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OFFICE OF SPECIAL COUNSEL

5 CFR Part 1800

RIN 3255-ZA00

Filing Complaints of Prohibited Personnel Practice or Other Prohibited Activity; Filing Disclosures of Information

AGENCY: Office of Special Counsel.

ACTION: Final rule.

SUMMARY: The Office of Special Counsel (OSC) is issuing a final rule amending its regulations at 5 CFR part 1800 to: provide basic information about OSC jurisdiction over complaints of improper employment practices, and over disclosures of information of wrongdoing in federal agencies (also known as "whistleblower disclosures"); implement a requirement that complaint filers use an OSC form to submit allegations of improper employment practices (other than alleged Hatch Act violations); outline procedures to be followed by OSC when filers submit complaints (other than Hatch Act allegations) in formats other than an OSC complaint form; revise and update descriptions of information needed by OSC to process both complaints alleging Hatch Act violations and whistleblower disclosures; and update contact information for sending complaints and disclosures to OSC, and for obtaining OSC complaint and disclosure forms.

DATES: This rule is effective on December 1, 2000.

FOR FURTHER INFORMATION CONTACT: Kathryn Stackhouse, Attorney, Planning and Advice Division, by telephone at (202) 653-8971, or by fax at (202) 653-5161. Information on the rule is also available on OSC's Web site (at www.osc.gov).

SUPPLEMENTARY INFORMATION:

I. Rulemaking History

On August 16, 2000, OSC published for comment a proposed rule revising agency regulations at 5 CFR part 1800. See 65 FR 49949. OSC issued the proposed rule pursuant to 5 U.S.C. 1212(e), which authorizes the Special Counsel to prescribe and publish such regulations as may be necessary to perform the functions of the office.

A brief outline of the purposes for which OSC has revised part 1800 follows:

(1) *To provide basic information about OSC jurisdiction over complaints of improper employment practices and whistleblower disclosures.* Sections 1800.1 and 1800.2 currently outline procedures for filing complaints and disclosures with OSC, with no reference to its basic jurisdiction. The revision of Part 1800 outlines matters within OSC's jurisdiction under each section as an aid to persons considering filing a complaint or disclosure.

(2) *To implement a requirement that complaint filers use an OSC complaint form to submit allegations of improper employment practices (other than alleged Hatch Act violations).* Most complaints received by OSC consist of allegations of improper employment practices other than Hatch Act violations. Section 1800.1, at paragraphs (b)(1)-(6), currently outlines the types of information that should be provided in a complaint, and indicates that complaints can be submitted in any written format. Given this latitude, there have been considerable disparities in the way complaint information is presented to OSC. Mandatory use of the revised Form OSC-11, rather than any written format chosen by a complaint filer, will help: (a) Enable complainants to obtain useful information about OSC jurisdiction and procedures before filing the complaint; (b) produce more complete and consistent presentations of facts needed by OSC to review, follow up on, and investigate complaints of improper employment practices; and (c) make more efficient use of OSC's limited resources, by reducing the time spent by staff in answering threshold questions about jurisdiction and procedures, and in soliciting basic information about allegations in complaints.

(3) *To outline procedures to be followed by OSC when filers submit*

complaints (other than Hatch Act allegations) in formats other than Form OSC-11. Under the revision of § 1800.1, if a person uses a format other than the required OSC form to file a complaint (other than a Hatch Act allegation), the material submitted will be returned to the filer with a blank Form OSC-11 to fill out and return to OSC. Processing of the complaint will begin upon OSC's receipt of the completed Form OSC-11.

(4) *To revise and update descriptions of information needed by OSC to process both complaints alleging Hatch Act violations and whistleblower disclosures.* OSC will continue to permit filers of complaints alleging Hatch Act violations, and filers of whistleblower disclosures, to submit such matters to OSC in any written format, including OSC's complaint and disclosure forms (Forms OSC-11 and OSC-12, respectively). Sections 1800.1 and 1800.2 currently describe information needed by OSC to review and evaluate complaints and disclosures. The revision of § 1800.1 tailors the description to Hatch Act allegations, for filers who submit them in formats other than an OSC complaint form. The revision of § 1800.2 updates the description of information needed in whistleblower disclosures to OSC, for filers who submit them in a format other than the OSC disclosure form.

