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certification at or before the end of that five-year period, the certification remains effective for an additional period extending until the completion of the re-certification process by the Attorney General and any related judicial review.

PART 27—WHISTLEBLOWER PROTECTION FOR FEDERAL BUREAU OF INVESTIGATION EMPLOYEES

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AUTHORITY: 5 U.S.C. 301, 3151; 28 U.S.C. 509, 510, 515–519; 5 U.S.C. 2303; President's Memorandum to the Attorney General, Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, 3 CFR p. 284 (1997); Presidential Policy Directive 19, "Protecting Whistleblowers with Access to Classified Information" (October 10, 2012).

SOURCE: Order No. 2264–99, 64 FR 58786, Nov. 1, 1999, unless otherwise noted.

Subpart A—Protected Disclosures of Information

§ 27.1 Making a protected disclosure.

(a) When an employee of, or applicant for employment with, the Federal Bureau of Investigation (FBI) (FBI employee) makes a disclosure of information to a supervisor in the direct chain of command of the employee, up to and including the Attorney General; to the

Department of Justice's (Department's) Office of the Inspector General (OIG), the Department's Office of Professional Responsibility (OPR), the FBI Office of Professional Responsibility (FBI OPR), or the FBI Inspection Division (FBI-INSID) (collectively, Receiving Offices); to Congress as described in 5 U.S.C. 7211; to the Office of Special Counsel; or to an employee of any of the foregoing entities when designated by any officer, employee, office, or division named in this subsection for the purpose of receiving such disclosures, the disclosure will be a "protected disclosure" if the person making it reasonably believes that it evidences:

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

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

(b) Any office or official (other than the OIG or OPR) receiving a protected disclosure shall promptly report such disclosure to the OIG or OPR for investigation. The OIG and OPR shall proceed in accordance with procedures establishing their respective jurisdiction. The OIG or OPR may refer such allegations to FBI-INSID Internal Investigations Section for investigation unless the Deputy Attorney General determines that such referral shall not be made.

(c) To be a "protected disclosure" under this part, the disclosure must be made to an office or official specified in paragraph (a) of this section.

[Order No. 2926–2008, 73 FR 1495, Jan. 9, 2008, as amended by Order No. 5872–2024, 89 FR 7284, Feb. 2, 2024]

§ 27.2 Prohibition against reprisal for making a protected disclosure.

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

(b) Personnel action means any action described in clauses (i) through

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(xii) of 5 U.S.C. 2302(a)(2)(A) taken with respect to an FBI employee other than one in a position which the Attorney General has designated in advance of encumbrance as being a position of a confidential, policy-determining, policy-making, or policy-advocating character.

[Order No. 2264–99, 64 FR 58786, Nov. 1, 1999, as amended by Order No. 5872–2024, 89 FR 7284, Feb. 2, 2024]

Subpart B—Investigating Reprisal Allegations and Ordering Corrective Action

§ 27.3 Investigations: The Department of Justice's Office of Professional Responsibility and Office of the Inspector General.

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

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

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

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

(1) That the allegation has been received; and

(2) The name of a person within the Conducting Office who will serve as a contact with the Complainant.

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

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

(f) The Conducting Office shall determine whether there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure. The Conducting Office shall make this determination within 240 calendar days of receiving the allegation of reprisal unless the Complainant agrees to an extension.

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

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

(1) The termination of the investigation;

(2) A summary of relevant facts ascertained by the Conducting Office;

(3) The reasons for termination of the investigation; and

(4) A response to any comments submitted under paragraph (g) of this section.

(i) Such written statement prepared pursuant to paragraph (h) of this section may not be admissible as evidence

in any subsequent proceeding without the consent of the Complainant.

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

§ 27.4 Corrective action and other relief; Director, Office of Attorney Recruitment and Management.

(a) If, in connection with any investigation, the Conducting Office determines that there are reasonable grounds to believe that a reprisal has been or will be taken, the Conducting Office shall report this conclusion, together with any findings and recommendations for corrective action, to the Director, Office of Attorney Recruitment and Management (the Director). If the Conducting Office's report to the Director includes a recommendation for corrective action, the Director shall provide an opportunity for comments on the report by the FBI and the Complainant. The Director, upon receipt of the Conducting Office's report, shall proceed in accordance with paragraphs (e) and (f) of this section. A determination by the Conducting Office that there are reasonable grounds to believe that a reprisal has been or will be taken shall not be cited or referred to in any proceeding under these regulations, without the Complainant's consent.

