, firm, partnership, trustee, receiver, agency, public or private organization, or governmental agency. A party who seeks relief or other affirmative action shall be designated as *plaintiff, complainant* or *claimant,* as appropriate. A party against whom relief or other affirmative action is sought in any proceeding shall be designated as a *defendant* or *respondent,* as appropriate. When a party to the proceeding, the Department of Labor shall be either a party or party-in-interest.

(b) Other persons or organizations shall have the right to participate as parties if the administrative law judge determines that the final decision could directly and adversely affect them or the class they represent, and if they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties.
(c) A person or organization wishing to participate as a party under this section shall submit a petition to the administrative law judge within fifteen (15) days after the person or organization has knowledge of or should have known about the proceeding. The petition shall be filed with the administrative law judge and served on each person or organization who has been made a party at the time of filing. Such petition shall concisely state: (1) Petitioner's interest in the proceeding, (2) how his or her participation as a party will contribute materially to the disposition of the proceeding, (3) who will appear for petitioner, (4) the issues on which petitioner wishes to participate, and (5) whether petitioner intends to present witnesses.
(d) If objections to the petition are filed, the administrative law judge shall then determine whether petitioners have the requisite interest to be a party in the proceedings, as defined in paragraphs (a) and (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the administrative law judge may request all such petitioners to designate a single representative, or he or she may recognize one or more of such petitioners. The administrative law judge shall give each such petitioner written notice of the decision on his or her petition. If the petition is denied, he or she shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae. The administrative law judge shall give written notice to each party of each petition granted.

§ 18.11 Consolidation of hearings.
When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge or the administrative law judge assigned may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made, at the discretion of the administrative law judge as appropriate.

§ 18.12 Amicus curiae.
A brief of an amicus curiae may be filed only with the written consent of all parties, or by leave of the administrative law judge granted upon motion, or on the request of the administrative law judge, except that consent or leave shall not be required when the brief is presented by an officer of an agency of the United States, or by a state, territory or commonwealth. The amicus curiae shall not participate in any way in the conduct of the hearing, including the presentation of evidence and the examination of witnesses.

§ 18.13 Discovery methods.

Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or other evidence for inspection and other purposes; and requests for admission. Unless the administrative law judge orders otherwise, the frequency or sequence of these methods is not limited.

§ 18.14 Scope of discovery.

(a) Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

§ 18.15 Protective orders.

(a) Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) The discovery not be had;

(2) The discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters;

(5) Discovery be conducted with no one present except persons designated by the administrative law judge; or

(6) A trade secret or other confidential research, development or commercial information may not be disclosed or be disclosed only in a designated way.

§ 18.16 Supplementation of responses.
A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
(a) A party is under a duty to supplement timely his response with respect to any question directly addressed to:
(1) The identity and location of persons having knowledge of discoverable matters; and
(2) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he or she is expected to testify and the substance of his or her testimony.
(b) A party is under a duty to amend timely a prior response if he or she later obtains information upon the basis of which:
(1) He or she knows the response was incorrect when made; or
(2) He or she knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
(c) A duty to supplement responses may be imposed by order of the administrative law judge or agreement of the parties.

§ 18.17 Stipulations regarding discovery.
Unless otherwise ordered, a written stipulation entered into by all the parties and filed with the Chief Administrative Law Judge or the administrative law judge assigned may: (a) Provide that depositions be taken before any person, at any time or place, upon sufficient notice, and in any manner and when so taken may be used like other depositions, and (b) modify the procedures provided by these rules for other methods of discovery.

§ 18.18 Written interrogatories to parties.
(a) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any authorized officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be served on all parties to the proceeding. Copies of interrogatories and responses thereto shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.
(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers and objections shall be signed by the person making them. The party upon whom the interrogatories were served shall serve a copy of the answer and objections upon all parties to the proceeding within thirty (30) days after service of the interrogatories, or within such shorter or longer period as the

administrative law judge may allow.
(c) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-hearing conference or other later time.
[48 FR 32538, July 15, 1983, as amended at 59 FR 41877, Aug. 15, 1994]

§ 18.19 Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination.

(a) Any party may serve on any other party a request to:
(1) Produce and permit the party making the request, or a person acting on his or her behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served; or
(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, photographing, testing, or for other purposes as stated in paragraph (a)(1) of this section.
(3) Submit to a physical or mental examination by a physician.
(b) The request may be served on any party without leave of the administrative law judge.
(c) The request shall:
(1) Set forth the items to be inspected either by individual item or by category;
(2) Describe each item or category with reasonable particularity;
(3) Specify a reasonable time, place, and manner of making the inspection and performing the related acts;
(4) Specify the time, place, manner, conditions, and scope of the physical or mental examination and the person or persons by whom it is to be made. A report of examining physician shall be made in accordance with Rule 35(b) of the Federal Rules of Civil Procedure, title 28 U.S.C., as amended.
(d) The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after service of the request.
(e) The response shall state, with respect to each item or category:
(1) That inspection and related activities will be permitted as requested; or
(2) That objection is made in whole or in part, in which case the reasons for objection shall be stated.
(f) A copy of each request for production and each written response shall be served on all parties, but shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.
[48 FR 32538, July 15, 1983, as amended at 59 FR 41877, Aug. 15, 1994]

§ 18.20 Admissions.

(a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.

(b) Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves on the requesting party:

(1) A written statement denying specifically
the relevant matters of which an admission is requested;

(2) A written statement setting forth in detail the reasons why he or she can neither truthfully admit nor deny them; or

(3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(c) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable the party to admit or deny.

(d) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the administrative law judge determines that an objection is justified, he or she shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he or she may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final disposition of the request be made at a pre-hearing conference or at a designated time prior to hearing.

(e) Any matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission.

(f) Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by him or her for any other purpose nor may it be used against him or her in any other proceeding.

(g) A copy of each request for admission and each written response shall be served on all parties, but shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.

[48 FR 32538, July 15, 1983, as amended at 59 FR 41877, Aug. 15, 1994]

§ 18.21 Motion to compel discovery.

(a) If a deponent fails to answer a question propounded or a party upon whom a request is made pursuant to §§ 18.18 through 18.20, or a party upon whom interrogatories are served fails to respond adequately or objects to the request, or any part thereof, or fails to permit inspection as requested,

the discovering party may move the administrative law judge for an order compelling a response or inspection in accordance with the request.
(b) The motion shall set forth:
(1) The nature of the questions or request;
(2) The response or objections of the party upon whom the request was served; and
(3) Arguments in support of the motion.
(c) For purposes of this section, an evasive answer or incomplete answer or response shall be treated as a failure to answer or respond.
(d) In ruling on a motion made pursuant to this section, the administrative law judge may make and enter a protective order such as he or she is authorized to enter on a motion made pursuant to § 18.15(a).

§ 18.22 Depositions.
(a) *When, how, and by whom taken.* The deposition of any witness may be taken at any stage of the proceeding at reasonable times. Depositions may be taken by oral examination or upon written interrogatories before any person having power to administer oaths.
(b) *Application.* Any party desiring to take the deposition of a witness shall indicate to the witness and all other parties the time when, the place where, and the name and post office address of the person before whom the deposition is to be taken; the name and address of each witness; and the subject matter concerning which each such witness is expected to testify.
(c) *Notice.* Notice shall be given for the taking of a deposition, which shall not be less than five (5) days written notice when the deposition is to be taken within the continental United States and not less than twenty (20) days written notice when the deposition is to be taken elsewhere. A copy of the Notice shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.
(d) *Taking and receiving in evidence.* Each witness testifying upon deposition shall be sworn, and any other party shall have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing; read by or to, and subscribed by the witness; and certified by the person administering the oath. Subject to such objections to the questions and answers as were noted at the time of taking the deposition and which would have been valid if the witness were personally present and testifying, such deposition may be read and offered in evidence by the party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof.
(e) *Motion to terminate or limit examination.* During the taking of a deposition, a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, oppression of a deponent or party or improper questions propounded. The deposition will then be adjourned. However, the objecting party or deponent must immediately move the administrative law judge for a ruling on his or her

objections to the deposition conduct or proceedings. The administrative law judge may then limit the scope or manner of the taking of the deposition. [48 FR 32538, July 15, 1983; 49 FR 2739, Jan. 20, 1984; 59 FR 41877, Aug. 15, 1994]

§ 18.23 Use of depositions at hearings.

(a) *Generally.* At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of expert witnesses, particularly the deposition of physicians, may be used by any party for any purpose, unless the administrative law judge rules that such use would be unfair or a violation of due process.

(3) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or duly authorized agent of a public or private corporation, partnership, or association which is a party, may be used by any other party for any purpose.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds:

(i) That the witness is dead; or

(ii) That the witness is out of the United States or more than 100 miles from the place of hearing unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend to testify because of age, sickness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(5) If only part of a deposition is offered in evidence by a party, any other party may require him or her to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

(6) Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any hearing has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.* Except as provided in this paragraph, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make

them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.
(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.
(3) Objections to the form or written interrogatories are waived unless served in writing upon the party propounding them.
(c) *Effect of taking or using depositions.*
A party shall not be deemed to make a person his or her own witness for any purpose by taking his or her deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by any other party of a deposition as described in paragraph (a)(2) of this section. At the hearing, any party may rebut any relevant evidence contained in a deposition whether introduced by him or her or by any other party.

§ 18.24 Subpoenas.
(a) Except as provided in paragraph
(b) of this section, the Chief Administrative Law Judge or the presiding administrative law judge, as appropriate, may issue subpoenas as authorized by statute or law upon written application of a party requiring attendance of witnesses and production of relevant papers, books, documents, or tangible things in their possession and under their control. A subpoena may be served by certified mail or by any person who is not less than 18 years of age. A witness, other than a witness for the Federal Government, may not be required to attend a deposition or hearing unless the mileage and witness fee applicable to witnesses in courts of the United States for each date of attendance is paid in advance of the date of the proceeding.
(b) If a party's written application for subpoena is submitted three (3) working days or less before the hearing to which it relates, a subpoena shall issue at the discretion of the Chief Administrative Law Judge or presiding administrative law judge, as appropriate.
(c) *Motion to quash or limit subpoena.* Within ten (10) days of receipt of a subpoena but no later than the date of the hearing, the person against whom it is directed may file a motion to quash or limit the subpoena, setting forth the reasons why the subpoena should be withdrawn or why it should by limited in scope. Any such motion shall be answered within ten (10) days of service, and shall be ruled on immediately thereafter. The order shall specify the date, if any, for compliance with the specifications of the subpoena.
(d) *Failure to comply.* Upon the failure of any person to comply with an order to testify or a subpoena, the party adversely affected by such failure to comply may, where authorized by statute or by law, apply to the appropriate district court for enforcement of the order or subpoena.

§ 18.25 Designation of administrative law judge.
Hearings shall be held before an administrative law judge appointed under 5 U.S.C. 3105 and assigned to the Department of Labor. The presiding judge shall be designated by the Chief Administrative Law Judge.

§ 18.26 Conduct of hearings.
Unless otherwise required by statute or regulations, hearings shall be conducted in conformance with the Administrative Procedure Act, 5 U.S.C. 554.

