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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 351

RIN 3206–AO99

Reduction in Force Appeals

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a proposed rule to revise its regulations governing appeals of reduction-in-force (RIF) actions. OPM proposes to transfer appeal rights for employees who have been furloughed more than 30 days, separated, or demoted by a RIF action from the Merit Systems Protection Board (MSPB) to OPM. OPM expects this change will promote greater efficiency and reduce costs to agencies in effectuating RIF actions, which may be necessary in a variety of circumstances, such as to eliminate duplicative or unnecessary functions or align agency workforces with new technology, changing mission needs, or budgetary constraints.

DATES: Comments must be received on or before March 12, 2026.

ADDRESSES: You may submit comments by using the Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the instructions for submitting comments.

All submissions must include the agency name and docket number or RIN for this **Federal Register** document. Please arrange and identify your comments about the regulatory text by subpart and section number. If your comments relate to the supplementary information, please reference the heading and page number in the supplementary section. All comments must be received by the end of the comment period for them to be considered. All comments and other submissions received generally will be posted on the internet at *https://regulations.gov* as they are received, without change, including any personal information provided. However, OPM retains discretion to redact personal or sensitive information, including but not limited to, personal or sensitive information pertaining to third parties.

As required by 5 U.S.C. 553(b)(4), a summary of this rule may be found in the docket for this rulemaking at *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Carol Matheis by email at *employeeaccountability@opm.gov* or by phone at (202) 606–2930.

SUPPLEMENTARY INFORMATION:

I. Background

The federal government's civil service system is rooted in principles of merit, fairness, and efficiency. When agencies face workforce restructuring, RIF procedures provide a mechanism for realigning staff through objective criteria. These procedures are governed by 5 U.S.C. 3501–3504 and are implemented through OPM regulations at 5 CFR 351. These regulations provide employees subject to a RIF action an avenue to appeal to the MSPB. Under 5 CFR 351.901, employees furloughed for more than 30 days, separated, or demoted by a RIF action may appeal to the MSPB.

OPM is proposing to revise its regulations governing RIFs and related technical changes under statutory authority vested in it by Congress in 5 U.S.C. 1103 and 3502. OPM is proposing these changes to more accurately reflect the governing federal statute while improving the efficiency of the RIF appeal process, which will effect more timely outcomes with less burden on agencies utilizing RIFs. This rule proposes to return the venue to hear RIF appeals from MSPB to OPM, thereby honoring congressional intent and historical practice, improving the consistency of regulatory interpretation, and streamlining the RIF process by housing it from beginning to end at OPM.

The current regulations are antiquated and no longer reflect the needs of agencies operating in the twenty-first century. The current regulatory framework has been in place for decades. During this time, the scope of RIF appeal action proceedings has expanded beyond administrative review of a written record. As written, the regulations provided that ''hearings were to be held only when the MSPB administrative judge decided there were material issues of fact in dispute.'' [1] This requirement was struck down on a collateral issue. *American Federation of Government Employees* v. *Office of Personnel Management,* 821 F.2d 761, 768 (D.C. Cir. 1987) (*AFGE* v. *OPM*). In effect, however, *AFGE* v. *OPM* allowed MSPB to dictate its own procedures for adjudicating RIF appeals, without any ability for OPM to modify those procedures, with the end result being MSPB permitting sweeping hearings related to RIF appeals. See *id.,* at 768–769. This dynamic has led to an unnecessarily lengthy and expensive appeals process, at considerable expense to the government and to the detriment of the appellant. OPM notes that no statutory right to an administrative or judicial review pertaining to RIF actions exists in 5 U.S.C. 3502 (though certain veterans have been granted administrative and judicial appeals rights under 5 U.S.C. 3330a, 3330b, and 38 U.S.C. chapter 43). Nor is a RIF an adverse action under 5 U.S.C. 7512. *See Schall* v. *Postal Service,* 73 F.3d 341, 344 (Fed. Cir. 1996). Further, there are significant qualitative differences between an adverse action separation and a RIF separation, such that they are not comparable. Employees who are subject to a RIF are given priority status for reemployment in the federal government (if separated),[2] the right to bump or retreat to an available position in the competitive area (if one is available and the employee is eligible by virtue of retention standing),[3] and eligibility for career transition assistance and retraining,[4] among other differences. Employees separated for misconduct under Chapter 75 or poor performance under Chapter 43 are given no similar benefits.

In passing the Civil Service Reform Act, Congress carefully created the MSPB review scheme and determined that there should be no RIF appeal right to MSPB.[5] In the nearly 50 years since its original enactment, Congress has not amended the statute to provide for such

[1] *Reduction in Force,* 51 FR 318–01 (Jan. 3, 1986).

[2] *See* 5 CFR 351.803(a), 5 CFR part 330, subpart B.

[3] *See* 5 CFR part 351, subpart G.

[4] *See* 5 CFR 351.803(a), 5 CFR part 330, subpart B.

[5] *See* 5 U.S.C. 7512.

a right, nor has it provided for an appeal process for RIFs that includes judicial review. Congress's choice not to create statutory appeal rights in 5 U.S.C. Part III, Subpart B for employees or other parties to challenge RIF actions demonstrates Congress's intention to allow the contours of any RIF appeal rights to be determined by OPM regulation.[6] Thus, MSPB's authority to hear RIF appeals is provided for in OPM regulation (5 CFR 351.901), not statute. The MSPB acknowledged that it derived its authority to review agency RIF actions through OPM regulations. *See Kohfield* v. *Dept. of the Navy,* 75 M.S.P.R. 1, 4 (1997) (citing *Grubb* v. *Department of the Interior,* 73 M.S.P.R. 296, 299 (1997)); *Gaxiola* v. *U.S. Department of the Air Force,* 6 M.S.P.R. 515, 519 (1981). Under this flexibility, OPM may regulate matters such as whether to establish RIF appeal rights, the entity responsible for accepting RIF appeals, and the procedures under which an employee may appeal a RIF action.

OPM believes in the importance of RIF appeal rights for employees who have been furloughed more than 30 days, separated, or demoted by a RIF action. Such procedures have existed in OPM's regulations (and those of its predecessor agency, the Civil Service Commission [the Commission]) since the mid-twentieth century, albeit in various formulations. OPM's proposal also intends to return the focus of RIF appeals to the administrative record, with discretion provided to the presiding official to investigate or audit the RIF action. OPM believes this is a more efficient and streamlined process than is provided for under the current regulations. The current rules were initially intended ''to give RIF a stronger merit basis'' by, for example, linking individual performance with an employee's retention factor.[7] While OPM agrees that individual performance should be a factor in an employee's retention standing in a RIF action, OPM does not believe that this consideration justifies housing RIF appeals at the MSPB. Indeed, individual employee performance, as reflected in an employee's rating of record, would continue to be a retention factor if RIF appeals were to be transferred to OPM, and OPM would continue to ensure that these performance-based retention factors are appropriately applied and respected in RIF actions. Further, OPM has taken numerous steps in the past several months to ensure that employee performance is measured rigorously and fairly across the federal government, and to ensure that agencies are empowered to address poor performance.[8] However, the procedural burdens and inefficiencies associated with MSPB appeals outweigh any symbolic tie to performance or merit basis created by requiring that such appeals be adjudicated by the MSPB.[9]

From the inception of the current regulations, ''the burden and cost of defending appeals'' before the MSPB have been subject to agency criticism.[10] The criticisms continued throughout the 1990s. The Government Accountability Office (GAO) critiqued the process for MSPB appeals as ''inefficient, expensive, and time consuming'' while OPM suggested ''improving the [f]ederal [g]overnment's appeals process can substantially contribute to a more effective and efficient [f]ederal [g]overnment.'' [11] OPM endorses these criticisms, particularly regarding an employee's regulatory right to a hearing in any case in which the appellant requests one, as well as the potential benefits to the Federal government. Due in part to the perceived burdens of RIF appeals, including the requirement of a hearing in any case where the appellant requests one, agencies historically have not used the authority Congress provided to agencies to execute RIFs as widely as would be expected given the size of the federal government and fast-evolving agency missions and priorities, especially when compared to the private sector.[12]

a. History of RIF Appeals and the CSRA Statutory Scheme

Congress has long recognized the President is inherently empowered, as part of effective management of the Executive Branch, to quickly grow and shrink the federal workforce in response to the needs of the moment. This power became more relevant when the federal government dramatically increased its employee headcount over the first half of the 20th century as Congress enacted new programs and created new agencies, coupled with the significant 1940s wartime increase at the Department of Veterans Affairs.[13]

As this rapid expansion was ongoing, presidents also recognized their inherent authority to regulate the manner by which RIFs may take place, including but not limited to by executive order, absent explicit reference to RIFs in the Pendleton Civil Service Act of 1883.[14] For example, ''the first uniform RIF regulations were issued in 1925 by the Personnel Classification Board,'' which was subsumed by the Commission.[15] Those regulations were bolstered again in 1929, when President Calvin Coolidge issued Executive Order 5068, prescribing how veterans were to be treated ''when reductions are being made in the force.'' [16] President Coolidge's presupposition of his authority was affirmed by President Roosevelt, who similarly invoked presidential authority to institute the regulatory procedures by which RIFs may be executed, notwithstanding the lack of an explicit statutory grant.[17]

Recognizing such a dramatic and temporary increase in the workforce would necessitate empowering the President with plenary, clear, and broad authority to swiftly and agilely conduct RIFs, Congress first contemplated the modern configuration of a RIF in legislation as part of the Veterans

[6] *See generally* 5 U.S.C. 3501–3504.

[7] *Id.* at p. 3.

[8] OPM Memorandum, ''Performance Management for Federal Employees,'' June 17, 2025, *available at: https://www.opm.gov/policy-data-oversight/latest-memos/performance-management-for-federal-employees/.* This Memorandum, for example, outlines the Administration's policies of ending inflation of employee performance ratings, directing agencies to maximize the use of probationary and trial periods, and encouraging the use of both performance-based and adverse action procedures under Chapters 43 and 75.

[9] Congress has tasked OPM with ensuring merit system principles are respected and adhered to in matters of federal employment. 5 U.S.C. 1104(b)(2).

[10] U.S. Merit Sys. Prot. Bd., ''Reduction in Force: The Evolving Ground Rules'' (Sept. 28, 1987), pp. 5, 7, *https://www.mspb.gov/studies/studies/Reduction_in_Force_The_Evolving_Ground_Rules_253680.pdf.*

[11] *Streamlining Federal Appeals Procedures: Hearings Before the Subcomm. on Civil Service of the House Comm. on Government Reform and Oversight,* 104th Cong., 1st Sess. (Nov. 29, 1995).

[12] Just 2,029 employees have been subject to a RIF from 2014 to 2024, constituting an exceedingly small fraction of the federal workforce. (Source: OPM FedScope Data, Aug. 5, 2025). Meanwhile, the Bureau of Labor Statistics reports roughly that an average of over 1.7 million private sector employees have been subject to a ''layoff or discharge'' each month over the same 10-year span. (Source: BLS Job Openings and Layoff Turnover Survey, Aug. 28, 2025).

[13] Rockoff, Hugh, ''By Way of Analogy: The Expansion of the Federal Government in the 1930s,'' (Jan. 1998), *https://www.nber.org/system/files/chapters/c6891/c6891.pdf.*

[14] Exec. Order No. 7915, ''Amendment of Civil Service Rules,'' (June 24, 1938), *https://www.presidency.ucsb.edu/documents/executive-order-7915-amendment-civil-service-rules.*

[15] U.S. Merit Sys. Prot. Bd., ''Reduction-in-Force in the Federal Government, 1981: What Happened and Opportunities for Improvement,'' (June 1983), *https://babel.hathitrust.org/cgi/pt?id=uc1.31210024942615&seq=31.*

[16] Exec. Order No. 5068, ''Amendment of Civil Service Rule VI,'' (Mar. 2, 1929), *https://www.presidency.ucsb.edu/documents/executive-order-5068-amendment-civil-service-rule-vi.*

[17] Exec. Order No. 6175, ''Separation Ratings of Departmental Employees,'' (June 16, 1933), *https://www.presidency.ucsb.edu/documents/executive-order-6175-separation-ratings-departmental-employees.*

Preference Act of 1944.[18] In that Act, Congress directed employees to be ''released in accordance with Civil Service Commission regulations.'' [19] Specifically, these regulations were to be promulgated with a small number of infringements on the President's plenary authority to effectuate a RIF. Namely Congress directed the President, when conducting a RIF, to give ''due effect to tenure of employment, military preference, length of service, and efficacy ratings,'' which was in turn subject to several provisos, among which was a directive that ''employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference [sic.] employees who have equal or lower efficiency ratings.'' [20] Congress, therefore, in codifying the President's authority to execute a RIF, granted him a wide berth to manage his workforce, articulating no limiting principles in statute regarding how, and whether, RIFs were appropriate, including procedures by which an employee may appeal those decisions. Rather, Congress merely noted in its legislative history that its ''purpose'' in imposing those limiting principles ''was to grant honorably discharged veterans 'preference in employment where Federal funds are disbursed' and to codify a governmental policy of extending 'certain benefits to those who have risked their lives in the armed services during wartime.' '' H. Rept. 1289 on H.R. 4115, 78th Cong. 2d sess. (1944).[21] This configuration—establishing limiting principles for RIF processes rather than directives—has always been Congress's approach to the RIF system, dating to Congress establishing the first retention system in 1876, which prioritized veterans of the Civil War above others when RIFs occur.[22]

The Commission issued implementing regulations for the Veterans' Preference Act that became effective on September 1, 1949.[23] The regulations provided that: ''(a) Any employee notified of proposed action by reduction in force who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Civil Service Commission, stating reasons for believing the proposed action to be improper, within ten days from the date he received notice of the proposed action, or within ten days after a decision by the agency on his answer to any notice giving him an opportunity to answer.'' [24] Notably, the Commission itself directed impacted employees to file their appeal to an office under the purview of the Commissioners, not the Commission itself. Only after an office of the Commission rendered a decision was an employee permitted to appeal directly to the Commissioners.