(5) *To update contact information for sending complaints and disclosures to OSC, and for obtaining OSC complaint and disclosure forms.* Since OSC's current regulations were published, its mailing address for complaints and disclosures has changed, and a Web site, at which many OSC forms and publications are available to the public, has been established. The revision of §§ 1800.1 and 1800.2 updates both sections with current mailing and Web site address information.

Following OSC's publication of the notice of proposed rulemaking, the Office of Management and Budget (OMB) approved a revised complaint form (Form OSC-11), along with a revised form for whistleblower disclosures (Form OSC-12), as a collection of information (OMB Control No. 3255-0002) under the Paperwork Reduction Act. See 65 FR 41512 (July 5, 2000) for a description of the revisions to both forms.

II. Summary of Comments

The proposed rule provided a 60-day comment period, and invited comments from current and former Federal employees, employee representatives, other Federal agencies, and the general public. OSC also posted the notice of proposed rulemaking on its Web site.

Timely comments were received from two sources, an individual and an executive branch agency. After carefully considering the comments and making appropriate modifications, OSC is publishing this final rule pursuant to 5 U.S.C. 1212(e).

The individual respondent stated that making use of OSC's complaint form mandatory would further discourage federal employees from reporting unlawful and wasteful actions by federal agencies. He suggested that OSC could simply provide the form and the information requested to complainants, and request that they respond.

OSC has implemented a variant of this suggestion over the years—either accepting and acting on complaints in whatever form submitted, or offering persons who inquired the option of submitting their complaints on an OSC complaint form. As described in the notice of proposed rulemaking, this led to considerable disparities in the way complaint information was presented to OSC. In addition, due to a lack of awareness about or misunderstanding of its role and jurisdiction, OSC received many complaints about matters that it had no legal authority to pursue.

OSC has concluded that mandatory use of its revised complaint form will be more efficient, effective, and useful, both for complaint filers and OSC. As outlined in the Rulemaking History section, above, mandatory use of the OSC form, rather than any written format chosen by a filer, will help: (a) Enable complainants to obtain useful information about OSC jurisdiction and procedures before filing a complaint (including information about matters outside OSC's jurisdiction, election of remedies, OSC deferral policies, legal elements required to establish reprisal for whistleblowing, and certain appeal rights to the Merit Systems Protection Board ("the Board")); (b) produce more complete and consistent presentations of facts needed by OSC to review, follow up on, and investigate complaints of improper employment practices; and (c) make more efficient use of OSC's limited resources, by reducing the time spent by staff in answering threshold questions about jurisdiction and procedures, and in soliciting basic information about allegations in complaints.

The respondent's comment, however, led OSC to conclude that the final rule should state more clearly the procedures that OSC will follow when allegations are received in a format other than an OSC complaint form. Therefore, OSC is revising the final regulation, at § 1800.1(f), to indicate that: (a) When allegations are received in a format other than an OSC complaint form, the material submitted will be returned to the filer with a blank Form OSC-11 to complete and return to OSC; and (b) the complaint will be considered to be filed on the date on which OSC receives the completed Form OSC-11.

OSC anticipates that the return of allegations and supporting material may be required more frequently for some months after use of the complaint form becomes mandatory on December 1, 2000. After information about mandatory use of the Form OSC-11 becomes more widely known, however, OSC believes that this will occur less often. OSC also believes that, with increasing access to the Internet, its complaint form and information about its complaint procedures will be more readily available to potential filers. OSC's planned implementation of procedures permitting electronic filing of complaints by October 2003 will make that process even easier.

OSC does not intend in any way to discourage federal employees from filing complaints, nor does OSC believe that this regulatory change will produce that result. Rather, OSC believes that this change will help employees make more informed decisions about whether and what to report to OSC, and will result in greater efficiencies in the complaint process.