§ 18.27 Notice of hearing.
(a) *Generally.* Except when hearings are scheduled by calendar call, the administrative law judge to whom the matter is referred shall notify the parties by mail of a day, time, and place set for hearing thereon or for a pre-hearing conference, or both. No date earlier than fifteen (15) days after the date of such notice shall be set for such hearing or conference, except by agreement of the parties. Service of such notice shall be made by regular, first-class mail, unless under the circumstances it appears to the administrative law judge that certified mail, mailgram, telephone, or any combination of these methods should be used instead.
(b) *Change of date, time and place.* The Chief Administrative Law Judge or the administrative law judge assigned to the case may change the time, date and place of the hearing, or temporarily adjourn a hearing, on his or her own motion or for good cause shown by a party. The parties shall be given not less than ten (10) days notice of the new hearing date, unless they agree to such change without such notice.
(c) *Place of hearing.* Unless otherwise required by statute or regulation, due regard shall be given to the convenience of the parties and the witnesses in selecting a place for the hearing.

§ 18.28 Continuances.
(a) *When granted.* Continuances will only by granted in cases of prior judicial commitments or undue hardship, or a showing of other good cause.
(b) *Time limit for requesting.* Except for good cause arising thereafter, requests for continuances must be filed within fourteen (14) days prior to the date set for hearing.
(c) *How filed.* Motions for continuances shall be in writing. At least 3" x 3 1/2" of blank space shall be provided on the last page of the motion to permit space for the entry of an order by the administrative law judge. Copies shall be served on all parties. Any motions for continuances made within ten (10) days of the date of the scheduled proceeding shall, in addition to the written request, be telephonically conveyed to the administrative law judge or a member of his or her staff and to all other parties. Motions for continuances, based on reasons not reasonably ascertainable prior thereto, may also be made on the record at calendar calls, pre-hearing conferences or hearings.
(d) *Ruling.* Time permitting, the administrative law judge shall issue a written order in advance of the scheduled proceeding date which either

allows or denies the request. Otherwise the ruling may be made orally by telephonic communication to the party requesting same who shall be responsible for telephonically notifying all other parties. Oral orders shall be confirmed in writing.
[48 FR 32538, July 15, 1983; 49 FR 2739, Jan. 20, 1984]

§ 18.29 Authority of administrative law judge.
(a) *General powers.* In any proceeding under this part, the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including, but not limited to, the following:
(1) Conduct formal hearings in accordance with the provisions of this part;
(2) Administer oaths and examine witnesses;
(3) Compel the production of documents and appearance of witnesses in control of the parties;
(4) Compel the appearance of witnesses by the issuance of subpoenas as authorized by statute or law;
(5) Issue decisions and orders;
(6) Take any action authorized by the Administrative Procedure Act;
(7) Exercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Secretary of Labor as are necessary and appropriate therefor;
(8) Where applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, issued from time to time and amended pursuant to 28 U.S.C. 2072; and
(9) Do all other things necessary to enable him or her to discharge the duties of the office.
(b) *Enforcement.* If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the administrative law judge responsible for the adjudication, where authorized by statute or law, may certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies.

§ 18.30 Unavailability of administrative law judge.
In the event the administrative law judge designated to conduct the hearing becomes unavailable, the Chief Administrative Law Judge may designate another administrative law judge for the purpose of further hearing or other appropriate action.

§ 18.31 Disqualification.
(a) When an administrative law judge deems himself or herself disqualified to preside in a particular proceeding, such judge shall withdraw therefrom by notice on the record directed to the Chief Administrative Law Judge.
(b) Whenever any party shall deem the administrative law judge for any reason to be disqualified to preside, or to continue to preside, in a particular

proceeding, that party shall file with the administrative law judge a motion to recuse. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. The administrative law judge shall rule upon the motion.
(c) In the event of disqualification or recusal of an administrative law judge as provided in paragraph (a) or (b) of this section, the Chief Administrative Law Judge shall refer the matter to another administrative law judge for further proceedings.

§ 18.32 Separation of functions.
No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of the administrative law judge, except as a witness or counsel in the proceedings.

§ 18.33 Expedition.
Hearings shall proceed with all reasonable speed, insofar as practicable and with due regard to the convenience of the parties.

§ 18.34 Representation.
(a) *Appearances.* Any party shall have the right to appear at a hearing in person, by counsel, or by other representative, to examine and cross-examine witnesses, and to introduce into the record documentary or other relevant evidence, except that the participation of any intervenor shall be limited to the extent prescribed by the administrative law judge.
(b) Each attorney or other representative shall file a notice of appearance. Such notice shall indicate the name of the case or controversy, the docket number if assigned, and the party on whose behalf the appearance is made.
(c) *Rights of parties.* Every party shall have the right of timely notice and all other rights essential to a fair hearing, including, but not limited to, the rights to present evidence, to conduct such cross-examination as may be necessary for a full and complete disclosure of the facts, and to be heard by objection, motion, and argument.
(d) *Rights of participants.* Every participant shall have the right to make a written or oral statement of position. At the discretion of the administrative law judge, participants may file proposed findings of fact, conclusions of law and a post hearing brief. (e) *Rights of witnesses.* Any person compelled to testify in a proceeding in response to a subpoena may be accompanied, represented, and advised by counsel or other representative, and may purchase a transcript of his or her testimony.
(f) *Office of the Solicitor.* The Department of Labor shall be represented by the Solicitor of Labor or his or her designee and shall participate to the degree deemed appropriate by the Solicitor.
(g) *Qualifications.* (1) *Attorneys.* An attorney at law who is admitted to practice before the Federal courts or before the highest court of any State, the District of Columbia, or any territory or commonwealth of the United States, may practice before the Office of Administrative Law Judges. An attorney's own representation that he or she is in good standing before any

of such courts shall be sufficient proof thereof, unless otherwise ordered by the administrative law judge. Any attorney of record must file prior notice in writing of intent to withdraw as counsel.

(2) *Persons not attorneys.* Any citizen of the United States who is not an attorney at law shall be admitted to appear in a representative capacity in an adjudicative proceeding. An application by a person not an attorney at law for admission to appear in a proceeding shall be submitted in writing to the Chief Administrative Law Judge prior to the hearing in the proceedings or to the administrative law judge assigned at the commencement of the hearing. The application shall state generally the applicant's qualifications to appear in the proceedings. The administrative law judge may, at any time, inquire as to the qualification or ability of such person to render legal assistance.

(3) *Denial of authority to appear.* The administrative law judge may deny the privilege of appearing to any person, within applicable statutory constraints, e.g. 5 U.S.C. 555, who he or she finds after notice of and opportunity for hearing in the matter does not possess the requisite qualifications to represent others; or is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude. No provision hereof shall apply to any person who appears on his or her own behalf or on behalf of any corporation, partnership, or association of which the person is a partner, officer, or regular employee.

(h) *Authority for representation.* Any individual acting in a representative capacity in any adjudicative proceeding may be required by the administrative law judge to show his or her authority to act in such capacity. A regular employee of a party who appears on behalf of the party may be required by the administrative law judge to show his or her authority to so appear.

[48 FR 32538, July 15, 1983; 49 FR 2739, Jan. 20, 1984]

§ 18.35 Legal assistance.

The Office of Administrative Law Judges does not have authority to appoint counsel, nor does it refer parties to attorneys.

§ 18.36 Standards of conduct.

(a) All persons appearing in proceedings before an administrative law judge are expected to act with integrity, and in an ethical manner.

(b) The administrative law judge may exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The administrative law judge shall state in the record the cause for suspending or barring an attorney or other representative from participation in a particular proceeding. Any attorney or other representative so suspended or barred may appeal to the Chief Judge but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the administrative law judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or representative.

§ 18.37 Hearing room conduct.
Proceedings shall be conducted in an orderly manner. The consumption of food or beverage, smoking, or rearranging of courtroom furniture, unless specifically authorized by the administrative law judge, are prohibited.
[48 FR 32538, July 15, 1983; 49 FR 2739, Jan. 20, 1984]

§ 18.38 Ex parte communications.
(a) The administrative law judge shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. Communications by the Office of Administrative Law Judges, the assigned judge, or any party for the sole purpose of scheduling hearings or requesting extensions of time are not considered ex parte communications, except that all other parties shall be notified of such request by the requesting party and be given an opportunity to respond thereto.
(b) *Sanctions.* A party or participant who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including, but not limited to, exclusion from the proceedings and adverse ruling on the issue which is the subject of the prohibited communication.

§ 18.39 Waiver of right to appear and failure to participate or to appear.
(a) *Waiver of right to appear*. If all parties waive their right to appear before the administrative law judge or to present evidence or argument personally or by representative, it shall not be necessary for the administrative law judge to give notice of and conduct an oral hearing. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge. Where such a waiver has been filed by all parties and they do not appear before the administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant written evidence submitted by the parties, together with any pleadings they may submit with respect to the issues in the case. Such documents shall be considered as all of the evidence in the case, and the decision shall be based on them.
(b) *Dismissal—Abandonment by Party.* A request for hearing may be dismissed upon its abandonment or settlement by the party or parties who filed it. A party shall be deemed to have abandoned a request for hearing if neither the party nor his or her representative appears at the time and place fixed for the hearing and either (a) prior to the time for hearing such party does not show good cause as to why neither he or she nor his or her representative can appear or (b) within ten (10) days after the mailing of a notice to him or her by the administrative law judge to show cause, such party does not show good cause for such failure to appear and fails to notify the administrative law judge prior to the time fixed for hearing that he or she cannot appear. A default decision, under § 18.5(b), may be entered against any party failing, without good cause, to appear at a hearing.

§ 18.40 Motion for summary decision.

(a) Any party may, at least twenty (20) days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within ten (10) days after service of the motion, serve opposing affidavits or countermove for summary decision. The administrative law judge may set the matter for argument and/or call for submission of briefs.
(b) Filing of any documents under paragraph (a) of this section shall be with the administrative law judge, and copies of such documents shall be served on all parties.
(c) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.
(d) The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

§ 18.41 Summary decision.
(a) *No genuine issue of material fact.* (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision issued as a summary decision shall conform to the requirements for all final decisions.
(2) An initial decision and a final decision made under this paragraph shall include a statement of:
(i) Findings of fact and conclusions of law, and the reasons therefor, on all issues presented; and
(ii) Any terms and conditions of the rule or order.
(3) A copy of any initial decision and final decision under this paragraph shall be served on each party.
(b) *Hearings on issue of fact.* Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

§ 18.42 Expedited proceedings.
(a) When expedited proceedings are required by statute or regulation, or at any time after commencement of a proceeding, any party may move to advance the scheduling of a proceeding.
(b) Except when such proceedings are required or as otherwise directed by the Chief Administrative Law Judge or the administrative law judge assigned, any party filing a motion under this section shall:

(1) Make the motion in writing;
(2) Describe the circumstances justifying advancement;
(3) Describe the irreparable harm that would result if the motion is not granted; and
(4) Incorporate in the motion affidavits to support any representations of fact.
(c) Service of a motion under this section shall be accomplished by personal delivery or by telephonic or telegraphic communication followed by mail. Service is complete upon personal delivery or mailing.
(d) Except when such proceedings are required, or unless otherwise directed by the Chief Administrative Law Judge or the administrative law judge assigned, all parties to the proceeding in which the motion is filed shall have ten (10) days from the date of service of the motion to file an opposition in response to the motion.
(e) Following the timely receipt by the administrative law judge of statements in response to the motion, the administrative law judge may advance pleading schedules, pre-hearing conferences, and the hearing, as deemed appropriate: provided, however, that a hearing on the merits shall not be scheduled with less than five (5) working days notice to the parties, unless all parties consent to an earlier hearing.
(f) When expedited hearings are required by statute or regulation, such hearing shall be scheduled within sixty (60) days from the receipt of request for hearing or order of reference. The decision of the administrative law judge shall be issued within twenty (20) days after receipt of the transcript of any oral hearing or within twenty (20) days after the filing of all documentary evidence if no oral hearing is conducted.

§ 18.43 Formal hearings.
(a) *Public*. Hearings shall be open to the public. However, in unusual circumstances, the administrative law judge may order a hearing or any part thereof closed, where to do so would be in the best interests of the parties, a witness, the public or other affected persons. Any order closing the hearing shall set forth the reasons for the decision. Any objections thereto shall be made a part of the record.
(b) *Jurisdiction.* The administrative law judge shall have jurisdiction to decide all issues of fact and related issues of law.
(c) *Amendments to conform to the evidence.* When issues not raised by the request for hearing, pre-hearing stipulation, or pre-hearing order are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence may be made on motion of any party at any time; but failure to so amend does not affect the result of the hearing of these issues. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 18.44 [Reserved]
§ 18.45 Official notice.
Official notice may be taken of any material fact, not appearing in evidence

in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the hearing or by reference in the administrative law judge's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

§ 18.46 In camera and protective orders.

(a) *Privileges.* Upon application of any person the administrative law judge may limit discovery or introduction of evidence or issue such protective or other orders as in his or her judgment may be consistent with the objective of protecting privileged communications.

(b) *Classified or sensitive matter.* (1) Without limiting the discretion of the administrative law judge to give effect to any other applicable privilege, it shall be proper for the administrative law judge to limit discovery or introduction of evidence or to issue such protective or other orders as in his or her judgment may be consistent with the objective of preventing undue disclosure of classified or sensitive matter. Where the administrative law judge determines that information in documents containing sensitive matter should be made available to a respondent, he or she may direct the party to prepare an unclassified or non-sensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

(2) If the administrative law judge determines that this procedure is inadequate and that classified or otherwise sensitive matter must form part of the record in order to avoid prejudice to a party, he or she may advise the parties and provide opportunity for arrangements to permit a party or a representative to have access to such matter. Such arrangements may include obtaining security clearances or giving counsel for a party access to sensitive information and documents subject to assurances against further disclosure.

§ 18.47 Exhibits.

(a) *Identification.* All exhibits offered in evidence shall be numbered and marked with a designation identifying the party or intervenor by whom the exhibit is offered. (b) *Exchange of exhibits.* When written exhibits are offered in evidence, one copy must be furnished to each of the parties at the hearing, and one copy to the administrative law judge, unless the parties previously have been furnished with copies or the administrative law judge directs otherwise. If the administrative law judge has not fixed a time for the exchange of exhibits the parties shall exchange copies of exhibits at the earliest practicable time, preferably before the hearing, or at the latest at the commencement of the hearing.

(c) *Substitution of copies for original exhibits.* The administrative law judge may permit a party to withdraw original documents offered in evidence and substitute true copies in lieu thereof.

§ 18.48 Records in other proceedings.

In case any portion of the record in any other proceeding or civil or criminal action is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless the administrative law judge

directs otherwise.

§ 18.49 Designation of parts of documents.
Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, the participant offering the same shall plainly designate the matter so offered, segregating and excluding insofar as practicable the immaterial or irrelevant parts. If other matter in such document is in such bulk or extent as would necessarily encumber the record, such document will not be received in evidence, but may be marked for identification, and if properly authenticated, the relevant and material parts thereof may be read into the record, or if the administrative law judge so directs, a true copy of such matter in proper form shall be received in evidence as an exhibit, and copies shall be delivered by the participant offering the same to the other parties or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the entire document and to offer in evidence in like manner other material and relevant portions thereof.

§ 18.50 Authenticity.
The authenticity of all documents submitted as proposed exhibits in advance of the hearing shall be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.

§ 18.51 Stipulations.
The parties may by stipulation in writing at any stage of the proceeding, or orally made at hearing, agree upon any pertinent facts in the proceeding. It is desirable that the facts be thus agreed upon so far as and whenever practicable. Stipulations may be received in evidence at a hearing or prior thereto, and when received in evidence, shall be binding on the parties thereto.

§ 18.52 Record of hearings.
(a) All hearings shall be mechanically or stenographically reported. All evidence upon which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits introduced as evidence shall be marked for identification and incorporated into the record. Transcripts may be obtained by the parties and the public from the official reporter at rates not to exceed the applicable rates fixed by the contract with the reporter.
(b) *Corrections.* Corrections to the official transcript will be permitted upon motion. Motions for correction must be submitted within ten (10) days of the receipt of the transcript unless additional time is permitted by the administrative law judge. Corrections of the official transcript will be permitted only when errors of substance are involved and only upon approval of the administrative law judge.

§ 18.53 Closing of hearings.
The administrative law judge may hear arguments of counsel and may limit the time of such arguments at his or her discretion, and may allow briefs to be filed on behalf of either party but shall closely limit the time within which the briefs for both parties shall be filed, so as to avoid unreasonable delay.

§ 18.54 Closing the record.
(a) When there is a hearing, the record shall be closed at the conclusion of the hearing unless the administrative law judge directs otherwise.
(b) If any party waives a hearing, the record shall be closed on the date set by the administrative law judge as the final date for the receipt of submissions of the parties to the matter.
(c) Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record. However, the administrative law judge shall make part of the record, any motions for attorney fees authorized by statutes, and any supporting documentation, any determinations there-on, and any approved correction to the transcript.

§ 18.55 Receipt of documents after hearing.
Documents submitted for the record after the close of the hearing will not be received in evidence except upon ruling of the administrative law judge. Such documents when submitted shall be accompanied by proof that copies have been served upon all parties, who shall have an opportunity to comment thereon. Copies shall be received not later than twenty (20) days after the close of the hearing except for good cause shown, and not less than ten (10) days prior to the date set for filing briefs. Exhibit numbers should be assigned by counsel or the party.

§ 18.56 Restricted access.
On his or her own motion, or on the motion of any party, the administrative law judge may direct that there be a restricted access portion of the record to contain any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings. This portion of the record shall be placed in a separate file and clearly marked to avoid improper disclosure and to identify it as a portion of the official record in the proceedings.

§ 18.57 Decision of the administrative law judge.
(a) *Proposed findings of fact, conclusions, and order.* Within twenty (20) days of filing of the transcript of the testimony or such additional time as the administrative law judge may allow, each party may file with the administrative law judge, subject to the judge's discretion under § 18.55, proposed findings of fact, conclusions of law, and order together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the administrative law judge.* Within a reasonable time after the time allowed for the filing of the proposed findings of fact, conclusions of law, and order, or within thirty (30) days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the administrative law judge shall make his or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. Such decision shall be in accordance with the regulations and rulings of the statute or regulation conferring jurisdiction.

§ 18.58 Appeals.

The procedures for appeals shall be as provided by the statute or regulation under which hearing jurisdiction is conferred. If no provision is made therefor, the decision of the administrative law judge shall become the final administrative decision of the Secretary.

§ 18.59 Certification of official record.

Upon timely receipt of either a notice or a petition, the Chief Administrative Law Judge shall promptly certify and file with the reviewing authority, appellate body, or appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

Subpart B—Rules of Evidence

SOURCE: 55 FR 13219, Apr. 9, 1990, unless otherwise noted.

GENERAL PROVISIONS

§ 18.101 Scope.

These rules govern formal adversarial adjudications of the United States Department of Labor conducted before a presiding officer.

(a) Which are required by Act of Congress to be determined on the record after opportunity for an administrative agency hearing in accordance with the Administrative Procedure Act, 5 U.S.C. 554, 556 and 557, or

(b) Which by United States Department of Labor regulation are conducted in conformance with the foregoing provisions, to the extent and with the exceptions stated in § 18.1101. *Presiding officer*, referred to in these rules as *the judge*, means an Administrative Law Judge, an agency head, or other officer who presides at the reception of evidence at a hearing in such an adjudication.

§ 18.102 Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

§ 18.103 Rulings on evidence.

(a) *Effect of erroneous ruling*. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
(2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. A substantial right of the party is affected unless it is more probably true than not true that the error did not materially contribute to the decision or order of the judge. Properly objected to evidence admitted in error does not affect a substantial right if explicitly not relied upon by the judge in support of the decision or order.
(b) *Record of offer and ruling*. The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The judge may direct the making of an offer in question and answer form.
(c) *Plain error*. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

§ 18.104 Preliminary questions.
(a) *Questions of admissibility generally*. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of paragraph (b) of this section. In making such determination the judge is not bound by the rules of evidence except those with respect to privileges.
(b) *Relevance conditioned on fact*. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
(c) *Weight and credibility*. This rule does not limit the right of a party to introduce evidence relevant to weight or credibility.

§ 18.105 Limited admissibility.
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope.

§ 18.106 Remainder of or related writings or recorded statements.
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

OFFICIAL NOTICE
§ 18.201 Official notice of adjudicative facts.

(a) *Scope of rule*. This rule governs only official notice of adjudicative facts.
(b) *Kinds of facts*. An officially noticed fact must be one not subject to reasonable dispute in that it is either:
(1) Generally known within the local area,
(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or
(3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.
(c) *When discretionary*. A judge may take official notice, whether requested or not.
(d) *When mandatory*. A judge shall take official notice if requested by a party and supplied with the necessary information.
(e) *Opportunity to be heard*. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after official notice has been taken.
(f) *Time of taking notice*. Official notice may be taken at any stage of the proceeding.
(g) *Effect of official notice*. An officially noticed fact is accepted as conclusive.

PRESUMPTIONS

§ 18.301 Presumptions in general.

Except as otherwise provided by Act of Congress, or by rules or regulations prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

§ 18.302 Applicability of state law.

The effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

RELEVANCY AND ITS LIMITS

§ 18.401 Definition of *relevant evidence*.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

§ 18.402 Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive

order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority. Evidence which is not relevant is not admissible.

§ 18.403 Exclusion of relevant evidence on grounds of confusion or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of issues, or misleading the judge as trier of fact, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

§ 18.404 Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except evidence of the character of a witness, as provided in §§ 18.607, 18.608, and 18.609.

(b) *Other crimes, wrongs, or acts*. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

§ 18.405 Methods of proving character.

(a) *Reputation of opinion*. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of a claim or defense, proof may also be made of specific instances of that person's conduct.

§ 18.406 Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

§ 18.407 Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

§ 18.408 Compromise and offers to compromise.
Evidence of furnishing or offering or promising to furnish, or of accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negativing a contention of undue delay.