This regulatory framework remained largely in effect until 1963, when the Commission reorganized and revised the regulations governing appeals of RIF determinations. 28 FR 10021 (Sept. 14, 1963). At this juncture, the Commission once again did not opt to delegate its authority to review RIF appeals to any other entity. Rather, the Commission's revised regulations provided ''[a]n employee who has received a notice of specific action and who believes this part has not been correctly applied may appeal to the Commission.'' *Id.* at 10065.

Central to this regulatory framework was the understanding that there was no right of judicial review of Commission decisions. ''Employees sought to appeal the decisions of [the Commission] through the various forms of action traditionally used for so-called nonstatutory review of agency action, including suits for mandamus . . . injunction . . . and declaratory judgment.'' *United States* v. *Fausto,* 484 U.S. 439, 444 (1988). But ''so long as there was substantial compliance with applicable procedures and statutes, the administrative determination was not reviewable.'' *Hargett* v. *Summerfield,* 243 F.2d 29, 32 (D.C. Cir. 1957). It was long understood that RIFs ''are matters peculiarly within the province of those who are in charge of and superintending the departments, and, until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.'' *Keim* v. *United States,* 177 U.S. 290, 296 (1900).

In 1978, Congress enacted the Civil Service Reform Act of 1978 (CSRA). ''This legislation comprehensively overhauled the civil service system.'' *Lindahl* v. *Office of Personnel Management,* 470 U.S. 768, 773 (1985). The CSRA remains in sum and substance the governing legislative framework today. In passing the CSRA, Congress created ''an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration.'' *Grosdidier* v. *Broad. Bd. of Govs.,* 560 F.3d 495, 497 (D.C. Cir. 2009) (*Grosdidier*). It is both ''comprehensive and exclusive.'' *Id.* It is ''comprehensive'' in that ''[i]t ''regulates virtually every aspect of federal employment and prescribes in great detail the protections and remedies applicable to adverse personnel actions, including the availability of administrative and judicial review.'' *Nyunt* v. *Broad. Bd. of Gov.,* 589 F.3d 445, 448 (D.C. Cir. 2009) (internal quotations omitted). It is ''exclusive,'' meanwhile, in that ''[i]t constitutes *the* remedial regime for federal employment and personnel complaints.'' *Id.* Simply put, ''what you get under the CSRA is what you get.'' *Fornaro* v. *James,* 416 F.3d 63, 67 (D.C. Cir. 2005).

Indeed, the CSRA's review scheme is exclusive even when ''the CSRA provides no relief,'' and in fact, ''precludes other avenues of relief.'' *Graham* v. *Ashcroft,* 358 F.3d 931, 935 (D.C. Cir. 2004). In other words, ''the CSRA is the exclusive avenue for suit even if the plaintiff cannot prevail in a claim under the CSRA.'' *Grosdidier,* 560 F.3d at 497. ''Congress designed the CSRA's remedial scheme with care, 'intentionally providing—and intentionally not providing—particular forums and procedures for particular kinds of claims.' '' *Id.* (quoting *Filebark* v. *Dep't of Transp.,* 555 F.3d 1009, 1010 (D.C. Cir. 2009)). The comprehensive statutory review scheme created by the CSRA means that ''federal employees may not use the Administrative Procedure Act [APA] to challenge agency employment actions.'' *Filebark,* 555 F.3d at 1010.

The CSRA prescribes in precise detail the types of actions regarding which there is eventual judicial review—and it does not provide for such review of RIFs.[25] Under the CSRA, ''[t]he reviewable agency actions are removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less,'' including when there may be constitutional claims at issue and, even then, only through the proper channels. *Elgin* v. *Dep't of Treasury,* 5 U.S. 1, 5–6 (2012). Courts

[18] U.S. Merit Sys. Prot. Bd., *supra* note 15.

[19] 5 U.S.C. 861 (Jun. 27, 1944), ch. 287, sec. 12, 58 Stat. 390.

[20] 5 U.S.C. 861 (Jun. 27, 1944), ch. 287, sec. 12, 58 Stat. 390.

[21] U.S. Senate Committee on Post Office and Civil Service, ''Reduction-in-Force System in the Federal Government,'' (July 4, 1952), p. 61, *https://babel.hathitrust.org/cgi/pt?id=uc1.aa0005567177&seq=67&q1=rule.*

[22] U.S. Merit Sys. Prot. Bd., *supra* note 15, at p.17.

[23] U.S. Senate Committee on Post Office and Civil Service, *supra* note 21, at p. 68.

[24] Id. at 89.

[25] Congress did subsequently provide for career members of the Senior Executive Service (SES) to file RIF appeals to the MSPB but chose not to provide similar appeal rights from RIFs for other members of the civil service. 5 U.S.C. 3595(c).

have repeatedly dismissed a litany of other actions brought outside the proper CSRA channels (such as under the APA) by individuals regarding their employment under the comprehensive statutory scheme provided for in the CSRA. *See, e.g., United States* v. *Fausto,* 484 U.S. 439 (1988) (''the absence of provision for . . . employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment. . . This conclusion emerges not only from the statutory language, but also from what we have elsewhere found to be an indicator of nonreviewability, the structure of the statutory scheme''); *Bush* v. *Lucas,* 462 U.S. 367, 368 (1983) (holding ''that it would be inappropriate . . . to supplement [the CSRA] regulatory scheme with a new judicial remedy''); *Zummer* v. *Sallet,* 37 F.4th 996 (5th Cir. 2022) (holding the CSRA prohibits district courts from hearing claims seeking to reverse suspensions and terminations); *Krafsur* v. *Davenport,* 736 F.3d 1032, 1034 (6th Cir. 2013) (''The [CSRA] spells out in painstaking detail the path an employee must follow if he wants to challenge a prohibited personnel practice''); *Dotson* v. *Griesa,* 398 F.3d 156, 163 (2nd Cir. 2005) (''the CSRA creates an integrated scheme of administrative and judicial review for adverse employment actions . . . That scheme . . . affords no administrative or judicial review to judicial branch employees'') (internal quotation marks omitted); *Pathak* v. *Dep't of Veterans Aff.,* 274 F.3d 28 (1st Cir. 2001) (holding the CSRA stripped the district court of subject matter jurisdiction to consider a suspension of less than 14 days); *Ryon* v. *O'Neill,* 894 F.2d 199, 204 (6th Cir. 1990) (''In short, the text of the CSRA, the structure of the review it establishes, and the legislative history of the Act, all lead ineludibly to the conclusion that Congress intended review of agency reassignment decisions to be confined to the specific procedures set out in the text of the CSRA''); *Yokum* v. *U.S. Postal Serv.,* 877 F.2d 276 (4th Cir. 1989) (holding the CSRA ''precludes judicial review of administrative personnel decisions adverse to the interests of nonpreference eligible postal workers'') (internal quotations omitted). This is because ''CSRA nowhere grants any employee, whether in the excepted or competitive service, the right to bring an action in federal district court.'' *Galvin* v. *F.D.I.C.,* 48 F.3d 531 (5th Cir. 1995) (holding plaintiff's claim was properly dismissed by the federal district court because his ''claims arise out of his employment relationship with the United States, and CSRA provides the exclusive mode of redress.'').

What is given by the comprehensive statutory scheme in the way of RIF procedures are codified at 5 U.S.C. 3501–3504, which Congress directs OPM to implement by regulation. While those statutes technically predate the CSRA's enactment in 1978, it has long been recognized that the statutes and regulations regarding reductions-in-force in the federal government are part of the ''comprehensive employment scheme'' created by the CSRA, *Filebark* v. *U.S. Dep't of Transp.,* 555 F.3d 1009, 1010 (D.C. Cir. 2009), which ''regulates virtually every aspect of federal employment.'' *Nyunt* v. *Chairman, Broad. Bd. of Governors,* 589 F.3d 445, 448 (D.C. Cir. 2009); *see also Nat'l Treasury Emps. Union* v. *Vought,* 149 F.4th 762, 774–75 (D.C. Cir. 2025) (applying CSRA claims-channeling in lawsuit challenging, inter alia, reductions-in-force); *Nat'l Treasury Emps. Union* v. *Trump,* 770 F. Supp. 3d 1, 11 (D.D.C. 2025) (same); *Gober* v. *Collins,* No. CV 25–714 (RC), 2025 WL 1360434, at *6 (D.D.C. May 8, 2025) (same). The CSRA applies to preclude judicial review even where it provides no specific avenue for relief. *See Filebark* v. *U.S. Dep't of Transp,* 542 F. Supp. 2d 1, 8 (D.D.C. 2008) (''Where Congress wanted to guarantee certain remedies, it explicitly did so.''); aff'd sub nom. *Filebark* v. *U.S. Dep't of Transp.,* 555 F.3d 1009 (D.C. Cir. 2009). While RIF separations can result in job loss or reassignment, they are specifically excluded as adverse actions under chapter 75 of Title 5, U.S.C., which governs removals and discipline for misconduct and, in some cases, performance deficiencies. As a result, an employee impacted by a RIF may be so affected through no fault of his or her own because ''when reductions of force are justified, they must be made.'' [26]

As outlined above, employees whose positions are subject to a RIF, however, have been afforded the right to appeal under 5 U.S.C. Chapter 77 only since 1983. Pursuant to Section 205 of CSRA, which amended 5 U.S.C. 7701(a), MSPB is granted jurisdiction over certain personnel actions ''appealable to the Board under any law, rule, or *regulation.*'' This jurisdictional grant permits, but does not require, MSPB to review appeals of actions conducted pursuant to 5 U.S.C. 3501–3504, which as explained below was granted to MSPB by regulatory action of OPM. While 5 U.S.C. 7512(b) excludes RIF actions from MSPB review under 5 U.S.C. Chapter 75 and its implementing regulations, it does not preclude MSPB review of RIF actions entirely. Authority under Chapter 75 applies exclusively to adverse actions. 5 U.S.C. 7512. ''A RIF is an administrative procedure by which agencies eliminate jobs and account for employees who occupied abolished positions. It is not an adverse action against a particular employee, but it is directed solely at a position within an agency.'' *Huber* v. *Merit Systems Protection Bd.,* 793 F.2d 284, 286 (Fed. Cir. 1986). ''Unlike adverse actions, RIFs are not aimed at removing particular individuals; rather they are directed solely at positions.'' *Grier* v. *Dep't of Health and Human Services,* 750 F.2d 944, 945 (Fed. Cir. 1984). MSPB concurs, noting the Board's authority ''is not plenary,'' but rather ''the scope of the Board's jurisdiction to review an agency's RIF actions [are] under OPM's regulations at 5 CFR part 351,'' which do not implement Chapter 75. *Adams* v. *Dep't of Defense,* 96 M.S.P.R. 325, 329 (2004). Further, OPM specifically delegated the authority—explicitly pursuant to 5 U.S.C. 1302 and 3502—to review a RIF appeal to MSPB in 1983. 48 FR 49462 (Oct. 25, 1983). Therefore, MSPB's jurisdiction over RIF appeals is regulatory in nature, not statutory. It is subordinated to and contingent upon OPM's decision, or not, to delegate its authority to hear RIF appeals. MSPB's jurisdiction over RIF appeals thus developed by custom, rather than statutory command, which MSPB itself acknowledges. See *Kohfield* v. *Dept. Of the Navy,* 75 M.S.P.R. 1, 4 (1997) (''Neither [the CSRA] nor any other statutory provision provides for a right of [MSPB] appeal for a RIF action.'').