The second comment was received from an executive branch agency, which agreed with the proposal as written, and asked that OSC ensure that its complaint form comply with Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency). The executive order requires agencies to develop and begin implementing a plan to improve access to federally conducted and federally assisted programs and activities, and to submit the plan to the Department of Justice by December 11, 2000. OSC is reviewing its programs and activities to identify those that may be subject to the executive order. Should compliance with the executive order entail any revision to the complaint form, OSC will proceed accordingly.

Technical, non-substantive corrections have been made to the final version of § 1800.1(e) (to correct a disagreement in the text of the proposed rule between plural and singular

references to the OSC complaint form); § 1800.1(g)(1) (to substitute "complaint(s)" for an erroneous reference to "disclosure(s)"); and to § 1800.2(c)(2) (to conform the text more closely to that used in § 1800.1(e)).

III. Matters of Regulatory Procedure

Procedural determinations were published in the notice of proposed rulemaking for the Regulatory Flexibility Act; the Paperwork Reduction Act; the Unfunded Mandates Reform Act; the National Environmental Policy Act; Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Property Rights); Executive Order 12866 (Regulatory Planning and Review); Executive Order 12988 (Civil Justice Reform); Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks); and Executive Order 13132 (Federalism). There have been no changes in these procedural determinations.

List of Subjects in 5 CFR Part 1800

Administrative practice and procedure, Government employees, Investigations, Law enforcement, Political activities (Government employees), Reporting and recordkeeping requirements, Whistleblowing.

For the reasons set forth in the preamble, the Office of Special Counsel is amending title 5, chapter VIII, Part 1800 as follows:

PART 1800—FILING OF COMPLAINTS AND DISCLOSURES

1. The authority citation for 5 CFR Part 1800 continues to read as follows:

Authority: 5 U.S.C. 1212(e).

2. Section 1800.1 is revised to read as follows:

§ 1800.1 Filing complaints of prohibited personnel practices or other prohibited activities.

(a) The Office of Special Counsel (OSC) has investigative jurisdiction over the following prohibited personnel practices against current or former Federal employees and applicants for Federal employment:

(1) Discrimination, including discrimination based on marital status or political affiliation (see § 1810.1 of this chapter for information about OSC's deferral policy);

(2) Soliciting or considering improper recommendations or statements about individuals requesting, or under consideration for, personnel actions;

(3) Coercing political activity, or engaging in reprisal for refusal to engage in political activity;

(4) Deceiving or obstructing anyone with respect to competition for employment;

(5) Influencing anyone to withdraw from competition to improve or injure the employment prospects of another;

(6) Granting an unauthorized preference or advantage to improve or injure the employment prospects of another;

(7) Nepotism;

(8) Reprisal for whistleblowing (whistleblowing is generally defined as the disclosure of information about a Federal agency by an employee or applicant who reasonably believes that the information shows a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety);

(9) Reprisal for:

(i) Exercising certain appeal rights;

(ii) Providing testimony or other assistance to persons exercising appeal rights;

(iii) Cooperating with the Special Counsel or an Inspector General; or

(iv) Refusing to obey an order that would require the violation of law;

(10) Discrimination based on personal conduct not adverse to job performance;

(11) Violation of a veterans' preference requirement; and

(12) Taking or failing to take a personnel action in violation of any law, rule, or regulation implementing or directly concerning merit system principles at 5 U.S.C. 2302(b)(1).

(b) OSC also has investigative jurisdiction over allegations of the following prohibited activities:

(1) Violation of the Federal Hatch Act at title 5 of the U.S. Code, chapter 73, subchapter III;

(2) Violation of the state and local Hatch Act at title 5 of the U.S. Code, chapter 15;

(3) Arbitrary and capricious withholding of information prohibited under the Freedom of Information Act at 5 U.S.C. 552 (except for certain foreign and counterintelligence information);

(4) Activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking;

(5) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action (unless the Special Counsel determines that the allegation may be resolved more

appropriately under an administrative appeals procedure); and

(6) Violation of uniformed services employment and reemployment rights under 38 U.S.C. 4301, *et seq.*

(c) Complaints of prohibited personnel practices or other prohibited activities within OSC's investigative jurisdiction should be sent to: U.S. Office of Special Counsel, Complaints Examining Unit, 1730 M Street, NW, Suite 201, Washington, DC 20036-4505.