(b) At any time, the Conducting Office may request the Director to order a stay of any personnel action for 45 calendar days if it determines that there are reasonable grounds to believe that a reprisal has been or is to be taken. The Director shall order such stay within three business days of receiving the request for stay, unless the Director determines that, under the facts and circumstances involved, such a stay would not be appropriate. The Director may extend the period of any stay granted under this paragraph for any period that the Director considers appropriate. The Director shall allow the FBI an opportunity to comment to the Director on any proposed extension of a stay, and may request additional

information as the Director deems necessary. The Director may terminate a stay at any time, except that no such termination shall occur until the Complainant and the Conducting Office shall first have had notice and an opportunity to comment.

(c)(1) The Complainant may present a request for corrective action directly to the Director within 60 calendar days of receipt of notification of termination of an investigation by the Conducting Office or at any time after 120 calendar days from the date the Complainant first notified an Investigative Office of an alleged reprisal if the Complainant has not been notified by the Conducting Office that it will seek corrective action. Within 5 business days of the receipt of the request, the Director shall issue an Acknowledgement Order in accordance with paragraph (f)(1) of this section.

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

(d) Where a Complainant has presented a request for corrective action to the Director under paragraph (c) of this section, the Complainant may at any time request the Director to order a stay of any personnel action allegedly taken or to be taken in reprisal for a protected disclosure. The request for a stay must be in writing, and the FBI shall have an opportunity to respond. The request shall be granted within 10 business days of the receipt of any response by the FBI if the Director determines that such a stay would be appropriate. A stay granted under this paragraph shall remain in effect for such period as the Director deems appropriate. The Director may modify or dissolve a stay under this paragraph at any time if the Director determines that such a modification or dissolution is appropriate.

(e)(1) The Director shall determine based upon all the evidence, whether a protected disclosure was a contributing factor in a personnel action taken or to be taken. Subject to paragraph (e)(2) of this section, if the Director determines that a protected disclosure was a contributing factor in a personnel action taken or to be taken, the Director shall

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order corrective action as the Director deems appropriate. The Director may conclude that the disclosure was a contributing factor in the personnel action based upon circumstantial evidence, such as evidence that the employee taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. The determination made by the Director under this section shall be independent and impartial.

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

(3) In making the determinations required under this paragraph, the Director may hold a hearing at which the Complainant may present evidence in support of his or her claim, in accordance with such procedures as the Director may adopt. The Director is hereby authorized to compel the attendance and testimony of, or the production of documentary or other evidence from, any person employed by the Department if doing so appears reasonably calculated to lead to the discovery of admissible evidence, is not otherwise prohibited by law or regulation, and is not unduly burdensome. The Director may prohibit a party from adducing or relying on evidence from a person whom the opposing party does not have an opportunity to examine, or the Director may give less weight to such evidence. In excluding such evidence, the Director may consider certain factors, including, but not limited to: the probative value of the evidence; whether the evidence is supported by sufficient guarantees of trustworthiness after considering the totality of the circumstances under which it was made and any corroborating evidence; and whether the evidence is duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. Any privilege available in judicial and administrative proceedings relating to the disclosure of documents or the giving of testimony shall be available before the Director. All assertions of such

privileges shall be decided by the Director. The Director may, upon request, certify a ruling on an assertion of privilege for review by the Deputy Attorney General.

(4) Subject to paragraph (f) of this section, the Director may establish such procedures as the Director deems reasonably necessary to carry out the functions assigned under this paragraph.

(f)(1) Within 5 business days of receipt by the Director under paragraph (a) of this section of a report from a Conducting Office, or a request for corrective action from a Complainant under paragraph (c)(1) of this section, the Director shall issue an Acknowledgement Order that:

(i) Acknowledges receipt of the report or request;

(ii) Informs the parties of the relevant case processing procedures and timelines, including the manner of designation of a representative, the time periods for and methods of discovery, the process for resolution of discovery disputes, and the form and method of filing of pleadings;

(iii) Informs the parties of the jurisdictional requirements for full adjudication of the request; and

(iv) Informs the parties of their respective burdens of proof.