Absent explicit statutory directive, it cannot be presupposed Congress's intention was for MSPB to be the proper venue to hear RIF appeals for non-SES employees.[27] Moreover, when interpreting statutes such as CSRA which comprehensively overhaul a regulatory framework, special consideration must be given to the explicit wording of the statute—above and beyond typical adherence to the letter of the law—because ''Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does

[26] President Calvin Coolidge, ''Address at the Twelfth Regular Business Meeting of the Business Organization of the Government, Washington, DC,'' (Jan. 29, 1927), *https://www.presidency.ucsb.edu/documents/address-the-twelfth-regular-meeting-the-business-organization-the-government-washington-dc.*

[27] The fact that Congress did subsequently provide for RIF appeals to the MSPB for members of the SES (whose RIF procedures are different from those of other title 5 employees, see 5 CFR part 359) underscores that Congress made no similar determination regarding non-SES employees.

not, one might say, hide elephants in mouseholes.'' *Whitman* v. *American Trucking Associations, Inc.,* 531 U.S. 457, 468 (2001). Were Congress interested in reversing the long-established precedent of near-plenary executive authority to execute a RIF action, it could have legislated matters in the CSRA such as RIF appeal rights, the entity responsible for accepting those appeals, the procedures by which an employee or employees may appeal a RIF action, as well as whether those appeal determinations were subject to judicial review. This is especially true given ''[c]riticism of this 'system' of administrative and judicial review [of agencies' personnel actions prior to CSRA] was widespread.'' *United States* v. *Fausto,* 484 U.S. 439, 445 (1988). However, Congress in legislating CSRA remained both implicitly and explicitly silent on RIF appeals in the face of widespread criticism. *See* 5 U.S.C. 3501–3504. Interpreting Congress's desire to house RIF appeals at OPM instead of MSPB is best understood by reading the text of the CSRA itself. When interpreting legislative direction, in all contexts, including but not limited to the CSRA, the statute itself is the first and best source to which to refer when determining the best reading of a statute. As a general matter, ''Congress wrote the statute it wrote,'' and ''[t]hat congressional election settles'' questions of interpretation. See *CSX Transp., Inc.* v. *Alabama Dept. of Revenue,* 562 U.S. 277, 296 (2011). In this light, the best reading of the statute's absence of an explicit directive is that Congress intended for the President, through OPM, to retain maximum flexibility to determine the procedures under which a RIF is to be carried out, including which entity is best positioned to serve as the venue for RIF appeals.

b. The Current, Cumbersome RIF Appeal Procedures Hurt the Federal Government

Since before the promulgation of the modern RIF procedures in the 1980s, agencies have expressed concerns the procedures would render agencies unable to utilize RIFs effectively. In evaluating agency response to designating MSPB as the venue for RIF appeals, the MSPB found agencies were concerned with the increased administrative burden imposed upon them, as well as the significant weight the process placed on individual employees' performance plans and appraisals.[28]

These concerns ultimately became more than theoretical. In 1995, OPM, the Government Accountability Office (GAO), the National Academy of Public Administration (NAPA), MSPB personnel, as well as the former MSPB Chairman, were called to testify in front of the Subcommittee on the Civil Service of the Committee on Government Reform and Oversight of the House of Representatives regarding federal employee appellate procedures, including to MSPB. At the time, MSPB was experiencing a dramatic increase in RIF appeals, seeing a 252% increase from Fiscal Year (FY) 1994 to FY 1995.[29] All witnesses criticized MSPB policies to varying degrees—even the then-current and former MSPB personnel—for unnecessarily increasing inefficiencies and undermining effectiveness. OPM noted that many MSPB appeals ''concern straightforward provisions of law with which an appellant disagrees,'' but that ''under current rules a person also has a right to a hearing at MSPB, and we believe there may be room for streamlining in this particular area.'' [30] OPM also noted its ''central role in intervening in appeals to ensure that its regulations are properly interpreted and that the meaning and intent of the civil service laws enacted by Congress are adhered to,'' a ''special role'' reserved for OPM.[31] GAO raised more pointed concerns, suggesting a number of considerations ''detract[ing] from the fair and efficient operation of the federal government,'' including that ''because of the complexity of the system [of appeals] and the variety of redress mechanisms it affords federal employees, it is inefficient, expensive, and time consuming.'' [32] GAO also noted the system ''is vulnerable to employees who would take undue advantage of these protections [by drawing out] protracted processes and requirements.'' [33] GAO's chosen remedy was for the federal government to mirror remedies available ''in the private sector and elsewhere,'' suggesting they ''may be worth further study.'' [34] NAPA provided testimony detailing work it had previously conducted on employee appeals the conclusions of which included the following issues in need of resolution: ''jurisdictional overlap,'' ''timely, fair, and final decisions,'' inconsistent remedies, and a ''focus on non-substantive issues.'' [35] The Chairman of the MSPB testified that upon review, MSPB was undermining its own effectiveness as a venue for appeals because ''we have found that the existing policies are sound but are being poorly implemented or are not being implemented at all.'' [36] He continued by noting MSPB is ''like a court. We receive whatever complaints are going to be generated and come to us. But we, I believe, as a government, can be most efficient and a better utilizer of resources . . . Hopefully, [complaints] never come to us.'' [37] The former Chairman of the MSPB expressed confusion as to the excessive complication in the process, stating ''I think it would be one thing to require a public law scheme as complicated as this if you are dealing with areas that really require this kind of complication. In fact, the only field of law that comes to mind . . . in terms of parallel [levels of complication] would be the Tax Code and tax law.'' [38] Ultimately, as the former MSPB Chairman noted, ''it is clear, and I believe it is clear both to those who work within the system and would be patently clear to those who just view it from the outside, [MSPB procedures are] far too complicated and real obtuse for real people in real workplaces to have to deal with.'' [39]

No authority has substantively addressed these concerns, predicted in 1987 and affirmed in 1995, resulting in limitations on agencies' practical ability to exercise RIF authority. Across the vast majority of government from FY 2005 through FY 2024, only 10,614 employees have been subject to a RIF.[40] More recently, under President Trump, agencies prepared RIF and reorganization plans pursuant to Executive Order 14210, *Implementing the President's ''Department of Government Efficiency'' Workforce Optimization Initiative* (Feb. 11, 2025) (directing agencies, *inter alia,* to ''promptly undertake preparations to initiate large-scale reductions in force (RIFs), consistent with applicable law''). In addition, RIFs were undertaken pursuant to Executive Order 14242, *Improving Education Outcomes by Empowering Parents, States, and Communities* (March 25, 2025) (directing the Secretary of Education to ''to the maximum extent appropriate and permitted by law, take all necessary steps to facilitate the closure of the Department of Education''); Executive Order 14217, *Commencing the*

[28] U.S. Merit Sys. Prot. Bd., *supra* note 10.

[29] Subcomm. on Civil Service of the House Comm. on Government Reform and Oversight, *supra* note 11.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] OPM FedScope data, Aug. 5, 2025.

Reduction of the Federal Bureaucracy (February 25, 2025) (directing that several government entities ''be eliminated to the maximum extent consistent with applicable law''); and Executive Order 14238, *Continuing the Reduction of the Federal Bureaucracy* (March 14, 2025) (same, except as to a different set of government entities). Although in 2025 the Trump Administration oversaw the largest peacetime reduction in the size of the Federal workforce ever, some 317,000 employees, the overwhelming majority of these departures (over 92.5%) were due to voluntary programs like the Deferred Resignation Program, Voluntary Early Retirement Authority, Voluntary Separation Incentive Payments, and other voluntary resignations. Only a very small percentage of departures resulted from RIFs.

While at least some of the historical causes of these relatively low numbers of employees subject to a RIF have been lack of political will and the success of RIF avoidance measures, the relatively low numbers across time support a widespread perception that, due to the time-consuming RIF appeal process, RIF procedures are too burdensome and arduous to be effective. For example, one author (an experienced former Federal employee and consultant for Federal agencies) called the current OPM RIF regulations ''the ultimate bureaucratic poison pill: take it, and you die. Meaning, the RIF rules and regulations are so complex and cumbersome, the process so time-consuming and demoralizing, and the outcome so haphazard and invariably negative, that it's the absolute last option any sane organization would want to consider.'' [41]

The current dual-track structure, whereby OPM promulgates and interprets RIF regulations while MSPB adjudicates appeals, creates considerable detrimental impact for both employees and agencies and renders the RIF procedures inefficient. In addition, the MSPB lacks institutional expertise regarding RIFs compared to OPM. For example, MSPB requires an inflexible, formal, quasi-judicial process that requires a hearing at the appellant's request, adding minimal benefits while exacerbating the already-extensive adjudicative timeline, despite authority to streamline the process to the benefit of appellant and agency. *See* 5 U.S.C. 7701(b). Specifically, RIF appeals filed before MSPB typically require a hearing and searching discovery. *See* 5 U.S.C. 7701(a); 5 CFR 1201.71–1201.75. The decision to provide for such process, and in so doing depriving employees and agencies of the ability to adjudicate RIF appeals efficiently, is increasingly untenable in light of MSPB's extensive delays. MSPB has recognized the problem its recurring backlog of cases presents, as well as the cause: lack of quorum because the Senate has not confirmed a sufficient number of Board members. In recent years, MSPB has at various times lacked quorum for extended periods, including for five years between 2017 and 2022.[42] The risk of an additional backlog is also significant in light of the significantly increased number of cases received in calendar year 2025.[43]

Agencies similarly stand to benefit from a less burdensome process that addresses the historical concerns OPM now embraces. Further, the current rules are undermining Congress's broad authorization for RIFs by limiting agencies' ability to fully exercise the authority it provided. As stated above, Congress did not design the CSRA to require, nor did it intend for it to require, agencies to litigate matters touching on their decisions to conduct RIFs before the MSPB in a quasi-judicial hearing format. Ultimately, the status quo appeal process is no longer conducive to serve the needs of twenty-first century governance. Both agencies and employees would be far better served by a single, streamlined process spanning the full lifecycle of the RIF process and leveraging OPM's expertise throughout, rather than the fragmented process this rule proposes to replace. This will promote consistency, efficiency, and regularity of decision-making regarding RIF appeals.

As such, OPM believes it would be prudent and provide much needed clarity for employees and agencies alike to be able to leverage OPM's expertise with RIF actions, as well as its ability to efficiently adjudicate them, especially when contrasted with MSPB's lack thereof on both counts. ''The administrative process will be best vindicated by clarity in its exercise.'' *Phelps Dodge Corp.* v. *Nat'l Labor Relations Board,* 313 U.S. 177, 197 (1941). As noted elsewhere in this proposal, OPM has considerable historical expertise with the RIF process. The CSRA tasked OPM with managing the RIF process. *See* 5 U.S.C. 3501–3504. OPM also promulgated the regulations governing the RIF process. *See* 5 CFR part 351.[44] It also issues handbooks with guidance to provide assistance to agencies ''that are considering and/or undergoing some type of reshaping (*e.g.*, . . . reduction in force).'' [45] According to the Administrative Conference of the United States (ACUS), ''a situation in which agencies share closely related responsibilities for different aspects of a larger regulatory, programmatic, or management enterprise .–.–. produce[s] redundancy, inefficiency, and gaps, but they also create underappreciated challenges.'' [46] GAO concurs with ACUS in the obvious: eliminating fragmentation ''improv[es] the efficiency and effectiveness'' of operations.[47] Streamlining responsibilities will ''improv[e] the efficiency, effectiveness, and accountability'' regarding ''potential dysfunctions created by the shared regulatory space.'' [48] Improving processes in this way can also ''reduce costs for both the government and regulated entities,'' including employees filing RIF appeals.[49]

As a practical matter, OPM believes reducing that fragmentation by tasking MSAC with adjudication of RIF appeals will provide much needed clarity and efficiency. MSAC is not only equipped, but best positioned, to handle this task. MSAC is an external-facing organization within OPM with longstanding oversight and adjudicative functions. As a general matter, ''MSAC is responsible for ensuring that [f]ederal agency human resources programs are effective and

[41] Fred Mills, *Civil Disservice: Federal Employment Culture and the Challenge of Genuine Reform,* at p.42 (iUniverse 2010).

[42] U.S. Merit Sys. Prot. Bd., ''Frequently Asked Questions about the Lack of Quorum Period and Restoration of the Full Board'' (Apr. 9, 2025), *https://www.mspb.gov/FAQs_Absence_of_Board_Quorum_4-9-25.pdf.*

[43] U.S. Merit Sys. Prot. Bd., ''Weekly Number of Cases Received in the Regional and Field Offices Fiscal Year 2025'' (Sept. 29, 2025), *https://www.mspb.gov/Recent%20ROFO%20Case%20Receipts.pdf.*

[44] OPM plans to propose changes to the regulations governing the administration of a reduction in force in a separate rulemaking. *See* RIN 3206–AO86. That rulemaking will affect different subparts of part 351.

[45] Workforce Reshaping Operations Handbook: A Guide for Agency Management and Human Resources Offices, OPM, March 2017, *https://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force-rif/workforce_reshaping.pdf.*

[46] Administrative Conference of the United States, ''Improving Coordination of Related Agency Responsibilities,'' (June 15, 2012), *https://www.acus.gov/document/improving-coordination-related-agency-responsibilities.*

[47] Government Accountability Office, ''Opportunities to Reduce Fragmentation, Overlap, and Duplication and Achieve an Additional One Hundred Billion Dollars or More in Future Financial Benefits,'' GAO–25–107604, (May 13, 2025). *https://www.gao.gov/assets/gao-25-107604.pdf.*

[48] Administrative Conference of the United States, *supra* note 46.

[49] *Id.*

efficient and comply with merit system principles and related civil service regulations,'' [50] which includes oversight of agency RIF actions. Specifically, MSAC also has ''a long history of adjudicating federal employee classification appeals, as well as Fair Labor Standards Act (FLSA), compensation and leave, and declination of reasonable offer claims'' [51] MSAC ''offer[s] federal employees an independent review of agency personnel decisions. OPM's decision in these cases is the final administrative decision.'' [52] As part of those functions, MSAC provides employees with administrative procedural rights to challenge agency determinations without having to seek redress in federal court. Further, the appeals process set forth in this proposed rule is exceedingly similar to OPM's classification appeals and FLSA claims process at 5 CFR part 511 subpart F, and 5 CFR part 551 subpart G, respectively. Thus, OPM will adjudicate RIF appeals in much the same manner as it does these claims, allowing it to leverage its procedural institutional knowledge. Additionally, distinct from MSPB, it has the infrastructure in place to adjudicate RIF appeals effectively without being subject to restrictions arising from the lack of a quorum.

Housing RIF appeals within MSAC (OPM's oversight and adjudicative body) would additionally separate the RIF adjudicative function within OPM from OPM's RIF policymaking function, which is housed in its Workforce Policy & Innovation (WPI) office.[53] OPM would continue to maintain appropriate administrative separation between its policy arm (WPI) and adjudication arm (MSAC).

Meanwhile, MSPB has been considerably backlogged due to a protracted period without a quorum that leaves employees and agencies in limbo. Between January 7, 2017, and March 3, 2022, and between April 10 and October 27, 2025, MSPB lacked a quorum, which prevented it from reviewing cases and resulted in a considerable backlog.[54] In light of the Senate's failure to confirm nominees to the MSPB in a timely way, a process over which the executive branch lacks any meaningful control, prudent governance requires the executive to minimize disruption in personnel operations caused by loss of a quorum at MSPB. MSPB too has mitigated, as far as practicable, the effects of a future lack of quorum on delays. 89 FR 72957 (Sept. 9, 2024). However, this lack of faith in its own ability to timely adjudicate appeals provides additional evidence of the prudence of relocating RIF appeals to MSAC. While employees may lack some procedural mechanisms if appeals are transferred to MSAC as contemplated by this rule, OPM believes streamlining the process will not have a consequential impact upon the substantive outcomes of the appeals, while improving the efficiency and consistency of the process.

As noted above, under the CSRA, Congress intended the President, by and through agencies, to be able to invoke RIF action authorities absent additional congressional action. It also directed OPM to continue to regulate and manage the RIF action lifecycle, as the Commission and the Personnel Classification Board before it had done; Congress entrusted OPM to continue doing so as part of the CSRA. *See* 5 U.S.C. 1302 and 3502. Outsourcing the appeal process to MSPB subjects the viability of the process (from notice through to appeal) to the machinations of MSPB, which cannot be relied upon to have a functioning quorum at all times. Nowhere has Congress directed OPM to involve MSPB in the RIF process, much less subordinate an agency's ability to engage in and conclude a RIF action to MSPB involvement. *See* Public Law 95–454, 92 Stat. 1111, as amended.

In furtherance of addressing these concerns, OPM proposes to establish limited grounds for employees subject to a RIF action to appeal their designation. Under these proposed regulations, such employees will be able to challenge their designation based on an agency's improper execution of a RIF action resulting in their being subject to a RIF. Employees wishing to pursue collateral claims under statutes administered by other entities, like bringing a claim of discrimination to the EEOC, would continue to have those avenues of appeal, but would not be allowed to raise those claims with OPM. These limited grounds of appeal reflect the historical principles and precedents that the President has plenary power to determine if a RIF is necessary and proper, subject to the provisos informing retention preferences directed by Congress. These limited grounds of appeal will ensure agencies adhere to the Merit System Principles and allow OPM to correct agency actions taken contrary to these principles, consistent with OPM's direct statutory and presidentially delegated authority. *See* 5 U.S.C. 1103(a)(7) and (c)(2)(f), 1104(b)(2); *see also* 5 CFR 5.3, 10.2–10.3.

II. Proposed Amendments

OPM is proposing to amend its regulations at subpart I of part 351, governing appeals of and corrective action with respect to RIFs.

Section 351.901 currently provides: ''An employee who has been furloughed for more than 30 days, separated, or demoted by a reduction in force action may appeal to the Merit Systems Protection Board.'' OPM is proposing to revise § 351.901 to specify that an employee who has been furloughed for more than 30 days, separated, or demoted as a result of a RIF may appeal exclusively to OPM. The proposed revision also places the burden of proving, by a preponderance of the evidence, the timeliness and proper venue for the appeal on the employee. The rule would provide that the employee, also by preponderance of the evidence, has the burden of proving that the RIF action subject to appeal was conducted inconsistent with either statute or OPM regulations such that the employee would not have suffered the same or another RIF action if properly conducted. Further, to avoid duplication and ensure that RIF appeals may be decided expeditiously, and consistent with Congress's intent that the administrative remedies under the CSRA be exclusive, OPM clarifies that the OPM appeal process would be the sole and exclusive means, including through filing of a grievance, to challenge a RIF action, though matters otherwise within the jurisdiction of the EEOC, Federal Labor Relations Authority (FLRA), an Inspector General, the MSPB, the Department of Labor Veterans' Employment and Training Service, or the Office of Special Counsel (OSC) may proceed through those administrative channels. Finally, OPM is foreclosing judicial review of decisions it issues stemming from an appeal under this part.

[50] U.S. Off. of Personnel Management Off. of the Inspector General, ''Final Evaluation Report: Evaluation of the Merit System Accountability and Compliance Office,'' Rept. No. 2021–OEI–011 (Dec. 12, 2022), *available at https://www.oversight.gov/sites/default/files/documents/reports/2022-12/Final-Report-2021-OEI-001.pdf.*

[51] *See* U.S. Off. of Personnel Management, *Adjudications, https://www.opm.gov/compliance/adjudications/.*

[52] *Id.*

[53] *See* U.S. Off. of Personnel Management, *FY 2026 Congressional Budget Justification and Annual Performance Plan* at p. 26, *available at https://www.opm.gov/about-us/fy-2026-congressional-budget-justification/fy-2026-congressional-budget-justification.pdf.*

[54] U.S. Merit Sys. Prot. Bd., *Frequently Asked Questions About the Lack of Quorum Period and Restoration of the Full Board* (Nov. 14, 2025), *available at https://www.mspb.gov/FAQs%20About%20Absence%20of%20Board%20Quorum%2011-14-25.pdf.*

OPM understands the phrase ''sole and exclusive means of appealing'' in proposed § 351.901 to create an outer bound outside which an agency will be precluded from providing for or otherwise authorizing any process not contemplated, in whole or in part, by this rule. Thus, as provided in the rule, these procedures ''supersede any conflicting appeal procedures found in agency policies or collective bargaining agreements.'' This language is intended to preclude appeals filed pursuant to internal agency policies or collective bargaining agreements, whether filed by individual employees or by unions on behalf of their members. The Federal-Service Labor Management Relations Statute (the FSLMRS, enacted as part of the CSRA) provides that ''the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.'' 5 U.S.C. 7117(a)(1). This would be such a government-wide rule. It is proposed to apply to any agency executing a RIF action. To that end, it would firmly and completely limit the flexibility of agencies to provide processes not contemplated by this rule, including grievance arbitration. *See U.S. Dep't of Treasury, I.R.S.* v. *FLRA,* 996 F.2d 1246, 1250 (D.C. Cir. 1993) (5 U.S.C. 7117(a)(1) ''permits the government to pull a subject out of the bargaining process by issuing a government-wide rule that creates a regime inconsistent with bargaining,'' including where a regulation ''sets out an exclusive method of resolving any claims'').

In this rulemaking, OPM is foreclosing grievance arbitration regarding RIFs because it is to the benefit of agencies and employees alike. Agencies benefit from avoiding a protracted process that adds time and expense to conducting a RIF action and undercuts the agency head's ability to manage his or her workforce. In addition, in precluding grievance over RIF appeals, OPM is allowing each employee affected by a RIF to appeal to OPM as part of a streamlined and fair process. Further, both agencies and employees benefit both from finality of process and from availing themselves of competent adjudicators of the dispute in question.

While, for the reasons discussed above, agencies stand to benefit from the procedure OPM is proposing in this rule relative to the status quo, agencies also will directly benefit from precluding grievance arbitration. *First,* grievance arbitration under the FSLMRS is an unnecessarily protracted process, leaving uncertainty lingering over agencies for significant periods of time. Even after a hearing is held, the losing party can appeal to the FLRA, which reports the average age of its arbitration cases in FY2024 to be 307 days.[55] This is an untenable length of time to require an agency head to wait to finalize a RIF—and for an employee to wait to obtain a resolution to a RIF-related grievance. Indeed, commentators have observed that ''the FLRA process seems all too frequently to have become the Russian Roulette of federal sector arbitration. At the time a case is heard, when an award is rendered, or even years later, one or both of the parties often has its finger on the trigger ready to discharge every chamber in order to delay and frustrate the dispute resolution process or to strike down an award.'' [56]

Second, concerns exist that grievance arbitrators lack subject matter expertise necessary to properly adjudicate federal sector labor-management arbitration. ''Federal sector labor management practitioners have long expressed concerns about arbitrator quality and competence.'' [57] Neither agencies nor employees should be left with any doubt whatsoever that the grievance arbitrator understands the law he or she is applying. However, too often, that doubt not only persists, but is warranted. Between February 2019 and July 2023, nearly half (40.2 percent) of appeals of arbitrator decisions—which may only be appealed on exceedingly narrow grounds, like incorrect facts or an arbitrator exceeding his or her authority—were either overturned or remanded to the arbitrator for further consideration.[58] ''By far the most common basis for overturning arbitral awards over this period was that the arbitrator's ruling was, in whole or in part, contrary to law, rule or regulation. Almost two-thirds of the overturned awards were voided on that basis. The next most common ground—accounting for almost one-quarter of overturned awards—was that the award did not draw its essence from the parties' CBA.'' [59] In 2018, the Federal Mediation and Conciliation Service's Director of Arbitration identified a ''serious concern'' noted by ''parties on both sides at federal agencies,'' namely ''that they are receiving panels where one or more arbitrator appears to lack any meaningful experience in federal sector labor-management issues.'' [60] It should not be too much to ask (and OPM's proposal ensures) that no party to a RIF appeal would have to ''deal with Arbors [arbitrators] who are assigned ad hoc and may be relatively clueless re the fed sector.'' [61]

Third, there are serious concerns that grievance arbitration in the federal sector is itself unconstitutional. Federal-sector arbitrators exercise substantial power, and their decisions are only subject to review by the FLRA under an extraordinarily deferential standard.[62] At the same time, these arbitrators are private citizens who are not accountable to or appointed by the President or any principal officer. Although no court has directly weighed in on these issues, this framework is in considerable tension with private nondelegation doctrine caselaw on the scope of constitutionally permissible delegations of authority to private parties.[63] It is not clear that private citizens can issue orders binding the executive branch with minimal review by Federal officers. Transferring adjudication of RIFs from grievance arbitrators to OPM would vitiate these constitutional concerns.

