Possible Changes to MSPB Adjudicatory Regulations

Present Regulation	Possible Revised Regulation	Reasons for Recommended Change
This would be a new regulation.	**§ 1200.4 Petition for rulemaking.** (a) Any interested person may petition the MSPB for the issuance, amendment, or repeal of a rule. Each petition shall: (1) Be submitted to the Clerk of the Board, 1615 M Street, N.W., Washington, D.C., 20419; (2) Set forth the text of substance of the rule or amendment proposed or specify the rule sought to be repealed; (3) Explain the interest of the petitioner in the action sought; and (4) Set forth all data and arguments available to the petitioner in support of the action sought. (b) No public procedures will be held directly on the petition before its disposition. If the MSPB finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate. If the Board finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial. The Board may consider new evidence at any time; however, repetitious petitions for rulemaking will not be considered.	A petition for rulemaking is specifically authorized by 5 U.S.C. 553(e), which states that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." The MSPB recently received such a petition from AFGE Local 1923. The MSPB has no procedures in place for responding to these requests. A search of the Federal Code of Regulations has revealed that many Federal agencies have regulations in place for dealing with such requests. The proposed regulatory language identified above is based upon 24 C.F.R. § 10.20, a regulation issued by the Department of Housing and Urban Development.

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§ 1201.3 Appellate jurisdiction. (a) *Generally*. The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions:	**§ 1201.3 Appellate jurisdiction.** (a) *Generally*. The Board's appellate jurisdiction is not plenary or general; rather, it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. Potential appellants are cautioned that the Board's jurisdiction does not depend solely on the nature of the action or decision taken or made, but may also depend on the type of federal appointment the individual received, e.g., competitive or excepted service, whether an individual is preference eligible, and other factors. Accordingly, the laws and regulations cited below, which are the source of the Board's jurisdiction, should be consulted to determine not only the nature of the actions or decisions that are appealable, but also the limitations as to the types of employees, former employees, or applicants for employment who may assert them. Instances in which a law or regulation authorizes the Board to hear an appeal or claim include the following:	The purpose of this change is to explain that this regulation is not the source of Board jurisdiction and that the cited laws and regulations need to be consulted as to the nature of the Board's jurisdiction. The revised regulation emphasizes that jurisdiction depends on the nature of the employment or position held as well as the nature of the action taken.

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1201.3 Appellate Jurisdiction (a) . . . . . . (13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force action, or after partial or full recovery from a compensable injury (5 CFR 302.501, 5 CFR 330.209);	**1201.3 Appellate Jurisdiction** (a) . . . . . . (13) Failure to afford reemployment priority rights pursuant to a Reemployment Priority List (RPL) following separation by reduction in force (RIF), or full recovery from a compensable injury after more than 1 year, because of the employment of another person (5 CFR 330.209; 302.501.	The revised version clarifies that the gravamen of an appeal under either 330.209 or 302.501 is the failure to afford an appellant the reemployment priority rights to which he or she is entitled, rather than the employment of another applicant.
§ 1201.4 General definitions. (j) *Date of service*. The date on which documents are served on other parties.	**§ 1201.4 General definitions.** (j) *Date of service*. "Date of service" has the same meaning as "date of filing" under paragraph (l) of this section. Unless a different deadline is specified by the administrative judge or other designated Board official, whenever a regulation in this part bases a party's deadline for filing a pleading on the date of service of some previous document, and the previous document was served on the party by mail, the filing deadline will be extended by 5 calendar days.	Under the current regulation, the definition of "date of service" is both circular ("the date on which documents are served") and unclear, since "service" is defined as the "*process* of furnishing a copy of any pleading" to the Board and other parties. It is thus not clear if the date of service refers to when a pleading is sent out, e.g., the postmark date, or when the pleading is received. Parties have interpreted "date of service" both ways. The revised regulation resolves this ambiguity by providing that "date of service" refers to when a document is sent out, not when it is received. Having resolved the definition of "date of service," there remains a fairness

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		issue, in that the method of service used by one party can significantly affect the time that the other party has to file a response. For example, under § 1201.55(b), a party has just 10 days from the date of service of a written motion by the opposing party to file an objection to the motion. If the party filing the motion serves the motion by mail rather than e-filing, he effectively cuts the other party's time for filing an objection in half. (We note that there are at least 20 instances in the Board's regulations where a party's deadline for filing a pleading is based on the date of service of a previous document.) The amount of time that a party has to file a pleading should not depend on the method of service used by the opposing party. To redress this inequity, the proposed regulation provides that "whenever a regulation in this part bases a party's deadline for filing a pleading on the date of service of some previous document, and the previous document was served on the party by mail, the filing deadline will be extended by 5 calendar days." This incorporates the presumption of § 1201.4(k) that mailed documents are received 5 days after the postmark date.

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§ 1201.14 Electronic Filing Procedures . . . (c) *Matters excluded from electronic filing*. Electronic filing may not be used to: (1) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27); (2) Serve a subpoena (§ 1201.83); or (3) File a pleading with the Special Panel (§ 1201.137).	**§ 1201.14 Electronic Filing Procedures** . . . (c) *Matters excluded from electronic filing*. Electronic filing may not be used to: (1) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27); (2) Serve a subpoena (§ 1201.83); or (3) File a pleading with the Special Panel (§ 1201.137). (4) File a pleading that contains Sensitive Security Information (SSI) (49 CFR parts 15 and 1520); or (5) File a pleading that contains classified information (32 CFR part 2001). (6) File a request to participate as an amicus curiae or file a brief as amicus curiae pursuant to § 1201.34 of this part.	The new subsections (4) and (5) reflect current policy and procedure regarding SSI and classified information. Our e-Appeal Online system is not sufficiently secure to accommodate SSI or classified information.
§ 1201.14 Electronic Filing Procedures . . . (m) *Date electronic documents are filed and served*. (1) As provided in § 1201.4(l) of this Part, the date of filing for pleadings filed via e-Appeal Online is the date of electronic submission. All pleadings filed via e-Appeal Online are time	**§ 1201.14 Electronic Filing Procedures** . . . (m) *Date electronic documents are filed and served*. (1) As provided in § 1201.4(l) of this Part, the date of filing for pleadings filed via e-Appeal Online is the date of electronic submission. All pleadings filed via e-Appeal Online are time stamped with Eastern Time, but the timeliness of a pleading will be determined based on the time zone from which the pleading was	The regulation as published is not consistent with the stated purpose of this provision, which was as follows: Paragraph (m) clarifies that e-filed pleadings are stamped with the date and time of submission in the Eastern Time Zone, but that the timeliness of a pleading will be determined based on the time zone from which the pleading was submitted.

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stamped with Eastern Time, but the timeliness of a pleading is assessed based on the time zone where the pleading is being filed. For example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e-Appeal Online as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Western Regional Office on August 20, it would be considered timely, as it was submitted prior to midnight Pacific Time on August 20. . . .	submitted. For example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e-Appeal Online as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Washington Regional Office (in the Eastern Time Zone) on August 20, it would be considered timely, as it was submitted prior to midnight Pacific Time on August 20. . . .	73 Fed. Reg. 10127, 10128 (2008). The proposed revision makes the regulation consistent with this stated intent.
§ 1201.21 Notice of appeal rights. When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following: (a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal; (b) A copy, or access to a copy, of the	**§ 1201.21 Notice of appeal rights.** When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following: (a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal; (b) A copy, or access to a copy, of the Board's regulations;	As discussed more fully below, in connection with jurisdiction over IRA appeals under Part 1209, the Board is proposing to change longstanding jurisprudence concerning allegations of reprisal for whistleblowing under 5 U.S.C. § 2302(b)(8) where an employee has been subjected to an otherwise appealable action. Under the provisions of 5 U.S.C. 7121(g)(3), such an employee "may elect not more than one" of 3 remedies: (A) an appeal to the Board under 5 U.S.C. § 7701; (B) a

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Board's regulations; (c) A copy of the MSPB appeal form available at the Board's Web site (*http://www.mspb.gov*), and (d) Notice of any right the employee has to file a grievance, including: (1) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board; (2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and (3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d).	(c) A copy of the MSPB appeal form available at the Board's Web site (*http://www.mspb.gov*), and (d) Notice of any right the employee has to file a grievance or seek corrective action under subchapters II and II of 5 U.S.C. chapter 12, including: (1) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board; (2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; (3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d); and . (4) The effect of any election under 5 U.S.C. 7121(g), including the effect that seeking corrective action under subchapters II and II of 5 U.S.C. chapter 12 will have on the employee's appeal rights before the Board.	negotiated grievance under § 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (§ 1214), which can be followed by an IRA appeal filed with the Board (§ 1221). Under subsection (g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first. A plain reading of § 7121(g) would appear to indicate that, contrary to longstanding Board precedent, an individual who has been subjected to an otherwise appealable action, but who seeks corrective action from OSC before filing an appeal with the Board, has elected an IRA appeal, and is limited to the rights associated with such an appeal, i.e., the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures; the agency need not prove the elements of its case, and the appellant may not raise other affirmative defenses. The proposed regulation would require agencies to fully notify employees of their rights in these situations so that they can make an informed choice among the available 3 options.

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§ 1201.22 Filing an appeal and responses to appeals. . . . (b) *Time of filing.* (1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. Where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days--for a total of 60 days. A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order. The time for filing a submission under this section is computed in accordance with § 1201.23 of this part. (2) The time limit prescribed by paragraph (b)(1) of this section for filing an appeal does not apply	**§ 1201.22 Filing an appeal and responses to appeals.** (b) Time of filing. . . . (3) An appellant is responsible for keeping the agency informed of his or her current address for purposes of receiving correspondence. For purposes of paragraph (b)(1) of this section, an appellant is deemed to have received the agency's decision on the earliest date that: (i) The appellant personally receives the decision; (ii) A relative of the appellant who is at least 18 years of age and of suitable discretion receives the decision at the appellant's current address; (iii) A representative designated by the appellant to receive the agency decision receives the decision; (iv) The appellant would have received the decision if he or she had not failed to keep the agency informed of his or her current address; or (v) The appellant would have received the decision if he or she were not intentionally avoiding receipt. . . .	The proposed revisions would add a new subparagraph to section 1201.22(b) setting forth the substantive standard for when an appellant is deemed to have received a decision. The purpose of this proposal is to clarify and codify the Board's doctrine of constructive receipt. Currently, the plain language of sections 1201.22 and 1201.154 indicates that an appellant "receives" an agency's decision on the date that he actually receives it. This is especially so when the language of these sections is compared with the current language of section 1201.114(d), which explicitly accounts for receipt of an initial decision by an individual other than the petitioner. However, the Board has a practice of charging appellants with receiving decisions under sections 1201.22 and 1201.154 on dates other than when the appellants actually receive them. *E.g., Fain v. Department of Education*, 98 M.S.P.R. 162, ¶¶ 2-6 (2005); *Crearer v. Department of Justice*, 84 M.S.P.R. 434, ¶¶ 2-6 (1999). The Board also has a practice of charging petitioners with constructive receipt of initial decisions on dates other than those indicated in section 1201.114(d). *E.g., Jacks v. Department of the Air Force*, 114 M.S.P.R. 355, ¶ 7

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where a law or regulation establishes a different time limit or where there is no applicable time limit. No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (Pub. L. 103–353), as amended; see part 1208 of this title. See part 1208 of this title for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Pub. L. 105–339). See part 1209 of this title for the statutory filing time limits applicable to whistleblower appeals and stay requests. . . .		& n.2 (2010). We believe that it is sometimes appropriate for the Board to charge an individual with constructive receipt of a decision, but that the Board's policy on this matter should be reflected in its regulations, which are arguably misleading in their current form. The Board's current practice of calculating filing periods from dates that cannot be ascertained from its regulations is inconsistent with its policy of providing an open and transparent adjudication process. The Board should not require litigants to be familiar with its constructive receipt case law, especially before they have even filed their appeals, and particularly when it is a relatively simple matter to codify the case law. That case law is reflected in proposed subsections 1201.22(b)(3)(ii)-(v). Fed. R. Civ. P. 4(e)(2) was used as a model for drafting these provisions. [More discussion here.]
§ 1201.24 Content of an appeal; right to hearing. (a) *Content*. Only an appellant, his or her designated representative, or a party properly substituted under § 1201.35 may file an appeal. Appeals may be in any format, including letter form. An	**§ 1201.24 Content of an appeal; right to hearing.** (a) *Content*. Only an appellant, his or her designated representative, or a party properly substituted under § 1201.35 may file an appeal. Appeals may be in any format, including letter form. An appeal may be filed in electronic form provided that the requirements of § 1201.14 have been satisfied. All	The proposed revision radically reduces the scope of requested attachments from "any relevant documents" to "a copy of the decision or notice of the action being appealed." In our view, this is usually the only document, in conjunction with the items of information mandated in § 1201.24(a)(1)-(9), that is necessary in

