OFFICE OF THE DEPUTY ATTORNEY GENERAL
PROCEDURES FOR FBI WHISTLEBLOWER REPRISAL APPEALS

I. **PURPOSE**: This document establishes procedures for review by the Deputy Attorney General of a Final Determination or Corrective Action Order by the Office of Adjudication, Recruitment, and Management (OARM) deciding allegations of whistleblower reprisal by employees of, or applicants for employment with, the Federal Bureau of Investigation (FBI). Exceptions and/or modifications to these procedures may be made at the discretion of the Deputy Attorney General or her designee.

II. **SCOPE**: These procedures apply to:

A. The Deputy Attorney General, pursuant to her authority to adjudicate whistleblower reprisal appeals brought under 28 C.F.R. § 27.5 by the FBI, or employees of, or applicants for employment with, the FBI;

B. Any Department official the Deputy Attorney General designates to assist or advise her in conducting her appellate review; and

C. The parties to an FBI whistleblower reprisal proceeding before the Deputy Attorney General, including the FBI, Complainant, and Complainant's designated representative, if any.

III. **AUTHORITIES**:

A. 5 U.S.C. § 2303.

B. 28 C.F.R. Part 27.

IV. **DEFINITIONS**:

A. Appeal: A request by a Complainant or the FBI under 28 C.F.R. § 27.5 for review by the Deputy Attorney General of a Final Determination or Corrective Action Order issued by the Director of OARM. A party may also request review by the Deputy Attorney General of a decision by the Director of OARM of a breach of settlement claim pursuant to 28 C.F.R. § 27.9.

An FBI whistleblower may also appeal a final determination or corrective action order to the U.S. Merit Systems Protection Board in accordance with the provisions of 5 U.S.C. § 2303(d).

B. Complainant: An employee of, or applicant for employment with, the FBI, who filed a Request for Corrective Action with OARM.

C. Corrective Action: Remedial action that the Director of OARM or the Deputy Attorney General orders upon a finding of whistleblower reprisal under 28 C.F.R. Part 27. It includes the placement of Complainant, as nearly as possible, in the position Complainant would have been in had the whistleblower 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.

D. Mediation: An informal, collaborative, problem-solving process in which a neutral third party (a mediator) assists the opposing parties in reaching a voluntary, negotiated resolution of a reprisal allegation. Mediation is different from other forms of dispute resolution in that Complainant's participation is voluntary, and the mediator has no authority to decide the merits of the dispute.

E. Request for Corrective Action: A request by a Complainant that the Director of OARM order the FBI to remedy or "correct" the consequences of the FBI's alleged unlawful whistleblower reprisal.

V. **STANDARD OF REVIEW**: Under 28 C.F.R. § 27.5, the Deputy Attorney General shall set aside or modify the Director of OARM's actions, findings, or conclusions found to be arbitrary, capricious, an 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.

VI. **TIMELINESS**: Complainant or the FBI may request review by the Deputy Attorney General of a Final Determination, and/or Corrective Action Order by the Director of OARM. The Deputy Attorney General must receive the request for review no later than 30 calendar days after a party's receipt of the Final Determination, and/or Corrective Action Order.

Unless advised otherwise, any appeal and related submissions filed with the Deputy Attorney General under 28 C.F.R. § 27.5 shall be e-mailed to:

FBIWBAppeal@usdoj.gov
U.S. Department of Justice

VII. **PROCEDURES**:

A. Notice of Appeal: To initiate an appeal of a Final Determination or Corrective Action Order by the Director of OARM, a party must submit to the Deputy Attorney General or her designee a Notice of Appeal, in which the party declares its intent to appeal a determination or order under 28 C.F.R. § 27.5. A party's Notice of Appeal must be filed within 30 calendar days after receipt of OARM's Final Determination and/or Corrective Action Order. Unless a different deadline is specified by the Deputy Attorney General or

her designee, 5 days are added to a party's deadline for appeal when OARM's Final Determination and/or Corrective Action Order are served on the party by mail.

1. Extension of Time: Under 28 C.F.R. § 27.6, the Director of OARM may extend, for extenuating circumstances, the time limit for filing an appeal of a Final Determination and/or Corrective Action Order by OARM.

2. Motion to Stay Corrective Action Ordered by OARM: Any motion to stay implementation of the corrective action ordered by OARM pending a decision by the Deputy Attorney General on appeal must be made in writing to OARM no later than 15 calendar days prior to the deadline for the FBI's compliance with OARM's Corrective Action Order.

3. Interlocutory Appeal: The parties may not file an interlocutory appeal to the Deputy Attorney General from a procedural ruling made by the Director of OARM. The Deputy Attorney General has full discretion to review such rulings while reviewing an appeal of the Director's finding of lack of jurisdiction, final determination, or corrective action brought pursuant to 28 C.F.R. § 27.5.

B. Briefing Schedule: A party's brief in support of their appeal shall be served on the Office of the Deputy Attorney General (ODAG) and the opposing party (respondent) within 30 calendar days after the filing of the Notice of Appeal. The respondent shall file a response no later than 20 calendar days after the date of service of the appellant's brief. Any reply by the appellant to the response shall be filed no later than 15 calendar days after the date of service of the response; any surreply by the respondent shall be filed no later than 10 calendar days after the date of service of the appellant's reply. In the event both parties – Complainant and the FBI – file a Notice of Appeal of OARM's Final Determination and/or Corrective Action Order with ODAG, ODAG will set a briefing schedule that will direct the parties to submit simultaneous submissions in support of their respective appeals. The record on appeal closes at the conclusion of the briefing schedule, unless the Deputy Attorney General or her designee requests further information or briefing.

C. Pleadings: All pleadings filed with ODAG must comply with the following requirements:

1. Length Limitations: A party's brief in support of an appeal and the opposing party's reply brief – whether computer generated or typed – are limited to the lesser of 30 pages or 7500 words. Reply and surreply briefs are limited to the lesser of 15 pages or 3750 words. Computer-generated and typed pleadings must use no less than 12-point typeface and 1-inch margins, be double-spaced, and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. ODAG may grant a motion for

leave to exceed the page limits for good cause. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by ODAG at least 3 business days before the filing deadline. Such requests must state the reasons why a waiver is necessary, as well as the desired length of the pleading, and will be granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length.

2. Paper Size: Pleadings and attachments must be filed on 8½ by 11-inch paper, except for good cause shown. All electronic submissions must be formatted so that they will print on 8½ by 11-inch paper.

3. Date of Filing: All pleadings must be filed by the date set by the applicable regulations, 28 C.F.R. § 27.5, or otherwise set by ODAG. The date of filing is the date on which the submission is postmarked, hand-delivered, or e-mailed (if submitted electronically). Extensions of filing dates will be granted only if requested in writing and if supported by good cause.

4. Service: All pleadings filed with ODAG must be served upon the opposing party and/or designated representative, if any.

5. Certificate of Service: All pleadings filed with ODAG must be accompanied by a certificate of service stating the:

   a. Method of service (*e.g.*, by mail, hand-delivery, or e-mail);

   b. Date of service; and

   c. Name and address of the individual(s) served.

6. Organization:

   a. Hard Copy: When a pleading submitted by postal mail or hand delivery includes documentary attachments, the attachments should be "tabbed." A "tab" is a dividing page, a portion of which extends beyond the normal 8½-inch width of paper, and that contains a description or label. Pages in a pleading, including any attachments, should be sequentially numbered or Bates-stamped, and the attachments should be preceded by a table of contents describing each attachment and indicating the tab assigned.

   b. Electronic: Pleadings filed electronically should contain electronic tables of contents in lieu of the physical "Tabs" in pleadings filed by

hard copy. When an electronic pleading contains supporting documents, each attachment must be identified in the accompanying table of contents and designated with a brief descriptive label (*e.g.*, "Exh. 4b, Decision Notice"). If what would otherwise be a single pleading must be broken into multiple files because of the size limit, each should contain the same descriptive title, together with a "Part" designation in parentheses (*e.g.*, "Complainant's Brief on Appeal (Part A)," "Complainant's Brief on Appeal (Part B)," etc.).

7. Rejection for Failure to Comply: ODAG may reject a submission that does not have a certificate of service or does not substantially conform to the procedural requirements set forth above by issuing a rejection letter advising the parties of the nature of the nonconformity and the requirements and deadline for resubmission.