In place of the protracted, fragmented process of grievance arbitration regarding RIFs, including unaccountable grievance arbitrators who often lack appropriate federal-sector experience, OPM proposes a streamlined, one-stop process, overseen by a principal officer (the OPM Director) directly accountable to the President. OPM expects that

[55] U.S. Fed. Lab. Rels. Auth., ''Performance & Accountability Report Fiscal Year 2024,'' (2024) *available at https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/Public%20Affairs/PAR/FLRA%20FY2024%20PAR.pdf.*

[56] Dr. Mollie H. Bowers, ''Challenges to Arbitrability in Federal Sector Grievance Cases,'' 5 Hofstra U. Lab. & Emp. L.J. 169, 175 (1988).

[57] James Sherk & Jacob Sagert, ''Grievance Arbitrators Lack Federal Sector Experience,'' (June 24, 2024), *https://www.americafirstpolicy.com/issues/grievance-arbitrators-lack-federal-sector-experience.*

[58] James Sherk, ''Federal Union Arbitrators Frequently Misapply the Law,'' (Aug. 2, 2023), *https://www.americafirstpolicy.com/issues/expert-insight-federal-union-arbitrators-frequently-misapply-the-law.*

[59] *Id.*

[60] Sherk & Sagert, *supra* note 57.

[61] *Id.*

[62] *See Nat'l Weather Serv. Emps. Org.* v. *FLRA,* 966 F.3d 875, 881 (D.C. Cir. 2020) (as ''long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the Authority may not reverse the arbitrator's award even if it is convinced he committed serious error'').

[63] *See, e.g., Alpine Securities Corp.* v. *Financial Industry Regulatory Authority,* 121 F.4th 1314, 1325 (D.C. Cir. 2024) (''For a delegation of governmental authority to a private entity to be constitutional, the private entity must act only as an aid to an accountable government agency that retains the ultimate authority to approve, disapprove, or modify the private entity's actions and decisions'') (cleaned up). *See also Federal Communications Commission* v. *Consumers' Research,* 145 S. Ct. 2428, 2508 (2025) (delegations of authority to private parties are permissible only ''[a]s long as an agency [ ] retains decision-making power'').

similar efficiencies can be gained by allowing for the RIF appeal process in this part to supersede any overlapping agency appeal processes, whether or not they were negotiated as part of the collective bargaining process.

This proposed section leaves the full array of CSRA statutory remedies for ancillary issues available to an employee subject to a RIF. For example, this proposal allows for an employee who believes he or she has been unfairly targeted for political purposes to file a complaint to that effect with the OSC. As noted above, the CSRA provides for these pathways in statute, and this proposal does nothing to restrict or redirect these claims.

Proposed § 351.902 describes the procedures and timeline an employee must adhere to when submitting an appeal.[64] It provides that all appeals must be filed using an e-filing system and that, unless the party demonstrates good cause and seeks approval from OPM, OPM will not accept documents via postal mail or electronic mail. Either the employee or the employee's authorized representative may file the appeal. OPM anticipates that it would have an e-filing system in place prior to the effective date of a final rule. It also implements a timetable an employee must abide by to ensure the appeal will not be deemed untimely and dismissed (subject to the employee demonstrating good cause for an untimely appeal, as determined by OPM, in which case the timetable may be waived). The timetable requires the employee to submit a RIF appeal to OPM prior to 11:59 p.m. Eastern Time on the 30th calendar day after the effective date of the action. However, if the 30th day falls on a Saturday, Sunday, or Federal holiday, the filing period would be extended to include the first weekday after that date. It also proposes to provide e-filing procedures necessary to file appeals.

Proposed § 351.903 describes the content of a RIF appeal, the employing agency's response to that appeal, and an employee's reply if warranted, grants the employee or the employee's representative, by request, the ability to inspect OPM's appellate records, and requires the appellant and agency to serve all information submitted to OPM on one another, at the same time as such documents are submitted to OPM.

Proposed § 351.904 describes who an employee may select to be his or her representative and the circumstances under which the agency may disallow the representative to represent the employee. This section proposes to permit the employee to select any person with whom the employee has a written agreement for the representative to act as such related to the specific appeal being filed. If the employee is incapacitated, this section proposes to permit the designated individual exercising the durable power of attorney on the employee's behalf or, in the alternative, the employee's surrogate decisionmaker, to act as a stand-in for the employee. However, this section proposes an agency be authorized to, at the agency's discretion, reject any representative who is an employee of the agency when his or her actions as such would present a conflict of interest, the representative cannot be released from official duties because he or she is serving a priority need of the Government, or the representative is an employee whose release would result in unreasonable costs to the Government. This section also proposes that, if the representative is an agency employee, he or she may not perform representational functions while in a duty status and is not able to claim agency reimbursement for any expenses incurred while performing representational functions.

Proposed § 351.905 describes the procedures by which adjudication of appeals is to take place, including how to address conflicts of interest, appeals by OPM employees, investigative authorities, a requirement for OPM to notify interested parties of the decision, and relevant remedies, if any. The section proposes for OPM personnel to adjudicate appeals by employees of other agencies, provided such personnel have not served in a position impacted by a RIF action or served as a representative for an employee subject to a RIF action in the two years prior to the date on which the appeal was filed. The section further proposes to permit OPM to appoint an administrative law judge (ALJ) to preside over the appeal. It does not require OPM to appoint an ALJ for non-OPM employees. In contrast, to insulate OPM employees' appeals from agency involvement, this section proposes to assign an ALJ to adjudicate such appeals and restricts OPM from disturbing the ALJ's initial decision except if there has been a harmful procedural irregularity in the proceedings before the ALJ or if the ALJ makes a clear error of law. Under this construction the OPM Director would be proactively exercising restraint in permitting decisions pertaining to OPM employees to lie undisturbed, not delegating his authority to the ALJ. In essence, the OPM Director is regulatorily tying his own hands but can nevertheless choose to regulatorily untie them. This leaves the ALJ as a properly supervised inferior officer, not a principal officer. *See United States* v. *Arthrex, Inc.,* 594 U.S. 1, 6 (2021) (holding that the Appointments Clause provides that inferior officers may exercise executive power provided they are directed and supervised by a principal officer.).

For ''harmful procedural irregularity,'' the appealing party must prove the irregularity in the application of procedures was likely to have caused the ALJ to reach a conclusion different from the one it would have reached in the absence or cure of the irregularity. The section also proposes to empower OPM to investigate or audit the RIF action to ascertain facts, which will be based on the developed written record or, in the sole discretion of OPM, a hearing if it deems such a hearing necessary and efficient. OPM defines ''necessary and efficient'' to mean circumstances in which the written record is insufficiently developed to make a determination regarding one or more facts material to the outcome of the appeal, or where there is a disputed issue of witness credibility that is material to the outcome of the appeal. In cases in which an audit or investigation is conducted, the section proposes to require OPM to inform the parties and provide each with a reasonable opportunity to supplement their positions with additional arguments or information. This section would further require OPM to notify the parties in writing of its decision on the appeal. This section proposes to provide remedies to the employee in an instance in which he or she is the prevailing party. In such cases, the section proposes that OPM will issue an order directing correction of the personnel action and providing the employee with any back pay, as well as reasonable attorney's fees and interest consistent with subpart H of part 550 of title 5 of the Code of Federal Regulations. Employees are further proposed to be precluded from compensatory damages or other relief not authorized under 5 U.S.C. 5596(b). Finally, the section proposes that, if the agency requests a reconsideration of an initial decision, or OPM reopens the case, the ordered relief must be adhered to until OPM issues a second order, in which case the parties must adhere to the second order.

Proposed § 351.906 describes the authority of OPM to prevent harassing communications by the parties via a cease-and-desist directive, and the penalties for failing to follow a directive from OPM. Specifically, the proposed

[64] This proposed rule contemplates retaining the rights currently codified at 5 CFR 351.902 elsewhere in the subpart.

language would authorize OPM to direct any party to cease-and-desist communications, or communications which could reasonably be foreseen to lead to harassment, with or about any individual. This authority is proposed to be exercised *sua sponte* or at the request of a party. The section further proposes to impose several penalties upon a party failing to comply with such a directive, including drawing all inferences against the noncompliant party, prohibiting the noncompliant party from introducing evidence, or eliminating consideration of any filings or submissions of the noncompliant party.

MSPB procedures, while providing for protective orders, are inadequate to protect federal employees from threats and harassment. While MSPB permits a party to petition the board for a protective order, it cannot, *sua sponte,* bind a party to a protective order without a motion. Instead, MSPB relies primarily on mutual consent of the parties, which allows for significant abuse by bad actors. The failure to preemptively issue an order provides ample opportunity to those who would channel unwarranted attention, harassing messages, and threats to federal employees, who neither sought nor deserve public attention, merely for fulfilling their responsibilities. This failure should be corrected to protect rank and file federal employees seeking to serve the public interest. However, unfortunately, to date, MSPB has proven itself unwilling to take necessary steps to protect federal employees, who deserve to be fully protected from undue scrutiny. As such, OPM believes it would be prudent and provide much needed protection for federal employees to adjudicate these appeals by issuing cease-and-desist directives, with strict consequences for failure to comply.

Proposed § 351.907 describes the authority and basis for OPM to reconsider its decision. The section proposes to authorize OPM in its sole discretion for only delineated grounds, and only upon request of a party to the dispute to reopen and reconsider an initial decision issued under proposed § 351.905. This authority is proposed to be time-limited to within 30 calendar days from issuance of the initial decision. This section proposes to require any request for reconsideration of an initial decision to be filed using the same e-filing system employees or their representatives are to use to file their initial appeals. The section proposes to delineate the grounds for reconsideration to be: (1) an erroneous finding of fact material to the outcome of the decision; (2) an erroneous interpretation of statute or regulation, or application of the facts of the case to such law; (3) new and material evidence (which is proposed to constitute new information contained in documents, not just new documents, which was unavailable despite due diligence) or legal argument has become available that, despite the petitioner's due diligence, was not available when the record closed; or (4) OPM finds good cause to reconsider an appeal. The section further proposes that, in an instance in which there is an allegation of erroneous interpretation of statute or regulation, or application of case facts to the law, the petitioner must further explain how the error affected the case outcome. The section further proposes that, in any case that OPM reopens for review, OPM is authorized to issue a decision, require the parties to submit argument and evidence, or take any other action necessary for final disposition. The section proposes to empower OPM to affirm, reverse, modify, or vacate the initial decision in whole or in part, as well as issue a reconsidered decision, and where appropriate, order a date for compliance. It also precludes any further right of administrative appeal.

In proposed § 351.908, OPM reserves the Director's right, at his or her discretion and *sua sponte,* to reopen and reconsider any decision OPM has issued provided the decision has not yet become final. OPM views this process as necessary to ensure that the Director is able to sufficiently supervise adjudicators and avoid any serious constitutional concerns from having subordinate officials wield executive authority. Under Article II, the Constitution vests the executive power in the President who must rely upon subordinates to exercise his authority. Adjudicators assigned to adjudicate appeals under this proposed rule exert significant authority that must be properly supervised to avoid a constitutional problem. *Seila Law* v. *Consumer Finance Protection Bureau,* 140 S. Ct. 2183 (2020). OPM believes the Director should have the final decision-making authority for OPM to avoid legal challenges to the constitutionality of this regulation.[65]

Proposed § 351.909 describes the process by which OPM's initial decision becomes its final decision. The section proposes that initial decisions become final when neither party requests reconsideration within 30 calendar days and the Director does not reopen a matter. It further proposes to convert a reconsidered decision into a final decision 30 calendar days following its issuance if the Director does not intercede but, in such cases, backdates the date on which the final decision becomes effective to the date on which the reconsidered decision is issued. In instances in which the Director does intercede, this section proposes to define a final decision as effective as of the date on which the Director issues his or her decision.[66] Further, the section proposes to limit further rights to appeal following a final OPM decision, including judicial review. Finally, the section mandates OPM maintain a public website containing some final decisions adjudicated on the merits, and that any concerned party be permitted to access, upon request, any decision, whether on the public website or not.

As stated above, OPM is proposing to limit judicial review of decisions issued under this subpart to adhere to the CSRA's specific and well-defined statutory scheme for judicial review and prevent unnecessarily protracted litigation regarding RIFs. OPM recognizes the status quo that RIF appeals are appealable to the MSPB and then, in turn, to the Federal Circuit. 5 U.S.C. 7701, 7703(b). However, this pathway currently exists because of an OPM regulation, not because the CSRA itself specifically requires it. The detailed discussion above regarding the structure of the CSRA supports both the legal and prudential bases for limiting judicial review in accordance with the comprehensive statutory scheme. OPM believes that there is little added value from the review that an Article III court could provide relative to OPM's adjudicatory venue.

OPM's appeal process provides robust assurance for an employee that all laws and rules applicable to RIFs are followed and that employees will not be adversely impacted by errors. OPM will have all tools necessary to make an employee whole who is subject to an unlawful or improperly executed RIF. OPM is proposing conforming changes to § 351.802(a)(6) pertaining to the content of RIF notices to employees. The current subsection describes a right to appeal to MSPB. Proposed § 351.802(a)(6) will replace references to the MSPB with OPM, except for employees with a statutory right of

[65] *See Lucia* v. *Sec. & Exch. Comm'n,* 585 U.S. 237 (2018) (holding administrative law judges to whom the SEC could delegate responsibility to preside over enforcement proceedings are Officers of the United States) and *Freytag* v. *Comm'r,* 501 U.S. 868 (1991).

[66] This regulation is modeled after those of the Commission, published in 1949. U.S. Senate Committee on Post Office and Civil Service, *supra* note 23, at p. 68.

appeal to MSPB under 38 U.S.C. chapter 43. OPM is making this change to conform with changes to appeal rights as proposed in § 351.901.

Proposed § 351.807(e) removes the reference to the MSPB to conform with changes to appeal rights as proposed in § 351.901.

III. Regulatory Analysis

A. Statement of Need

The proposed rule seeks to modernize the current RIF appeals process. The current process has become cumbersome and less efficient than it needs to be. The proposed changes are needed to streamline this process to improve both the efficiency and consistency of this process. OPM believes this change can be achieved by leveraging its accumulated knowledge and expertise through its unique role as developer, administrator, and end-user of RIF provisions.[67] This perspective and insight are essential to streamlining the appeals process and the Government's ability to achieve consistent outcomes in the RIF appeals process.

B. Regulatory Alternatives

An alternative to this rulemaking is to revoke the ability for a federal employee to appeal a RIF action entirely. Congress provided discretion to OPM pursuant to 5 U.S.C. 3502(d)(2)(E) when directing it to provide a notice which includes ''a description of any appeal or other rights which *may* [emphasis added] be available.'' However, were OPM to choose this alternative, employees subject to RIFs would not be able to seek relief for a RIF conducted not in accordance with applicable statutes and regulations. Employees have enjoyed the ability to appeal a RIF action to the Executive Branch for nearly a century, and OPM believes it is unwise to reverse this long-standing precedent.

Another alternative is to delegate the authority to review RIF appeals to each agency itself. This solution is similarly imprudent given the conflicts of interest that may arise, which are addressed elsewhere in this rule. Further, the same shortcomings that exist by placing the RIF appeal process at MSPB, including contravening the best reading of the authorizing statute, efficiency losses from lack of expertise, among others, would not just remain, but would be exacerbated.

A third alternative is to propose a rule that would re-house the RIF appeal rights at OPM while mirroring the appeal rights and procedures currently in place at MSPB. However, MSPB procedures add needless, quasi-judicial complexity to a process fundamentally designed to ensure federal agencies are properly evaluating whether an agency's reorganization adhered to congressional directive and agency internal policy. Appellants to MSPB receive a full hearing when the matter is within MSPB's jurisdiction. *See* 5 U.S.C. 7701(a). This includes a full discovery process causing needless delay and transactional cost increases resulting from protracted adjudication and potential litigation. The MSPB procedures, even housed at OPM, are also unnecessary given the limited grounds for appeal. As the central personnel agency for the federal government tasked with regularly monitoring and enforcing the civil service rules and regulations, OPM can leverage its considerable expertise to adjudicate RIF appeals efficiently in accordance with Merit System Principles without having to rely on the costly, burdensome, and time-consuming processes MSPB employs for its adjudications.

A further alternative would be to seek to change the procedures applicable to MSPB RIF appeals to more closely align with the proposed process in this rule. However, that avenue is closed to OPM. Under *AFGE* v. *OPM.,* OPM cannot issue any ''regulation that purports to instruct the MSPB how to conduct personnel appeals.'' 821 F.2d 761, 768 (D.C. Cir. 1987). Instead, ''if OPM chooses to use the MSPB for dispute resolutions, it must take that statutory device as it finds it.'' *Id.* at 769.

C. Impact

OPM expects the impact of these rules will be a more streamlined and consistent RIF appeals process. The proposed RIF appeals process is similar to the classification appeals process currently administered by OPM whereby determinations are made on information provided by an agency and appellant in writing, except in circumstances in which OPM determines it necessary to conduct an investigation or audit. OPM can leverage its experience with classification appeals, and its expertise in developing and administering RIF rules over the decades, into an economy of scale with respect to RIF appeals. OPM has a unique perspective with respect to RIF actions; OPM has a decades-long history of developing and administering RIF rules which includes providing hands-on technical policy advice and assistance to agencies as well as operational RIF support on a reimbursable basis. And, as an employing agency, OPM has applied these rules to its own workforce in several RIFs over the years. OPM has the advantage of being both the practitioner and the policy expert and believes it is in the best position to adjudicate appeals for federal agencies. OPM believes transferring the appeals function from MSPB to OPM and confining OPM reviews of agency actions to the written record promotes standardization and consistency in outcomes—both of which promote the efficiency of government operations, including by leading to fewer challenges and reconsiderations.

D. Costs

This proposed rule, once finalized and in effect, would affect how a federal employee may pursue an appeal asserting an improperly executed RIF resulting in his or her termination. This proposal grants authority of these appeals to OPM. The proposed rule also removes authority from MSPB to adjudicate complaints asserting erroneous findings of fact, erroneous interpretation of statute or regulation to the facts of the case, the existence of new material or legal arguments not available when the record closed, or other good cause to consider an appeal.

The return of adjudicative responsibility to OPM will likely result in net cost savings to the government. The proposed rule streamlines the adjudicative process by replacing discovery with an as-needed investigation or audit conducted by OPM. The parties will no longer have the right or ability to conduct discovery, an often contextually needless process given the formulaic nature of a RIF that can result in protracted costs (including time spent on document production, depositions, and written discovery, each of which involve extensive costs in time and resources for the government) creating extensive and costly delays in the adjudicative process.[68] It also eliminates an employee's right to a hearing in favor of decisions based on the written record unless OPM determines that a hearing is both necessary and will result in an efficient

[67] OPM emphasizes the independence of its adjudicative function from its policymaking function. It further notes that both the independent policymaking function and adjudicative function are under the supervision of the Director of OPM. As head of the agency, he is uniquely positioned to understand the intent and substance of the RIF process rules, which he can leverage to ensure they are properly effectuated. MSPB personnel lack such a perspective.

[68] OPM recognizes MSPB regulations provide for time constraints on discovery. 5 CFR 1201.73. However, these regulations also provide for an unlimited extension at the direction of the judge, which can extend the discovery timeline far beyond the regulatory timeline.

adjudication. The rule also locates the adjudicative function at OPM, resulting in a significant cost savings based on a reduction in personnel salaries as detailed below.[69]

OPM estimates that this rulemaking will require individuals employed by more than 80 federal agencies, including MSPB and EEOC, to modify their regulations, policies, and procedures to implement this rulemaking and train human resources (HR) practitioners, hiring managers, attorneys, and administrative judges. For the purposes of this proposal, OPM assumes the average salary rate of federal employees performing this work will be the rate in 2025 for GS–14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $154.76 per hour.

To comply with the regulatory changes, affected agencies would need to review the final rule and update their regulations, policies, and procedures. OPM estimates that, in the first year following publication of the final rule, doing so will require an average of 100 hours of work by employees with an average hourly cost of $154.76. This work would result in estimated costs in that first year of implementation of about $15,476 per agency, and about $1.2 million governmentwide.

Recurring Costs and Savings

OPM estimates that, in general and on an annual basis, approximately 292 employees will file appeals pursuant to a RIF. This figure is derived from averaging all RIF appeals (8,770) from 1995 to the present.[70] While OPM acknowledges the significant number of RIF appeals filed in recent months,[71] OPM views this as anomalous and not indicative of a broader trend.

This analysis compares the cost of an adjudication at MPSB relative to OPM. OPM believes MSPB employs administrative judges at the GS–14 and GS–15 grade levels to adjudicate appeals. OPM further assumes that each RIF appeal requires one administrative judge paid at the rate in 2025 for GS–14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate) and one paralegal at the GS–11, step 5, from the Washington, DC locality pay table ($95,878 annual locality rate and $45.94 hourly locality rate). OPM assumes that the total dollar value of labor, including wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $154.76, $91.88, and $216.30 per hour for these respective positions. OPM estimates each initial appeal currently takes MSPB personnel 40 and four hours for an administrative judge and paralegal to adjudicate an initial appeal, respectively. Based on these assumptions, OPM estimates the cost to MSPB of adjudicating an initial appeal to be $6,557.92 per case, or $1.9 million per year for 292 appeals.

OPM anticipates handling initial procedural RIF appeals will require one paralegal at the rate in 2025 of GS–11, step 5, from the Washington, DC locality pay table ($95,878 annual locality rate and $45.94 hourly locality rate) and one staff assistant at the rate in 2025 of GS–7, Step 5, from the Washington, DC locality pay table ($64,788 annual rate and $31.04 hourly locality rate) and one staff assistant at the rate in 2025 of GS–7, step 5, from the Washington, DC locality pay table ($64,788 annual locality rate and $31.04 hourly locality rate) to handle procedural dismissals, including but not limited to failure to file timely or for lack of jurisdiction. Assuming a 200% value of labor, including wages, benefits, and overhead, the assumed hourly labor cost for these positions are $91.88 and $62.30 respectively. OPM further anticipates that, predicated on historical precedents for volume of RIF appeals and the necessary resources used for similarly situated appellate procedures, both the paralegal and the staff assistant will have additional responsibilities as part of their duties. OPM estimates each initial appeal will require 20 hours for the paralegal and 4 hours from the staff assistant to adjudicate initial appeals. This results in a per-appeal cost of about $2,085, and an annual cost of approximately $135,025 for 219 appeals.

OPM anticipates that adjudicators will handle 73 initial appeals that are timely and germane. OPM further anticipates handling initial non-procedural RIF appeals will require an adjudicator at the rate in 2025 of GS–13, step 5, from the Washington, DC locality pay table ($136,486 annual locality rate and $65.48 hourly locality rate) and one paralegal at the rate in 2025 of GS–11, Step 5, from the Washington, DC locality pay table ($64,788 annual rate and $31.15 hourly locality rate). Assuming a 200% value of labor, including wages, benefits, and overhead, the assumed hourly labor cost for these positions are $130.96 and $91.88 respectively. OPM estimates that each appeal will require 20 hours from the adjudicator and one hour from the paralegal, resulting in a roughly $2,700 per case cost, or nearly $200,000 for 73 appeals.

With respect to petitions for reconsideration, OPM estimates that MSPB would hear 155 requests (53 percent) for reconsideration of an initial appeal. This is based on data from the MSPB's three most recent annual reports for which there is data, which indicate that employees petitioned for review of initial MSPB decisions in 53 percent of RIF decisions.[72] With respect to the cost to adjudicate petitions for review from initial appeals, we estimate that each petition requires 4 hours each for the Chairman and two Members of the MSPB respectively, paid at a rate of Executive Schedule Level IV of $195,200 ($93.53 hourly rate); and 16 hours for one attorney paid at the GS–15, step 5, from the Washington, DC, locality pay table ($189,950 annual locality rate and $91.02 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $187.06, $187.06, and $182.04 for these respective positions, or about $683,413 per year for 155 petitions for review.

Given the expertise present in MSAC and the limited grounds under which OPM proposes to be able to grant a request to reopen and reconsider an initial appeal, OPM anticipates 5 percent of the 292 employees who make an initial appeal, or 15 employees, will

[69] OPM used the most recently available data in the FedScope employment database, updated May 2024, to estimate grade levels of MSPB personnel assigned to adjudicate appeals covered by this proposed rule. The data is available at *https://fedscope.opm.gov/*.

[70] OPM has opted to include all RIF appeals from 1995 to the present, inclusive of the comparatively increased number occurring during the Clinton Administration relative to the George W. Bush, Obama, and first Trump administrations. OPM has chosen to include this information in its analysis in the interest of transparency in light of this being the oldest data available in its FedScope database. OPM is, however, excluding the anomalously large number of RIFs from 2025. OPM believes including the Clinton RIFs while excluding the 2025 RIFs is the best path forward because while OPM is not aware of any decision to initiate future large-scale RIFs, excluding the potentiality that such an occurrence may happen would potentially render this estimate inaccurately low. By including the Clinton Administration data, however, OPM seeks to protect against a potential under-estimate of the necessary overall cost to the government of RIF appeals on an annualized basis. Similarly, excluding the 2025 RIFs protects against an over-estimate of the overall cost.