(d) Complaints alleging a prohibited personnel practice, or a prohibited activity other than a Hatch Act violation, must be submitted on Form OSC-11 ("Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity").

(1) The form includes a section (Part 2) that must be completed in connection with allegations of reprisal for whistleblowing, including identification of:

- (i) Each disclosure involved;
- (ii) The date of each disclosure;
- (iii) The person to whom each disclosure was made; and
- (iv) The type and date of any personnel action that occurred because of each disclosure.

(2) If a complainant who has alleged reprisal for whistleblowing seeks to supplement a pending OSC complaint by reporting a new disclosure or personnel action, then, at OSC's discretion:

(i) The complainant will be required to document the disclosure or personnel action in the Part 2 format, or

(ii) OSC will document the disclosure or personnel action in the Part 2 format, a copy of which will be provided to the complainant upon OSC's closure of the complaint.

(e) Form OSC-11 is available by writing to OSC at the address shown in paragraph (c) of this section; by calling OSC at (1) (800) 872-9855; or by printing the form from OSC's Web site (at <http://www.osc.gov>).

(f) Except for complaints alleging only a Hatch Act violation, OSC will not process a complaint submitted in any format other than a completed Form OSC-11. If a person uses a format other than the required OSC form to file a complaint (other than a Hatch Act allegation), the material received by OSC will be returned to the filer with a blank Form OSC-11 to complete and return to OSC. The complaint will be considered to be filed on the date on which OSC receives the completed Form OSC-11.

(g) Complaints alleging only a Hatch Act violation may be submitted in any written form to the address shown in

paragraph (c) of this section, but should include:

(1) The name, mailing address, and telephone number(s) of the complainant(s), and a time when the person(s) making the complaint(s) can be safely contacted, unless the matter is submitted anonymously;

(2) The department or agency, location, and organizational unit complained of; and

(3) A concise description of the actions complained about, names and positions of employees who took these actions, if known to the complainant, and dates, preferably in chronological order, together with any documentary evidence the complainant may have.

3. Section 1800.2 is revised to read as follows:

§ 1800.2 Filing disclosures of information.

(a) OSC is authorized by law (at 5 U.S.C. 1213) to provide an independent and secure channel for use by current or former Federal employees and applicants for Federal employment in disclosing information that they reasonably believe shows wrongdoing by a Federal agency. The law requires OSC to determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. If so, OSC must refer the information to the agency head involved for investigation and a written report on the findings to the Special Counsel. The law does not give OSC jurisdiction to investigate the disclosure.

(b) Employees, former employees, or applicants for employment wishing to file a whistleblower disclosure with OSC should send the information to: U.S. Office of Special Counsel, Disclosure Unit, 1730 M Street, NW, Suite 201, Washington, DC 20036-4505.

(c) A disclosure of the type of information described in paragraph (a) of this section should be submitted in writing, using any of the following formats:

(1) Filers may use Form OSC-12 ("Disclosure of Information"), which provides more information about OSC jurisdiction and procedures for processing whistleblower disclosures. This form is available from OSC by writing to the address shown in paragraph (b) of this section; by calling OSC at (1) (800) 572-2249; or by printing the form from OSC's Web site (at <http://www.osc.gov>).

(2) Filers may use another written format, but the submission should include:

(i) The name, mailing address, and telephone number(s) of the person(s) making the disclosure(s), and a time when that person(s) can be safely contacted by OSC;

(ii) The department or agency, location and organizational unit complained of; and

(iii) A statement as to whether the filer consents to the disclosure of his or her identity to the agency by OSC in connection with any referral to the appropriate agency.

Dated: October 25, 2000.

Elaine Kaplan,

Special Counsel.

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

RIN 3064-AC45

Rules of Practice and Procedure

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Civil Monetary Penalty Inflation Adjustment Act of 1990 requires all federal agencies with statutory authority to impose civil money penalties (CMPs) to evaluate and adjust those CMPs every four years. The FDIC last adjusted its CMP statutes in 1996. The FDIC is issuing this final rule to implement the required adjustments to its CMP statutes.

EFFECTIVE DATE: October 31, 2000.