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appeal may be filed in electronic form provided that the requirements of § 1201.14 have been satisfied. All appeals must contain the following: . . . (7) The notice of the decision to take the action being appealed, along with any relevant documents; . . .	appeals must contain the following: . . . (7) Where applicable, a copy of the decision or notice of the action being appealed. No other attachments should be included with the appeal, as the agency will be submitting the documents required by § 1201.25 of this part, and there will be several opportunities to submit evidence and argument after the appeal is filed. . . .	order to docket a new appeal and issue appropriate Acknowledgment and jurisdictional orders. Under the current regulation, appellants frequently file numerous attachments, many of which will be included as part of the Agency File, and other documents that are not relevant to the disposition of the appeal. We note that the proposed regulation does not mandate the attachment of documents that would demonstrate that the appellant has satisfied the jurisdictional requirement of exhausting an administrative procedure in IRA and VEOA appeals. We believe that getting such documents is best left to acknowledgment and jurisdictional orders issued after an appeal is filed. We also note that the current MSPB Appeal Form requests the attachment of numerous documents. If the proposed revision is adopted, the Board will need to revise the Appeal Form so that it is consistent with the regulation.
§ 1201.24 Content of an appeal; right to hearing. . . . (d) *Right to hearing*. Under 5 U.S.C. 7701, an appellant has a right to a hearing.	**§ 1201.24 Content of an appeal; right to hearing.** . . . (d) *Right to hearing*. In an appeal under 5 U.S.C. 7701, an appellant generally has a right to a hearing if the appeal has been timely filed and the Board has jurisdiction over the appeal.	The revised regulation clarifies that an appellant does not automatically have a right to a hearing in every Board appeal; the right exists, if at all, only when the appeal has been timely filed and the appellant has established jurisdiction over the appeal. *Conway v. Department of the Navy*, 71 M.S.P.R. 502, 504

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		(1996). Even when those two conditions have been satisfied, the right to a hearing is not universal; it does not extend to VEOA appeals or to addendum proceedings such as petitions for enforcement and motions for attorney fees. *See* § 1201.203(f). We considered listing the exceptions to the right to a hearing, but feared that we might not capture them all and/or that future decisions by the Board or the Federal Circuit might alter them.
1201.28 Case suspension procedures. (a) *Joint requests*. The parties may submit a joint request for additional time to pursue discovery or settlement. Upon receipt of such request, an order suspending processing of the case for a period up to 30 days may be issued at the discretion of the judge. (b) *Unilateral requests*. In lieu of participating in a joint request, either party may submit a unilateral request for additional time to pursue discovery as provided in this subpart. Unilateral requests for additional time of up to 30 days may be granted for good cause shown at the discretion of the judge. (c) *Time for filing requests*. The parties	**1201.28 Case suspension procedures.** (a) *Suspension period*. An administrative judge may suspend case processing for one or more periods that may not exceed a combined total of 60 days. (1) Joint requests. The parties may file a joint request to suspend case processing, and such a request is granted in the discretion of the administrative judge. (2) Unilateral requests. Either party may file a unilateral request to suspend case processing in order to pursue discovery or for another significant reason. Unilateral requests must explain the attempts the moving party has made to obtain the consent of the nonmoving party, and must be supported by a showing of good cause. Any opposition to a unilateral request must be received by the Board within 5 days of the filing of the request or such shorter	The most significant change here is to allow for more than a single 30-day suspension period. There can be many valid reasons suspending the adjudication of an appeal, and circumstances justifying a suspension can arise at any stage of the proceeding. Accordingly, the proposed regulation provides for one or more suspensions, with the limitation that a case cannot be suspended for more than 60 days, and eliminates the current restrictions on when a request must be filed. Unlike the current regulation, the draft regulation does not include separate subsections for unilateral requests and joint requests.

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must file a joint request that the adjudication of the appeal be suspended within 45 days of the date of the acknowledgment order (or within 7 days of the appellant's receipt of the agency file, whichever date is later). (d) *Untimely requests*. The judge may consider requests for suspensions that are filed after the time limit set forth in paragraph (c) of this section. Such requests may be granted at the discretion of the judge. (e) *Early termination of suspension period*. The suspension period may be terminated prior to the end of the agreed upon period if the parties request the judge's assistance relative to discovery or settlement during the suspension period and the judge's involvement pursuant to that request is likely to be extensive. (f) *Limitation on suspension period*. No case may be suspended for more than a total of 30 days under the provisions of this section. (g) *Termination after 30 days*. If the final day of the 30-day suspension period falls on a day on which the MSPB is closed for business, adjudication shall resume as of the first business day	period ordered by the administrative judge. (b) *Time for Filing.* All requests for suspension of case processing shall be filed within 45 days after issuance of the acknowledgment order. (c) *Late suspension requests*. Requests for suspension of case processing that are filed more than 45 days after issuance of the acknowledgment order must be supported by a showing of good cause for the late filing, and must be approved by the appropriate Regional Director or Chief Administrative Judge. (d) *Early termination of suspension period.* The administrative judge, in his or her discretion, may terminate the suspension period at any time for any appropriate reason. For example, the judge may terminate the suspension period in cases where the parties request the judge's assistance and the judge's involvement pursuant to that request is likely to be extensive. (e) *End of suspension period.* If the final day of any suspension period falls on a day on which the Board is closed for business, adjudication shall resume as of the first business day following the expiration of the period.	

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following the expiration of the 30-day period.		
No existing regulation. This would be a new provision.	**1201.29 Dismissal Without Prejudice.** A dismissal of an appeal without prejudice is a dismissal which allows for the refiling of the appeal in the future. A judge has wide discretion to control Board proceedings, and a dismissal of an appeal without prejudice to its subsequent refiling is a procedural option committed to the judge's sound discretion. A dismissal without prejudice is appropriate when it furthers the interests of fairness, due process, and administrative efficiency. Accordingly, where the judge determines that such a dismissal is appropriate and does not prejudice the interests of either party, the judge may issue a decision dismissing an appeal without prejudice, and setting a date certain by which the appeal must be refiled.	This codifies existing case law. *See, e.g., Wheeler v. Department of Defense*, 113 M.S.P.R. 519, ¶ 7 (2010); *Milner v. Department of Justice*, 87 M.S.P.R. 660, ¶ 13 (2001).
§ 1201.31 Representatives. . . . (d)(1) A judge may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious misconduct or conduct that is prejudicial to the administration of justice.	(d) As set forth in paragraphs (d) and (e) of section 1201.43 of this part, a judge may exclude a representative from all or any portion of the proceeding before him or her for contumacious misconduct or conduct that is prejudicial to the administration of justice.	The provisions governing exclusion and other sanctions for contumacious behavior by parties and representatives have been moved from section 1201.31 to section 1201.43 (Sanctions). See that section for proposed revisions.

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. . .		
§ 1201.33 Federal witnesses. (a) Every Federal agency or corporation must make its employees or personnel available to furnish sworn statements or to appear as witnesses at the hearing when ordered by the judge to do so. When providing those statements or appearing at the hearing, Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate). . . .	**§ 1201.33 Federal witnesses.** (a) Every Federal agency or corporation, including nonparties, must make its employees or personnel available to furnish sworn statements or to appear as witnesses at the hearing when ordered by the judge to do so. The responding agency shall arrange for the presence of approved Federal employee witnesses to include those who are employed by other Federal agencies or corporations. When providing those statements or appearing at the hearing, Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate). . . .	This proposed change will shift the administrative burden of ensuring the appearance of federal employee witnesses requested by the appellant who work for a non-party Federal agency. Agencies are already responsible for ensuring the presence of their own employee witnesses and for the presence of agency requested witnesses employed by non-party Federal agencies.
§ 1201.34 Intervenors and amicus curiae. . . . (e) Amicus *curiae*. An amicus curiae is a person or organization that, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may, in the discretion of the judge, be granted permission to	**§ 1201.34 Intervenors and amicus curiae.** . . . (e) *Amicus curiae*. (1) An amicus curiae is a person or organization who, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge or the Board regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may request permission to file an amicus brief. (2) A request to file an amicus curiae brief must	The present regulation defines an amicus curiae as a person/organization that files a brief with "the judge," and that persons/organizations may, in the discretion of "the judge," be granted permission to file a brief. In practice, the Board has recently been receiving motions to file amicus briefs for the first time on petition for review, and the Board has been granting at least some of those requests. The proposed regulation addresses this discrepancy and also provides further explanation as to what

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file an amicus curiae brief.	include a statement of the person's or organization's interest in the appeal and how the brief will be relevant to the issues involved. (3) The request may be granted, in the discretion of the judge or the Board, if the person or organization has a legitimate interest in the proceedings, and such participation will not unduly delay the outcome and may contribute materially to the proper disposition thereof. (4) The amicus curiae shall submit its brief within the time limits set by the judge or the Board, and must comply with any further orders by the judge or the Board. (5) An amicus curiae is not a party to the proceeding and may not participate in any way in the conduct of the hearing, including the presentation of evidence or the examination of witnesses. The Board may, in its discretion, invite an amicus curiae to participate in oral argument in proceedings in which oral argument is scheduled.	an amicus can and cannot do. In addition, there are presently no criteria in the regulation indicating when requests to file amicus briefs will be granted or denied. Although the current regulation allows the Board a great deal of flexibility, it does not provide the parties or OAC attorneys/Board members with guidelines as to when a request will be granted or denied. The proposed regulation sets forth general guidelines while maintaining the current language that provides that such requests may be granted in the judge's (or Board's) discretion. These general guidelines (legitimate interest, no undue delay, material contribution to proper disposition) are similar to those found in the regulations of some other federal adjudicatory agencies. *See, e.g.*, 24 C.F.R. § 180.310 (Department of Housing & Urban Development); 28 C.F.R. § 68.17 (Department of Justice); 38 C.F.R. § 18b.17 (Department of Veterans Affairs); 42 C.F.R. § 426.513 (Department of Health & Human Services); 43 C.F.R. § 4.406 (Department of the Interior); 49 C.F.R. § 821.9 (Department of Transportation). We note that an additional subsection is being proposed to § 1201.14 to provide that amici cannot e-file. There was

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		discussion as to whether e-Appeal Online should be configured to allow such filings, but prevent amici from accessing the Repository because of Privacy Act concerns, but did not think that the time and effort would be worthwhile considering how rarely the Board receives amicus briefs.
§ 1201.43 Sanctions. The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, the circumstances set forth in paragraphs (a), (b), and (c) of this section. . . . **§ 1201.31 Representatives.** . . . (d) (1) A judge may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious misconduct or conduct that is prejudicial to the administration of justice. (2) When a judge determines that a person should be excluded from participation in a proceeding, the judge shall inform the person of this determination through issuance of an order to show	**§ 1201.43 Sanctions.** The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, the circumstances set forth in paragraphs (a), (b), (c), (d), and (e) of this section. Before imposing a sanction, the judge shall provide appropriate prior warning, allow a response to the actual or proposed sanction when feasible, and document the reasons for any resulting sanction in the record. . . . (d) *Exclusion of a representative or other person*. A judge may exclude a representative or other person from further participation in the case for contumacious misconduct or conduct prejudicial to the administration of justice. When the judge excludes an appellant's representative, the judge will afford the appellant a reasonable time to obtain another representative before proceeding with the case. (e) *Cancellation, suspension, or termination of hearing*. A judge may cancel a scheduled hearing, or suspend or terminate a hearing in progress, for	Excluding parties and representatives for contumacious behavior is currently covered by 1201.31 (Representatives). We believe that this subject is better covered under 1201.43 (Sanctions), as exclusion or other action for contumacious behavior is a sanction. The revised regulation would give explicit authority for suspending or terminating a hearing that has begun. As a related matter, the proposed rule deletes the requirement of a show-cause order in favor a general requirement that, before imposing a sanction, the judge must provide a prior warning and document the reasons for any sanction. A formal show-cause order is simply not feasible where the misconduct occurs at or during a hearing. Similarly, the revised regulation also eliminates the provision for an interlocutory appeal of a sanction for contumacious behavior. We believe that review of sanctions of this nature via petition for review would

Present Regulation	Possible Revised Regulation	Reasons for Recommended Change
cause why he or she should not be excluded. The show cause order shall be delivered to the person by the most expeditious means of delivery available, including issuance of an oral order on the record where the determination to exclude the person is made during a hearing. The person must respond to the judge's show cause order within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the order, unless the judge provides a different time limit, or forfeit the right to seek certification of a subsequent exclusion order as an interlocutory appeal to the Board under paragraph (d)(3) of this section. (3) When, after consideration of the person's response to the show cause order, or in the absence of a response to the show cause order, the judge determines that the person should be excluded from participation in the proceeding, the judge shall issue an order that documents the reasons for the exclusion. The person may obtain review of the judge's ruling by filing, within three days (excluding Saturdays, Sundays,	contumacious misconduct or conduct prejudicial to the administration of justice on the part of the appellant or the appellant's representative. If the judge suspends a hearing, the parties must be given notice as to when the hearing will resume. If the judge cancels or terminates a hearing, the judge must set a reasonable time during which the record will be kept open for receipt of written submissions.	be sufficient. Delaying the entire proceeding to adjudicate the appropriateness of a sanction is not warranted.

