

# Rules and Regulations

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## MERIT SYSTEMS PROTECTION BOARD

### 5 CFR Part 1209

#### Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Final rule.

**SUMMARY:** The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure in this part to permit an appellant who files a whistleblower appeal with MSPB after first seeking corrective action from the Office of Special Counsel (OSC) to satisfy certain requirements for the information to be included in the appeal by filing a copy of *Part 2: Reprisal for Whistleblowing* of the complaint form submitted to OSC, Form OSC-11 (*Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity*), as revised August 2000. On October 31, 2000, OSC amended its rules to require that, effective December 1, 2000, complaints of prohibited personnel practices or other prohibited activity (other than an alleged Hatch Act violation) be submitted on Form OSC-11. The amendment to the Board's rules is intended to assist appellants who file whistleblower appeals after first seeking corrective action from the Special Counsel to provide the information necessary for the Board to determine whether the appellant has satisfied the requirement to exhaust OSC procedures prior to filing with the Board.

**EFFECTIVE DATE:** November 13, 2000.

**FOR FURTHER INFORMATION CONTACT:** Robert E. Taylor, Clerk of the Board, (202) 653-7200.

**SUPPLEMENTARY INFORMATION:** On October 31, 2000, the Office of Special Counsel amended its rules at 5 CFR

1800.1, effective December 1, 2000, to require an individual who files a complaint of a prohibited personnel practice or other prohibited activity (other than an alleged Hatch Act violation) to complete and submit Form OSC-11, *Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity* (65 FR 64881). OSC revised the complaint form in August 2000 to group details of whistleblower reprisal allegations in a separate section of the form. That section, designated as *Part 2: Reprisal for Whistleblowing*, requires the complainant to describe each whistleblowing disclosure and to identify when and to whom the disclosure was made, the personnel action that was taken or threatened because of the whistleblowing disclosure, and the date of any such action or threat. The form is available on the OSC Web site ([www.osc.gov](http://www.osc.gov)).

Under the Whistleblower Protection Act, a Federal employee, former employee, or applicant for employment may file an appeal with the Board challenging a personnel action that the individual believes was taken or threatened because of whistleblowing activity. If the individual seeks to challenge a personnel action that is not directly appealable to the Board under another law, rule, or regulation, however, he must first seek corrective action from the Special Counsel. Such an individual may file an individual right of action (IRA) appeal with the Board only if the Special Counsel declines to seek corrective action from the Board or does not inform the individual within 120 days of the filing of the complaint that corrective action will be sought. 5 U.S.C. 1214(a)(3), 5 U.S.C. 1221(a), 5 CFR 1209.2(b)(1), 5 CFR 1209.5(a).

An individual who may appeal a personnel action directly to the Board under another law, rule, or regulation may file his appeal with the Board and raise the allegation that the personnel action was based on whistleblowing as a part of that appeal. 5 U.S.C. 1221(b), 5 CFR 1209.2(b)(2). Alternatively, such an individual may first file a complaint with the Special Counsel and subsequently file an otherwise appealable action (OAA) appeal with the Board after exhausting OSC procedures. 5 CFR 1209.5(b); also see *Hartfield v. Department of Defense*, 70 M.S.P.R. 20 (1996).

The U.S. Court of Appeals for the Federal Circuit held in *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526-27 (Fed. Cir. 1992), that in an IRA appeal, the Board may consider only those matters raised by the appellant in the complaint to the Special Counsel. By providing the Board a copy of Part 2 of Form OSC-11, describing each whistleblowing reprisal claim, an appellant who first sought corrective action from the Special Counsel will help ensure that the Board has sufficient information to determine whether the appellant has satisfied the statutory requirement of exhausting the OSC procedures with respect to all matters raised before the Special Counsel before filing an appeal with the Board.

Therefore, the Board is amending its rule at 5 CFR 1209.6 by adding a new subsection (a)(6) to permit an appellant who files a whistleblower appeal with the Board after first seeking corrective action from the Special Counsel to satisfy the requirements of subsections (a)(3) through (a)(5) of that section by filing a copy of Part 2 of Form OSC-11, together with a copy of any continuation sheet with answers to Part 2 questions filed with OSC, and any supplement to the original complaint filed with OSC or completed by OSC and furnished to the appellant.

The Board is making two additional changes to reflect Board rulings that an appellant is protected by the Whistleblower Protection Act if a personnel action is taken against him because the agency believed he made whistleblowing disclosures (*Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274 (1990)) or because of his close relationship to a whistleblower (*Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444 (1991)). In § 1209.6(a)(4), "the appellant's disclosure" is replaced by "each disclosure." In § 1209.6(a)(5)(ii), "the appellant's whistleblowing" is replaced by "the whistleblowing disclosure."

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

#### List of Subjects in 5 CFR Part 1209

Administrative practice and procedure, Government employees.

Accordingly, the Board amends 5 CFR part 1209 as follows:

# **PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING**

1. The authority citation for part 1209 continues to read as follows:

**Authority:** 5 U.S.C. 1204, 1221, 2302(b)(8), and 7701.

2. Amend § 1209.6 at paragraph (a) by revising subparagraphs (a)(4) and (a)(5)(ii) and by adding new subparagraph (a)(6) to read as follows:

## **§ 1209.6 Content of appeal; right to hearing.**

(a) \* \* \*

(4) A description of each disclosure evidencing whistleblowing as defined in § 1209.4(b) of this part; and

(5) \* \* \*

(ii) The personnel action was or will be based wholly or in part on the whistleblowing disclosure, as described in § 1209.4(b) of this part.

(6) An appellant who first sought corrective action from the Special Counsel may satisfy the requirements of paragraphs (a)(3) through (a)(5) of this section by filing with the appeal a copy of *Part 2: Reprisal For Whistleblowing* of the complaint form submitted to the Office of Special Counsel (Form OSC-11, *Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity*, Rev. 8/00), together with a copy of any continuation sheet with answers to Part 2 questions filed with the Office of Special Counsel, and any supplement to Part 2 of the original complaint filed with the Office of Special Counsel or completed by the Office of Special Counsel and furnished to the appellant.

\* \* \* \* \*

Dated: November 6, 2000

**Robert E. Taylor,**  
Clerk of the Board.

[FR Doc. 00-28823 Filed 11-9-00; 8:45 am]

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## **DEPARTMENT OF AGRICULTURE**

### **Commodity Credit Corporation**

#### **7 CFR Part 1424**

#### **RIN 0560-AG16**

#### **Bioenergy Program**

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Credit Corporation (CCC) is adopting as final

the proposed rule published July 27, 2000, in the **Federal Register** to accelerate the development and use of bio-based technologies in stimulating the industrial use of agricultural commodities into bio-based fuels and products. CCC will make incentive cash payments to bioenergy producers who increase their purchases of eligible agricultural commodities, as compared to the corresponding period in the prior fiscal year (FY), and convert that commodity into increased bioenergy production.

**EFFECTIVE DATE:** This program will become effective December 1, 2000. The FY 2001 sign-up period will begin that day and will end December 31, 2000.

**FOR FURTHER INFORMATION CONTACT:** Steve Gill, Director, Warehouse and Inventory Division, FSA, United States Department of Agriculture (USDA), STOP 0553, 1400 Independence Avenue, SW., Washington, DC 20250-0553, telephone (202) 720-2121 or e-mail address, Steve\_Gill@wdc.fsa.usda.gov or Jim Goff at (202) 720-5396. Persons with disabilities who require alternative means of communication for regulatory information (braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

#### **SUPPLEMENTARY INFORMATION:**

##### **Executive Order 12866**

This rule has been determined to be economically significant for the purposes of Executive Order 12866 and therefore has been reviewed by the Office of Management and Budget (OMB). A summary of the cost-benefit assessment is included in the Background section explaining the actions this rule will take.

##### **Small Business Regulatory Enforcement Fairness Act**

This rule was determined to be Major under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Section 801 of SBREFA requires a 60-day delay for Congressional review before Major regulations can go into effect. However, section 808 of SBREFA allows an agency to promulgate a rule at such time as it determines necessary, notwithstanding the Congressional review required by section 801 of SBREFA, if the agency finds for good cause that it is impracticable, unnecessary, or contrary to the public purpose to delay the rule. It is hereby determined that delaying this rule would be contrary to the public interest

and, accordingly, this rule is effective December 1, 2000.

##### **Regulatory Flexibility Act**

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rule making with respect to the matter of this rule.

##### **Executive Order 12372**

This program is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015 subpart V published at 48 FR 29115 (June 24, 1983).

##### **Environmental Assessment**

An environmental assessment has been completed and it has been determined that there will be no significant impact on the environment.

##### **Executive Order 12988**

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. All State and local laws and regulations that are in conflict with this rule will be preempted. No retroactive effect will be given to this rule. It will not effect agreements entered into prior to the effective date of the rule. The administrative appeal provisions published at 7 CFR parts 11 and 780 must be exhausted before bringing any action for judicial review.

##### **Executive Order 12612**

It has been determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this Rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various levels of Government.

##### **Unfunded Mandates Reform Act of 1995**

This Rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA regulations.

##### **Paperwork Reduction Act**

The information collection reporting and recordkeeping requirements associated with this rulemaking have