(2) In cases where the Director determines that there is a question about the Director's jurisdiction to review a request from the Complainant, the Director shall, simultaneously with the issuance of the Acknowledgement Order, issue a Show-Cause Order explaining the grounds for such determination and directing that the Complainant, within 15 calendar days of receipt of such order, submit a written statement, accompanied by evidence, to explain why the request should not be dismissed for lack of jurisdiction. The Complainant's written statement must provide the following information as necessary to address the jurisdictional question or as otherwise directed:

(i) The alleged protected disclosure or disclosures;

(ii) The date on which the Complainant made any such disclosure;

(iii) The name and title of any individual or office to whom the Complainant made any such disclosure;

(iv) The basis for the Complainant's reasonable belief that any such disclosure evidenced any violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety;

(v) Any action the FBI allegedly took or failed to take, or threatened to take or fail to take, against the Complainant because of any such disclosure, the name and title of all officials responsible for each action, and the date of each action;

(vi) The basis for the Complainant's belief that any official responsible for an action knew of any protected disclosure, and the date on which the official learned of the disclosure;

(vii) The relief sought; and

(viii) The date the reprisal complaint was filed with the Investigative Office and the date on which the Conducting Office notified the Complainant that it was terminating its investigation into the complaint, or if the Complainant has not received such notice, evidence that 120 days have passed since the Complainant filed a complaint of reprisal with the Investigative Office.

(3) The FBI shall file a reply to the Complainant's response to the Show-Cause Order within 20 calendar days of receipt of such reply.

(i) The reply shall address issues identified by the Director in the Show-Cause Order and matters raised in the Complainant's response to that order under paragraph (f)(2) of this section, and shall include: a statement identifying any FBI actions taken against the Complainant and the reasons for taking such actions; designation of and signature by the FBI legal representative; and any other documents or information requested by the Director.

(ii) The reply may also include any and all documents contained in the FBI record of the action or actions.

(4) After receipt of the FBI's response, the record on the jurisdictional issue will close, absent a request from either party establishing exigent circumstances requiring the need for the presentation of additional evidence or arguments.

(g) If the Director orders corrective action, such corrective action shall, as appropriate, include: placing the Complainant, as nearly as possible, in the position the Complainant would have been in had the reprisal not taken place; reimbursement for attorney's fees, reasonable costs, medical costs incurred, and travel expenses; back pay and related benefits; compensatory damages to the extent authorized by law; and any reasonable and foreseeable consequential damages.

(h) Whenever the Director determines that there has been a reprisal prohibited by § 27.2 of this part, the Director, in addition to ordering any corrective action as authorized by § 27.4(g), shall forward to FBI OPR, FBI-INSD, and the Director of the FBI, a copy of the Director's written opinion finding that there has been a prohibited reprisal. FBI OPR shall make an independent determination of whether disciplinary action is warranted.

(i) If the Director determines that there has not been any reprisal prohibited by § 27.2, the Director shall report this finding in writing to the Complainant, the FBI, and the Conducting Office.

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

[Order No. 2264-99, 64 FR 58786, Nov. 1, 1999, as amended by Order No. 2492-2001, 66 FR 37904, July 20, 2001; Order No. 2926-2008, 73 FR 1495, Jan. 9, 2008; Order No. 5872-2024, 89 FR 7285, Feb. 2, 2024]

§ 27.5 Review.

(a) Within 30 calendar days of a finding of a lack of jurisdiction, a final determination on the merits, or corrective action ordered by the Director, the Complainant or the FBI may request review by the Deputy Attorney General of that determination or order. The Deputy Attorney General shall set aside or modify the Director's actions, findings, or conclusions found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. The Deputy

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Attorney General has full discretion to review and modify corrective action ordered by the Director, provided, however that if the Deputy Attorney General upholds a finding that there has been a reprisal, then the Deputy Attorney General shall order appropriate corrective action.

(b) The parties may not file an interlocutory appeal to the Deputy Attorney General from a procedural ruling made by the Director during proceedings pursuant to § 27.4 of this part. The Deputy Attorney General has full discretion to review such rulings by the Director during the course of reviewing an appeal of the Director's finding of a lack of jurisdiction, final determination, or corrective action order brought under paragraph (a) of this section.

(c) In carrying out the functions set forth in this section, the Deputy Attorney General may issue written directives or orders to the parties as necessary to ensure the efficient and fair administration and management of the review process.

[89 FR 7286, Feb. 2, 2024]

§ 27.6 Extensions of time.

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

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

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

[89 FR 7286, Feb. 2, 2024]

§ 27.8 Alternative dispute resolution.

(a) At any stage in the process set forth in §§ 27.3 through 27.5 of this part, the Complainant may request Alternative Dispute Resolution (ADR) through the Department of Justice Mediator Corps (DOJMC) Program. The Complainant may elect to participate in ADR by notifying in writing the of-

fice before which the matter is then pending.

(b) If the Complainant elects mediation, the FBI, represented by the Office of General Counsel, will participate.