[71] U.S. Merit Sys. Prot. Bd., ''Annual Performance Plan for FY 2025–2026'' (May 30, 2025), *https://www.mspb.gov/about/annual_reports/MSPB_APP_for_FY_2025_2026.pdf*.

[72] MSPB's Annual Reports for FY 2020 through FY 2024 can be found on MSPB's website at *https://www.mspb.gov/about/annualreport_archive.htm*.

request to reopen and reconsider an initial appeal. OPM anticipates that each reconsideration will require one adjudicator at the rate in 2025 of GS–14, step 5, from the Washington, DC locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate) and one paralegal at the rate in 2025 for GS–11, step 5, from the Washington, DC locality pay table ($95,878 annual locality rate and $45.94 hourly locality rate) to manage these appeals. Assuming a 200% value of labor, including wages, benefits, and overhead, the assumed labor cost for these positions are $154.76 and $91.88 per hour, respectively. OPM estimates that each adjudication of a request to reopen and reconsider an initial appeal requires 16 hours and one hour of the adjudicator's and paralegal's time, respectively. This results in a per-case cost of roughly $2,568 or about $38,520.60 per year for 15 requests to reopen and reconsider initial appeals.

There is also a cost-benefit to agencies of litigating appeals and reconsiderations at OPM rather than MSPB. Under the status quo, OPM estimates that agencies' litigation is handled by an agency attorney at the rate in 2025 of GS–14, step 5, from the Washington, DC locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate), one paralegal at the rate in 2025 of GS–11, step 5, from the Washington, DC locality pay table ($95,878 annual locality rate and $45.94 hourly locality rate), one supervisory attorney at the rate in 2025 of GS–15, step 5, from the Washington, DC locality pay table ($189,950 annual locality rate and $91.02 hourly locality rate). Assuming a 200% value of labor, including wages, benefits, and overhead, the assumed hourly rate for these positions are $154.76, $91.88, and $182.04 respectively. OPM estimates that each appeal will require 80 hours from the agency attorney, four hours from the paralegal, and 8 hours from the supervisory attorney, resulting in a per-case cost of $14,204.64, or $4,147,754.88 cost to agencies to litigate initial appeals. OPM further estimates that an agency attorney compensated at the same GS–14, step 5, Washington, DC locality pay table will handle petitions for reconsideration, with each petition requiring 24 hours of the attorney's time, or $3,714.24 per case. In total, OPM estimates the cost of the petition for reconsideration to be $575,707.20, for a total cost to agencies of litigating at MSPB to be $4,723,462.08.

OPM estimates the cost to agencies of litigation at OPM relative to MSPB would dramatically decrease. OPM estimates that agencies' litigation would be handled by an agency attorney at the rate in 2025 of GS–14, step 5, from the Washington, DC locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate), one paralegal at the rate in 2025 of GS–11, step 5, from the Washington, DC locality pay table ($95,878 annual locality rate and $45.94 hourly locality rate), one supervisory attorney at the rate in 2025 of GS–15, step 5, from the Washington, DC locality pay table ($189,950 annual locality rate and $91.02 hourly locality rate). Assuming a 200% value of labor, including wages, benefits, and overhead, the assumed hourly rate for these positions are $154.76, $91.88, and $182.04 respectively. As noted above, OPM estimates that the efficiencies gained by this rule will result in 128 appeals reaching the litigation stage in which agencies would have to devote more than a negligible amount of resources. As a result, OPM estimates that the cost to litigate initial appeals at OPM to be $1,025,822.72. OPM further estimates that an agency attorney compensated at the same GS–14, step 5, Washington, DC locality pay table will handle petitions for reconsideration, with each petition requiring 24 hours of the attorney's time, or $3,714.24 per case. For the reasons stated above, OPM estimates only 15 complaints will need to be reopened and reconsidered. Therefore, in total, OPM estimates the cost of the petition for reconsideration to be $575,707.20, for a total cost to agencies of litigating at OPM to be $1,081,536.32, or $3,641,925.76 less costly per year.

OPM notes that federal employees subject to a RIF action may file an Equal Employment Opportunity (EEO) complaint. OPM believes that terminations on EEO grounds are, as a general matter, rare, and that employees would have substantial added difficulty claiming a RIF action to be pretextual due to the purpose of, and nature by which, a RIF is conducted. Further, OPM notes that in Fiscal Year 2021 (FY21), the most recent year for which there is publicly available data, more than half of federal employees who engaged in counseling sessions related to potential EEO violations ultimately resolved their concerns by withdrawing from the complaint process.[73] This leads OPM to the conclusion that exceedingly few employees will file an EEO complaint related to a RIF action. Therefore, OPM estimates 1 percent of employees who would otherwise file a RIF appeal would instead file an EEO complaint, resulting in 3 complaints annually. OPM estimates that each EEO complaint will require 125 hours by attorney at the rate in 2025 of GS–14, step 5, from the Washington, DC locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate) to manage each complaint. Assuming a 200% value of labor, including wages, benefits, and overhead, the labor cost for this position is $154.76 per hour. Factoring in $5,000 worth of miscellaneous litigation costs associated with each appeal, OPM estimates it will cost roughly $88,000 for EEOC to manage RIF complaints resulting from this rulemaking.

In sum, OPM predicts considerable savings to the American taxpayer resulting from returning the venue to hear appeals of RIF actions from MSPB to OPM. OPM estimates that it will cost the taxpayer more than $7.3 million, inclusive of agency litigation costs, to adjudicate initial appeals and petitions for review on an annual basis absent this rulemaking. Conversely, OPM estimates it would cost just more than $1.1 million to taxpayers for OPM to adjudicate initial appeals and requests to reopen and reconsider an initial decision. This proposal would result in over $6.1 million in annual savings to the government.

E. Benefits

In addition to the direct cost savings this proposed rule would generate, OPM expects that the faster adjudication of appeals will result in additional benefits. First, receiving a timely decision on an appeal will provide the individual with a clear determination and provide much-needed certainty, quickly. Agencies will similarly benefit as the streamlined appeal procedures proposed in this rule remove the default requirement for a hearing before a MSPB AJ. This will reduce the costly and protracted legal discovery process between an appellant and agency. Moreover, a timely decision on an appeal will help the Government to limit backpay and attorney's fees should an individual be improperly terminated as part of a RIF.

OPM also expects these rules will result in a more efficient RIF appeals process. The proposed RIF appeals process is similar to the classification appeals process currently used by OPM. OPM believes transferring the appeals function from MSPB to OPM and confining OPM reviews of agency actions to the written record, except in rare circumstances where OPM determines additional information is

[73] U.S. Equal Employment Opportunity Comm. ''Annual Report on the Federal Workforce Part I: EEO Complaint Processing Activity Fiscal Year 2021'' (Dec. 2024), *https://www.eeoc.gov/sites/default/files/2024-11/FY%202021%20Annual%20Report%20Workforce%20Part%20I_final_508.pdf.*

needed, promotes standardization and consistency in outcomes—both of which promote the efficiency of government operations because this proposed process should lead to fewer challenges and reconsiderations.

In addition, OPM expects greater consistency with respect to the outcomes of employees' appeals. This expectation is due to OPM's unique position as the agency authorized by Congress to promulgate these rules, OPM's decades-long administration of RIF rules on a governmentwide basis, and OPM's own experiences as an employing agency that has applied RIF rules numerous times over the decades in its own downsizing actions. OPM believes this inherent familiarity and history with the RIF rules and RIF process will lead to more efficiency and consistency in adjudicating appeals across the government for agencies and federal employees.

F. Reliance Interests

OPM understands that the current regulations governing administrative appeals of RIFs have been in place for many decades. It plans to accommodate any reliance interests by providing, in the ''Effective Date'' section of the Final Rule, that the new procedures will not be applied retroactively to appeals that were filed with the MSPB before the effective date of the new regulation. While OPM does not believe that any reliance interests are implicated by the new appeals system beyond the fact that some unresolved appeals remain pending with the MSPB, it invites comments regarding any reliance interests that may have been engendered by the current RIF appeal regulations.

IV. Procedural Issues and Regulatory Review

A. Regulatory Review

The Office of Information and Regulatory Affairs in the Office of Management and Budget has designated this as a significant regulatory action under E.O. 12866 section 3(f). Accordingly, OPM has examined the impact of this rule as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for rules that have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. This rulemaking does not reach that threshold. This proposed rule is expected to be an Executive Order 14192 deregulatory action.

B. Regulatory Flexibility Act

The Director of OPM certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because this rule will apply only to Federal agencies and employees.

C. Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Aug. 10, 1999), the Director of OPM certifies that this rulemaking does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

D. Civil Justice Reform

This regulation meets the applicable standard set forth in subsection 3(a) and paragraph 3(b)(2) of Executive Order 12988 (Feb. 7, 1966).

E. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or Tribal governments in the aggregate, or on the private sector, in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately $206 million. This rulemaking will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

F. Paperwork Reduction Act of 1995

This regulatory action will impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). OPM is creating an e-filing system for use in collecting and maintaining adjudication records for a variety of different existing regulatory provisions. That system would also be used to support this proposal. OPM is publishing a separate notice in the **Federal Register** requesting OMB approval of a new information collection associated with the e-filing system. OPM is also reviewing its SORNs to determine whether to revise an existing SORN or to create a new SORN for the e-filing system. OPM will publish any proposed changes to its SORNs in the **Federal Register**.

List of Subjects in 5 CFR Part 351

Administrative practice and procedure, Government employees.

The Director of OPM, Scott Kupor, reviewed and approved this document and has authorized the undersigned to electronically sign and submit this document to the Office of the Federal Register for publication.

Office of Personnel Management.

Jerson Matias,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR part 351 as follows:

PART 351—REDUCTION IN FORCE

■ 1. The authority citation for part 351 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3502, 3503; E.O. 14284, 90 FR 17729; 5 CFR 2.2(c). Sec. 351.801 also issued under E.O. 12828, 58 FR 2965, 3 CFR, 1993 Comp., p. 569.

Subpart H—Notice to Employee

■ 2. Amend § 351.802 by revising paragraph (a)(6) to read as follows:

§ 351.802 Content of notice.

(a) * * *

(6) The employee's right, as applicable, to appeal to OPM. The agency must also comply with § 1201.21 of this title.

* * * * *

■ 3. Amend § 351.807 by revising paragraph (e) to read as follows:

§ 351.807 Certification of expected separation.

* * * * *

(e) An agency determination of eligibility for certification may not be appealed.

* * * * *

■ 4. Revise subpart I to read as follows:

Subpart I—Appeals

Sec.

§ 351.901 Right to appeal.

(a) *Right of appeal.* An employee who has been the subject of a reduction-in-force action may appeal an action taken under this part to the Office of Personnel Management (OPM).

(b) *Burden of Proof.* The employee (*i.e.,* appellant) bears the burden of proof to demonstrate, by a preponderance of the evidence:

(1) The timeliness of the appeal,

(2) OPM possesses jurisdiction over the appeal, and

(3) The reduction-in-force action (*i.e.,* more than 30-day furlough, separation, or demotion due to a reduction in force) was conducted inconsistent with either statute or OPM regulations such that the employee would not have suffered the same or another reduction-in-force action.

(c) *Exclusive appeal procedure.* The procedures in this part are the sole and exclusive means of appealing any reduction-in-force action, and shall supersede any appeal procedures found in agency policies or collective bargaining agreements, but they do not otherwise preclude an employee from filing a complaint, appeal, or other matter within the jurisdiction of the Equal Employment Opportunity Commission, Federal Labor Relations Authority, an Inspector General, Merit Systems Protection Board, the Department of Labor Veterans' Employment and Training Service, or the Office of Special Counsel. A party cannot obtain judicial review of a decision under this part.

§ 351.902 Procedures for submitting appeals.

(a) *Filing an appeal.* A party, or his or her authorized representative, seeking to file an initial appeal or reconsideration of an initial appeal under this part must utilize the electronic filing (e-filing) system available at [URL TBD]. Unless a party demonstrates good cause and seeks approval from OPM, OPM will not accept any statements, evidence, or documents via electronic mail or postal mail.

(b) *Time limits.* An employee may submit an appeal of a reduction in force action within 30 calendar days from the effective date of the action. An appeal is deemed timely when it is electronically filed by 11:59 p.m. Eastern Standard Time on the 30th calendar day after the effective date of the action.