Present Regulation	Possible Revised Regulation	Reasons for Recommended Change
and Federal holidays) of receipt of the ruling, a motion that the ruling be certified to the Board as an interlocutory appeal. The judge shall certify an interlocutory appeal to the Board within one day (excluding Saturdays, Sundays, and Federal holidays) of receipt of such a motion. Only the provisions of this paragraph apply to interlocutory appeals of rulings excluding a person from a proceeding; the provisions of §§ 1201.91 through 1201.93 of this part shall not apply. (4) A proceeding will not be delayed because the judge excludes a person from the proceeding, except that: (i) Where the judge excludes a party's representative, the judge will give the party a reasonable time to obtain another representative; and (ii) Where the judge certifies an interlocutory appeal of an exclusion ruling to the Board, the judge or the Board may stay the proceeding sua sponte or on the motion of a party for a stay of the		

Present Regulation	Possible Revised Regulation	Reasons for Recommended Change
proceeding. (5) The Board, when considering a petition for review of a judge's initial decision under subpart C of this part, will not be bound by any decision of the judge to exclude a person from the proceeding below.		
§ 1201.51 Scheduling the hearing. . . . (d) The Board has established certain approved hearing locations, which are published as a Notice in the Federal Register. See appendix III. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board. . . . **Appendix III to Part 1201 – Approved Hearing Locations by Regional Office** [Appendix III lists approved hearing sites for each regional and field office.]	**§ 1201.51 Scheduling the hearing.** . . . (d) The Board has established certain approved hearing locations, which are listed on the Board's public website (www.mspb.gov). The judge will advise parties of these hearing sites as appropriate. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board. . . . [Appendix III to Part 1201 would be deleted.]	The current extensive list of fixed hearing sites causes administrative inefficiencies and can have adverse budgetary considerations for the MSPB, as the cost of airfares are renegotiated by GSA each fiscal year, and cost of court reporters varies considerably from one city to the next. For example, the Government fare for a flight from Atlanta to Pensacola, Fla. is presently less than $200, while the fare to Mobile, Al., less than 60 miles from Pensacola, is over $1,000. Having the flexibility to change approved hearing sites from year to year by changing information on the Board's public website should improve the situation greatly.

§ 1201.52 Public hearings. Hearings are open to the public. The judge may order a hearing or any part of a hearing closed, however, when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the judge's decision. Any objections to the order will be made a part of the record.	**§ 1201.52 Public hearings.** Hearings are open to the public. The judge may order a hearing or any part of a hearing closed, however, when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the judge's decision. Any objections to the order will be made a part of the record. Absent express approval from the judge, no two-way communications devices may be operated and/or powered on in the hearing room; all cell phones, text devices, and all other two-way communications devices shall be powered off in the hearing room. Further, no cameras, recording devices, and/or transmitting devices may be operated, operational, and/or powered on in the hearing room without the consent of the judge.	The last two sentences have been added to give administrative judges express authority to control the use of electronic devices at a hearing.
§ 1201.53 Record of proceedings. (a) *Preparation*. A word-for-word record of the hearing is made under the judge's guidance. It is kept in the Board's copy of the appeal file and it is the official record of the hearing. Only hearing tape recordings or written transcripts prepared by the official hearing reporter will be accepted by the Board as the official record of the hearing. When the judge assigned to the case tape records a hearing (for example, a telephonic hearing in a retirement appeal), the	**§ 1201.53 Record of proceedings.** (a) *Preparation*. A word-for-word record of the hearing is made under the judge's guidance. It is kept in the Board's copy of the appeal file and it is the official record of the hearing. Only hearing recordings or transcripts prepared by the official hearing reporter will be accepted by the Board as the official record of the hearing. A "transcript" refers not only to printed copies of the hearing testimony or recordings transcribed by the official hearing reporter, but also to electronic versions of the reporter's transcription of the hearing testimony or recordings. When the judge assigned to the case records a hearing (for example, a telephonic	Several changes have been made: Because of the existence of "e-transcripts and other electronic formats, the term "written transcript" has been replaced by "transcript," and a definition of the word is included. In light of changing technology, the term "tape recording" has been replaced by the word "recording." A new subsection (b) has been added, which provides that a party may request the official court reporter to prepare a transcript and that, in the absence of

judge is the "official hearing reporter" under this section. (b) *Copies*. When requested and when costs are paid, a copy of the official record of the hearing will be provided to a party. A party must send a request for a copy of a hearing tape recording or written transcript to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. A request for a copy of a hearing tape recording or written transcript sent by a non-party is controlled by the Board's rules at 5 CFR part 1204 (Freedom of Information Act). Requests for hearing tape recordings or written transcripts under the Freedom of Information Act must be sent to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC. (c) *Exceptions to payment of costs*. A party may not have to pay for a hearing tape recording or written transcript if he has a good reason to support a request for an exception. If a party believes he has a good reason and the request is made before the judge issues an initial decision, the party must send the request for an exception to the judge. If the request is made after the judge issues an initial	hearing in a retirement appeal), the judge is the "official hearing reporter" under this section. (b) *Requests for Transcripts*. Any party may request that the official hearing reporter prepare a transcript. If no party requests a transcript, the judge or the Clerk of the Board may direct that a transcript (full or partial) be prepared. (c) *Copies*. When requested and when costs are paid, a copy of the official record of the hearing will be provided to a party. Copies of recordings will be provided to parties free of charge. Unless ordered by the Board, transcripts will be prepared at the requesting party's expense. A party must send a request for a copy of a hearing recording or transcript to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. A request for a copy of a hearing recording or transcript sent by a non-party is controlled by the Board's rules at 5 CFR part 1204 (Freedom of Information Act). Requests for hearing recordings or transcripts under the Freedom of Information Act must be sent to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC, as appropriate. (d) *Exceptions to payment of costs*. A party may not have to pay for a transcript if he has a good reason to support a request for an exception. If a party believes he has a good reason and the request is made before the judge issues an initial decision, the party must send the request for an exception to the judge. If the request is made after the judge issues an initial decision, the request must be sent to the	such a request, the judge or the Clerk of the Board may direct that a transcript be prepared. In accordance with long-standing practice, the regulation provides that recordings will be provided to parties at no cost. Subsection (e), dealing with corrections to a transcript, has been modified slightly, and now specifies that requests for corrections should be submitted to the Clerk of the Board rather than to the judge where appropriate. Subsection (f) has been modified to clarify that MSPB case files are not available for public inspection and copying, but are subject to Privacy and FOIA Act requests.

decision, the request must be sent to the Clerk of the Board, who shall have authority to grant or deny such requests. The party must clearly state the reason for the request in an affidavit or sworn statement. (d) *Corrections to written transcript.* Corrections to the official written transcript may be made on motion by a party or on the judge's own motion. Motions for corrections must be filed within 10 days after the receipt of a written transcript. Corrections of the official written transcript will be made only when substantive errors are found and only with the judge's approval. (e) *Official record.* Exhibits, the official hearing record, if a hearing is held, all papers filed, and all orders and decisions of the judge and the Board, make up the official record of the case.	Clerk of the Board, who shall have authority to grant or deny such requests. The party must clearly state the reason for the request in an affidavit or sworn statement. (e) *Corrections to transcript.* Any discrepancy between the transcript and the recording shall be resolved by the judge or the Clerk of the Board as appropriate. Corrections to the official transcript may be made on motion by a party or on the judge's own motion or by the Clerk of the Board as appropriate. Motions for corrections must be filed within 10 days after the receipt of a transcript. Corrections of the official transcript will be made only when substantive errors are found by the judge, or by the Clerk of the Board, as appropriate. (f) *Official record.* Hearing exhibits and pleadings that have been accepted into the record, the official hearing record, if a hearing is held, and all orders and decisions of the judge and the Board, make up the official record of the case. Other than the Board's initial and final decisions, the official record is not available for public inspection and copying. The official record is, however, subject to requests under both the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a) pursuant to the procedures contained in 5 C.F.R. parts 1204 and 1205.	
§ 1201.71 Purpose of discovery. Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to	**§ 1201.71 Purpose of discovery.** Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the	A sentence has been added to the end of this section stating that discovery requests and discovery responses should not be ordinarily be filed with the Board. Although statements to this

obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected to start and complete discovery with a minimum of Board intervention.	party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected to start and complete discovery with a minimum of Board intervention. Discovery requests and responses thereto are not to be filed with the Board, except in connection with a motion to compel discovery under § 1201.73(c) or a motion to subpoena discovery under § 1201.73(d).	effect are currently given in standard orders, it couldn't hurt to reinforce this message in the regulations.
§ 1201.73 Discovery procedures. (a) *Initial disclosures.* Except to the extent otherwise directed by order, each party must, without awaiting a discovery request and within 10 days following the date of the MSPB's acknowledgment order, provide the following information to the other party: (1) The agency must provide: . . . (2) The appellant must provide: . . . (3) Each party must make its initial disclosure based upon the information then reasonably available to the party. . . . (b) *Discovery from a party.* A party seeking discovery from another party must start the process by serving a request for discovery on the	**1201.73 Discovery procedures.** (a) *Initiating discovery.* A party seeking discovery must start the process by serving a request for discovery on the representative of the party or nonparty, or, if there is no representative, on the party or nonparty themselves. The request for discovery must state the time limit for responding, as prescribed in § 1201.73(d), and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to the official or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency. (b) *Responses to discovery requests.* A party or nonparty must answer a discovery request within the time provided under paragraph (d)(2) of this section, either by furnishing to the requesting party the information or testimony requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the	The revised version of this regulation includes several important changes: The initial disclosure requirement of subsection (a) has been eliminated in its entirety. The Board's initial disclosure provision is based on Fed. R. Civ. P. 26(a)(1). Although such a requirement makes a great deal of sense in article III courts, it makes little sense in the adjudication of MSPB appeals. First and foremost, there is nothing comparable in federal court litigation to the Agency File in an MSPB proceeding. The Agency File, required by § 1201.25, contains "[a]ll documents contained in the agency record of the action" being appealed. In our experience, the initial disclosure requirement results in unnecessary and unfruitful motion practice, and distracts both parties from more important matters, such as the preparation of the Agency File and responses to orders on