§ 18.409 Payment of medical and similar expenses.
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

§ 18.410 Inadmissibility of pleas, plea discussion, and related statements.
Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:
(a) A plea of guilty which was later withdrawn;
(b) A plea of nolo contendere;
(c) Any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
(d) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

§ 18.411 Liability insurance.
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

PRIVILEGES
§ 18.501 General rule.
Except as otherwise required by the Constitution of the United States, or provided by Act of Congress, or by rules or regulations prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the

common law as they may be interpreted by the courts of the United States in the light of reason and experience. However with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

WITNESSES

§ 18.601 General rule of competency.

Every person is competent to be a witness except as otherwise provided in these rules. However with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

§ 18.602 Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of § 18.703, relating to opinion testimony by expert witnesses.

§ 18.603 Oath or affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

§ 18.604 Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

§ 18.605 Competency of judge as witness.

The judge presiding at the hearing may not testify in that hearing as a witness. No objection need be made in order to preserve the point.

§ 18.606 [Reserved]

§ 18.607 Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

§ 18.608 Evidence of character and conduct of witness.

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness, and

(2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation

evidence or otherwise.
(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in § 18.609, may not be proved by extrinsic evidence. They may, however, in the discretion of the judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness, concerning the witness' character for truthfulness or untruthfulness, or concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony by any witness does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

§ 18.609 Impeachment by evidence of conviction of crime.
(a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or involved dishonesty or false statement, regardless of the punishment.
(b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.
(c) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if:
(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or
(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
(d) *Juvenile adjudications.* Evidence of juvenile adjudications is not admissible under this rule.
(e) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.
[55 FR 13219, Apr. 9, 1990; 55 FR 14033, Apr. 13, 1990]

§ 18.610 Religious beliefs or opinions.
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

§ 18.611 Mode and order of interrogation and presentation.
(a) *Control by judge.* The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:
(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and
(3) Protect witnesses from harassment or undue embarrassment.
(b) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

§ 18.612 Writing used to refresh memory.
If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying, or before testifying if the judge in the judge's discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the judge shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available in the event of review. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires.

§ 18.613 Prior statements of witnesses.
(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in § 18.801(d)(2).

§ 18.614 Calling and interrogation of witnesses by judge.
(a) *Calling by the judge.* The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
(b) *Interrogation by the judge.* The judge may interrogate witnesses, whether called by the judge or by a party.
(c) *Objections.* Objections to the calling of witnesses by the judge or to interrogation by the judge must be timely.

§ 18.615 Exclusion of witnesses.
At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the judge may make the order of the judge's own motion. This rule does not authorize exclusion of a party who is a natural person, or an officer or employee of a party which is not a natural person designated as its representative by its attorney, or a person whose presence is shown by a party to be essential to the presentation of the party's cause.

OPINIONS AND EXPERT TESTIMONY
§ 18.701 Opinion testimony by lay witnesses.
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

§ 18.702 Testimony by experts.
If scientific, technical, or other specialized knowledge will assist the judge as trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

§ 18.703 Bases of opinion testimony by experts.
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

§ 18.704 Opinion on ultimate issue.
Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the judge as trier of fact.

§ 18.705 Disclosure of facts or data underlying expert opinion.
The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

§ 18.706 Judge appointed experts.
(a) *Appointment.* The judge may on the judge's own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of the judge's own selection. An expert witness shall not be appointed by the judge unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the

judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the judge or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
(b) *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in hearings involving just compensation under the fifth amendment. In other hearings the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs.
(c) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

HEARSAY

§ 18.801 Definitions.

(a) *Statement.* A *statement* is (1) an oral or written assertion, or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.
(b) *Declarant.* A *declarant* is a person who makes a statement.
(c) *Hearsay. Hearsay* is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted.
(d) *Statements which are not hearsay.* A statement is not hearsay if:
(1) *Prior statement by witness.* The declarant testifies at the hearing and is subject to cross-examination concerning the statement, and the statement is—
(i) Inconsistent with the declarant's testimony, or
(ii) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
(iii) One of identification of a person made after perceiving the person; or
(2) *Admission by party-opponent.* The statement is offered against a party and is—
(i) The party's own statement in either an individual or a representative capacity, or
(ii) A statement of which the party has manifested an adoption or belief in its truth, or
(iii) A statement by a person authorized by the party to make a statement concerning the subject, or
(iv) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
(v) A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

§ 18.802 Hearsay rule.

Hearsay is not admissible except as provided by these rules, or by rules or

regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress.

§ 18.803 Hearsay exceptions; availability of declarant immaterial.
(a) The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
(4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.
(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term *business* as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the non-occurrence or non-existence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trust-worthiness.
(8) *Public records and reports.* Records, reports, statements, or data

compilations, in any form, of public offices or agencies, setting forth—
(i) The activities of the office or agency, or
(ii) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or
(iii) Factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trust-worthiness.
(9) *Records of vital statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
(10) *Absence of public record or entry.*
To prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or non-existence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with § 18.902, or testimony, that diligent search failed to disclose the record, report, statement, or date compilation, or entry.
(11) *Records of religious organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
(12) *Marriage, baptismal, and similar certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
(13) *Family records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
(14) *Records of documents affecting an interest in property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.
(15) *Statements in documents affecting an interest in property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
(16) *Statements in ancient documents.* Statements in a document in existence twenty years or more the authenticity of which is established.
(17) *Market reports, commercial publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
(18) *Learned treatises.* To the extent called to the attention of an expert

witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by official notice.

(19) *Reputation concerning personal or family history.* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) *Reputation concerning boundaries or general history.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) *Reputation as to character.* Reputation of a person's character among associates or in the community.

(22) *Judgment of previous conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to personal, family, or general history, or boundaries.* Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trust-worthiness to the aforementioned hearsay exceptions, if the judge determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(25) *Self-authentication.* The self-authentication of documents and other items as provided in § 18.902.

(26) *Bills, estimates and reports.* In actions involving injury, illness, disease, death, disability, or physical or mental impairment, or damage to property, the following bills, estimates, and reports as relevant to prove the value and reasonableness of the charges for services, labor and materials stated therein and, where applicable, the necessity for furnishing the same, unless the sources of information or other circumstances indicate lack of trust-worthiness, provided that a copy of said bill, estimate, or report has

been served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it:
(i) Hospital bills on the official letterhead or billhead of the hospital, when dated and itemized.
(ii) Bills of doctors and dentists, when dated and containing a statement showing the date of each visit and the charge therefor.
(iii) Bills of registered nurses, licensed practical nurses and physical therapists, or other licensed health care providers when dated and containing an itemized statement of the days and hours of service and charges therefor.
(iv) Bills for medicine, eyeglasses, prosthetic device, medical belts or similar items, when dated and itemized.
(v) Property repair bills or estimates, when dated and itemized, setting forth the charges for labor and material. In the case of an estimate, the party intending to offer the estimate shall forward with his notice to the adverse party, together with a copy of the estimate, a statement indicating whether or not the property was repaired, and, if so, whether the estimated repairs were made in full or in part and by whom, the cost thereof, together with a copy of the bill therefor.
(vi) Reports of past earnings, or of the rate of earnings and time lost from work or lost compensation, prepared by an employer on official letterhead, when dated and itemized. The adverse party may not dispute the authenticity, the value or reasonableness of such charges, the necessity therefor or the accuracy of the report, unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds thereof, that the adverse party will make if the bill, estimate, or reports is offered at the time of the hearing. An adverse party may call the author of the bill, estimate, or report as a witness and examine the witness as if under cross-examination.
(27) *Medical reports.* In actions involving injury, illness, disease, death, disability, or physical or mental impairment, doctor, hospital, laboratory and other medical reports, made for purposes of medical treatment, unless the sources of information or other circumstances indicate lack of trustworthiness, provided that a copy of the report has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. The adverse party may not object to the admissibility of the report unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefor, that the adverse party will make if the report is offered at the time of the hearing. An adverse party may call the author of the medical report as a witness and examine the witness as if under cross-examination.
(28) *Written reports of expert witnesses.* Written reports of an expert witness prepared with a view toward litigation, including but not limited to a diagnostic report of a physician, including inferences and opinions, when on official letterhead, when dated, when including a statement of the expert's qualifications, when including a summary of experience as an expert witness in litigation, when including the basic facts, data, and

opinions forming the basis of the inferences or opinions, and when including the reasons for or explanation of the inferences and opinions, so far as admissible under rules of evidence applied as though the witness was then present and testifying, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness, provided that a copy of the report has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. The adverse party may not object to the admissibility of the report unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefor, that the adverse party will make if the report is offered at the time of the hearing. An adverse party may call the expert as a witness and examine the witness as if under cross-examination.

(29) *Written statements of lay witnesses.* Written statements of a lay witness made under oath or affirmation and subject to the penalty of perjury, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness provided that (i) a copy of the written statement has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it, and (ii) if the declarant is reasonably available as a witness, as determined by the judge, no adverse party has sufficiently in advance of the hearing filed and served upon the noticing party a written demand that the declarant be produced in person to testify at the hearing. An adverse party may call the declarant as a witness and examine the witness as if under cross-examination.

(30) *Deposition testimony.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, provided that a notice of intention to offer the deposition in evidence, together with a copy thereof if not otherwise previously provided, has been served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. An adverse party may call the deponent as a witness and examine the witness as if under cross-examination.

(b) [Reserved]

§ 18.804 Hearsay exceptions; declarant unavailable.

(a) *Definition of unavailability. Unavailability as a witness* includes situations in which the declarant:

(1) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under paragraph (b) (2), (3), or (4) of this section, the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
(2) *Statement under belief of impending death.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.
(4) *Statement of personal or family history.* (i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or
(ii) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trust-worthiness to the aforementioned hearsay exceptions, if the judge determines that—
(i) The statement is offered as evidence of a material fact;
(ii) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
(iii) The general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a

statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

§ 18.805 Hearsay within hearsay.
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

§18.806 Attacking and supporting credibility of declarant.
When a hearsay statement, or a statement defined in § 18.801(d)(2), (iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

AUTHENTICATION AND IDENTIFICATION
§ 18.901 Requirement of authentication or identification.
(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.
(2) *Non-expert opinion on handwriting.* Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation.
(3) *Comparison by judge or expert witness.*
Comparison by the judge as trier of fact or by expert witnesses with specimens which have been authenticated.
(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if—

(i) In the case of a person, circumstances, including self-identification, show the person answering to be the one called, or
(ii) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form,
(i) Is in such condition as to create no suspicion concerning its authenticity,
(ii) Was in a place where it, if authentic, would likely be, and
(iii) Has been in existence 20 years or more at the time it is offered.
(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by Act of Congress, or by rule or regulation prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order.

§ 18.902 Self-authentication.
(a) Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
(2) *Domestic public documents not under seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (a)(1) of this section, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
(3) *Foreign public documents.* A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position—
(i) Of the executing or attesting person, or
(ii) Of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned

or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the judge may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (a) (1), (2), or (3) of this section, with any Act of Congress, or with any rule or regulation prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions under Acts of Congress or administrative agency rules or regulations.* Any signature, document, or other matter declared by Act of Congress or by rule or regulation prescribed by the administrative agency pursuant to statutory authority or pursuant to executive order to be presumptively or prima facie genuine or authentic.

