

under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart 1, section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Egegik Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

#### **List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

#### **Adoption of the Amendment**

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

#### **PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS**

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389.

#### **§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9N, Airspace Designations and Reporting Points, dated September 1, 2005, and effective September 15, 2005, is amended as follows:

\* \* \* \* \*

*Paragraph 6005 Class E airspace extending upward from 700 feet or more above the surface of the earth.*

\* \* \* \* \*

#### **AAL AK E5 Egegik, AK [Revised]**

Egegik Airport, AK

(Lat. 58°11'08" N., long. 157°22'32" W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Egegik Airport.

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Issued in Anchorage, AK, on November 8, 2005.

**Michael A. Tarr,**  
*Manager, Operations Support.*  
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Attorney General or his designee shall be the final arbiter of a complaint. See 18 U.S.C. 3771(f).

#### **Proposed Rule**

In order to implement section 102 of the Act, the Department published a proposed rule on July 7, 2005, that proposed to create a new section in part 45, Employee Responsibilities, of title 28, Judicial Administration, of the Code of Federal Regulations. 70 FR 39206-01. The proposed rule provided for the creation of the office of the Victims' Rights Ombudsman (VRO) within the Executive Office for United States Attorneys (EOUSA) as the designated administrative authority within the Department to receive and investigate complaints relating to the provision or violation of the rights of a crime victim. The proposed rule delineated the powers and duties of the VRO as well as the basic procedures of its operations.

The proposed rule authorized the VRO to designate points of contact (POCs) in each office of the Department to perform initial investigations and review of complaints, in order to allow for complaints to be addressed at the most local level.

The proposed rule then established a procedure for filing complaints, investigations of those complaints, and imposition of disciplinary sanctions against employees where warranted. The proposed rule required that a complaint be in writing and contain sufficient information to enable an investigation of the complaint by the POC. Complaints were to be filed within 30 days of the alleged violation of a victim's rights, unless the victim demonstrated good cause for the delay. The precise requirements for the investigation were to be established by internal Department policy guidance. At the end of the investigation, the POC was to prepare a written report of the results of the investigation, including a signed statement by the victim as to whether or not he was satisfied that his complaint had been resolved. In either case, however, the report was to be forwarded to the VRO for review. The VRO would then decide whether (a) no further action was necessary; (b) further investigation, to be conducted by the VRO, was necessary; or (c) the employee would be required to undergo training or be subject to disciplinary sanctions. The VRO's determination was not to be dependent on the victim's satisfaction, although it could be taken into account. The VRO would be the final arbiter of whether the complaint had been adequately addressed.

If the VRO determined that no further action was necessary, the matter was to be closed.

The VRO, upon either review of the POC's investigation or his own further investigation, could require an employee to undergo training on the obligations of Department employees regarding victims' rights. If, upon either review of the POC's investigation or his own further investigation, the VRO determined that the employee had willfully or wantonly violated a crime victim's rights, the VRO was authorized to recommend, in conformity with laws and regulations regarding employee discipline, a range of disciplinary sanctions to the head of the office in which the employee was located, or to the official who had been designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office. The head of that office of the Department of Justice, or the other official designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office, was to be the final decision-maker regarding the disciplinary sanction to be imposed.

Because of restrictions on the release of information regarding the status of Department employees and the need to balance the rights of the victim with the rights of the employee, the proposed rule provided that the victim would be notified of the results of the investigation only at the discretion of the VRO and in accordance with relevant statutes and regulations regarding privacy of Federal employees.

Both the POC and the VRO were required to refer to the Office of the Inspector General (OIG) or the Office of Professional Responsibility (OPR) any matters that fell under those offices' jurisdictions that may have come to light in the POC's or the VRO's investigation.

For purposes of the new section, victims of crime were defined identically to the definition in the Justice for All Act, and victims' rights were defined as those established in the Act.

#### Response to Public Comments

Three public comments were received in response to the proposed rule from victim rights' advocates and advocacy organizations. This section explains the Department's response to those comments and notes changes to the proposed rule taken in response to several of them. The comments are divided into three categories—structure of the office, powers of the office, and the complaint process.