representative of the other party or the party if there is no representative. The request for discovery must state the time limit for responding, as prescribed in §1201.73(f), and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to an officer or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency. (c) *Discovery from a nonparty, including a nonparty Federal agency.* Parties should try to obtain voluntary discovery from nonparties whenever possible. A party seeking discovery from a nonparty Federal agency or employee must start the process by serving a request for discovery on the nonparty Federal agency or employee. A party may begin discovery from other nonparties by serving a request for discovery on the nonparty directly. If the party seeking the information does not make that request, or if it does so but fails to obtain voluntary cooperation, it may obtain discovery from a nonparty by filing a written motion with the judge, showing the relevance, scope, and materiality of	particular request and the reasons for the objection. Parties and nonparties may respond to discovery requests by electronic mail if authorized by the requesting party. (c) *Motions to compel or issue a subpoena.* (1) If a party fails or refuses to respond in full to a discovery request, the requesting party may file a motion to compel discovery. If a nonparty fails or refuses to respond in full to a discovery request, the requesting party may file a motion for the issuance of a subpoena directed to the individual or entity from which the discovery is sought under the procedures described in § 1201.81. The requesting party must serve a copy of the motion on the other party or nonparty. Before filing any motion to compel or issue a subpoena, the moving party shall discuss the anticipated motion with the opposing party or nonparty and the litigants shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. The motion shall include: (i) A copy of the original request and a statement showing that the information sought is relevant and material; (ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. § 1746 supporting the statement (See appendix IV to party 1201.); and (iii) A statement that the moving party has discussed or attempted to discuss the anticipated motion with the opposing	timeliness and jurisdiction. The present regulation includes separate subsections governing discovery from a party and discovery from a nonparty. That distinction has been eliminated as unnecessary. There was an intermediate process for unsuccessful attempts at discovery from a nonparty, in which the party seeking discovery would seek an order from the judge directing that the discovery take place. If that was insufficient, a subpoena could be sought and issued. Under the proposed regulation, the requirements are essentially the same for parties and nonparties. The discovery request is served on the party or nonparty and/or their representative. If a discovery response is not forthcoming or is inadequate, attempts must be made to resolve the matter informally. If those attempts are unsuccessful, then a motion is filed with the judge. If the non-responsive entity is a party, a motion to compel discovery is filed. If the non-responsive entity is a non-party, a motion for issuance of a subpoena under § 1201.81 is filed. The time limit for initial discovery requests has been increased from 25 days to 30 days after the date on which the judge issues the Acknowledgment Order. That Order requires the production of the Agency File within 20

the particular information sought. If the party seeks to take a deposition, it should state in the motion the date, time, and place of the proposed deposition. An authorized official of the MSPB will issue a ruling on the motion, and will serve the ruling on the moving party. That official also will provide that party with a subpoena, if approved, that is directed to the individual or entity from which discovery is sought. The subpoena will specify the manner in which the party may seek compliance with it, and it will specify the time limit for seeking compliance. The party seeking the information is responsible for serving any MSPB-approved discovery request and subpoena on the individual or entity, or for arranging for its service. (d) *Responses to discovery requests* . A party, or a Federal agency that is not a party, must answer a discovery request within the time provided under paragraph (f)(2) of this section, either by furnishing to the requesting party the information or testimony requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for the objection. Parties and non-parties may respond to discovery requests by electronic mail if authorized by the	party or nonparty, and made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. (2) The party or nonparty from whom discovery was sought may respond to the motion to compel or issue a subpoena within the time limits stated in paragraph (d)(3) of this section. (d) *Time limits.* (1) Unless otherwise directed by the judge, parties must serve their initial discovery requests within 30 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response. (2) A party or nonparty must file a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed by the judge. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place. (3) Any motion for an order to compel or issue a subpoena must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel or subpoena discovery must be filed with the judge within 10 days of the date of service of the motion.	days. The increase of time to 30 days should ensure that, in most cases, appellants have the opportunity to initiate discovery after they have seen what is in the Agency File. As is already the case, parties can seek permission to initiate discovery after the deadline has passed, and such permission should be granted where appropriate. Subsection (d)(4) clarifies that, if no other deadline has been specified, discovery must be completed no later than the prehearing or close of record conference.

requesting party. (e) *Motions to compel discovery*. (1) If a party fails or refuses to respond in full to a discovery request, or if a nonparty fails or refuses to respond in full to a MSPB-approved discovery order, the requesting party may file a motion to compel discovery. The requesting party must file the motion with the judge, and must serve a copy of the motion on the other party and on any nonparty entity or person from whom the discovery was sought. Before filing any motion to compel discovery, the moving party shall discuss the anticipated motion with the opposing party either in person or by telephone and the parties shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. The motion shall include: (i) A copy of the original request and a statement showing that the information sought is relevant and material; and (ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the	(4) Discovery must be completed within the time period designated by the judge or, if no such period is designated, no later than the prehearing or close of record conference. (e) *Limits on the number of discovery requests.* (1) Absent prior approval by the judge, interrogatories	

statement (See appendix IV to part 1201.); and (iii) A statement that the parties have discussed the anticipated motion and have made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. (2) The other party and any other entity or person from whom discovery was sought may respond to the motion to compel discovery within the time limits stated in paragraph (f)(4) of this section. (f) *Time limits*. (1) Parties who wish to make discovery requests or motions must serve their initial requests or motions within 25 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response. (2) A party or nonparty must file a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed. Deposition witnesses		

must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place. (3) Any motion to depose a nonparty (along with a request for a subpoena) must be submitted to the judge within the time limits stated in paragraph (f)(1) of this section or as the judge otherwise directs. (4) Any motion for an order to compel discovery must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel discovery must be filed with the judge within 10 days of the date of service of the motion. (5) Discovery must be completed within the time the judge designates. (g) *Limits on the number of discovery requests*		

§ 1201.93 Procedures. . . . (c) *Stay of Hearing*. The judge has the authority to proceed with or to stay the hearing while an interlocutory appeal is pending with the Board. Despite this authority, however, the Board may stay a hearing on its own motion while an interlocutory appeal is pending with it.	**§ 1201.93 Procedures.** . . . (c) *Stay of Appeal*. The judge has the authority to proceed with or to stay the appeal while an interlocutory appeal is pending with the Board. If the judge does not stay the appeal, the Board may do so while an interlocutory appeal is pending with it.	The word "hearing" has been replaced by "appeal." There may or may not be a pending hearing in a case where an interlocutory appeal has been certified to the Board.
§ 1201.112 Jurisdiction of judge. (a) After issuing the initial decision, the judge will retain jurisdiction over a case only to the extent necessary to: . . . (4) Vacate an initial decision before that decision becomes final under § 1201.113 in order to accept a settlement agreement into the record. . . .	**§ 1201.112 Jurisdiction of judge.** (a) After issuing the initial decision, the judge will retain jurisdiction over a case only to the extent necessary to: . . . (4) Vacate an initial decision to accept into the record a settlement agreement that is filed before the initial decision becomes final under 1201.113. . . .	This change is being made to allow an administrative judge to vacate an initial decision to accept a settlement agreement into the agreement when the settlement agreement is filed by the parties prior to the deadline for filing a petition for review, but is not received until after the date when the initial decision would become the Board's final decision by operation of law.
§ 1201.113 Finality of decision. The initial decision of the judge will become final 35 days after issuance. Initial	**§ 1201.113 Finality of decision.** The initial decision of the judge will become final 35 days after issuance. Initial decisions are not	The revision to paragraph (a) is to make this regulation to the revision to § 1201.112(a)(4) described above.

decisions are not precedential. (a) *Exceptions*. The initial decision will not become final if any party files a petition for review within the time limit for filing specified in § 1201.114 of this part, or if the Board reopens the case on its own motion. . . .	precedential. (a) *Exceptions*. The initial decision will not become final if within the time limit for filing specified in 1201.114 of this part, any party files a petition for review or, if no petition for review is filed, files a request that the initial decision be vacated for the purpose of accepting a settlement agreement into the record, or if the Board reopens the case on its own motion. . . . (f) When the Board, by final decision or order, finds there is reason to believe a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. § 2302(b)(8), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. § 1215.	Paragraph (f) is added to indicate that the Board will make a referral to OSC to investigate and take any appropriate disciplinary action whenever the Board finds that an agency has engaged in reprisal for an individual making a protected whistleblowing disclosure. Previously, our regulations (§ 1209.13) only required a referral when retaliation was found in an IRA appeal. Such referrals will also be made when retaliation for whistleblowing is found in an otherwise appealable action.
Subpart C – Petitions for Review of Initial Decisions, §§ 1201.114 to .116	**Subpart C – Petitions for Review of Initial Decisions, §§ 1201.114 to .116**	We have reorganized the contents of these sections somewhat. Under the proposed revisions, § 1201.114 contains all the rules governing the content and procedures for pleadings on review, including some matters that were covered in § 1201.115. Section 1201.115 is now limited to the criteria for granting petitions and cross petitions for review. Section 1201.116 contains the rules governing compliance with interim relief orders, including those that were previously located at § 1201.115(b) and (c).

§ 1201.114 Filing petition and cross petition for review. (a) *Who may file*. Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel may file a petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative. (b) *Cross petition for review*. If a party, the Director of OPM, or the Special Counsel files a timely petition for review, any other party, the Director of OPM, or the Special Counsel may file a timely cross petition for review. The Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review. (c) *Place for filing*. A petition for review, cross petition for review, responses to those petitions, and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, by	**§ 1201.114 Petition and cross petition for review – content and procedure.** (a) *Pleadings allowed*. Pleadings allowed on review include a petition for review, a cross petition for review, a response to a petition for review, a response to a cross petition for review, and a reply to a response to a petition for review. (1) A petition for review is a pleading in which a party contends that an initial decision was incorrectly decided in whole or in part. (2) A cross petition for review has the same meaning as a petition for review, but is used to describe a pleading that is filed by a party when another party has already filed a timely petition for review. (3) A response to a petition for review and a cross petition for review may be contained in a single pleading. (4) A reply to a response to a petition for review is limited to the factual and legal issues raised by another party in the response to the petition for review. It may not raise new assignments of error. (5) No pleading other than the ones described in this paragraph will be accepted unless the party files a motion with and obtains leave from the Clerk of the Board. The motion must describe the nature of and need for the pleading. (b) *Contents of petition or cross petition for review*. A petition or cross petition for review states a party's	The suggested revisions to §§ 1201.114 would do several things: (1) Institute page limitations for pleadings on PFR. We believe that parties can fully articulate their arguments within page limits similarl to those imposed on submissions to courts and other administrative bodies. *See, e.g.*, rules for the U.S. Court of Appeals for the D.C. Circuit, the Securities and Exchange Commission (17 C.F.R. § 201.154 and 201.450), the Patent and Trademark Office (37 C.F.R. § 1.943)), and the Federal Mine Safety and Health Review commission (29 C.F.R. § 2700.75). Some courts and administrative tribunals have alternative length limitations, expressed both in the number of pages and the number of words in a pleading. We have not adopted such an approach, believing that it would make our requirements too confusing and exacting, considering that about half of the appellants who come before the Board are unrepresented. (2) Expressly allow for replies to responses to petitions for review. The proposed regulation would permit a reply to a response to a petition for review, but with a short 10-day time limit for filing. Under the current regulation, such a reply is permitted only if the respondent (usually the

commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with § 1201.14. (d) *Time for filing.* Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. (e) *Extension of time to file.* The Board will grant a motion for extension of time to file a petition for review, a cross petition, or a response only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing	objections to the initial decision, including all of the party's legal and factual arguments, and must be supported by references to applicable laws or regulations and by specific references to the record. Any petition or cross petition for review that contains new evidence or argument must include an explanation why the evidence or argument was not presented before the record below closed (see § 1201.58). A petition or cross petition for review should not include documents that were part of the record below, as the entire administrative record will be available to the Board. (c) *Who may file.* Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel may file a petition for review or cross petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative. (d) *Place for filing.* All pleadings described in paragraph (a) and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, by commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with § 1201.14. (e) *Time for filing.* Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days	agency) files its response to the petition for review before its deadline. The proposed regulation would give all petitioners the opportunity to submit such a pleading. We note that federal appellate courts and some administrative tribunals allow for 3 primary pleadings or briefs. *See* Fed. R. App. P. 28; NLRB Rule 102.46(h); *but see* 29 C.F.R. § 1614.403 (EEOC allows only a response to an appeal). Although the amended regulation would expand pleading opportunities in this one respect, it would limit them in others, by providing in paragraph (a)(5) that no pleading other than the ones described (PFR, cross-PFR, responses to PFR or cross-PFR, and replies to responses to PFRs) will be accepted without requesting and obtaining leave from the Clerk of the Board. Under present rules, some petitioners provide numerous "supplements" to their PFRs, both before and after the record on review has closed. (3) Define petitions for review and cross petitions for review. (4) Subsection (e) incorporates by reference the rules governing constructive receipt as proposed for § 1201.22(b)(3) (receipt of agency decision notice). See explanation above. (5) Paragraph (b) now specifies that a

the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted. (f) *Late filings.* Any petition for review, cross petition for review, or response that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (e) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include: (1) The reasons for failing to request an extension before the deadline for the submission; and (2) A specific and detailed description of the circumstances causing the late filing,	after the date of issuance, within 30 days after the date the petitioner received the initial decision. For purposes of this section, the date that the petitioner receives the initial decision is determined according to the standard set forth at § 1201.22(b)(3) of this title, pertaining to an appellant's receipt of a final agency decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. Any reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review or cross petition for review. (f) *Extension of time to file.* The Board will grant a motion for extension of time to file a pleading described in paragraph (a) only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be	petition or cross petition for review must include "all of the party's legal and factual arguments." This was added to ensure that attorneys do not assume that the MSPB works like many courts, where all that is required is to file a notice of appeal with the appellate court, and the Clerk of that court then promulgates a briefing schedule.

accompanied by supporting documentation or other evidence. Any response to the motion may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (d) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely. (g) *Intervention* - . . . . . . (i) *Closing the record*. The record closes on expiration of the period for filing the response to the petition for review, or to the cross petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party	accompanied by any available documentation or other evidence supporting the matters asserted. (g) *Late filings*. Any pleading described in paragraph (a) that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (f) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include: . . . (h) *Length limitations*. A petition for review, a cross petition for review, or a response to a petition or cross petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages. A reply to a response to petition for review shall be limited to 15 pages. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins. The length limitation shall be exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 7 days before the filing deadline. Such requests must give the reasons therefore as well as the desired length of the pleading, and are granted only in exceptional circumstances or if the Board in specific cases changes the length limitation. (i) *Intervention* – [unchanged] (j) *Service*. [unchanged]	

submitting it shows that the evidence was not readily available before the record closed.	(k) *Closing the record.* The record closes on expiration of the period for filing the reply to the response to the petition for review, or on expiration of the period for filing a response to the cross petition for review, whichever is later, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.	
§ 1201.115 Contents of petition for review. (a) The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record. (b)(1) If the appellant was the prevailing party in the initial decision, and the decision granted the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B). (2) If the appellant challenges the agency's certification of	**1201.115 Criteria for granting petition or cross petition for review** The Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing by the petitioner that: (a) The initial decision contains erroneous findings of material fact; (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. (b) The initial decision is based on an erroneous	As noted above, the modified regulation is limited to the criteria for granting petitions and cross petitions for review. All of the rules governing the content and procedures for pleadings on review are now contained in § 1201.114. The proposed regulation would update the criteria for granting petitions for review to reflect relevant case law and to cover situations in which the Board has denied a petition for review but "reopened" the appeal "on its own motion" to address a petitioner's arguments or vacate, modify, or reverse an initial decision. As for updating the regulation to reflect applicable case law, starting with its seminal decision in *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam),

compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission. (3) If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B). (4) Failure by an agency to provide the certification required by paragraph (b)(1) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraph (b)(2) or (b)(3) of this section, may result in the dismissal of the agency's petition or cross petition for review. (c) Nothing in paragraph (b) of this section shall be construed to require any	interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case; (c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, resulting in harmful error to the petitioner; (d) New and material evidence or legal argument is available that, despite the petitioner'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.	the Board stated that an initial decision will be overturned when it is based on an erroneous *application* of a statute or regulation as well as when it is based on an erroneous *interpretation* of a statute or regulation. The Board has also long required that adjudicatory errors have been material, i.e., of sufficient weight to warrant a different outcome. *See, e.g., Urist v. Department of Transportation*, 18 M.S.P.R. 443, 444 (1983) (any inconsistency in the presiding official's findings would not affect the outcome of the appeal); *Cochran v. Department of Justice*, 16 M.S.P.R. 343, 346-47 (1983) (because the presiding official's erroneous findings of fact and conclusions relating to sexual harassment and mental handicap discrimination had a significant effect on the outcome of the case, the Board would substitute its own determinations of fact). The other additional criteria for granting a petition for review reflect situations where, in the past, the Board may have stated that it was denying a petition for review for failure to meet the criteria of the regulation, but then "reopened" the appeal "on its own motion" to address problems with the initial decision raised by the petitioner. We note in this regard that we are considering revisions to § 1201.118 that would state that "reopening" only applies to, and should

payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final. (d) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that: (1) New and material evidence is available that, despite due diligence, was not available when the record closed; or (2) The decision of the judge is based on an erroneous interpretation of statute or regulation.		be reserved for, instances in which the Board has already issued a final order or the initial decision has become the Board's final decision by operation of law.
§ 1201.116 Appellant requests for enforcement of interim relief. (a) *Before a final decision is issued*. If the agency files a petition for review or a cross petition for review and has not provided required interim relief, the appellant may request dismissal of the agency's petition. Any such request must be filed with the Clerk of the Board within 25 days of the date of service of the agency's petition. A copy of the response must be served on the agency at the same time it is filed with the Board. The agency may respond with evidence and argument	**§ 1201.116 Compliance with orders for interim relief.** (a) *Certification of compliance*. If the appellant was the prevailing party in the initial decision, and the decision granted the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B). (b) *Challenge to certification.* If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant	As modified, this regulation combines the existing contents of § 1201.116 with the provisions of § 1201.115(b) and (c).

to the appellant's request to dismiss within 15 days of the date of service of the request. If the appellant files a motion to dismiss beyond the time limit, the Board will dismiss the motion as untimely unless the appellant shows that it is based on information not readily available before the close of the time limit. (b) *After a final decision is issued*. If the appellant is not the prevailing party in the final Board order, and if the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition with the regional office under § 1201.182. The appellant must file this petition within 20 days of learning of the agency's failure to provide full interim relief. If the appellant prevails in the final Board order, then any interim relief enforcement motion filed will be treated as a motion for enforcement of the final decision. Petitions under this subsection will be processed under § 1201.183.	may respond to the agency's submission of evidence within 10 days after the date of service of the submission. (c) *Allegation of noncompliance in petition or cross petition for review*. If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B). (d) *Request for dismissal for noncompliance with interim relief order*. If the agency files a petition for review or a cross petition for review and has not provided required interim relief, the appellant may request dismissal of the agency's petition. Any such request must be filed with the Clerk of the Board within 25 days of the date of service of the agency's petition. A copy of the response must be served on the agency at the same time it is filed with the Board. The agency may respond with evidence and argument to the appellant's request to dismiss within 15 days of the date of service of the request. If the appellant files a motion to dismiss beyond the time limit, the Board will dismiss the motion as untimely unless the appellant shows that it is based on information not readily available before the close of the time limit. (e) *Effect of failure to show compliance with interim relief order*. Failure by an agency to provide the certification required by paragraph (a) of this section with its petition or cross petition for review,	

	or to provide evidence of compliance in response to a Board order in accordance with paragraphs (b), (c), or (d) of this section, may result in the dismissal of the agency's petition or cross petition for review. (f) *Back pay and attorney fees*. Nothing in this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final. (g) *Allegations of noncompliance after a final decision is issued*. If the initial decision granted the appellant interim relief, but the appellant is not the prevailing party in the final Board order disposing of a petition for review, and the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition with the regional office under § 1201.182. The appellant must file this petition within 20 days of learning of the agency's failure to provide full interim relief. If the appellant prevails in the final Board order disposing of a petition for review, then any interim relief enforcement motion filed will be treated as a motion for enforcement of the final decision. Petitions under this subsection will be processed under § 1201.183.	
§ 1201.117 Procedures for review or reopening. (a) In any case that is reopened or reviewed, the Board may: (1) Issue a single decision that denies	**§ 1201.117 Procedures for review or reopening.** (a) In any case that is reopened or reviewed, the Board may: (1) Issue a decision that decides the case;	The minor revision to paragraph (a)(1) reflects the significant revision to § 1201.118, which would restrict "reopening" to situations in which the Board members have previously issued a final order or the initial decision has

or grants a petition for review, reopens an appeal, and decides the case; (2) Hear oral arguments; (3) Require that briefs be filed; (4) Remand the appeal so that the judge may take further testimony or evidence or make further findings or conclusions; or (5) Take any other action necessary for final disposition of the case. (b) The Board may affirm, reverse, modify, or vacate the initial decision of the judge, in whole or in part. The Board may issue a final decision and, when appropriate, order a date for compliance with that decision. (c) The Board may issue a final decision in the form of a Final Order or an Opinion and Order. In the Board's sole discretion, a Final Order may, but need not, include additional discussion of the issues raised in the appeal. All Final Orders are nonprecedential and may not be cited or referred to except by a party asserting issue preclusion, claim preclusion, collateral estoppel, res judicata, or law of the case. Only an Opinion and Order is a precedential decision of the Board, and an Opinion and Order may be appropriately cited or referred to by any party.	. . . [The rest of the regulation is unchanged.]	become the Board's final order by operation of law.

§ 1201.118 Board reopening of case and reconsideration of initial decision. The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part.	**§ 1201.118 Board reopening of final decisions.** Regardless of any other provision of this part, the Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law. The Board will exercise its discretion to reopen only in unusual or extraordinary circumstances, such as the discovery of misrepresentation or fraud after issuance of the final decision, and only within a reasonably short period of time.	The primary point of this proposal would be to change the current Board practice of "reopen[ing] the appeal on the Board's own motion under 5 C.F.R. § 1201.118" when a party's petition for review is denied, but the Board deems it appropriate to issue an Opinion and Order for some reason. We think "reopening" only applies to, and should be reserved for, instances in which the Board has already issued a final order or the initial decision has become the Board's final decision by operation of law. We think that current practice involves a misinterpretation of 5 U.S.C. § 7701(e), which provides that an initial decision "shall be final unless – (A) a party to the appeal or the Director [of OPM] petitions the Board for review within 30 days after the receipt of the decision; or (B) the Board reopens and reconsiders a case on its own motion." As we read this, if either party files a timely petition for review, the appeal remains "open" and there is no final decision until the Board issues an Opinion and Order or Final Order. In addition to clarifying the situations in which an appeal may be reopened, the proposed revision corrects an apparent anomaly in the current regulations in that, as presently written, section 1201.118 applies only to the reopening

		of initial decisions. Neither section 1201.118 nor any other existing regulation discusses the Board's authority under 5 U.S.C. § 7701(e) to reopen a final decision issued by the Board itself. The proposed revision addresses reopening of all final Board decisions, whether issued by the Board or when an initial decision has become the Board's final decision. It also incorporates well-established case law as to the rare and limited circumstances in which the Board will reopen a final decision. We note that the proposed revision to § 1201.118 may have significant effects on the closing codes used in Law Manager and on annual and other external reports concerning the disposition of petitions for review. The reason is that a significant number of closing codes include the word "reopened." In almost none of the situations in which these codes have been used in the past would reopening be appropriate under the revised regulation. As a result, there will be a discontinuity in the outcomes described in the Board's annual and other external reports that will need to be explained. Some changes to the Board's closing codes and internal practices may also be required.

§ 1201.153 Contents of appeal. (a) *Contents*. An appeal raising issues of prohibited discrimination must comply with § 1201.24 of this part, with the following exceptions: . . . (2) The appeal must state whether the appellant has filed a formal discrimination complaint or a grievance with any agency. If he or she has done so, the appeal must state the date on which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance. . . .	**§ 1201.153 Contents of appeal.** (a) *Contents*. An appeal raising issues of prohibited discrimination must comply with § 1201.24 of this part, with the following exceptions: . . . (2) The appeal must state whether the appellant has filed a formal discrimination complaint or a grievance with any agency regarding the matter being appealed to the Board. If he or she has done so, the appeal must state the date on which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance. . . .	The additional language at the end of the first sentence of paragraph (a)(2) clarifies that not all discrimination matters may be raised with the Board.
§ 1201.154 Time for filing appeal; closing record in cases involving grievance decisions. Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits: . . .	**§ 1201.154 Time for filing appeal; closing record in cases involving grievance decisions.** For purposes of this section, the date an appellant receives the agency's decision is determined according to the standard set forth at § 1201.22(b)(3) of this title. Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits: . . .	This incorporates by reference the rules governing constructive receipt as proposed for § 1201.22(b)(3). See explanation above.

§ 1201.155 Remand of allegations of discrimination. If the parties file a written agreement that the discrimination issue should be remanded to the agency for consideration, and if the judge determines that action would be in the interest of justice, the judge may take that action. The remand order will specify a time period within which the agency action must be completed. In no instance will that time period exceed 120 days. While the issue is pending with the agency, the judge will retain jurisdiction over the appeal. **§ 1201.156 Time for processing appeals involving allegations of discrimination.** . . . (c) *Discrimination issue remanded to agency*. When the judge remands an issue of discrimination to the agency, adjudication will be completed within 120 days after the agency completes its action and returns the case to the Board.	We recommend that these provisions be deleted.	We believe that these provisions are unnecessary and, to our knowledge, have not been utilized in recent years. Existing practices regarding case suspensions and dismissing appeals without prejudice are adequate to handle situations covered by the existing regulations.
§ 1201.154 Time for filing appeal; closing record in cases involving grievance decisions. . . .	**(New) 1201.155 Requests for review of arbitrators' decisions.** (a) *Scope.* If an individual has filed a grievance of action appealable to the Board with the agency under a negotiated grievance procedure, he may ask the Board to review the final decision on the	Although requests for review of arbitrators' decisions under 5 U.S.C. § 7121(d) by definition must include claims of unlawful discrimination under 5 U.S.C. § 2302(b)(1), they are quite different from other mixed cases

(d) This paragraph does not apply to employees of the Postal Service or to other employees excluded from the coverage of the federal labor-management relations laws at chapter 71 of title 5, United States Code. If the appellant has filed a grievance with the agency under a negotiated grievance procedure, he may ask the Board to review the final decision on the grievance if he alleges before the Board that he is the victim of prohibited discrimination. Usually, the final decision on a grievance is the decision of an arbitrator. A full description of an individual's right to pursue a grievance and to request Board review of a final decision on the grievance is found at 5 U.S.C. 7121 and 7702. The appellant's request for Board review must be filed within 35 days after the date of issuance of the decision or, if the appellant shows that he or she received the decision more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision. The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain: (1) A statement of the grounds on which review is requested; (2) References to evidence of record	grievance if he alleges before the Board that he is the victim of prohibited discrimination. Usually, the final decision on a grievance is the decision of an arbitrator. A full description of an individual's right to pursue a grievance and to request Board review of a final decision on the grievance is found at 5 U.S.C. 7121 and 7702. This section does not apply to employees of the Postal Service or to other employees excluded from the coverage of the federal labor management laws at Chapter 71 of title 5, United States Code. (b) *Time for filing.* The appellant's request for Board review must be filed within 35 days after the date of issuance of the final decision or, if the appellant shows that he received the decision more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision. (c) *Contents.* The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain: (1) A statement of the grounds on which review is requested; (2) References to evidence of record or rulings related to the issues before the Board; (3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and (4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or	covered by Subpart E of Part 1201, in that they have not been adjudicated in the Board's regional offices by administrative judges pursuant the provisions of Part 1201. Because of this, arbitrators' decisions are subject to a much more lenient standard of review than are decisions by administrative judges. *See, e.g., Fanelli v. Department of Agriculture*, 109 M.S.P.R. 115, ¶ 6 (2008). Because of these differences, we thought that such requests merited a single regulation devoted to that subject. We therefore moved the existing coverage from § 1201.154(d) and made it into 1201.155 (replacing the old § 1201.155 which authorized remands of discrimination claims to agencies, which is being eliminated. In addition to moving the existing regulatory language, we have also added a new paragraph (d), which provides that the Board may, in its discretion, "develop the record as to a claim of prohibited discrimination by ordering the parties to submit additional evidence or forwarding the request for review to a judge to conduct a hearing." We note in this regard that established case law allows the grievant to raise a claim of discrimination to the Board even if no such claim was raised before the arbitrator. *See, e.g., Jones v. Department of the Navy*, 898 F.2d 133,

or rulings related to the issues before the Board; (3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and (4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or tape recording of the hearing. (e) The record will close upon expiration of the period for filing the response to the petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.	recording of the hearing. (d) *Development of the Record.* The Board, in its discretion, may develop the record as to a claim of prohibited discrimination by ordering the parties to submit additional evidence or forwarding the request for review to a judge to conduct a hearing. (e) The record will close upon expiration of the period for filing the response to the request for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.	135-36 (Fed. Cir. 1990). In such circumstances, the factual record may be insufficiently developed to allow the Board to resolve the discrimination claim(s). This may be the case even when the claim was raised to the arbitrator. When the existing record is insufficient, this additional provision would give the Board the option of ordering the parties to supplement the record or forwarding the matter to an administrative judge to gather additional evidence and/or conduct a hearing and make factual findings.
§ 1201.181 Authority and explanation. (a) Under 5 U.S.C. 1204(a)(2), the Board has the authority to order any Federal agency or employee to comply with decisions and orders issued under its jurisdiction, and the authority to enforce compliance with its orders and decisions. The parties are expected to	**§ 1201.181 Authority and explanation.** (a) *Authority.* Under 5 U.S.C. 1204(a)(2), the Board has the authority to order any Federal agency or employee to comply with decisions and orders issued under its jurisdiction, and the authority to enforce compliance with its orders and decisions. The Board's decisions and orders, when appropriate, will contain a notice of the Board's	No substantive changes here; just reorders the information and adds descriptive labels to each paragraph.

cooperate fully with each other so that compliance with the Board's orders and decisions can be accomplished promptly and in accordance with the laws, rules, and regulations that apply to individual cases. The Board's decisions and orders will contain a notice of the Board's enforcement authority. (b) In order to avoid unnecessary petitions under this subpart, the agency must inform the appellant promptly of the actions it takes to comply, and it must tell the appellant when it believes it has completed its compliance. The appellant must provide all necessary information that the agency requests in order to comply, and, if not otherwise notified, he or she should, from time to time, ask the agency about its progress.	enforcement authority. (b) *Requirements for parties.* The parties are expected to cooperate fully with each other so that compliance with the Board's orders and decisions can be accomplished promptly and in accordance with the laws, rules, and regulations that apply to individual cases. Agencies must promptly inform an appellant of actions taken to comply and must inform the appellant when it believes compliance is complete. Appellants must provide agencies with all information necessary for compliance and should monitor the agency's progress towards compliance.	
§ 1201.182 Petition for enforcement. (a) *Appellate jurisdiction.* Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction. The petition must be filed promptly with the regional or field office that issued the initial decision; a copy of it must be served on the other party or that party's representative; and it must describe specifically the reasons the	**§ 1201.182 Petition for enforcement.** (a) *Appellate jurisdiction.* Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction, or for enforcement of the terms of a settlement agreement that has been entered into the record for the purpose of enforcement in an order or decision under the Board's appellate jurisdiction. The petition must be filed promptly with the regional or field office that issued the initial decision; a copy of it must be served on the other party or that	The revised regulation clarifies that the Board's enforcement authority under 5 U.S.C. § 1204(a)(2) extends to situations in which a party asks the Board to enforce the terms of a settlement agreement entered into the record for purposes of enforcement as well as to situations in which a party asks the Board to enforce the terms of a final decision or order.

petitioning party believes there is noncompliance. The petition also must include the date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition. (b) *Original jurisdiction*. Any party seeking enforcement of a final Board decision or order issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance. (c) *Petition by an employee other than a party*. . . .	party's representative; and it must describe specifically the reasons the petitioning party believes there is noncompliance. The petition also must include the date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition. (b) *Original jurisdiction.* Any party seeking enforcement of a final Board decision or order issued under its original jurisdiction or enforcement of the terms of settlement agreement entered into the record for the purpose of enforcement in an order or decision issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance. (c) *Petition by an employee other than a party*. . . .	
§ 1201.183 Procedures for processing petitions for enforcement. (a) *Initial Processing.* . . . (2) If the agency is the alleged noncomplying party, it shall	**§ 1201.183 Procedures for processing petitions for enforcement.** (a) *Initial Processing*. . . . (2) If the agency is the alleged noncomplying party, it shall submit the name, title, grade, and	The proposed regulation would change the nature of an administrative judge's decision in a compliance proceeding from a "recommendation" to a regular initial decision, which would become the Board's final decision if a petition for review is not filed or is denied. The

submit the name and address of the agency official charged with complying with the Board's order, even if the agency asserts it has fully complied. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President by and with the consent of the Senate is charged with compliance. . . . (5) If the judge finds that: (i) The alleged noncomplying party has not taken, or has not made a good faith effort to take, any action required to be in compliance with the final decision, or (ii) The party has taken or made a good faith effort to take one or more, but not all, actions required to be in compliance with the final decision; he or she will issue a recommendation containing his or her findings, a statement of the actions required by the party to be in compliance with the final decision, and a recommendation that the Board enforce the final	address of the agency official charged with complying with the Board's order, even if the agency asserts it has fully complied. The agency must advise the Board of any change to the identity or location of this official during the pendency of any compliance proceeding. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President by and with the consent of the Senate is charged with compliance. . . . (5) If the judge finds that the alleged noncomplying party has not taken all actions required to be in full compliance with the final decision, the judge will issue an initial decision resolving all issues raised in the petition for enforcement, and identifying the specific actions the noncomplying party must take to be in compliance with the Board's final decision. If the noncomplying party is the agency, the initial decision will further document the responsible agency official, previously identified pursuant to paragraph (a)(2) of this section, who shall not be entitled to receive payment for service as an employee during the period of noncompliance, if the initial decision becomes the Board's final decision on the issue of compliance, pursuant to paragraph (b) of this section, and the provisions of 5 U.S.C. § 1204(e)(2)(a). A copy of the initial decision will be served on the responsible agency official.	goal is to ensure, to the extent feasible, that all relevant evidence is produced during the regional office proceeding, and that the initial decision actually resolves all contested issues: "[T]he judge will issue an initial decision resolving all issues raised in the petition for enforcement, and identifying the specific actions the noncomplying party must take . . . ." In addition, the regulation provides that the "responsible agency official" whose pay may be suspended should a finding of noncompliance become the Board's final decision will be served with a copy of any initial decision finding the agency in noncompliance. To the extent that an agency found to be in noncompliance decides to take the compliance actions identified in the initial decision, the proposed regulation increases the period for providing evidence of compliance from 15 days to 30 days. This was done for a couple of reasons. First, where the initial decision is the first time that the agency learns definitively what actions it must take, 15 days would rarely be sufficient to have taken all required actions, e.g., the issuance of SF-52s and/or SF-50s and action taken by a payroll office. Second, we felt that there should not be different deadlines for submitting evidence of compliance as compared to contesting compliance actions with

decision. (6) If a recommendation described under paragraph (a)(5) of this section is issued, the alleged noncomplying party must do one of the following: (i) If it decides to take the actions required by the recommendation, it must submit to the Clerk of the Board, within 15 days after the issuance of the recommendation, evidence that it has taken those actions. (ii) If it decides not to take any of the actions required by the recommendation, it must file a brief supporting its nonconcurrence in the recommendation. The brief must be filed with the Clerk of the Board within 30 days after the recommendation is issued and, if it is filed by the agency, it must identify by name, title, and grade the agency official responsible for the failure to take the actions required by the recommendation for compliance. (iii) If the party decides to take one or more, but not all, actions required by the	(6) If an initial decision described under paragraph (a)(5) of this section is issued, the party found to be in noncompliance must do the following: (i) To the extent that the party decides to take the actions required by the initial decision, the party must submit to the Clerk of the Board, within the time limit for filing a petition for review under section 1201.114(d) of this part, a statement that the party has taken the actions identified in the initial decision, along with evidence establishing that the party has taken those actions. The narrative statement must explain in detail why the evidence of compliance satisfies the requirements set forth in the initial decision. (ii) To the extent that the party decides not to take any of the actions required by the initial decision, the party must file a petition for review under the provisions of sections 1201.114 and 1201.115 of this part. (iii) The responses required by the preceding two paragraphs may be filed separately or as a single pleading. If the agency is the party found to be in noncompliance, it must advise the Board, as part of any submission under this paragraph, of any change in the identity or location of the official responsible for compliance previously provided pursuant to paragraph (a)(2). (7) The petitioner may file evidence and argument in response to any submission described in	which the agency disagrees by filing a petition for review. We note in this regard that 15 days comprises a very small part of the time involved in a compliance proceeding at the headquarters level. The average age of an X-File proceeding when it is closed during the past 3 fiscal years has been as follows: 268 days in FY 2011 (10/1/10 to 6/30/11); 180 days in FY 2010; and 171 days in FY 2009. As noted above, revised section 1201.182 explains that the Board considers petitions for enforcement in two different situations: (1) when the Board has ordered relief or corrective action and (2) when the parties have entered a settlement agreement into the record for enforcement. New paragraph (c) to section 1201.183 codifies existing case law regarding the different burdens of proof that apply in these enforcement actions depending on whether the Board is adjudicating a petition to enforce relief ordered by the Board (typically status quo ante relief when the Board has not sustained an agency action), or a petition to enforce a settlement agreement that a party is alleging that the other party breached. *See*, *e.g.*, *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 732-33 (Fed. Cir. 1984) (emphasizing the Board's obligation, in ensuring status quo ante relief in a compliance action, to "make a

recommendation, it must submit both evidence of the actions it has taken and, with respect to the actions that it has not taken, a brief supporting its disagreement with the recommendation. The evidence and brief must be filed with the Clerk of the Board within 30 days after issuance of the recommendation and, if it is filed by the agency, it must contain the identifying information required by paragraph (a)(6)(ii) of this section. (7) The petitioner may file a brief that responds to the submission described in paragraph (a)(6) of this section, and that asks the Board to review any finding in the recommendation, made under paragraph (a)(5)(ii) of this section, that the other party is in partial compliance with the final decision. The petitioner must file this brief with the Clerk of the Board within 20 days of the date of service of the submission described in paragraph (a)(6) of this section. (b) *Consideration by the Board.* (1) The Board will consider the	paragraph (a)(6) by filing opposing evidence and argument with the Clerk of the Board within 20 days of the date such submission is filed. (b) Consideration by the Board. (1) Following review of the initial decision and the written submissions of the parties, the Board will render a final decision on the issues of compliance. Upon finding that the agency is in noncompliance, the Board may, when appropriate, require the agency to appear before the Board to show why sanctions should not be imposed under 5 U.S.C. 1204(a)(2) and 1204(e)(2)(A). The Board also may require the agency to make this showing in writing, or to make it both personally and in writing. (2) The Board's final decision on the issues of compliance is subject to judicial review under § 1201.120 of this part. . . (c) *Burdens of proof.* If an appellant files a petition for enforcement seeking compliance with a Board order, the agency generally has the burden to prove its compliance with the Board order by a preponderance of the evidence. However, if any party files a petition for enforcement seeking compliance with the terms of a settlement agreement, that party has the burden of proving the other party's breach of the settlement agreement by a preponderance of the evidence. [Existing paragraphs (c) and (d) would become (d) and (e).]	substantive assessment of whether the actual duties and responsibilities to which the employee was returned are either the same as or substantially equivalent in scope and status to the duties and responsibilities held prior to the wrongful discharge"); *House v. Department of the Army*, 98 M.S.P.R. 530, ¶ 14 (2005) (when the Board orders an agency action cancelled, the agency must return the appellant, as nearly as possible, to the status quo ante, which requires, in most instances, restoring the appellant to the position he occupied prior to the adverse action or placing him in a position that is substantially equivalent); *Fredendall v. Veterans Administration*, 38 M.S.P.R. 366, 370-71 (1988) (adopting judicial precedent that an action to enforce a settlement agreement is analogous to an action for breach of contract, and the burden of proof in an action for breach of contract rests on the plaintiff). Both the Board and the Federal Circuit have emphasized that, even though an appellant who alleges that the agency breached a settlement agreement bears the burden of proof, the agency bears the burden to produce relevant evidence regarding its compliance. *See Perry v. Department of the Army*, 992 F.2d 1575, 1588 (Fed. Cir. 1993); *Fredendall*, 38 M.S.P.R. at 371.

recommendation, along with the submissions of the parties, promptly. When appropriate, the Board may require the alleged noncomplying party, or that party's representative, to appear before the Board to show why sanctions should not be imposed under 5 U.S.C. 1204(a)(2) and 1204(e)(2)(A). The Board also may require the party or its representative to make this showing in writing, or to make it both personally and in writing. (2) The Board may hold a hearing on an order to show cause, or it may issue a decision without a hearing. . . .		
§ 1208.21 VEOA exhaustion requirement. Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation and allow the Secretary at least 60 days from the date the complaint is filed to attempt to resolve the complaint.	**§ 1208.21 VEOA exhaustion requirement.** (a) *General rule*. Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation. In addition, either the Secretary must have sent the appellant written notification that efforts to resolve the complaint were unsuccessful or, if the Secretary has not issued such notification and at least 60 days have elapsed from the date the complaint is filed, the appellant must have provided written notification to the Secretary of the appellant's intention to file	The purpose of the proposed revision to paragraph (a) is to clarify and codify an appellant's burden of proving exhaustion in a VEOA appeal. Section 1208.21 currently explains that to exhaust his administrative remedies with DOL, an appellant must file a complaint with DOL and allow DOL 60 days to resolve the complaint. However, this provides an incomplete and misleading picture of the exhaustion process. It is incomplete because it does not include the exhaustion requirement that DOL close the complaint, either on its own

	an appeal with the Board. (b) *Equitable tolling*. The appellant's 60-day deadline for filing a complaint with the Secretary is subject to equitable tolling under certain situations, such as where the appellant has actively pursued his or her judicial or administrative remedies by filing a defective pleading during the statutory period, or has been induced or tricked by his or her adversary's misconduct into allowing the filing deadline to pass.	accord or based on a letter from the appellant after 60 days have elapsed stating that the appellant intends to file a Board appeal. *See* 5 U.S.C. § 3330a (d)(1); *Burroughs v. Department of Defense*, 114 M.S.P.R. 647, ¶¶ 7-9 (2010) (the administrative judge erred in finding that the appellant exhausted his administrative remedy with DOL based on the mere fact that the appellant filed a complaint and waited 60 days before appealing to the Board); *Becker v. Department of Veterans Affairs*, 107 M.S.P.R. 327, ¶¶ 9, 11 (2007); 5 C.F.R. § 1208.23(a)(5). It is misleading because it does not account for the fact that DOL might close its investigation before 60 days have elapsed. The proposed revision provides a more accurate and complete picture of what is required to establish exhaustion in a VEOA appeal. The addition of paragraph (b) regarding equitable tolling reflects the Federal Circuit's ruling in *Kirkendall v. Department of the Army*, 479 F.3d 830, 836-44 (Fed. Cir. 2007) (en banc).
§ 1208.22 Time of filing. (a) Unless the Secretary of Labor has notified the appellant that the Secretary's efforts have not resolved the VEOA complaint, a VEOA appeal may not be filed with the Board before the 61st day after the date on which	**§ 1208.22 Time of filing.** (a) Unless the Secretary of Labor has notified the appellant that the Secretary's efforts have not resolved the VEOA complaint, a VEOA appeal may not be filed with the Board before the 61st day after the date on which the appellant filed the complaint under 5 U.S.C. 3330a(a) with the	Paragraph (c) has been added to address the possibility of excusing an untimely filed appeal under the doctrine of equitable tolling.

the appellant filed the complaint under 5 U.S.C. 3330a(a) with the Secretary. (b) If the Secretary of Labor notifies the appellant that the Secretary's efforts have not resolved the VEOA complaint and the appellant elects to appeal to the Board under 5 U.S.C. 3330a(d), the appellant must file the VEOA appeal with the Board within 15 days after the date of receipt of the Secretary's notice. A copy of the Secretary's notice must be submitted with the appeal.	Secretary. (b) If the Secretary of Labor notifies the appellant that the Secretary's efforts have not resolved the VEOA complaint and the appellant elects to appeal to the Board under 5 U.S.C. 3330a(d), the appellant must file the VEOA appeal with the Board within 15 days after the date of receipt of the Secretary's notice. A copy of the Secretary's notice must be submitted with the appeal. (c) *Equitable tolling*. The appellant's 15-day deadline for filing a Board appeal is subject to equitable tolling under certain situations, such as where the appellant has actively pursued his or her judicial or administrative remedies by filing a defective pleading during the statutory period, or has been induced or tricked by his or her adversary's misconduct into allowing the filing deadline to pass.	
§ 1208.23 Content of a VEOA appeal; request for hearing. (a) *Content*. A VEOA appeal may be in any format, including letter form, but must contain the following: (1) The nine (9) items or types of information required in 5 CFR 1201.24(a)(1) through (a)(9); (2) Evidence or argument that the appellant is a preference eligible; (3) A statement identifying the statute or regulation relating to veterans'	**§ 1208.23 Content of a VEOA appeal; request for hearing.** (a) *Content*. A VEOA appeal may be in any format, including letter form, but must contain the following: (1) The nine (9) items or types of information required in 5 CFR 1201.24(a)(1) through (a)(9); (2) Evidence or argument that the appellant is a preference eligible; (3) A statement identifying the statute or regulation relating to veterans' preference that was	Subparagraphs (a)(2)-(5) of the current section 1208.23 require that a VEOA appeal contain information to establish Board jurisdiction. *See Jarrard v. Department of Justice*, 113 M.S.P.R. 502, ¶ 9 (2010) (jurisdictional elements in a VEOA appeal). In particular, current subparagraphs (a)(4)-(5) require that an appellant submit evidence that he exhausted his remedy with DOL. *See Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶ 7 (2008) (exhaustion of the administrative remedy is a jurisdictional requirement in

preference that was allegedly violated, an explanation of how the provision was violated, and the date of the violation; (4) Evidence that a complaint under 5 U.S.C. 3330a(a) was filed with the Secretary of Labor, including the date the complaint was filed; and (5)(i) Evidence that the Secretary has notified the appellant in accordance with 5 U.S.C. 3330a(c)(2) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); or (ii) Evidence that the appellant has provided written notice to the Secretary of the appellant's intent to appeal to the Board, as required by 5 U.S.C. 3330a(d)(2) (a copy of the appellant's written notice to the Secretary satisfies this requirement). . . .	allegedly violated, an explanation of how the provision was violated, and the date of the violation; (4) Evidence that a complaint under 5 U.S.C. 3330a(a) was filed with the Secretary of Labor, including the date the complaint was filed; (5) Evidence identifying the specific veterans' preference claims that the appellant raised before the Secretary; and (6)(i) Evidence that the Secretary has notified the appellant in accordance with 5 U.S.C. 3330a(c)(2) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); or (ii) Evidence that the appellant has provided written notice to the Secretary of the appellant's intent to appeal to the Board, as required by 5 U.S.C. 3330a(d)(2) (a copy of the appellant's written notice to the Secretary satisfies this requirement). . . .	a VEOA appeal). However, the current provisions pertaining to the exhaustion requirement are incomplete. Both the Board and the Federal Circuit have found that the Board has VEOA jurisdiction only over the *particular* claims for which an appellant has exhausted his administrative remedy. *See Gingery v. Department of the Treasury*, 2010 WL 3937577 at *5 (Fed. Cir. 2010); *Burroughs v. Department of the Army*, 2011 MSPB 30, ¶¶ 9-10; *White v. U.S. Postal Service*, 114 M.S.P.R. 574, ¶ 9 (2010). The first step of the statutory exhaustion process is to "file a complaint with DOL containing 'a summary of the allegations that form the basis for the complaint.'" *Gingery*, 2010 WL 3937577 at *5 (quoting 5 U.S.C. § 3330a(a)(2)(B)); *Burroughs*, 2011 MSPB 30, ¶ 9. The purpose of this requirement is to afford DOL an opportunity to investigate the claim before involving the Board in the matter, which is the same as the purpose of the exhaustion requirement in an IRA appeal. *See Gingery*, 2010 WL 3937577 at *5 (citing *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992)); *Burroughs*, 2011 MSPB 30, ¶ 9. In order for the Board to make a jurisdictional ruling in a VEOA appeal, it must have evidence of the particular claims that the appellant raised before DOL, but an appellant can

		meet the literal requirements of the Board's current regulations without submitting any such evidence. Because it is now clear that Board and the court will scrutinize the exhaustion issue in a VEOA appeal in the same way that they scrutinize the exhaustion issue in an IRA appeal, the Board's regulations on VEOA exhaustion ought to reflect that fact. *See Gingery*, 2010 WL 3937577 at *5 ("when an appellant's complaint entirely fails to inform the DOL of a particular alleged violation or ground for relief, the Board lacks jurisdiction over the claim"); *cf. Boechler v. Department of the Interior*, 109 M.S.P.R. 638, ¶ 6 (2008) (the Board may consider only those charges of whistleblowing that the appellant raised before OSC), *aff'd*, 328 F. App'x 660 (Fed. Cir. 2009). The proposed revision would, therefore, add a new subparagraph between current section 1208.23(a)(4) and (5), stating that a VEOA appeal must contain evidence to identify the specific claims that the appellant raised before DOL. In drafting the proposed revision, we considered that an appellant might exhaust his administrative remedy on an issue that was not mentioned in the original 5 U.S.C. § 3330a(1) complaint itself. *Cf. Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 19 (2010) ("in showing that the

		exhaustion requirement [in an IRA appeal] has been met, the appellant is not limited by the statements in her initial complaint, but may also rely on subsequent correspondence with OSC"). Therefore, the proposed revision does not require an appellant to submit evidence of the issues raised in the "complaint," and it does not suggest that the requirements of the section can be satisfied by submitting a copy of the complaint. Rather, the proposed amendment is broad enough to encompass all matters that an appellant might have given DOL a sufficient basis to pursue during the course of the complaint process.
§ 1209.2 Jurisdiction. (a) Under 5 U.S.C. 1214(a)(3), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. (b) The Board exercises jurisdiction over: (1) *Individual right of action appeals*. These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in § 1209.4(a) of this part that are allegedly threatened, proposed, taken, or	**§ 1209.2 Jurisdiction.** (a) Under 5 U.S.C. 1221(a), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. (b) The Board exercises jurisdiction over: (1) *Individual right of action (IRA) appeals*. These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in § 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant	This proposed regulation would overrule a significant body of Board case law. Starting with its decision in *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318 (1993), the Board has consistently maintained the position that an individual who claims that an otherwise appealable action was taken against him in retaliation for making whistleblowing disclosures, and who seeks corrective action from the Special Counsel before filing an appeal with the Board, retains all the rights associated with an otherwise appealable action in the Board appeal. In an adverse action, for example, the agency must prove its charges, nexus, and the reasonableness of the penalty by a preponderance of the

not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board. *Example*: Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he reported that his supervisor embezzled public funds in violation of federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an individual right of action appeal. (2) *Otherwise appealable action appeals*. These are appeals to the Board under laws, rules, or	must seek corrective action from the Special Counsel before appealing to the Board. *Example*: Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he reported that his supervisor embezzled public funds in violation of federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an individual right of action appeal. *Example*: As above, Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he previously filed a Board appeal of the agency's action suspending him without pay for 15 days. The Board would not have jurisdiction over the performance evaluation as an IRA appeal because the appellant has not made an allegation of a violation of 5 U.S.C. 2302(b)(8), i.e., a claim of retaliation for a protected whistleblowing disclosure. Retaliation for filing a Board appeal would constitute a different prohibited personnel	evidence, and the appellant is free to assert any affirmative defense he might have, including harmful procedural error and discrimination under Title VII or the Rehabilitation Act. In an IRA appeal, however, the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures. Although the Board's regulations in Part 1209 do not spell out all of the ramifications of the *Massimino* decision, they are made explicit in the Judges' Handbook as well as in case law. In 1994, the year after *Massimino* was issued, Congress amended 5 U.S.C. § 7121 to add paragraph (g). Pub. L. No. 103-424, § 9(b), 108 Stat. 4361, 4365-66 (1994). Subsection (g)(3) provides that an employee affected by a prohibited personnel practice "may elect not more than one" of 3 remedies: (A) an appeal to the Board under 5 U.S.C. § 7701; (B) a negotiated grievance under § 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (§ 1214), which can be followed by an IRA appeal filed with the Board (§ 1221). Under subsection (g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first.

regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to appeal directly to the Board. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3(a)(1) through (a)(19).) *Example*: Agency B removes Ms. Y for alleged misconduct under 5 U.S.C. 7513. Ms. Y believes that the agency removed her because of her whistleblowing activities. Because the removal action is appealable to the Board under some law, rule or regulation other than 5 U.S.C. 1221(a), Ms. Y may choose to file an appeal with the Board without first seeking corrective action from the Special Counsel or to seek corrective action from the Special Counsel and then appeal to the Board. (3) *Stays*. Where the appellant alleges that a personnel action was or will be based on whistleblowing, the Board may, upon the appellant's	practice, 5 U.S.C. 2302(b)(9), retaliation for having exercised an appeal, complaint, or grievance right granted by any law, rule, or regulation. *Example*: As above, Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he testified on behalf of a co-worker in an EEO proceeding. As in the previous example, the Board would not have jurisdiction over the performance evaluation as an IRA appeal because the appellant has not made an allegation of a violation of 5 U.S.C. 2302(b)(8), i.e., a claim of retaliation for a protected whistleblowing disclosure. Retaliation for protected EEO activity is a prohibited personnel practice under 5 U.S.C. 2302(b)(9), not under section 2302(b)(8). (2) *Otherwise appealable action appeals*. These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3(a).) An individual who has been subjected to an otherwise appealable action must make an election of remedies as described in 5 U.S.C. 7121(g) and paragraphs (c) and (d) of this section.	A plain reading of § 7121(g) indicates that, contrary to *Massimino*, an individual who has been subjected to an otherwise appealable action, but who seeks corrective action from OSC before filing an appeal with the Board, has elected an IRA appeal, and is limited to the rights associated with such an appeal, i.e., the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures; the agency need not prove the elements of its case, and the appellant may not raise other affirmative defenses. The Board has never reconsidered or amended its holding in *Massimino* in light of the 1994 amendment to section 7121, despite the fact that OSC later suggested that the Board change its regulatory guidance in 5 C.F.R. § 1201.21 "to include notice of the right to file a prohibited personnel practice complaint with the Special Counsel and the requirement for making an election among a grievance, an appeal to MSPB, and a complaint to the Special Counsel." *See* 65 Fed. Reg. 25623, 25624 (2000). The long-term consequences of the proposed change would be straightforward. When taking an otherwise appealable action, agencies would be required, per revised 5 C.F.R. § 1201.21, to advise employees of their

request, order an agency to suspend that action.	*Example*: [no change] (3) *Stays*. [no change] (c) *Issues before the Board in IRA appeals*. In an individual right of action appeal over which the Board has jurisdiction, the only issues before the Board are those listed in 5 U.S.C. 1221(e), i.e., whether the appellant has demonstrated that one or more whistleblowing disclosures was a contributing factor in one or more covered personnel actions and, if so, whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosure(s). The appellant may not raise affirmative defenses other than reprisal for whistleblowing activities, such as claims of discrimination or harmful procedural error. In an IRA appeal that concerns an adverse action under 5 U.S.C. 7512, the agency need not prove its charges, nexus, or the reasonableness of the penalty, as a requirement under 5 U.S.C. 7513(a), i.e., that its action is taken "only for such cause as will promote the efficiency of the service." However, the Board may consider the strength of the agency's evidence in support of its adverse action in determining whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure(s). (d) *Elections under 5 U.S.C. 7121(g).* (1) Under 5 U.S.C. 7121(g)(3), an employee who believes he or she was subjected to a covered personnel action in retaliation for protected	options under § 7121(g) and the consequences of such an election, including the fact that the employee would be foregoing important rights if he or she seeks corrective action from OSC before filing with the Board. There would be difficult interim questions concerning cases that are already in the pipeline. One issue would be whether, despite the seemingly clear language and consequences of § 7121(g), the appellant should be deemed to have made a valid and binding election. An argument might be made that an election is not binding unless it constitutes a knowing and informed decision. *Cf. Atanus v. Merit Systems Protection Board*, 434 F.3d 1324, 1326-27 (Fed. Cir. 2006) (concluding that the appellant made a knowing and informed, and therefore binding election under § 7121(e)). The proposed regulation does not resolve this question, which would be resolved in particular appeals. If the Board were to hold that some elections were not binding, a related question would be whether the Board should excuse the untimely filing of the Board appeal, which would be filed well after the 30-day deadline of 5 C.F.R. § 1201.22(b)(1). Again, this would be resolved in particular appeals. Other changes The reference in paragraph (a) has been

	whistleblowing "may elect not more than one" of 3 remedies: (A) an appeal to the Board under 5 U.S.C. 7701; (B) a negotiated grievance under 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (section 1214), which can be followed by an IRA appeal filed with the Board (section 1221). Under subsection 7121(g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first. (2) In the case of an otherwise appealable action as described in paragraph (b)(2) of this section, an employee who files a complaint with OSC prior to filing an appeal with the Board has elected corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC, which can be followed by an IRA appeal with the Board. As described in paragraph (c) of this section, the IRA appeal in such a case is limited to resolving the claim(s) of reprisal for whistleblowing activities.	changed from 5 U.S.C. 1214(a)(3) to 5 U.S.C. 1221(a). The latter provision is the one that authorizes appeals to the Board for claims of reprisal for protected whistleblowing. Section 1214(a)(3) contains the exhaustion requirement applicable to IRA appeals that do not involve an otherwise appealable action. In its present form, the regulation contains a single example of an IRA appeal. Two additional examples have been added, in which the Board would not have jurisdiction over the asserted claim as an IRA appeal. Both examples involve situations in which an agency would have committed a violation of 5 U.S.C. § 2302(b)(9), but not 5 U.S.C. § 2302(b)(8). Appellants often mistake (b)(9) claims for claims of retaliation for making protected whistleblowing disclosures. In the absence of an otherwise appealable action, however, the Board does not have jurisdiction over claims of (b)(9) violations.
§ 1209.4 Definitions. . . . (b) *Whistleblowing* is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of	**§ 1209.4 Definitions.** . . . (b) *Whistleblowing* is the making of a protected disclosure, that is, a dislcosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to	The Board's case law, as well as its acknowledgment and jurisdictional orders, speak in terms of "protected disclosures," but this regulation defines "whistleblowing" and the Part 1209 regulations refer in several places to "whistleblowing activities." This minor revision to the definition combines the two concepts so that the use of "whistleblowing activities" is not

authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it. . . .	public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it. . . .	ambiguous.
§ 1209.5 Time of filing. (a) *Individual right of action appeals*. The appellant must seek corrective action from the Special Counsel before appealing to the Board. Where the appellant has sought corrective action, the time limit for filing an appeal with the Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed: (1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within	**§ 1209.5 Time of filing.** (a) *Individual right of action appeals*. The appellant must seek corrective action from the Special Counsel before appealing to the Board. Where the appellant has sought corrective action, the time limit for filing an appeal with the Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed: (1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel's notification; or, (2) If the Office of Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the	In a number of IRA appeals, the Board has considered whether an untimely appeal can be excused under the doctrine of equitable tolling. *See*, *e.g.*, *Pacilli v. Department of Veterans Affairs*, 113 M.S.P.R. 526, ¶ 11 1011 10; *Bauer v. Department of the Army*, 88 M.S.P.R. 352, ¶¶ 8-9 (2001); *Wood v. Department of the Air Force*, 54 M.S.P.R. 587, 593 (1992). As in VEOA appeals, we believe that the possibility of excusing the filing deadline under the doctrine of equitable tolling should be addressed in the Board's timeliness regulation.

60 days after the date the appellant received the Special Counsel's notification; or, (2) If the Office of Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the date of filing of the request for corrective action, at any time after the expiration of 120 days. . . .	date of filing of the request for corrective action, at any time after the expiration of 120 days. (3) *Equitable tolling*. The appellant's deadline for filing an individual right of action appeal with the Board after receiving written notification from the Office of Special Counsel that it was terminating its investigation of his or her allegations is subject to equitable tolling under certain situations, such as where the appellant has actively pursued his or her judicial or administrative remedies by filing a defective pleading during the statutory period, or has been induced or tricked by his or her adversary's misconduct into allowing the filing deadline to pass. . . .	
§ 1209.6 Content of appeal; right to hearing. . . . (b) *Right to hearing*. An appellant has a right to a hearing. . . .	**§ 1209.6 Content of appeal; right to hearing.** . . . (b) *Right to hearing*. An appellant generally has a right to a hearing if the appeal has been timely filed and the Board has jurisdiction over the appeal. . . .	As with the proposed modification to 1201.24(d), the proposed rule clarifies that an appellant does not automatically have a right to a hearing in every Board appeal; the right exists, if at all, only when the appeal has been timely filed and the appellant has established jurisdiction over the appeal.