(11) *Certified records of regularly conducted activity.* The original or a duplicate of a record of regularly conducted activity, within the scope of § 18.803(6), which the custodian thereof or another qualified individual certifies

(i) Was made, at or near the time of the occurrence of the matters set forth, by, or from information transmitted by, a person with knowledge of those matters,

(ii) Is kept in the course of the regularly conducted activity, and

(iii) Was made by the regularly conducted activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. A record so certified is not self-authenticating under this paragraph unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to object or meet it. As used in this subsection, *certifies* means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record, a written declaration signed in a foreign country which, if falsely

made, would subject the maker to criminal penalty under the laws of that country.

(12) *Bills, estimates, and reports.* In actions involving injury, illness, disease, death, disability, or physical or mental impairment, or damage to property, the following bills, estimates, and reports provided that a copy of said bill, estimate, or report has been served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it:

(i) Hospital bills on the official letterhead or billhead of the hospital, when dated and itemized.

(ii) Bills of doctors and dentists, when dated and containing a statement showing the date of each visit and the charge therefor.

(iii) Bills of registered nurses, licensed practical nurses and physical therapists or other licensed health care providers, when dated and containing an itemized statement of the days and hours of service and the charges therefor.

(iv) Bills for medicine, eyeglasses, prosthetic devices, medical belts or similar items, when dated and itemized.

(v) Property repair bills or estimates, when dated and itemized, setting forth the charges for labor and material. In the case of an estimate, the party intending to offer the estimate shall forward with his notice to the adverse party, together with a copy of the estimate, a statement indicating whether or not the property was repaired, and, if so, whether the estimated repairs were made in full or in part and by whom, the cost thereof, together with a copy of the bill therefor.

(vi) Reports of past earnings, or of the rate of earnings and time lost from work or lost compensation, prepared by an employer on official letterhead, when dated and itemized. The adverse party may not dispute the authenticity, therefore, unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefore, the adverse party will make if the bill, estimate, or report is offered at the time of the hearing. An adverse party may call the authors of the bill, estimate, or report as a witness and examine the witness as if under cross-examination.

(13) *Medical reports.* In actions involving injury, illness, disease, death, disability or physical or mental impairment, doctor, hospital, laboratory and other medical reports made for purposes of medical treatment, provided that a copy of the report has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. The adverse party may not object to the authenticity of the report unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefore, that the adverse party will make if the report is offered at the time of the hearing. An adverse party may call the author of the medical report as a witness and examine the witness as if under cross-examination.

(14) *Written reports of expert witnesses.* Written reports of an expert witness prepared with a view toward litigation including but not limited to a diagnostic report of a physician, including inferences and opinions, when

on official letterhead, when dated, when including a statement of the expert's qualifications, when including a summary of experience as an expert witness in litigation, when including the basic facts, data, and opinions forming the basis of the inferences or opinions, and when including the reasons for or explanation of the inferences or opinions, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, provided that a copy of the report has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. The adverse party may not object to the authenticity of the report unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefore, that the adverse party will make if the report is offered at the time of the hearing. An adverse party may call the expert as a witness and examine the witness as if under cross-examination.

(15) *Written statements of lay witnesses.* Written statements of a lay witness made under oath or affirmation and subject to the penalty of perjury, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, provided that:

(i) A copy of the written statement has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it, and:

(ii) If the declarant is reasonably available as a witness, as determined by the judge, no adverse party has sufficiently in advance of the hearing filed and served upon the noticing party a written demand that the declarant be produced in person to testify at the hearing. An adverse party may call the declarant as a witness and examine the witness as if under cross-examination.

(16) *Deposition testimony.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, provided that a notice of intention to offer the deposition in evidence, together with a copy thereof if not otherwise previously provided, has been served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. An adverse party may call the deponent as a witness and examine the witness as if under cross-examination.

(b) [Reserved]

§ 18.903 Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

CONTENTS OF WRITINGS, RECORDINGS,
AND PHOTOGRAPHS

§ 18.1001 Definitions.
(a) For purposes of this article the following definitions are applicable:
(1) *Writings and recordings. Writings* and *recordings* consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
(2) *Photographs. Photographs* include still photographs, X-ray films, video tapes, and motion pictures.
(3) *Original.* An *original* of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An *original* of a photograph includes the negative or, other than with respect of X-ray films, any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an *original*.
(4) *Duplicate.* A *duplicate* is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.
(b) [Reserved]

§ 18.1002 Requirement of original.
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, or by rule or regulation prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order, or by Act of Congress.

§ 18.1003 Admissibility of duplicates.
A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or in the circumstances it would be unfair to admit the duplicate in lieu of the original.

§ 18.1004 Admissibility of other evidence of contents.
(a) The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
(1) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
(2) *Original not obtainable.* No original can be obtained by any available judicial process or procedure; or
(3) *Original in possession of opponent.* At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleading or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
(4) *Collateral matters.* The writing, recording, or photograph is not closely related to a controlling issue.
(b) [Reserved]

§ 18.1005 Public records.
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with § 18.902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

§ 18.1006 Summaries.
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined at the hearing may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The judge may order that they be produced at the hearing.

§ 18.1007 Testimony or written admission of party.
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the non-production of the original.

§ 18.1008 Functions of the judge.
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the judge to determine in accordance with the provisions of § 18.104(a). However, when an issue is raised whether the asserted writing ever existed; or whether another writing, recording, or photograph produced at the hearing is the original; or whether other evidence of contents correctly reflects the contents, the issue is for the judge as trier of fact to determine as in the case of other issues of fact.

APPLICABILITY
§ 18.1101 Applicability of rules.
(a) *General provision.* These rules govern formal adversarial adjudications conducted by the United States Department of Labor before a presiding officer.
(1) Which are required by Act of Congress to be determined on the record after opportunity for an administrative agency hearing in accordance with the Administrative Procedure Act, 5 U.S.C. 554, 556 and 557, or
(2) Which by United States Department of Labor regulation are conducted in conformance with the foregoing provisions. *Presiding officer*, referred to in these rules as *the judge*, means an Administrative Law Judge, an agency head, or other officer who presides at the reception of evidence at a hearing in such an adjudication.
(b) *Rules inapplicable.* The rules (other than with respect to privileges) do

not apply in the following situations:
(1) *Preliminary questions of fact*. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under § 18.104.
(2) *Longshore, black lung, and related acts.* Other than with respect to §§ 18.403, 18.611(a), 18.614 and without prejudice to current practice, hearings held pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901; the Federal Mine Safety and Health Act (formerly the Federal Coal Mine Health and Safety Act) as amended by the Black Lung Benefits Act, 30 U.S.C. 901; and acts such as the Defense Base Act, 42 U.S.C. 1651; the District of Columbia Workmen's Compensation Act, 36 DC Code 501; the Outer Continental Shelf Lands Act, 43 U.S.C. 1331; and the Non-appropriated Fund Instrumentalities Act, 5 U.S.C. 8171, which incorporate section 23(a) of the Longshore and Harbor Workers' Compensation Act by reference.
(c) *Rules inapplicable in part.* These rules do not apply to the extent inconsistent with, in conflict with, or to the extent a matter is otherwise specifically provided by an Act of Congress, or by a rule or regulation of specific application prescribed by the United States Department of Labor pursuant to statutory authority, or pursuant to executive order.

§ 18.1102 [Reserved]

§ 18.1103 Title.

These rules may be known as the United States Department of Labor Rules of Evidence and cited as 29 CFR 18.—— (1989).

§ 18.1104 Effective date.

These rules are effective thirty days after date of publication with respect to formal adversarial adjudications as specified in § 18.1101 except that with respect to hearings held following an investigation conducted by the United States Department of Labor, these rules shall be effective only where the investigation commenced thirty days after publication.

SECTION 16
FREEDOM OF INFORMATION AND PRIVACY

Freedom of Information Act
5 U.S.C. § 552

(a) Each agency shall make available to the public information as follows:
(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public -
(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.
(2) Each agency, in accordance with published rules, shall make available for public inspection and copying -
(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
(C) administrative staff manuals and instructions to staff that affect a member of the public;
(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
(E) a general index of the records referred to under subparagraph (D); unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not

been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if -

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(4)(A) (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of

requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.
(ii) Such agency regulations shall provide that -
(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.
(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section -
(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or (II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.
(v) No agency may require advance payment of any fee unless
the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.
(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.
(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.
(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo,

and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.)

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall -

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole

or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.
(B) (i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.
(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).
(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests -
(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.
(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.
(C) (i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly

available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.
(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.
(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.
(D) (i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.
(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.
(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.
(E) (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records -
(I) in cases in which the person requesting the records demonstrates a compelling need; and
(II) in other cases determined by the agency.
(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure -
(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and
(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.
(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.
(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.
(v) For purposes of this subparagraph, the term "compelling need" means
(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the

life or physical safety of an individual; or
(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.
(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.
(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.
(b) This section does not apply to matters that are -
(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute
(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
(8) contained in or related to examination, operating, or condition reports

prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
(9) geological and geophysical information and data, including maps, concerning wells. Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.
(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and -
(A) the investigation or proceeding involves a possible violation of criminal law; and
(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.
(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.
(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.
(e) (1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include -
(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
(B) (i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and
(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold

information under each such statute, and a concise description of the scope of any information withheld;
(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;
(D) the number of requests for records received by the agency and the number of requests which the agency processed;
(E) the median number of days taken by the agency to process different types of requests;
(F) the total amount of fees collected by the agency for processing requests; and
(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.
(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.
(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.
(4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.
(5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.
(f) For purposes of this section, the term -
(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and
(2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency

in any format, including an electronic format.
(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including -
(1) an index of all major information systems of the agency;
(2) a description of major information and record locator systems maintained by the agency; and
(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

Privacy Act
5 USCS § 552a

(a) Definitions. For purposes of this section--
(1) the term "agency" means agency as defined in section 552[(f)](e) of this title;
(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;
(3) the term "maintain" includes maintain, collect, use, or diseminate;
(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;
(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;
(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;
(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected; and
(8) the term "matching program"--
(A) means any computerized comparison of--
(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--
(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or
(II) recouping payments or delinquent debts under such Federal benefit programs, or
(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal

records,
(B) but does not include--
(i) matches performed to produce aggregate statistical data without any personal identifiers;
(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;
(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;
(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986 [26 USCS §§ 6103(d)], (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code [26 USCS §§ 6103(b)(4)], (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act [42 USCS §§ 604(e), 664, or 1337]; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act [42 USCS §§ 1320b-7];
(v) matches--
(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or
(II) conducted by an agency using only records from systems of records maintained by that agency;
if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;
(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;
(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986 [26 USCS §§ 6103(k)(8)]; or
(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));
(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;
(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;
(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be

used in a matching program;
(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and
(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).
(b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--
(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
(2) required under section 552 of this title;
(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;
(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;
(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;
(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;
(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;
(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;
(11) pursuant to the order of a court of competent jurisdiction; or
(12) to a consumer reporting agency in accordance with section 3711(e) of

title 31.
(c) Accounting of certain disclosures. Each agency, with respect to each system of records under its control, shall--
(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--
(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and
(B) the name and address of the person or agency to whom the disclosure is made;
(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;
(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and
(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.
(d) Access to records. Each agency that maintains a system of records shall-
(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;
(2) permit the individual to request amendment of a record pertaining to him and--
(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and
(B) promptly, either--
(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or
(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;
(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency,

and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;
(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and
(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.
(e) Agency requirements. Each agency that maintains a system of records shall--
(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;
(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;
(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--
(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;
(B) the principal purpose or purposes for which the information is intended to be used;
(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and
(D) the effects on him, if any, of not providing all or any party of the requested information;
(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include-
(A) the name and location of the system;
(B) the categories of individuals on whom records are maintained in the system;
(C) the categories of records maintained in the system;
(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;
(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;
(F) the title and business address of the agency official who is responsible for the system of records;
(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and
(I) the categories of sources or records in the system;
(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;
(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;
(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;
(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;
(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;
(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;
(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and
(12) [Caution: For effective date, see 1988 Amendment note] if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.
(f) Agency Rules. In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall--
(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;
(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before

the agency shall make the record or information available to the individual;
(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;
(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and
(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.
The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.
(g) Civil remedies.
(1) Whenever any agency--
(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;
(B) refuses to comply with an individual request under subsection (d)(1) of this section;
(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or
(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,
the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.
(2) (A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.
(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.
(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this

section, and the burden is on the agency to sustain its action.
(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.
(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--
(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $ 1,000; and
(B) the costs of the action together with reasonable attorney fees as determined by the court.
(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.
(h) Rights of legal guardians. For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.
(i) Criminal penalties.
(1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $ 5,000.
(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $ 5,000.
(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $ 5,000.
(j) General exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections

553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision. At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligiblity, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an

express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;
(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or
(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.
At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.
(l) Archival records.
(1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.
(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.
(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section [effective 270 days following Dec. 31, 1974], shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.
(m) Government contractors.
(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be

considered to be an employee of an agency.
(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.
(n) Mailing lists. An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.
(o) Matching agreements.
(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--
(A) the purpose and legal authority for conducting the program;
(B) the justification for the program and the anticipated results, including a specific estimate of any savings;
(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;
(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v), to--
(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and
(ii) applicants for and holders of positions as Federal personnel, that any information provided by such applicants, recipients, holders and individuals may be subject to verification through matching programs;
(E) procedures for verifying information produced in such matching program as required by subsection (p);
(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;
(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;
(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;
(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;
(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and
(K) that the Comptroller General may have access to all records
of a recipient agency or a non-Federal agency that the Comptroller General

deems necessary in order to monitor or verify compliance with the agreement.
(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall--
(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and
(ii) be available upon request to the public.
(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).
(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.
(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if--
(i) such program will be conducted without any change; and
(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.
(p) Verification and opportunity to contest findings.
(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until--
(A)(i) the agency has independently verified the information; or (ii) the Date Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that--
(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and
(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;
(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and
(C) (i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or
(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.
(2) Independent verification referred to in paragraph (1) requires nvestigation and confirmation of specific information elating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of-

(A) the amount of any asset or income involved;
(B) whether such individual actually has or had access to such asset or income for such individual's own use; and
(C) the period or periods when the individual actually had such asset or income.
(3) Notwithstanding paragraph (1), an agency may take any appropriateaction otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.
(q) Sanctions.
(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.
(2) No source agency may renew a matching agreement unless--
(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and
(B) the source agency has no reason to believe that the certification is inaccurate.
(r) Report on new systems and matching programs. Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.
(s) Biennial report. The President shall biennally submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--
(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;
(2) describing the exercise of individual rights of access and amendment under this section during such years;
(3) identifying changes in or additions to systems of records;
(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974 [note to this section].
(t) Effect of other laws.
(1) No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.
(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual

under the provisions of section 552 of this title.
(u) Data Integrity Boards.

* * *

SECTION 17
MODEL DISCOVERY

The following draft discovery requests are intended to be models for use, as applicable, in whistleblower cases. A party must consult with the applicable rules of procedures and local rules governing discovery requests applicable in the court or administrative agency that is adjudicating the case. These requests are intended to serve as examples only, and should not be simply reproduced as-is and filed. Necessary inserts are identified in bold/italics. No representation is made concerning whether any request or instruction set forth herein would survive a motion to quash or a motion for protective order.

Model Request for Interrogatories and Production of of Documents

INSERT NAME OF COURT

INSERT NAME OF PLAINTIFF,	)	
Plaintiff,	)	
v.	)	***INSERT CASE NUMBER***
INSERT NAME OF DEFENDANT,	)	
Defendant.	)	

PLAINTIFF'S FIRST REQUEST FOR INTERROGATORIES AND PRODUCTION OF DOCUMENTS

Pursuant to the applicable rules of discovery, Fed. R. Civ. P. Rules 26, 33 and 34, Plaintiff hereby requests that Defendant answer the discovery requests set forth herein within thirty days of service of these requests. Defendants should file their discovery answers, and/or produce or allow for inspection and copying of any and all of the following requested documents within the possession, custody or control of the Defendant, in accordance with the definitions and instructions set forth herein. The discovery responses are to be filed at the law office of ***INSERT APPLICABLE ADDRESS HERE***.

I. Definitions and Instructions

A. Definitions: For the purpose of this request the following terms shall have the following meanings:

1. "Document(s)" shall mean every instrument or device by which, through which, or on which information has been recorded including, but not limited to, e-mails; attached documents to e-mails; notes of meetings, discussions or conversations; notes; letters; correspondence; drawings; files; graphs; charts; maps; photographs; deeds; studies; data sheets; chronological data; ledgers; invoices; worksheets; notebooks; books; appointment calendars; diaries; affidavits; contracts; transcripts; surveys; microfilm; videotapes; tape recordings; motion pictures or other film; telephone bills; telephone messages; telegrams; receipts; vouchers; minutes of meetings; pamphlets; computations; calculations; accounting(s); financial statements; voice recordings; draft documents; computer printouts; and any device or media on which or through which information of any type is transmitted, recorded or preserved. The term "document" also means every copy of a document when such a copy is not an identical duplicate of the original.
2. "Contact(s)" means any and all communications, by any means whatsoever, that involve a transfer of information, whether written, oral, electronic, wire, or in any other form, including but not limited to discussions, e-mails, letters, memoranda, telephone calls, voice-mail messages, or telegrams. "Contact(s)" and "Interaction(s)" shall be used interchangeably.
3. "Communications" means any and all transfers of information, by any means whatsoever, whether written, oral, electronic, wire or any other form, including, but not limited to, discussions, e-mails, letters, memoranda, telephone calls, voice-mail messages or telegrams.
4. The Defendant includes, but is not limited to, all its branches, departments, sections, offices, subdivisions, its present and former administrators, officials, inspectors, investigators, staff, employees, consultants, contractors, attorneys, employees, agents, representatives and accountants, or their agents, attorneys, and representatives.
5. "Person(s)" or "individual(s)" shall refer to any natural person, firm, partnership, joint venture, trust, corporation, holding company, non-profit corporation, public interest group, or other entity, natural or legal, domestic or foreign, or the agents or representatives of said entity.
6. "Statement(s)" shall include any form of communication between two or more persons or internal communication between one person. The term "statement(s)" shall also incorporate the definition of the term "contact(s)."
7. "Concerning," without limitation, means relating to, regarding, referring to, describing, evidencing, constituting, mentioning, summarizing, listing, relevant to, demonstrating, tending to prove

or disprove, or explain.

8. "Possession" of documents means documents within your actual or constructive possession, custody or control or within your right of possession, custody, or control. It also includes documents which are under your control, even if in the possession of an agent, such as an attorney, and also includes documents held in your personal capacity and/or in your professional capacity as custodian of documents.
9. "And" and "or" shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of each request all documents which might otherwise be construed to be outside its scope. The term "and/or" is to be read in both the conjunctive and disjunctive and shall serve as a request for information which would be responsive under a conjunctive reading in addition to all information which would be responsive under a disjunctive reading.
10. "Each" includes both "each" and "every."
11. "For" shall be meant to also include "of," "about," "concerning," "on account of," and "related to."
12. "Investigation" shall mean any inquiry, check, search or other type of probe for information of any type about an individual or event, whether formal or informal, by any party, person, organization or entity. The term "investigation" or "to investigate" may be used interchangeably.
13. "Database" shall be meant to include any repository for data, whether raw, finished, or otherwise manipulated. The term "database" may refer to any type of repository, whether electronic, physical or tangible, or otherwise. Examples of a database include, but are not limited to, files, notes, worksheets, the contents of electronic storage devices, computer or manual spreadsheets, computer or manually word-processed documents and/or other computer files.
14. "Computer drive" shall be meant to include any discrete or partitioned portion of a computer's hard or removable disk. A computer's storage and retrieval functions may be divided into several categories, with each category denoted in a particular manner. For example, the 3.5" diskette device is often termed "Drive A," the hard disk device is often termed "Drive C," the CD-ROM device is often termed "Drive D," and subdivisions of the hard disk device may be termed "Drive E" or some other similar term. For purposes of the requests below, "computer drive" shall include, but not be limited to, any one of these types of devices or any subdivision thereof.
15. "Computer file" shall be meant to include any discrete, organized collection of data residing on a computer. For Windows-based computers, "computer files" are often termed "files," "folders," "briefcases," and/or "documents." For purposes of the requests below, the term "computer file" shall include, but not be limited to, any of these terms as well as any other discrete form of data stored

on a computer, a computer peripheral device, or any type of electronic storage medium.

16. "Employee" shall be meant to include any person who is or has been employed by the Defendant on a permanent, temporary, full and/or part-time basis, and includes all executives, managers, supervisors, professionals, consultants, and contractors.

17. "Whistleblower disclosure" shall mean any allegation of wrongdoing or misconduct raised by the Plaintiff to any person and/or any government agency, including, but not limited to, ***INSERT SPECIFIC WHISTLEBLOWER DISCLOSURES MADE BY THE PLAINTIFF***

B. Instructions for Production of Documents

1. The documents and things to be produced should, at the time of production, be organized and labeled to correspond to the enumerated requests below. In the alternative, they may be produced as they are kept in the ordinary course of business, if it is possible to do so.

2. All requests for document production should be produced on the basis of the Defendant's and/or non-parties' knowledge or information and belief, including that of Defendant's and/or non-parties' representatives, agents and, unless privileged, attorneys. Each production of documents should indicate if and when it is based upon information and belief.

3. Where a request for document production has one or more sub-parts, the production of each subpart should be set forth separately and completely.

4. Where any person(s) responding to the attached subpoena and/or this document request believes that the production of any document is privileged, in whole or in part, or otherwise objects to any part of the command for production of documents, the person(s) so responding must state the reason(s) for each objection, and identify each person having knowledge of the factual basis for the objection set forth the basis upon which the privilege or objection is asserted, and identify and describe any document withheld.

5. If the request for production of documents could, at one time, have been performed by consulting or producing documents that are no longer in existence, the person(s) responding to the attached subpoena must, in responding to the command for production of documents:
   a. Identify what information was maintained in such documents;
   b. Identify all documents that contained such information;
   c. State the time period during which such documents were maintained;
   d. State the circumstances under which such documents ceased to exist;
   e. Identify all persons having knowledge of the circumstances

under which such documents ceased to exist; and

f. Identify all persons who have knowledge or had knowledge of the documents and their contents.

6. Where identification of a document is required, state the following: its date; its exact title; the general subject matter of the document; the author and his/her affiliation, office or business, presently and at the time the document or correspondence was prepared; the last known address of every person to whom a copy of the document was to be sent, other than the addressee described above; the name and address of all persons who now have the original and/or copies; the identification and location of the files where the original and each copy is kept in the regular course of business and the custodian thereof.

7. This document request is deemed to be continuing, and any other additional information which is discovered and responsive to this request requires supplementation to these answers, up to and including the time of the hearing in this proceeding.

8. Produce a privilege log for any document Defendants do not produce. This log should include, but not be limited to, the following:

a. Name of the document;
b. Date of the document;
c. Name of person who prepared the document;
d. List of all persons to whom the document was provided;
e. Description of the document and its contents;
f. Specific grounds for asserting any privilege;

C. Instructions for Interrogatory Questions

1. This discovery request is deemed to be continuing, and any other additional information which is discovered and responsive to this request requires supplementation to these answers, up to and including the time of the hearing in this proceeding.

2. All interrogatories should be answered on the basis of Defendant's knowledge or information and belief, including that of Defendant's representatives, agents, and, unless privileged, attorneys. The response should indicate when an answer is based upon information and belief.

3. If Defendant believes that the answer to any interrogatory is privileged, in whole or in part, or otherwise objects to any part of the interrogatory, Defendant must state the reason(s) for each objection, and identify each person having knowledge of the factual basis, if any, on which the privilege or objection is asserted.

4. If an interrogatory could, at one time, have been answered by consulting documents that are no longer in existence, the Defendant must, in responding to the interrogatory:

i. identify what information was maintained in such documents;
ii. identify all documents that contained such information;
iii state the time period during which such documents were

maintained;
iv. state the circumstances under which such documents ceased to exist;
v. identify all persons having knowledge of the circumstances under which documents ceased to exist;
vi. identify all persons who have knowledge or had knowledge of the documents and their contents.

II. Interrogatory Questions

Pursuant to Fed. R. Civ. P. Rules 26 and 33, and to any other rule or regulation applicable to discovery in this proceeding, Plaintiff requests that Defendant answer fully and completely the following interrogatory questions:

1. Identify all persons who participated in the decision to terminate or discipline Plaintiff.

2. Set forth in detail the complete factual basis for any disciplinary action taken against Plaintiff, including, but not limited to, the termination of Plaintiff.

3. Set forth in detail every action taken to investigate or review the accuracy of Plaintiff's whistleblower disclosures.

4. Set forth in detail every step taken to investigate or review the reasonableness or validity of the disciplinary actions taken against Plaintiff.

5. State whether each and every disciplinary action taken against Plaintiff was in accordance with Defendant's written or non-written rules and regulations. If yes, produce a copy of each such rule and/or regulation applicable to the disciplinary action. If no such written rule or regulation exists, set forth in detail the oral rule or regulation applicable to the disciplinary action.

6. Identify every person who knew or suspected that Plaintiff raised a whistleblower disclosure, and set forth what that person knew or suspected and how that person obtained this knowledge or belief.

7. Identify all persons the Defendant believes may be a witness to any of the events relevant to this proceeding, and set forth the nature or substance of that person's testimony, if known.

8. Identify all persons Defendant intends to call as a fact witness or expert witness at the trial, and set forth in detail the substance of said witness' testimony.

9. For each response given to these interrogatory questions, identify

the person, other than counsel, responsible for providing the information used in the response or the information used in formulating a response.

10. ***INSERTS: ADDITIONAL INTERROGATORY REQUESTS AS RELEVANT TO EACH CASE. NOTE: SOME COURTS LIMIT THE NUMBER OF INTERROGATORY QUESTIONS THAT ARE PERMISSIBLE WITHOUT AN AGREEMENT OF THE PARTIES OF WITHOUT LEAVE OF THE COURT.***

III. Documents Requested For Production

Pursuant to Fed. R. Civ. P. Rules 26 and 34, and any other rule or regulation applicable to the production of documents in this proceeding, Plaintiff requests that Defendant produce the original or copies of all of the following documents which are in its custody, possession or control, that refers or relates in any way to the following:

1. The Plaintiff's complete personnel file(s), including, but not limited to, all performance reviews, all letters of commendation, all awards, application for employment, work record, warnings, transfers, and all disciplinary records.
2. Documents that set forth Plaintiff's wage and benefit history with the Defendant, including, but not limited to, documents that set forth Plaintiff's complete wage and benefits package at the time of Plaintiff's discharge.
3. All documents directly or indirectly related to any performance problems or allegations of misconduct related to the Plaintiff.
4. All documents relied upon by the Defendant to justify the discharge of Plaintiff and/or any other disciplinary action taken against or proposed to be taken against the Plaintiff.
5. The Plaintiff's formal and/or informal position description.
6. All rules, regulations, guidelines, and other materials that govern or otherwise bear upon the employment rules and regulations governing any position held by the plaintiff.
7. All documents related in any manner to any meetings or contacts between any person or persons directly or indirectly related to any contacts Plaintiff had with any audit committee or internal employee concerns program, any state or federal regulatory agency, any state or federal law enforcement agency, with the U.S. Department of Labor, with the Securities and Exchange Commission, with any representative of the news media, with any oversight person or group utilized by the Defendant, in which either the Plaintiff and/or any of Plaintiff's whistleblower disclosures were discussed or referenced in any manner.
8. With respect to the following list of employees, please produce any documents that relate to the employee's disciplinary record; work

performance; any criticism of that employee by any person, the employee's peers and/or by management; the employee's education, qualification and credentials; the employee's complete training and personnel files:

a. ***INSERT LIST NAME OF EMPLOYEES POTENTIALLY RELEVANT TO A DISPARATE TREATMENT ANALYSIS***

9. For all employees who performed work similar to the job performed by Plaintiff, and/or who held the same job position as plaintiff over the past five years, please produce the following:
   a. Complete personnel record for each such employee;
   b. The complete disciplinary record for each such employee;
   c. All performance reviews, letters of commendation, warning letters, and/or other documents that contain information related to evaluating the performance or conduct of each such employee;
   d. Each such employee's application for employment;
   e. Each such employee's training record and documents which set forth the education, credentials, and qualifications of each such employee.
10. For each employee who was accused of or found to have committed the same or similar work rule violation(s) or who had the same or similar performance problems of which the Plaintiff was accused, please produce the following documents:
   a. Complete personnel record for each such employee;
   b. The complete disciplinary record for each such employee;
   c. All performance reviews, letters of commendation, warning letters, and/or other documents that contain information related to evaluating the performance or conduct of each such employee;
   d. Each such employee's application for employment;
   e. Each such employee's training record and documents which set forth the education, credentials, and qualifications of each said employee;
   f. If such employee filed a grievance, discrimination complaint, and/or appeal of any performance related or disciplinary related matter, produce all documents directly or indirectly related to any such complaint, grievance, and/or appeal;
   g. This request covers all such documents created over the past five years.

11. All documents related in any way whatsoever to Plaintiff's whistleblower disclosures.
12. If any other employee, contractor, subcontractor, or agent of the Defendant filed a complaint pursuant to any whistleblower

protection law alleging that the Defendant discriminated against any employee in violation of any whistleblower law, please produce all documents directly or indirectly related to any such complaint.

13. Produce a copy of all procedures or rules adopted by the Defendant for the receipt, retention, and treatment of employee complaints regarding accounting, internal accounting controls, and/or auditing matters or other matters related to potential misconduct by the Defendant or employees of the Defendant.
14. Produce a copy of all procedures or rules adopted by the Defendant in order to ensure that employees can file confidential and anonymous allegations to the Defendant regarding questionable accounting or auditing matters or any other matter.
15. Produce a copy of all audit documents directly or indirectly related to Plaintiff's whistleblower disclosures.
16. Produce a copy of any document filed with any federal or state regulatory agency directly or indirectly related to Plaintiff's whistleblower disclosures.
17. Produce a copy of all documents received from any state or federal regulatory agency, and/or the SEC, related in any manner to Plaintiff's whistleblower disclosures.
18. Produce a copy of any document related directly or indirectly to any communication, contact or filing made by any attorney in accordance with Section 307 of the Sarbanes-Oxley Act directly or indirectly related to Plaintiff's whistleblower disclosures.
19. All documents related directly or indirectly to any investigation conducted regarding Plaintiff.
20. All documents directly or indirectly related to any investigation into the disciplinary actions taken against plaintiff.
21. All documents relating or referring in any way to the termination of Plaintiff's employment and/or any other disciplinary action taken against Plaintiff.
22. All documents relating to any communication between the Defendant and any person, organization or entity about Plaintiff, including but not limited to, any employment reference provided by Defendant concerning Plaintiff.
23. All laws, policies, rules, and regulations governing employment references or other information provided by Defendant to third parties about former employees.
24. All documents that support or refute Defendant's denial of the allegations Plaintiff set forth in his complaint.
25. All documents relevant to any affirmative defense Defendant has plead in its answer to the complaint, or any affirmative defense Defendant intends to raise as a defense to Plaintiff's complaint.
26. All documents reflecting any communications between any federal or state law enforcement agency and/or regulatory agency (including, but not limited to, ***INSERT RELEVANT AGENCIES HERE***) which concern or relate to Plaintiff's whistleblower disclosures.

27. All documents directly or indirectly related to Plaintiff's whistleblower disclosures.
28. All documents which concern or address the merits of Plaintiff's whistleblower disclosures.
29. All documents maintained by or created by any internal component of the Defendant, such as an audit committee, an employee concerns program, a hotline program and/or and EEO office, that are directly or indirectly related to Plaintiff.
30. All documents maintained by or created by any internal component of the Defendant, such as an audit committee, an employee concerns program, a hotline program and/or and EEO office, that are directly or indirectly related to Plaintiff's whistleblower disclosures.
31. All documents Defendant intends to introduce into testimony at a hearing or the trial.
32. All documents obtained by Defendants pursuant to any request filed under the Freedom of Information Act directly or indirectly related to Plaintiff and/or the whistleblower disclosures.
33. All documents obtained by Defendants from any third party whatsoever directly or indirectly related to Plaintiff and/or the whistleblower disclosures.
34. All documents which directly or indirectly concern, evaluate, and/or discuss the Plaintiff.
35. All documents related to any internal or external investigation or review of the merits of Plaintiff's whistleblower disclosures and/or Plaintiff's employment discrimination case.
36. All documents directly or indirectly related to any government investigation into any of Plaintiff's whistleblower disclosures.
37. Plaintiff's complete medical record.
38. All pre-employment application material related to the Plaintiff, including, but not limited, the results of any tests the Plaintiff was required to take as a condition of employment.
39. All documents reflecting any communication directly or indirectly related to Plaintiff.
40. All documents reflecting any communication directly or indirectly related to Plaintiff's whistleblower disclosure(s).
41. All documents reflecting any communication directly or indirectly related to this case and/or Plaintiff's allegation that Plaintiff was subjected to retaliation or discriminatory conduct.
42. All documents reflecting any contacts directly or indirectly related to Plaintiff.
43. All documents reflecting any contacts directly or indirectly related to Plaintiff's whistleblower disclosure(s).
44. All documents reflecting any contacts directly or indirectly related to this case and/or Plaintiff's allegation that Plaintiff was subjected to retaliation or discriminatory conduct.
45. Documents contained in any data base, computer drive or computer file responsive to any of the document requests set forth herein.
46. All documents used in answering the above-referenced

interrogatory questions.

47. All documents identified in the above-referenced interrogatory questions.

48. All documents directly or indirectly related to the Plaintiff not produced in response to any of the above-referenced document requests.

49. ***INSERTS: ADD ADDITIONAL DOCUMENT REQUESTS AS RELEVANT TO EACH CASE.***

Respectfully submitted,

_____

INSERT NAME, ADDRESS
AND PHONE NUMBER
OF ATTORNEY FOR PLAINTIFF

Dated: ***INSERT DATE***

Model Notice of Fact Witness Deposition

INSERT NAME OF COURT

INSERT NAME OF PLAINTIFF,	)	
Plaintiff,	)	
v.	)	***INSERT CASE NUMBER***
INSERT NAME OF DEFENDANT,	)	
Defendant.	)	

PLAINTIFF'S NOTICE TO TAKE TESTIMONY BY DEPOSITION UPON ORAL EXAMINATION OF FACT WITNESS

Pursuant to Fed. R. Civ. P. Rules 30 and 45, Plaintiff hereby provides notice that commencing on [***INSERT: DATE AND TIME OF DEPOSITION***] Plaintiff will take the testimony of the [***INSERT NAME OF PERSON TO BE DEPOSED***] by deposition upon oral examination.

Pursuant to Fed. R. Civ. P. Rule 45 and the attached subpoena, the deponent should bring to the deposition all documents in his personal possession, custody, or control that are responsive to Plaintiff's previous document requests filed on the Defendant. A copy of this document request(s) is attached hereto.

The deposition will be taken at [***INSERT LOCATION OF DEPOSITION***], and will be recorded by stenographic and/or sound means. The deposition may be videotaped.

Respectfully submitted,

_____

INSERT NAME, ADDRESS
AND PHONE NUMBER
OF ATTORNEY FOR PLAINTIFF

Dated: ***INSERT DATE***

Model Notice of Corporate Representative Deposition

INSERT NAME OF COURT

INSERT NAME OF PLAINTIFF,	)	
Plaintiff,	)	
v.	)	***INSERT CASE NUMBER***
INSERT NAME OF DEFENDANT,	)	
Defendant.	)	

PLAINTIFF'S NOTICE TO TAKE TESTIMONY BY DEPOSITION OF DEFENDANT'S EPRESENTATIVES AND REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Fed. R. Civ. P. Rules 26, 30 and 45, Plaintiff hereby provides notice of deposition of the following persons identified herein. The time each deposition shall commence is set forth herein. The following persons are noticed for deposition by oral examination:

1. A representative(s) of defendant, produced pursuant to FRCP 30(b)(6), who can testify concerning each and every reason why Defendant terminated the Plaintiff. The witness or witnesses should be prepared to testify regarding the complete basis for this termination and all facts directly or indirectly related to this decision. The witness or witnesses identified herein shall bring to their deposition all documents directly or indirectly related to the subject matter of the deposition.

2. A representative(s) of defendant, produced pursuant to FRCP 30(b)(6), who can testify concerning each and every reason why Defendant maintains that the whistleblower disclosures made by the Plaintiff were not accurate. The witness or witnesses should be prepared to testify regarding the complete basis for this determination(s) and all facts directly or indirectly related to this determination. The witness or witnesses identified herein shall bring to their deposition all documents directly or indirectly related to the subject matter of the deposition.

The deposition will be taken at [***INSERT TIME, DATE AND***

LOCATION OF EACH DEPOSITION], and will be recorded by stenographic and/or sound means. The deposition may be videotaped.

Respectfully submitted,

_____

INSERT NAME, ADDRESS
AND PHONE NUMBER
OF ATTORNEY FOR PLAINTIFF

Model Freedom of Information and Privacy Act Request

[***INSERT NAME AND ADDRESS OF REQUESTER AND THE DATE OF THE LETTER***]

Via First Class Mail and Fax

FOIA Officer
[***INSERT NAME AND ADDRESS OF FEDERAL AGENCY***]

Re: FOIA and PA Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552, et seq., the Privacy Act (PA), 5 U.S.C. § 552a, we hereby file this FOIA and PA request on behalf of our client, ***[INSERT NAME OF CLIENT REQUESTING ACCESS TO THE INFORMATION]***. Pursuant to the FOIA and PA we hereby request copies of any and all documents, including, but not limited to, notes, letters, memoranda, drafts, minutes, diaries, logs, procedures, instructions, engineering analyses, drawings, files, graphs, charts, maps, photographs, agreements, handwritten notes, e-mails, studies, data, notebooks, books, telephone messages, computations, interim and/or final reports, status reports, and any and all other records relevant to and/or generated in connection with:

(1) **All documents directly or indirectly related to [*NAME OF CLIENT*];**

(2) **[INSERT: DESCRIBE REQUESTED DOCUMENTS IN AS MUCH DETAIL AS POSSIBLE]**

We hereby request that all fees be waived because the information requested will contribute significantly to the public's understanding of the operations of the government. The request is filed primarily in the public interest and is not in the commercial interest of the requester. All fees for documents produced under the Privacy Act should also be waived.

As you are aware, the FOIA and PA require you to release documents in segregable portions in the event that they contain exempt

material. For any documents or portions that you deny due to a specific FOIA or PA exemption, please provide an index itemizing and describing the documents or portions of documents withheld.

A notarized authorization, signed by ***[NAME OF CLIENT]***, granting us permission to file this FOIA and PA request on ***[HIS OR HER]*** behalf is attached hereto.

We hereby request that this FOIA and PA request be expedited and that all documents be released within ten (10) working days. In the event that our request for expedited processing is denied, we expect to receive a response within 20 working days as required by the FOIA.

Please inform every person who is the subject of this FOIPA that the FOIPA has been filed and that he is not permitted to destroy or alter documents covered under this request.

If you have any questions, please do not hesitate to contact me.

Sincerely,

_____

INSERT NAME, ADDRESS
AND PHONE NUMBER
OF ATTORNEY FOR PLAINTIFF

SECTION 18
RESOURCES FOR WHISTLEBLOWERS

Attorney Referral Service
National Whistleblower Legal Defense and Education Fund
PO Box3768
Washington, DC 20027
Fax 202-342-1904
http://www.whistleblowers.org/ars.htm

The Fund operates an Attorney Referral Service (ARS) which provides referrals to employee whistleblowers.

Equal Employment Opportunity Commission (EEOC)
1801 L Street, NW
Washington, DC 20507
http://www.eeoc.gov/

The EEOC has jurisdiction over the anti-retaliation laws governing traditional employment discrimination matters. The web site catalogues laws prohibiting discrimination in employment, indicating those which the organization oversees.

Federal Aviation Administration (FAA)
800 Independence Ave, SW
Washington, DC 20591
http://www1.faa.gov/

The FAA web site on the airline whistleblower law includes a page entitled "How do I file a whistleblower complaint?."

Ignet
Federal Inspectors General Web Page
http://www.ignet.gov/

This web site contains a central point of contact for all 57 Offices of Inspector General and contact points for OIG oversight bodies.

The National Whistleblower Center
3238 P Street, NW
Washington, DC 20007-2756
Phone 202-342-1902/Fax 202-342-1904
http://www.whistleblowers.org/

The National Whistleblower Center (NWC) is a non-profit public interest organization devoted to the protection of whistleblowers. Founded in 1988, the NWC conducts educational programs and supports test case litigation. The Center's website provides information on legislative updates, publications, referrals and employee rights.

Regulations.gov
http://www.regulations.gov/

Regulations.gov is a U.S. government web site that publishes all proposed federal rules published in the *Federal Register* and permits citizens to provide rulemaking comments on-line. Most federal whistleblower regulations are approved through the rule making process.

U.S. Department of Justice
Freedom of Information Act Homepage
http://www.usdoj.gov/04foia/

The Department of Justice web page on the Freedom of Information Act (FOIA) lists FOIA contact personnel at every federal agency and provides detailed information on filing FOIA requests.

U.S. Department of Labor
Occupational Safety and Health Administration(OSHA)
200 Connecticut Ave., NW
Washington, DC 20210
http://www.osha.gov/

The OSHA website contains information regarding worker complaints and resources under DOL administered whistleblower statutes.

U.S. Department of Labor
Office of Administrative Law Judges (OALJ)
800 K Street, NW Suite 400N
Washington, DC 20210
http://www.oalj.dol.gov/

The OALJ conducts administrative adjudications under numerous federal whistleblower laws (including corporate and environmental). This site contains copies of DOL OALJ rulings, administrative procedures and a periodic newsletter highlighting DOL whistleblower decisions.

U.S. Office of Special Counsel
1730 M Street, NW, Suite 201
Washington, DC 20036-4505
http://www.osc.gov/

The Office of Special Counsel ("OSC") website contains information on the Whistleblower Protection Act (WPA), the law which provides covers most federal employee whistleblowers The site contains the OSC Form 11, which federal employees must use to file WPA claims with OSC.

ABOUT THE AUTHOR

Stephen M. Kohn is the Chairperson of the Board of Directors of the National Whistleblower Center and a partner in the Washington, D.C. law firm of Kohn, Kohn & Colapinto, LLP. Mr. Kohn is the author or co-author of six books on whistleblower law, including *Whistleblower Law: A Guide to Legal Protections for Corporate Employees* (Praeger, 2004), *Concepts and Procedures in Whistleblower Law* (Greenwood Press, 2001), *The Whistleblower Litigation Handbook: Environmental, Nuclear, Health, and Safety Claims* (John Wiley & Sons: 1991) and *The Labor Lawyers Guide to the Rights and Responsibilities of Employee Whistleblowers* (Quorum Books: 1988). In 1985 Mr. Kohn wrote the first-ever legal treatise on whistleblower law, *Protecting Environmental and Nuclear Whistleblowers: A Litigation Manual* (Washington, D.C., NIRS: 1985). He is also the author of *Jailed for Peace: The History of American Draft Law Violators, 1658-1985* (Greenwood Press, 1986) and *American Political Prisoners: Prosecutions under the Espionage and Sedition Acts* (Praeger, 1994). Prior to establishing the National Whistleblower Center in 1988, Mr. Kohn served as the Director of Corporate Litigation for the Government Accountability Project and was an Adjunct Professor and Clinical Supervisor at the Antioch School of Law. In 2006 Mr. Kohn was awarded the Daynard Public Interest Visiting Fellowship by the Northeastern University School of Law.