#### Structure of the Office

One commenter commented that the proposed rule improperly placed the VRO in EOUSA. According to this commenter, EOUSA is viewed within the Department only as a resource, rather than an authority. Further, claimed this commenter, although all Department offices are subject to the statute, including investigative and corrections agencies, EOUSA deals only with U.S. Attorneys' Offices (USAOs). Rather than EOUSA, this commenter suggested that the VRO should be located in the office of the Deputy Attorney General or, alternatively, within OPR.

The Department has declined to adopt changes to the proposed rule in response to this comment. Although it is true that all Department employees are subject to the regulation, the Department expects that the large majority of complaints will relate to Assistant United States Attorneys (AUSAs), since the rights in the Act primarily apply to the prosecution stage. Furthermore, the Department does not agree that EOUSA is only a resource and not an authority. EOUSA is a central policy coordination office that routinely disseminates binding guidance for the operation of U.S. Attorneys' Offices. OPR is not a proper location for the VRO because it is anticipated that most of the complaints raised by victims will not implicate the investigative, litigative, or advice-giving conduct of Department attorneys normally handled by OPR. In the unusual case in which such conduct is implicated, the regulations provide that the complaint be referred to OPR by the VRO or by the POC. The Department therefore determined that EOUSA was the most appropriate office in which to locate the VRO and declines to revise that determination.

One commenter commented that the decisions of the VRO should be appealable by the victim in case he is unsatisfied with the outcome of his complaint. According to the commenter, this is another reason to locate the VRO in the office of the Deputy Attorney General, so that the Deputy Attorney General can serve as the reviewing official.

The Department declines to adopt changes to the proposed rule in response to this comment. The only two outcomes provided for in the statute for violations of the Act are the requirement of training and the possible imposition of disciplinary sanctions. In the first case, the VRO has no discretion under the statute, once he has made a finding of a violation, not to require training. If

the VRO declined to require training, the only reason would be a lack of factual basis for doing so. A reviewing official, such as the Deputy Attorney General, would not be in a better position than the VRO to make findings of fact. In the second case, the decision to impose disciplinary sanctions on an employee is a confidential matter under other provisions of federal law. A complaining member of the public would not be permitted to know the results of the VRO's investigation if it resulted in a recommendation for the imposition of disciplinary sanctions or whether those sanctions were in the end imposed.

#### Powers of the Office

One commenter commented that the rule should direct that the VRO require training for Department employees or offices when the VRO finds a violation of victims' rights that are not willful or wanton, rather than authorizing the VRO to require training if the VRO deems it necessary.

Upon review of the statutory language, the Department accepts this comment and has made changes in the final rule directing the VRO to require training in response to violations of victims' rights. The statute makes clear that such training shall be required, with no room for discretion on the part of the VRO.

One commenter commented that the VRO should, in consultation with the Department's Office for Victims of Crime (OVC), identify and promote best practices in victims' rights training.

The Department declines to adopt this comment. The Act neither requires nor authorizes the VRO to perform this function, and the victim-witness staff at the components already do so. Indeed, it is expected that the required training will be conducted by the relevant component.

#### Complaint Procedures

One commenter commented that a victim should not be required to submit complaints to a POC in each different office of the Department. Rather, the commenter suggested, complaints should go directly to the VRO. According to the commenter, a victim might not even be aware of which office had violated his rights.

The Department declines to adopt changes to the proposed rule in response to this comment. The Department proposed the POC system for both the benefit of victims and for administrative practicability. The Department believes that complaints by victims are most likely to be resolved at the local level. A local POC can more

easily and effectively investigate and resolve the complaint. The Department acknowledges that a victim might not necessarily know which office failed to provide him his rights, but a guide to the system and instructions on how to contact the appropriate POC will be made available to victims. Further, the Department is unable to determine how many complaints may be filed. It is impracticable to have one central office receive and investigate all complaints from across the nation without some form of initial review as to the sufficiency of the complaint and the possibility for local resolution.

One commenter commented that a victim may have a complaint against the POC himself and that, therefore, the final rule should provide for an alternative complaint procedure in such circumstances, such as having an alternative POC available to the crime victim.

The Department declines to accept his comment. Such a provision would be highly burdensome to enact. The burdens of doubling the number of individuals trained in VRO procedures do not seem worthwhile for the likely very small number of complaints actually brought against the POC. Further, some United States Attorneys' Offices may not be able to designate two POCs. Nevertheless, the Department has made a small change to the final rule to require all complaints alleging a violation that would create a conflict of interest for the POC to investigate to be forwarded immediately to the VRO.

One commenter commented that the requirements for the information to be provided in the written complaint were too burdensome on the victim. For example, the required information could be beyond the knowledge of the victim. The commenter suggested that the requirements instead be recommended items. This commenter also commented that the requirement that the complaint include information regarding whether the complainant had contacted the employee who is the subject of the complaint indicated an exhaustion-of-remedies requirement.

The Department accepts this comment in part and has written the final rule to require only as much information as is known to, or reasonably available to, the victim. However, the Department declines to make the information only recommended rather than required. The information is intended to provide as much background to the POC and the VRO as possible in order to expedite the investigation. Further, to be clear, there is no exhaustion-of-remedies requirement.

Two commenters commented that the information required in the complaint included the district court case number and the name of the defendant in the case, although a victim could file a complaint prior to an indictment. The commenters recommended that the final rule clarify that such information is required only when such information exists.

The Department accepts this comment, but believes that the change in the final rule noted in the paragraph above adequately resolves the issue raised by the commenter.

Two commenters commented that the Department should draft standard complaint forms for victims to fill out and should provide assistance to victims in completing and submitting the forms.

The Department declines to adopt changes to the proposed rule in response to this comment. The Department does not rule out the possibility of providing written complaint forms, but does not believe that it is necessary to do so in this final rule. Likewise, the Department does not believe it is necessary to state in this final rule that the POC or VRO will provide assistance to victims in submitting complaints.

Two commenters commented that the proposed rule's requirement that a complaint make a *prima facie* case of a violation was unfair to complainants. According to the commenters, the rule did not define the standards for making a determination as to whether a *prima facie* case had been made, such that the complainant would be unaware of the quantum of evidence required for the complaint.

The Department partially adopts this comment. The Department has replaced the term "*prima facie*" with language similar to that found in the regulations governing the operations of the Alaska Office of Victims' Rights (OVR). Under those regulations, the Alaska OVR conducts a preliminary examination of a complaint to assess whether "there is specific and credible information to indicate that one or more crime victim rights guaranteed by the laws and constitution of this state may have been violated by a justice agency or person." 23 AAC 10.030(2). The final rule states that a complaint must provide "specific and credible information that demonstrates that one or more crime victims' rights listed in 18 U.S.C. 3771 may have been violated by a Department of Justice employee or office."

Three commenters commented that the time limit of 30 days for filing of a complaint was unfair and burdensome to victims. According to the

commenters, many victims are unaware of their rights or are unaware when those rights have been violated. The commenters recommended eliminating the time frame for complaints, considerably extending the time frame, or making the time frame begin when the victim became aware of the violation of his rights.

The Department partially adopts this comment. The Department does not wish victims to have their ability to file a complaint of violation of their rights arbitrarily limited; at the same time, however, the Department must design the complaint process so that complaints can be investigated and resolved expeditiously and effectively and in such a way that Department employees' due process rights are protected. A reasonable limitation period can be fair to both parties. The Department has therefore changed the final rule to provide that complaints must be filed within 60 days of knowledge of the violation, but not more than one year after the actual violation. Because of the significant extension of time to file a complaint, the exemption for good cause for a delay has been removed.

Three commenters commented that, while the proposed rule placed time limits on the ability of the victim to file a complaint, the rule did not require the POC and VRO to reply to the complaint within a specific time frame.

The Department partially adopts this comment. The final rule requires that the POC or the VRO shall investigate the complaint "within a reasonable time period." The Department is unable to require a specific time frame for response in this final rule because of the uncertainty regarding the number and complexity of complaints that may be filed. The definition of "reasonable time period" will be addressed in internal guidance and may be adjusted as experience with the complaint process refines the Department's procedures.

Two commenters commented that the proposed rule's limitations on information as to the resolution of the complaint being made available to the victim, including prohibition of disclosure of the proposed POC written report, are unfair to the victim. According to the commenters, open government requires that information should be presumptively available and that, without disclosure to the fullest extent possible, victims will not be confident that their complaints have been addressed.

The Department declines to adopt this comment. The Department recognizes that victims desire to know that their complaints have been taken seriously

and have been addressed. However, as a matter of law, the Department is severely restricted regarding what information about individuals in its possession it may release. *See* 5 U.S.C. 552a(b). The Department regrets that victims might therefore not receive information regarding the ultimate disposition of their complaints, but believes that providing a discretionary disclosure by the POC or the VRO within the bounds of the law and Department policy is the best compromise between the right of the victim to an open process and the right of an accused employee to confidential adjudication of a potential disciplinary action.

Three commenters commented that the proposed rule's requirement that the victim sign a statement indicating his or her satisfaction (or lack thereof) in response to the initial investigation of the complaint was unfair and unworkable, particularly in combination with the prohibition on the disclosure of the report to the victim.

The Department accepts this comment and has eliminated the requirement of the victim statement.

One commenter made several suggestions for additional provisions in the regulations. The commenter stated that the final rule, similar to those governing the operations of the Alaska OVR, should list reasons for which the POC or VRO may decline to investigate a complaint and should provide standards for prioritizing the processing of complaints. The Department agrees that such guidance would be helpful to the POC and VRO, but it is unnecessary to include in this final rule.

The same commenter suggests that the final rule include procedures for maintaining confidentiality of information provided by a victim to the VRO, including creation of a testimonial privilege on the part of the VRO for information provided to the VRO by the victim, such as inconsistent or contradictory statements about the crime at issue. The Department declines to adopt these suggestions. First, a victim's privacy will be protected under the Privacy Act and other relevant statutes and Department policy. Second, the VRO, unlike, for example, the Alaska OVR, will be part of a law enforcement agency. Therefore, under certain circumstances the VRO may be legally required to disclose information received from a victim. For example, any information that would tend to exculpate a defendant must be disclosed to the defense, *see Brady v. Maryland*, 373 U.S. 83 (1963).

## Regulatory Procedures

### Regulatory Flexibility Act

Because this final rule affects only internal Department procedures, the Department states that this final rule will not have any effect on small businesses of the type described in 5 U.S.C. 605. Accordingly, the Department has not prepared an initial Regulatory Flexibility Act analysis in accordance with 5 U.S.C. 603.

### Executive Order 12866

The Department of Justice has reviewed this final rule in light of Executive Order 12866, section 1(b), Principles of Regulation. The Department of Justice has determined that this final rule is a "significant regulatory action" under Executive Order 12866, section 3(f)(4), Regulatory Planning and Review. Accordingly, this final rule has been reviewed by the Office of Management and Budget.

In particular, the Department has assessed both the costs and benefits of this final rule as required by Executive Order 12866 section 1(b)(6), and has made a reasoned determination that the benefits of this regulation justify its costs. The costs that the Department considered included the costs to victims of submitting complaints to the POC and VRO, the costs to the employees of participating in the complaint and disciplinary process, and the costs to the Federal Government of creating and maintaining the VRO office. The benefits considered by the Department are that the purpose of the Act and of these regulations is to protect victims' rights. The Department believes that the costs imposed by these regulations are justified by the benefits.

### Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

### Executive Order 12988

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

## Unfunded Mandates Reform Act of 1995

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

## Small Business Regulatory Enforcement Fairness Act of 1996

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

## Paperwork Reduction Act

This final rule is exempt from the requirements of the Paperwork Reduction Act under 5 CFR 1320.4(1) because it relates to the conduct of a Federal criminal investigation or prosecution.

All comments and suggestions relating to the Paperwork Reduction Act, or questions regarding additional information, should be directed to Brenda Dyer, Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, 601 D Street, NW., Washington, DC 20530.

## List of Subjects in 28 CFR Part 45

Employee responsibilities; Victims' rights.

■ Accordingly, for the reasons stated in the preamble, the Department of Justice amends 28 CFR chapter I part 45 as follows:

### PART 45—EMPLOYEE RESPONSIBILITIES

■ 1. The authority citation for part 45 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 7301; 18 U.S.C. 207, 3771; 28 U.S.C. 503, 528; DOJ Order 1735.1.

■ 2. In part 45, a new § 45.10 is added to read as follows:

#### § 45.10 Procedures to promote compliance with crime victims' rights obligations.

(a) **Definitions.** The following definitions shall apply with respect to

this section, which implements the provisions of the Justice for All Act that relate to protection of the rights of crime victims. *See* 18 U.S.C. 3771.

**Crime victim** means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights, but in no event shall the defendant be named as such guardian or representative.

**Crime victims' rights** means those rights provided in 18 U.S.C. 3771.

**Employee of the Department of Justice** means an attorney, investigator, law enforcement officer, or other personnel employed by any division or office of the Department of Justice whose regular course of duties includes direct interaction with crime victims, not including a contractor.

**Office of the Department of Justice** means a component of the Department of Justice whose employees directly interact with crime victims in the regular course of their duties.

(b) The Attorney General shall designate an official within the Executive Office for United States Attorneys (EOUSA) to receive and investigate complaints alleging the failure of Department of Justice employees to provide rights to crime victims under 18 U.S.C. 3771. The official shall be called the Department of Justice Victims' Rights Ombudsman (VRO). The VRO shall then designate, in consultation with each office of the Department of Justice, an official in each office to serve as the initial point of contact (POC) for complainants.

(c) Complaint process. (1) Complaints must be submitted in writing to the POC of the relevant office or offices of the Department of Justice. If a complaint alleges a violation that would create a conflict of interest for the POC to investigate, the complaint shall be forwarded by the POC immediately to the VRO.

(2) Complaints shall contain, to the extent known to, or reasonably available to, the victim, the following information:

(i) The name and personal contact information of the crime victim who allegedly was denied one or more crime victims' rights;

(ii) The name and contact information of the Department of Justice employee who is the subject of the complaint, or

other identifying information if the complainant is not able to provide the name and contact information;

(iii) The district court case number;

(iv) The name of the defendant in the case;

(v) The right or rights listed in 18 U.S.C. 3771 that the Department of Justice employee is alleged to have violated; and

(vi) Specific information regarding the circumstances of the alleged violation sufficient to enable the POC to conduct an investigation, including, but not limited to: The date of the alleged violation; an explanation of how the alleged violation occurred; whether the complainant notified the Department of Justice employee of the alleged violation; how and when such notification was provided to the Department of Justice employee; and actions taken by the Department of Justice employee in response to the notification.

(3) Complaints must be submitted within 60 days of the victim's knowledge of a violation, but not more than one year after the actual violation.

(4)(i) In response to a complaint that provides the information required under paragraph (c)(2) of this section and that contains specific and credible information that demonstrates that one or more crime victims' rights listed in 18 U.S.C. 3771 may have been violated by a Department of Justice employee or office, the POC shall investigate the allegation(s) in the complaint within a reasonable period of time.

(ii) The POC shall report the results of the investigation to the VRO.

(5) Upon receipt of the POC's report of the investigation, the VRO shall determine whether to close the complaint without further action, whether further investigation is warranted, or whether action in accordance with paragraphs (d) or (e) of this section is necessary.

(6) Where the VRO concludes that further investigation is warranted, he may conduct such further investigation. Upon conclusion of the investigation, the VRO may close the complaint if he determines that no further action is warranted or may take action under paragraph (d) or (e) of this section.

(7) The VRO shall be the final arbiter of the complaint.

(8) A complainant may not seek judicial review of the VRO's determination regarding the complaint.

(9) To the extent permissible in accordance with the Privacy Act and other relevant statutes and regulations regarding release of information by the Federal government, the VRO, in his

discretion, may notify the complainant of the result of the investigation.

(10) The POC and the VRO shall refer to the Office of the Inspector General and to the Office of Professional Responsibility any matters that fall under those offices' respective jurisdictions that come to light in an investigation.

(d) If the VRO finds that an employee or office of the Department of Justice has failed to provide a victim with a right to which the victim is entitled under 18 U.S.C. 3771, but not in a willful or wanton manner, he shall require such employee or office of the Department of Justice to undergo training on victims' rights.

(e) **Disciplinary procedures.** (1) If, based on the investigation, the VRO determines that a Department of Justice employee has wantonly or willfully failed to provide the complainant with a right listed in 18 U.S.C. 3771, the VRO shall recommend, in conformity with laws and regulations regarding employee discipline, a range of disciplinary sanctions to the head of the office of the Department of Justice in which the employee is located, or to the official who has been designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office. The head of that office of the Department of Justice, or the other official designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office, shall be the final decision-maker regarding the disciplinary sanction to be imposed, in accordance with applicable laws and regulations.

(2) Disciplinary sanctions available under paragraph (e)(1) of this section include all sanctions provided under the Department of Justice Human Resources Order, 1200.1.

Dated: November 10, 2005.

**Alberto R. Gonzales,**

*Attorney General.*

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