D. Motions:

1. Form: All motions must be in writing, include a statement of reasons in support of the motion, and be filed with ODAG and served upon the other party. A party filing a motion for extension of time, a motion to suspend proceedings to pursue settlement discussions, or any other procedural motion, must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.

2. Objection: Unless ODAG provides otherwise, any objection to a written motion must be filed within 10 calendar days after the date of service of the motion.

3. Motions for Extension of Time: Motions for extension of time are generally disfavored and may be granted, in ODAG's discretion, only for good cause. Motions for an extension of time must be made before the original due date. Any motion made after the due date will be denied absent extraordinary circumstances. ODAG, in its discretion, may grant or deny motions for extensions of time to file pleadings without providing an opportunity to respond.

E. Remand Order by ODAG: When ODAG remands a case to OARM for adjudication, OARM shall set the schedule for the proceedings on remand. Any decision by OARM on remand from ODAG is appealable to the Deputy Attorney General, to which the procedures set forth above shall apply (*e.g.*, Notice of Appeal shall be filed with ODAG within 30 calendar days after receipt of OARM's Remand Opinion and Order).

F. Estimated Time Frame for Deputy Attorney General Decision: At the conclusion of the parties' briefing on appeal, ODAG will provide the parties with an estimated time frame for a decision by the Deputy Attorney General, which will usually issue within 90 calendar days. ODAG will provide the parties with a revised time frame at such time as

ODAG determines that the initial estimated time frame cannot be met because of the complexity of the matter, the Deputy Attorney General's schedule, or other factors.

VIII. **REVIEW OF BREACH OF SETTLEMENT CLAIMS**: Under 28 C.F.R. § 27.9, a party may request, within 30 calendar days of a decision on a claim of breach of settlement agreement by the Director of OARM, review of that decision by the Deputy Attorney General. All pleadings filed with ODAG must comply with the requirements set forth in Section VII(C) above.

IX. **ALTERNATIVE DISPUTE RESOLUTION**: In an effort to provide an alternative to the regulatory, investigative, and adjudicative processes under 28 C.F.R. Part 27, as noted in 28 C.F.R. § 27.8, the Department of Justice, through the Department of Justice Mediator Corps (DOJMC) Program, offers the parties to an FBI whistleblower reprisal complaint the option to resolve their dispute through mediation. Mediation is available to the parties at any stage of the proceedings, including on appeal before the Deputy Attorney General.

A. General Information: The DOJMC Program is a confidential process in which the parties meet with a trained mediator in a non-litigious, non-adversarial setting. The option is cost-free to Complainant. Mediation may not be appropriate in some circumstances, such as if there is an ongoing criminal investigation relating to the reprisal claim, or if the claim involves an issue the FBI has no authority to decide.

B. Election: A Complainant who elects mediation during the appeal process shall notify ODAG and the FBI in writing. If a Complainant elects to pursue mediation, ODAG will refer the matter to the DOJMC Manager, who will assign a mediator to the case and handle the scheduling of, and administrative procedures related to, the mediation. If the Complainant elects mediation, the FBI, represented by the Office of General Counsel, will participate.

C. Effect on Appellate Proceedings Pending in ODAG: Mediation will not affect a party's rights before ODAG, and the parties will have the ability to continue to fully pursue their respective claims before ODAG if mediation is unsuccessful.

D. Stay: All time periods 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 OARM, the period of the stay may be extended up to an additional 45 days. Further requests to extend the stay may be granted by the Director of OARM upon a joint request showing good cause.

E. Closing of the Matter: If mediation is successful, the parties shall notify ODAG of a settlement. ODAG will then close the matter.

X. **PUBLICATION OF THE DEPUTY ATTORNEY GENERAL OPINIONS AND ORDERS**: OARM will publish on its website in redacted form any decisions in closed cases showing how the Deputy Attorney General has analyzed and decided issues relating to jurisdiction, discovery, merits, corrective relief, and other issues of relevance to FBI whistleblowers. Before OARM publishes any decision, Complainant (or Complainant's representative) will be provided notice with a copy of the redacted decision(s).

XI. **EFFECTIVE DATE AND IMPLEMENTATION**: These procedures are effective immediately.