(c) When the Complainant requests to engage in ADR, the process set forth in §§ 27.3 through 27.5, as applicable, including all time periods specified therein, will be stayed for an initial period of 90 days, beginning on the date of transmittal of the matter to the DOJMC Program office. Upon joint request by the parties to the office before which the matter is stayed, the period of the stay may be extended up to an additional 45 days. Further requests for extension of the stay may be granted only by the Director, regardless of the office before which the matter is pending, upon a joint request showing good cause. The stay otherwise will be lifted if the DOJMC Program notifies the office before which the matter is stayed that the Complainant no longer wishes to engage in mediation, or that the parties are unable to reach agreement on resolution of the complaint and that continued efforts at mediation would not be productive.

[89 FR 7286, Feb. 2, 2024]

§ 27.9 Authority of the Director to review and decide claims of a breach of a settlement agreement.

(a) Any party to a settlement agreement reached in proceedings and in a forum under this part may file a claim of a breach of that settlement agreement with the Director within 30 days of the date on which the grounds for the claim of breach were known or should have been known.

(b) The Director shall adjudicate any timely claim of a breach of a settlement agreement. The Director shall exercise the authority granted under § 27.4(e)(4) to ensure the efficient administration and management of the adjudication of the breach claim, pursuant to any procedures the Director deems reasonably necessary to carry out the functions assigned under this paragraph.

(c) A party may request, within 30 calendar days of a decision on a claim of a breach of a settlement agreement

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by the Director, review of that decision by the Deputy Attorney General.

[89 FR 7286, Feb. 2, 2024]

PART 28—DNA IDENTIFICATION SYSTEM

Subpart A—Qualifying Federal Offenses for Purposes of DNA Sample Collection

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AUTHORITY: 28 U.S.C. 509, 510; 34 U.S.C. 12592, 40702, 40703; 10 U.S.C. 1565; 18 U.S.C. 3600A; Public Law 106-546, 114 Stat. 2726; Public Law 107-56, 115 Stat. 272; Public Law 108-405, 118 Stat. 2260; Public Law 109-162, 119 Stat. 2960; Public Law 109-248, 120 Stat. 587; Public Law 115-50, 131 Stat. 1001.

SOURCE: Order No. 2699-2003, 68 FR 74858, Dec. 29, 2003, unless otherwise noted.

Subpart A—Qualifying Federal Offenses for Purposes of DNA Sample Collection

§ 28.1 Purpose.

Section 3 of Pub. L. 106-546 directs the collection, analysis, and indexing of a DNA sample from each individual in the custody of the Bureau of Prisons or under the supervision of a probation office who is, or has been, convicted of a qualifying Federal offense. Subsection (d) of that section states that

the offenses that shall be treated as qualifying Federal offenses are any felony and certain other types of offenses, as determined by the Attorney General.

[Order No. 2753-2005, 70 FR 4767, Jan. 31, 2005]

§ 28.2 Determination of offenses.

(a) *Felony* means a Federal offense that would be classified as a felony under 18 U.S.C. 3559(a) or that is specifically classified by a letter grade as a felony.

(b) The following offenses shall be treated for purposes of section 3 of Pub. L. 106-546 as qualifying Federal offenses:

(1) Any felony.

(2) Any offense under chapter 109A of title 18, United States Code, even if not a felony.

(3) Any offense under any of the following sections of the United States Code, even if not a felony:

(i) In title 18, section 111, 112(b) involving intimidation or threat, 113, 115, 245, 247, 248 unless the offense involves only a nonviolent physical obstruction and is not a felony, 351, 594, 1153 involving assault against an individual who has not attained the age of 16 years, 1361, 1368, the second paragraph of 1501, 1509, 1751, 1991, or 2194 involving force or threat.

(ii) In title 16, section 773g if the offense involves a violation of section 773e(a)(3), 1859 if the offense involves a violation of section 1857(1)(E), 3637(c) if the offense involves a violation of section 3637(a)(3), or 5010(b) if the offense involves a violation of section 5009(6).

(iii) In title 26, section 7212.

(iv) In title 30, section 1463 if the offense involves a violation of section 1461(4).

(v) In title 40, section 5109 if the offense involves a violation or attempted violation of section 5104(e)(2)(F).

(vi) In title 42, section 2283, 3631, or 9152(d) if the offense involves a violation of section 9151(3).

(vii) In title 43, section 1063 involving force, threat, or intimidation.

(viii) In title 47, section 606(b).

(ix) In title 49, section 46506(1) unless the offense involves only an act that would violate section 661 or 662 of title