(1) In computing the number of days allowed for filing an appeal, the first day counted is the day after the effective date of an Agency action. 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.

(2) If an employee does not submit an appeal within the time set by this section, the appeal will be dismissed as untimely filed unless the employee demonstrates good cause for an untimely appeal.

(3) The determination of good cause will be in the sole and exclusive discretion of OPM.

(c) *E-filing procedures.*

(1) All parties and their representatives to an appeal or reconsideration must register as instructed by OPM on its e-filing system using a unique email address.

(2) Registration as an e-filer constitutes consent to accept electronic service of pleadings, evidence, notices, orders, and other documents filed by other e-filers or issued by OPM. No party may electronically file any document with OPM or access an appeal or reconsideration of an appeal unless registered as an e-filer.

(3) All notices, orders, decisions, and other documents issued by OPM, as well as all documents filed by parties, will be made available for viewing and downloading at OPM's electronic filing system. Access to documents is limited to the parties and their representatives who are registered e-filers in the cases in which they were filed.

(4) All parties and their representatives must follow the instructions on OPM's website for properly filing all pleadings, evidence, and other documents. OPM may issue orders regulating the method and form of submissions and sanctions for noncompliance, including ordering any party or authorized individual to cease participation as an e-filer in circumstances that constitute a misuse of the system or a failure to comply with law, rule, regulations, or policy governing the use of a U.S. government information system.

(5) Each e-filer must promptly update their profile in OPM's electronic filing system and notify OPM and other parties of any change in their best address, telephone number, or email address by filing a pleading in each pending case with which they are associated. E-filers are responsible for monitoring case activity regularly in OPM's electronic filing system to ensure that they have received all case-related documents.

(6) A party or representative may withdraw their registration as an e-filer pursuant to the requirements posted on OPM's website. Withdrawing registration in OPM's e-filing system means that, effective upon OPM's processing of a proper withdrawal, pleadings, evidence, orders, and other documents filed by a party or party's representative and OPM will no longer be served on that person electronically and that person will no longer have electronic access to their case records through OPM's e-filing system. OPM may still process an appeal or request for reconsideration after a party withdraws as an e-filer. Withdrawal as a party or party's representative will not be considered good cause for staying a case. As the e-file system is the only accepted method for filing an appeal, a withdrawal of registration as an e-filer may preclude future re-registering as an e-filer.

(7) OPM, in its sole and exclusive discretion, may exempt a party or representative from registering as an e-filer for good cause. A party or representative must promptly contact OPM as instructed on OPM's website to request an exemption from the e-filing requirements in this part. OPM will not find good cause for failing to timely file an appeal or seek reconsideration if the party or representative fails to contact OPM to request an exemption before any deadline to appeal or seek reconsideration.

(8) Documents filed in OPM's e-filing system are deemed received on the date of the electronic submission.

§ 351.903 Form and content of RIF appeal and agency response.

(a) *Initial appeal.* An employee's appeal shall be in writing and must state the basis of the employee's appeal; and the legal name, best address, and email address or phone number of the appellant and appellant's representative, if any; and must include any documentation supporting the appellant's appeal.

(b) *Agency response.* The agency response to an appeal must be filed within 30 calendar days of the initial appeal; contain the name of the appellant and of the agency whose action the appellant is appealing; a statement identifying the agency action taken against the appellant and stating the reasons for taking the action; all documents contained in the agency record of the action; designation of and signature by the authorized agency representative; and any other documents or responses requested by OPM. The agency's 30 days to respond begins upon service of the appeal.

(c) *Reply.* The employee may file a reply to the agency response to an initial appeal within 15 calendar days of the agency response. The reply may only address the factual and legal issues raised by the agency in response to the initial appeal. The reply may not raise new allegations of error.

(d) *Inspection of OPM's appellate record.* The employee, an employee's representative, and the agency will be permitted to inspect OPM's appellate record on request.

(e) *Service of Documents.* The employee, employee's representative, and agency will serve on each other copies of any and all information submitted to OPM with respect to an appeal. Such information must be served on all other parties at the same time the information is submitted to OPM and must be accompanied by a certificate of service stating how and when service was made.

(f) *Untimely Filings.* Untimely filings may be accepted upon a party's showing of good cause at the sole and exclusive discretion of OPM.

§ 351.904 Employee representatives.

An employee may select a representative of his or her choice to assist in the preparation and presentation of an appeal, provided that the employee submits his or her designation of representative in writing related to the specific appeal. If the selected representative is a Federal employee, the representative may not perform such representational functions while in a duty status (including while on official time under 5 U.S.C. 7131), nor may the representative claim agency reimbursement for any expenses incurred while performing such representational function. OPM or the responsible agency may, in its sole and exclusive discretion, disallow an employee's choice of representative when the representative is an employee of the responsible agency or OPM and his or her activities as a representative would cause a conflict of interest or position; that employee cannot be released from his or her official duties because of the priority needs of the Government; or that employee's release would give rise to unreasonable costs to the Government.

§ 351.905 Adjudication of appeals.

(a) *Appeals by non-OPM employees.* OPM will assign personnel to adjudicate an appeal under this subpart by an employee of an agency other than OPM. However, no OPM employee may be assigned to adjudicate an appeal if the employee has a relationship with the appellant employee or, during the preceding two years, that person was an employee of the agency that is a party to the action to be assigned, or the employee was subject to, an action covered under this part. When necessary, OPM may appoint an administrative law judge to preside over the adjudication of an appeal.

(b) *Appeals by OPM employees.* OPM will assign an administrative law judge to adjudicate an appeal under this subpart by an OPM employee. To insulate the adjudication of its own employees' appeals from agency involvement, OPM will not disturb initial decisions in those cases unless a party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law. For these purposes, the term *harmful procedural irregularity* means an irregularity in the application of procedures was likely to have caused the administrative law judge to reach a conclusion different from the one he or she would have reached in the absence or cure of the irregularity.

(c) *Ascertainment of facts.* OPM may audit or investigate an agency's reduction in force action in the course of adjudicating an appeal if it determines, in its sole and exclusive discretion, the interest of justice is served by such an audit or investigation. The review of an agency action will be based solely on the developed written record unless OPM determines that a hearing or any other appropriate action is necessary and efficient to resolve an appeal and directs the parties to participate in such hearing or comply with such action. For purposes of this section, the term *necessary and efficient* means circumstances in which the written record is insufficiently developed to make a determination regarding one or more facts material to the outcome of the appeal, or where there is a disputed issue of witness credibility that is material to the outcome of the appeal. Where an investigation or audit is conducted, OPM will:

(1) Inform the employee, the employee's representative, and the agency of an investigation or audit; and

(2) Provide the employee, the employee's representative, and the agency with the results of an investigation or audit, and a reasonable opportunity to submit arguments or additional information to support their positions.

(d) *Failure to participate in ascertainment of facts.* If a party fails to participate in an audit or investigation pursuant to 351.905(c), OPM may, except when prohibited by law, impose any sanction listed at 351.906(b)(1)–(3).

(e) *Initial decision.* OPM will notify the employee, employee's representative, and agency in writing of its decision.

(f) *Remedies.* (1) If the employee is the prevailing party, OPM will order relief including correction of the personnel action and any back pay, interest, and reasonable attorney fees consistent with subpart H of part 550 of this chapter. The employee as a prevailing party is not entitled to compensatory damages or other relief not authorized under 5 U.S.C. 5596(b).

(2) If the agency timely requests reconsideration of an initial decision or OPM reopens and reconsiders an initial decision, the agency must continue to provide the relief ordered unless OPM issues an order staying any such relief. No such stay may be ordered that would deprive pay and benefits to the employee while the initial decision is pending reconsideration.

§ 351.906 Sanctions and protective orders.

(a) *Cease-and-desist directive.* OPM may issue a directive to a party to prevent or to cease-and-desist harassing communications (or communications which could reasonably be foreseen to lead to harassment) with or about any individual, or to prohibit a party from using any information related to the appeal for any purpose whatsoever unrelated to the adjudication of the appeal. OPM may do this *sua sponte,* or at the request of a party, preemptively or at any juncture in the appeal process. A party requesting OPM to issue a protective order or cease-and-desist should file such request using the e-filing procedures proscribed at § 351.902(c), and must include statement of reasons justifying the request, together with any relevant documentary evidence.

(b) *Failure to comply with an OPM directive.* When a party to an appeal fails to comply with a directive issued under paragraph (a), OPM shall, except when prohibited by law:

(1) Draw all inferences in opposition to the noncompliant party with regard to the appeal in question;

(2) Prohibit the noncompliant party from introducing evidence, or additional evidence, concerning the appeal, or otherwise relying on the record; or

(3) Eliminate from consideration any appropriate part of the filings or other submissions of the noncompliant party.

§ 351.907 Reconsideration of an initial decision.

(a) Upon a request from either party to the dispute, OPM may, in its sole and

exclusive discretion, reopen and reconsider an initial decision issued under this subpart. An employee, the employee's representative, or the agency may request reopening and reconsideration of an initial decision within 30 calendar days from issuance of the initial decision. The request to reopen and reconsider must be filed in the same manner as an initial appeal.

(b) Grounds for which OPM may grant a request for reconsideration are:

(1) The initial decision contains erroneous findings of material fact sufficient to warrant an outcome different from that of the initial decision;

(2) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The party must explain how the error affected the outcome of the case;

(3) New and material evidence or legal argument is available that, despite the party's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed; or

(4) OPM finds good cause to reconsider an appeal.

(c) In any case that is reopened or reviewed, OPM may:

(1) Issue a reopened and reconsidered decision (''R&R decision'') that affirms, reverses, modifies, vacates, or otherwise decides the case, in whole or in part;

(2) Require the parties to submit argument and evidence;

(3) Take any other action necessary for final disposition of the case; and

(4) Issue an order with a date for compliance with the R&R decision.

(d) There is no further right of administrative appeal from the R&R decision.

§ 351.908 Review by the OPM Director.

The Director may, at his or her discretion, *sua sponte,* reopen and reconsider any appeal in which OPM has issued a decision that has not yet become final.

§ 351.909 Final decision.

(a) The initial decision becomes the final decision of OPM if a party does not request OPM to reopen or reconsider the initial decision within 30 calendar days from the date of the initial decision.

(b) A R&R decision pursuant to § 351.907 becomes OPM's final decision if the OPM Director does not reopen the decision pursuant to § 351.908 within 30 calendar days from the date on which the R&R decision was issued.

(c) A decision by the Director pursuant to § 351.908 is the final decision of OPM and effective upon issuance.

(d) There is no further right of appeal of a final decision of OPM.

(e) OPM shall maintain a publicly accessible website containing final decisions issued on this part that address a party's claim on the merits. Any final decision not made publicly available shall be made available upon request by a concerned party. For purposes of this subsection, *a concerned party* means the Federal employee or former Federal employee involved in a proceeding under this subpart, his or her representative selected pursuant to § 351.904, or a representative of a Federal agency or office.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 958

[Doc. No. AMS–SC–25–0041]

Onions Grown in Certain Designated Counties in Idaho and Malheur County, Oregon; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Idaho-Eastern Oregon Onion Committee (Committee) to decrease the assessment rate established for the 2025–2026 and subsequent fiscal periods from $.07 to $.05 per hundredweight for onions grown in certain designated counties in Idaho and Malheur County, Oregon. The proposed assessment rate would remain in effect indefinitely until modified, suspended, or terminated.

DATES: Comments must be received by March 12, 2026.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments can be sent to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237. Comments can also be submitted to the Docket Clerk electronically by Email: *MarketingOrderComment@usda.gov* or via the internet at: *https://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments submitted in response to this proposed rule will be included in the record, will be made available to the public, and may be viewed at: *https://www.regulations.gov.* Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Barry Broadbent, Chief, Northwest Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326–2724, or Email: *Barry.Broadbent@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 958, as amended (7 CFR part 958), regulating the handling of onions grown in certain counties in Idaho, and Malheur County, Oregon. Part 958 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Committee locally administers the Order and is comprised of producers and handlers of onions operating within the area of production, as well as a public member.

This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This proposed rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires federal agencies to consider whether their rulemaking actions would have tribal implications. AMS has determined that this rule is unlikely to have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

This proposed rule has been reviewed under Executive Order 12988—Civil Justice Reform. Under the Order now in effect, Idaho-Eastern Oregon onion handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate would be applicable to all assessable Idaho-Eastern Oregon onions for the 2025–2026 fiscal period, and continue until amended, suspended, or terminated.