FOR FURTHER INFORMATION CONTACT: John T. Mahshie, Counsel, (202) 898-3503, Compliance and Enforcement Section, Legal Division, 550 17th Street, NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

The Debt Collection Improvement Act (DCIA) (Pub. L. 104-134) amended section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act) (28 U.S.C. 2461 note), to require the head of each Federal agency to enact regulations within 180 days of the enactment of the DCIA and at least once every four years thereafter, that adjust each CMP

provided by law within the jurisdiction of the agency (with the exception of certain specifically listed statutes) by the inflation adjustment formula set forth in section 5(b) of the Inflation Adjustment Act.

To satisfy the requirements of the DCIA, the FDIC is amending those sections of part 308 of its regulations pertaining to its Rules of Practice and Procedure which address CMPs. The amount of each CMP which the FDIC has jurisdiction to impose has been increased according to the prescribed formula. The penalties were last adjusted in 1996. (61 FR 57987). Any increase in penalty amounts under the DCIA shall apply only to violations which occur after the effective date of the increase.

Summary of Calculation

The Inflation Adjustment Act requires that each CMP amount be increased by the "cost of living" adjustment, which is defined as the percentage by which the Consumer Price Index (CPI-U)¹ for the month of June of the calendar year preceding the adjustment exceeds the CPI for the month of June of the calendar year in which the amount of the CMP was last set or adjusted pursuant to law. Any increase is to be rounded to the nearest multiple of \$10 in the case of penalties less than or equal to \$100; multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000; multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000; multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000; multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and multiple of \$25,000 in the case of penalties greater than \$200,000. Under the DCIA, the first adjustment may not exceed ten percent of the current penalty amount.

Example

To explain the inflation adjustment calculation for CMP amounts that were last adjusted in 1996, we will use the following example. Under 12 U.S.C. 1818(i), as adjusted under 12 CFR 308.132(c), the FDIC may impose a daily

¹ The CPI-U is compiled by the Bureau of Statistics of the Department of Labor. To calculate the adjustment, the FDIC used the Department of Labor, Bureau of Labor Statistics B All Urban Consumers tables to get the CPI-U values.

maximum Tier Three CMP not to exceed \$1,100,000 for violating certain laws.

We first determine the appropriate CPI-U. The statute requires the FDIC to use the CPI-U for June of the calendar year preceding the year of adjustment. Because we are adjusting CMPs in 2000, we use the CPI-U for June 1999, which was 166.2. We must also determine the CPI-U for June of the year the CMP was last set by law or adjusted for inflation. Because the FDIC last adjusted the CMPs under 12 U.S.C. 1818 in 1996, we use the CPI-U for June 1996, which was 156.7.

We next calculate the cost of living adjustment or inflation factor. To do this, we divide the CPI-U for June 1999 (166.2) by the CPI-U for June 1996 (156.7). The result is 1.061 (*i.e.*, a 6.1 percent increase).

Third, we calculate the raw inflation adjustment. To do this, multiply the maximum penalty amounts by the inflation factor. In our example, \$1,100,000 multiplied by the inflation factor of 1.061 equals \$1,167,100.

Fourth, we round the raw inflation amounts according to the rounding rules in section 5(a) of the Inflation Adjustment Act. Since we round only the increased amount, we calculate the increased amount by subtracting the current maximum penalty amounts from the raw maximum inflation adjustments. Accordingly, the increased amount for the maximum penalty in our example is \$67,100 (*i.e.*, \$1,167,100 less \$1,100,000). Under the rounding rules, if the penalty is greater than \$200,000, we round the increase to the nearest multiple of \$25,000. Therefore, the maximum penalty increase for our example is \$75,000.

Fifth, we add the rounded increase to the maximum penalty amount last set or adjusted. In our example, \$1,100,000 plus \$75,000 yields a maximum inflation adjusted penalty amount of \$1,175,000.

Summary of Adjustments

Under the Inflation Adjustment Act, the FDIC must adjust for inflation the civil monetary penalties in statutes that it administers. The following chart displays the adjusted civil money penalty amounts for the enumerated statutes. The amounts in this chart apply to violations that occur after October 31, 2000: