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MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1201, 1203, 1208, and 1209

Interim Regulatory Changes for Implementation of Electronic Filing

AGENCY: Merit Systems Protection Board.

ACTION: Interim rule with request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending the rules of practice and procedure that govern how participants in Board proceedings file and receive documents in electronic form. This change reflects an upgrade to e-Appeal, the MSPB's Web-based application for electronic filing (e-filing). Previously, only new appeals could be filed via the Internet, with electronic filing thereafter restricted to using e-mail. E-filers can now use the e-Appeal site to file almost any type of pleading.

DATES: This rule is effective September 27, 2004. Written comments should be submitted on or before November 29, 2004.

ADDRESSES: Submit comments to the Office of the Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419. Comments may be submitted by regular mail to this address, by facsimile to (202) 653-7130, or by e-mail to mspb@mspb.gov.

FOR FURTHER INFORMATION CONTACT: Timothy Korb, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200; fax: (202) 653-7130; or e-mail: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION: When the MSPB instituted electronic filing on October 20, 2003 (68 FR 59859), its Web-based application was available only for the filing of new appeals. The only tool available to those who wanted

to engage in e-filing thereafter was e-mail. E-Appeal (<https://e-appeal.mspb.gov>) has become quite popular over the past year, and presently accounts for about 10% of new appeals filed. By contrast, few have elected to engage in e-filing via e-mail. The Board has now upgraded e-Appeal so that it can accommodate virtually any type of pleading. Filing pleadings via e-Appeal will have several advantages for e-filers compared to filing by e-mail: (1) They will have access to context-specific Help text and links; (2) should they choose to do so, e-filers will have the option of submitting pleadings and attachments in the form of declarations made under penalty of perjury; (3) they can choose between entering their pleadings online and uploading them as electronic files; and (4) they will not be required to disclose their e-mail addresses to anyone except the MSPB.

When all participants in an appeal are e-filers, the filing process should be quick and easy. The Board as well as the parties will receive documents on the same day they are sent, rather than having to wait for mail delivery. This should facilitate quicker processing, particularly when the proceeding is pending in headquarters, because letters addressed to Washington, D.C. are first sent to Ohio for irradiation. And e-filers will be relieved of the burden of serving electronic documents on other e-filers.

Having all electronic filings go through the Board's Web-based application will enable the Board to manage these electronic documents more effectively. Because e-Appeal is now integrated with the Board's case management system and its document management system, making docket entries and placing pleadings into the appropriate electronic repository will be done automatically. Accordingly, the Board will no longer allow pleadings to be submitted via e-mail.

Electronic filing at the Board includes the following features:

- Documents can be submitted in any common electronic format, including word-processing and image formats (electronic files created by scanning paper documents). (1201.14(f)(2))
- E-filers will be able to submit "hybrid" pleadings, in which part of a pleading is submitted in electronic form, and the rest is submitted in paper form. (1201.14(g))
- Regardless of whether it is uploaded or entered online, each

pleading will be assembled into a single PDF document, which will include all electronic attachments, and which will be sequentially paginated. Pagination will enable everyone involved to make specific citations to the record.

- Before submitting an electronic pleading, e-filers will be able to review and make changes to it.
- If unable to complete a pleading while online, an e-filer will be able to save his or her work and complete it during a later session.
- E-filers will be provided a confirmation of electronic filing, and will be able to print or download a copy of the assembled pleading as a PDF document.
- Service of pleadings on other e-filers will be automated. (1201.14(h))
- Documents issued by the Board will be served on e-filers as PDF documents, which will be sent to the e-filer's e-mail address of record. (1201.14(k))
- When a party who is an individual is represented, the party and the representative can separately decide whether to register for e-filing. If only the representative registers for e-filing, the party will continue to receive documents by regular mail. (1201.14(e)(3))
- Although registration as an e-filer permits participants to file pleadings electronically, they may file any pleading, or portion of a pleading, by non-electronic means. (1201.14(e)(4))

• Registration as an e-filer can be withdrawn at any time, but while in effect the individual consents to accept electronic service of all documents issued by the Board and all pleadings submitted by other e-filers. (1201.14(e)(1), (e)(5))

Although numerous sections of the Board's regulations required minor revision in light of the upgrade to e-Appeal, the primary rules governing e-filing can be found in § 1201.14 (formerly 1201.5).

Participation in electronic filing is entirely voluntary. As before, where only one party is registered as an e-filer, the Board will set deadlines so that parties filing and receiving documents by conventional means will have adequate time to prepare and file responses.

List of Subjects**5 CFR Part 1201**

Administrative practice and procedure, Civil rights, Government employees.

5 CFR Part 1203

Administrative practice and procedure, Civil rights, Government employees.

5 CFR Part 1208

Administrative practice and procedure, Government employees, Veterans.

5 CFR Part 1209

Administrative practice and procedure, Government employees, Whistleblowing.

■ Accordingly, the Board amends 5 CFR parts 1201, 1203, 1208, and 1209 as follows:

PART 1201—[AMENDED]

■ 1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701, unless otherwise noted.

■ 2. Section 1201.4 is amended by deleting paragraph (o), and by revising paragraphs (i), and (k) through (n) as follows:

§ 1201.4 General definitions.

* * * * *

(i) *Service*. The process of furnishing a copy of any pleading to Board officials, other parties, or both, by mail, by facsimile, by commercial or personal delivery, or by electronic filing (e-filing) in accordance with § 1201.14.

* * * * *

(k) *Certificate of service*. A document certifying that a party has served copies of pleadings on the other parties or, in the case of paper documents associated with electronic filings under paragraph (g) of § 1201.14, on the Board.

(l) *Date of filing*. A document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the Board is closed for business) before its receipt. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. The date of filing by e-filing is the date of electronic submission.

(m) *Electronic filing (e-filing)*. Filing and receiving documents in electronic form in proceedings within the Board's appellate or original jurisdiction in accordance with § 1201.14.

(n) *E-filer*. A party or representative who has registered to engage in e-filing under paragraph (e) of § 1201.14.

§ 1201.5 [Redesignated and revised]

■ 3. Section 1201.5 is redesignated as § 1201.14, and revised to read as follows:

§ 1201.14 Electronic filing procedures.

(a) *General*. This section prescribes the rules and procedures by which parties and representatives to proceedings within the Board's appellate and original jurisdiction may file and receive documents in electronic form.

(b) *Matters subject to electronic filing*. Subject to the registration requirement of paragraph (e) of this section, parties and representatives may use electronic filing (e-filing) to do any of the following:

(1) File any pleading, including a new appeal, in any matter within the Board's appellate jurisdiction (§ 1201.3);

(2) File any pleading, other than the original complaint or request, in any matter within the Board's original jurisdiction (§ 1201.2);

(3) File a petition for enforcement of a final Board decision (§ 1201.182);

(4) File a motion for attorney fees as a prevailing party (§ 1201.203);

(5) File a motion for compensatory or consequential damages (§ 1201.204);

(6) Designate a representative, revoke such a designation, or change such a designation (§ 1201.31); or

(7) Notify the Board of a change in contact information such as address (geographic or electronic mail) or telephone number.

(c) *Matters excluded from electronic filing*. Electronic filing may not be used to:

(1) File the original complaint or request in a matter within the Board's original jurisdiction, which includes: a complaint filed by the Special Counsel seeking corrective or disciplinary action (§§ 1201.122, 1201.128); a request by the Special Counsel for the stay of certain personnel actions (§ 1201.134); a proposal to take action against an administrative law judge under 5 U.S.C. 7521 (§ 1201.137); or a request for a hearing on a proposed removal of a career appointee from the Senior Executive Service for performance reasons (§ 1201.143);

(2) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27);

(3) Serve a subpoena (§ 1201.83); or

(4) File a pleading with the Special Panel (§ 1201.137).

(d) *Internet is sole venue for electronic filing*. Following the instructions at the Board's e-Appeal site (<https://e-appeal.mspb.gov>) is the only method allowed for filing electronic pleadings with the Board. The Board will not accept pleadings filed by electronic mail.

(e) *Registration as an e-filer*. (1) Except when filing a new appeal within the Board's appellate jurisdiction (§ 1201.3), no party or representative may file an electronic pleading with the Board unless he or she has registered with the Board as an e-filer. Registration as an e-filer constitutes consent to accept electronic service of pleadings filed by other registered e-filers and documents issued by the Board.

(2) The exclusive means for a party or representative to register as an e-filer during a Board proceeding is to follow the instructions at the Board's e-Appeal site (<https://e-appeal.mspb.gov>).

(3) When a party who is an individual is represented, the party and the representative can make separate determinations whether to register as an e-filer. For example, an appellant may file and receive pleadings and Board documents by non-electronic means, even though his or her representative has registered as an e-filer. Similarly, when a party has more than one representative, each representative has the choice of registering as an e-filer or filing and receiving pleadings and Board documents by non-electronic means.

(4) A party or representative who has registered as an e-filer may file any pleading, or portion of a pleading as described in paragraph (g) of this section, by non-electronic means.

(5) A party or representative may withdraw his or her registration as an e-filer. Such withdrawal means that, effective upon the Board's receipt of this withdrawal, pleadings and Board documents will no longer be served on that person in electronic form. A withdrawal of registration as an e-filer may be filed at the Board's e-Appeal site, in which case service is governed by paragraph (h) of this section, or by non-electronic means, in which case service is governed by section 1201.26(b) of this part.

(f) *Form of electronic pleadings—(1) Options for e-filing*. An appellant or representative using e-Appeal to file a new appeal within the Board's appellate jurisdiction (§ 1201.3) must complete the structured interview at the Board's e-Appeal site (<https://e-appeal.mspb.gov>). For all other pleadings, the e-filer has the option of uploading an electronic file or entering

the text of the pleading online. Regardless of the means of filing a particular pleading, the e-filer will be allowed to submit supporting documentation as attachments, in both electronic and paper form, as described in paragraphs (f)(2) and (f)(3) of this section.

(2) *Electronic formats allowed.* The Board will accept numerous electronic formats, including word-processing and spreadsheet formats, Portable Document Format (PDF), and image files (files created by scanning). A list of formats allowed can be found at the Board's e-Appeal site. All electronic documents must be formatted so that they will print on standard 8½ inch by 11 inch paper.

(3) *Limitation on number of electronic attachments.* E-filers may upload up to three electronic files as supporting documentation, in addition to the document that constitutes the primary pleading. There is no limit on the number of non-electronic documents that may be submitted as attachments under paragraph (g) of this section.

(g) *Hybrid pleadings that include both electronic and paper documents.* An e-filer may file a hybrid pleading in which part of the pleading is submitted electronically, and part of the pleading consists of one or more paper documents filed by non-electronic means. If one or more parts of a hybrid pleading are untimely filed, the judge or the Clerk may reject the untimely part or parts while accepting timely filed parts of the same pleading.

(h) *Service of electronic pleadings.* The Board will serve electronic pleadings on other parties and representatives who have registered as e-filers. The Board's e-Appeal application will notify the e-filer of all documents that must be served by non-electronic means. The e-filer must certify that he or she will serve all such documents no later than the first business day after the electronic submission.

(i) *Documents requiring a signature.* An electronic document filed by a party who has registered as an e-filer pursuant to this section shall be deemed to be signed for purposes of any regulation in part 1201, 1203, 1208, or 1209 of this title that requires a signature.

(j) *Affidavits and Declarations made under penalty of perjury.* Registered e-filers may submit electronic pleadings in the form of declarations made under penalty of perjury under 28 U.S.C. 1746, as described in Appendix IV of this part. If the declarant is someone other than the e-filer, a physically signed affidavit or declaration should be uploaded as an image file, or submitted separately as a

non-electronic document under paragraph (g) of this section.

(k) *Issuance of Board documents to e-filers.* The Board's notices, orders, and decisions will be served on e-filers as PDF files attached to electronic mail messages, which will be sent to the electronic mail address supplied by the e-filer.

(l) *Date electronic documents are received.* Pleadings and Board documents served electronically on registered e-filers are deemed received on the date of electronic submission or, if submitted on a weekend or federal holiday, on the first business day after the electronic submission.

(m) *Authority of a judge or the Clerk to regulate e-filing—*(1) In the event that the Board or any party encounters repeated or unexplained difficulties filing, serving, or receiving electronic documents, the judge or the Clerk of the Board may order one or more parties to cease filing pleadings by e-filing, cease serving documents in electronic form, or take both these actions. In such instances, filing and service shall be undertaken in accordance with § 1201.26. The authority to order the cessation of the use of electronic filing may be for a particular submission, for a particular time frame, or for the duration of the pendency of a case.

(2) A judge or the Clerk of the Board may require that any document filed electronically be submitted in non-electronic form and bear the written signature of the submitter. A party receiving such an order from a judge or the Clerk of the Board shall, within 5 calendar days, serve on the judge or Clerk of the Board by regular mail, by facsimile, or by commercial or personal delivery a signed, non-electronic copy of the document.

■ 4. Section 1201.22 is amended by revising paragraphs (d) and (e), and by deleting paragraph (f) to read as follows:

§ 1201.22 Filing an appeal and responses to appeals.

* * * * *

(d) *Method of filing an appeal.* Filing of an appeal must be made with the appropriate Board office by commercial or personal delivery, by facsimile, by mail, or by electronic filing under § 1201.14.

(e) *Filing a response.* Filing of a response must be made with the appropriate Board office by commercial or personal delivery, by facsimile, by mail, or by electronic filing under § 1201.14.

■ 5. Section 1201.24 is amended by revising paragraphs (a) introductory text, (a)(9), and (c) to read as follows:

§ 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 appeals must contain the following:

* * * * *

(9) The signature of the appellant or, if the appellant has a representative, of the representative. If the appeal is electronically filed, compliance with § 1201.14 and the directions at the Board's e-Appeal site (<https://e-appeal.mspb.gov>) satisfy the signature requirement.

* * * * *

(c) *Use of Board form or electronic filing.* An appellant may comply with paragraph (a) of this section, and with § 1201.31, by completing MSPB Form 185, or by completing all requests for information marked as required at the e-Appeal site (<https://e-appeal.mspb.gov>). MSPB Form 185 can be accessed at the Board's Web site (<http://www.mspb.gov>).

■ 6. Section 1201.26 is amended by revising paragraphs (a), (b)(2), and (c) to read as follows:

§ 1201.26 Number of pleadings, service, and response.

(a) *Number.* The appellant must file two copies of both the appeal and all attachments with the appropriate Board office, unless the appellant files an appeal in electronic form under § 1201.14.

* * * * *

(b)(2) *Service by the parties.* The parties must serve on each other one copy of each pleading, as defined by § 1201.4(b), and all documents submitted with it, except for the appeal. They may do so by mail, by facsimile, by commercial or personal delivery, or by electronic filing in accordance with § 1201.14. Documents and pleadings must be served upon each party and each representative. A certificate of service stating how and when service was made must accompany each pleading. The parties must notify the appropriate Board office and one another, in writing, of any changes in the names, or addresses on the service list.

(c) *Paper size.* Pleadings and attachments must be filed on 8½ by 11-inch paper, except for good cause shown. This requirement enables the Board to comply with standards established for U.S. courts. All

electronic documents must be formatted so that they will print on 8½ by 11-inch paper.

■ 7. Section 1201.27 is amended by revising paragraph (d) to read as follows:

§ 1201.27 Class appeals.

* * * * *

(d) *Electronic filing.* A request to hear a case as a class appeal and any opposition thereto may not be filed in electronic form. Subsequent pleadings may be filed and served in electronic form, provided that the requirements of § 1201.14 are satisfied.

■ 8. Section 1201.31 is amended by revising paragraph (a) to read as follows:

§ 1201.31 Representatives.

(a) *Procedure.* A party to an appeal may be represented in any matter related to the appeal. Parties may designate a representative, revoke such a designation, and change such a designation in a signed submission, submitted as a pleading.

* * * * *

■ 9. Section 1201.114 is amended by revising paragraphs (c) and (h) to read as follows:

§ 1201.114 Filing petition and 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 commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with § 1201.14.

* * * * *

(h) *Service.* A party submitting a pleading must serve a copy of it on each party and on each representative, as required by paragraph (b)(2) of § 1201.26.

■ 10. Section 1201.122 is amended by revising paragraphs (b) and (e) to read as follows:

§ 1201.122 Filing complaint; serving documents on parties.

* * * * *

(b) *Initial filing and service.* The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The Special Counsel must serve a copy of the complaint on

each party or the party's representative, as shown on the certificate of service. The initial filing in a complaint may not be submitted in electronic form.

* * * * *

(e) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

■ 11. Section 1201.128 is amended by revising paragraphs (b) and (e) to read as follows:

§ 1201.128 Filing complaint; serving documents on parties.

* * * * *

(b) *Initial filing and service.* The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative, and each person on whose behalf the corrective action is brought. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative, and each person on whose behalf the corrective action is brought. The Special Counsel must serve a copy of the complaint on the agency or its representative, and each person on whose behalf the corrective action is brought, as shown on the certificate of service. The initial filing in a complaint may not be submitted in electronic form.

* * * * *

(e) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

■ 12. Section 1201.134 is amended by revising paragraphs (d) and (g) to read as follows:

§ 1201.134 Deciding official; filing stay request; serving documents on parties.

* * * * *

(d) *Initial filing and service.* The Special Counsel must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The Special Counsel must serve a copy of the request on the agency or its representative, as shown on the certificate of service. The initial

filing in a request for a stay may not be submitted in electronic form.

* * * * *

(g) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

■ 13. Section 1201.137 is amended by revising paragraphs (c) and (f) to read as follows:

§ 1201.137 Covered actions; filing complaint; serving documents on parties.

* * * * *

(c) *Initial filing and service.* The agency must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The agency must serve a copy of the complaint on each party or the party's representative, as shown on the certificate of service. The initial filing in a complaint may not be submitted in electronic form.

* * * * *

(f) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

■ 14. Section 1201.143 is amended by revising paragraphs (c) and (f) to read as follows:

§ 1201.143 Right to hearing; filing complaint; serving documents on parties.

* * * * *

(c) *Initial filing and service.* The appointee must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the agency proposing the appointee's removal or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The appointee must serve a copy of the request on the agency or its representative, as shown on the certificate of service. The initial filing may not be submitted in electronic form.

* * * * *

(f) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

■ 15. Section 1201.153 is amended by revising paragraph (b) to read as follows:

§ 1201.153 Contents of appeal.

(b) *Use of Board form or Internet filing option.* An appellant may comply with paragraph (a) of this section by completing MSPB Form 185, or by completing all requests for information marked as required at the e-Appeal site (<https://e-appeal.mspb.gov>). MSPB Form 185 can be accessed at the Board's Web site (<http://www.mspb.gov>).

■ 16. Section 1201.173 is amended by revising paragraph (k) to read as follows:

§ 1201.173 Practices and procedures of Special Panel.

(k) *Electronic filing.* Pleadings in matters before the Special Panel may not be filed or served in electronic form.

PART 1203—[AMENDED]

■ 17. The authority citation for part 1203 continues to read as follows:

Authority: 5 U.S.C. 1204(a), 1204(f), and 1204(h).

■ 18. Section 1203.13 is amended by revising paragraph (d) to read as follows:

§ 1203.13 Filing pleadings.

(d) *Method and date of filing.* An initial filing in a request for review of a regulation may be filed with the Office of the Clerk by mail, by commercial or personal delivery, or by facsimile. Pleadings, other than an initial request for a regulation review under this part, may be filed with the Office of the Clerk by mail, by commercial or personal delivery, by facsimile, or by e-filing in accordance with § 1201.14 of this chapter. If the document was submitted by certified mail, it is considered to have been filed on the mailing date. If it was submitted by regular mail, it is presumed to have been filed five days before the Office of the Clerk receives it, in the absence of evidence contradicting that presumption. If it was delivered personally, it is considered to have been filed on the date the Office of the Clerk receives it. If it was submitted by facsimile, the date of the facsimile is considered to be the filing date. If it was submitted by commercial delivery, the date of filing is the date it was delivered to the commercial delivery service. If it was submitted by e-filing, it is considered to have been filed on the date of electronic submission.

■ 19. Section 1203.14 is amended by revising paragraph (c) to read as follows:

§ 1203.14 Serving documents.

(c) *Electronic filing.* Other than the initial request for a regulation review, pleadings in a regulation review proceeding may be filed with the Board and served upon other parties by electronic filing, provided the requirements of § 1201.14 of this chapter are satisfied.

■ 20. Section 1203.22 is amended by revising paragraph (a) to read as follows:

§ 1203.22 Enforcement of order.

(a) Any party may ask the Board to enforce a final order it has issued under this part. The request may be made by filing a petition for enforcement with the Office of the Clerk of the Board and by serving a copy of the petition on each party to the regulation review. The request may be filed in electronic form, provided the requirements of § 1201.14 are satisfied. The petition must include specific reasons why the petitioning party believes that there has been a failure to comply with the Board's order.

PART 1208—[AMENDED]

■ 21. The authority citation for part 1208 continues to read as follows:

Authority: 5 U.S.C. 1204(h), 3330a, 3330b, 38 U.S.C. 4331.

■ 22. Section 1208.13 is amended by revising paragraph (c) to read as follows:

§ 1208.13 Content of appeal; request for hearing.

(c) *Electronic filing.* An appeal may be filed electronically by using the Board's e-Appeal site (<https://e-appeal.mspb.gov>) in accordance with § 1201.14 of this chapter.

■ 23. Section 1208.14 is revised to read as follows:

§ 1208.14 Representation by Special Counsel.

The Special Counsel may represent an appellant in a USERRA appeal before the Board. A written statement (in any format) that the appellant submitted a written request to the Secretary of Labor that the appellant's complaint under 38 U.S.C. 4322(a) be referred to the Special Counsel for litigation before the Board, and that the Special Counsel has agreed to represent the appellant, will be accepted as the written designation of representative required by 5 CFR 1201.31(a). The designation of representative may be filed by electronic filing, provided the requirements of § 1201.14 of this chapter are satisfied.

■ 24. Section 1208.23 is amended by revising paragraph (c) to read as follows:

§ 1208.23 Content of appeal; request for hearing.

(c) *Electronic filing.* An appeal may be filed electronically by using the Board's e-Appeal site (<https://e-appeal.mspb.gov>) in accordance with § 1201.14 of this chapter.

■ 25. Section 1208.24 is amended by revising paragraph (a) to read as follows:

§ 1208.24 Election to terminate MSPB proceeding.

(a) *Election to terminate.* At any time beginning on the 121st day after an appellant files a VEOA appeal with the Board, if a judicially reviewable Board decision on the appeal has not been issued, the appellant may elect to terminate the Board proceeding as provided under 5 U.S.C. 3330b and file a civil action with an appropriate United States district court. Such election must be in writing, signed, filed with the Board office where the appeal is being processed, and served on the parties. The election is effective immediately on the date of receipt by the Board office where the appeal is being processed. The election may be filed by electronic filing, provided the requirements of § 1201.14 of this chapter are satisfied.

PART 1209—[AMENDED]

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

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

■ 27. Section 1209.6 is amended by revising paragraph (d) to read as follows:

§ 1209.6 Content of appeal; right to hearing.

(d) *Electronic filing.* An appeal may be filed electronically by using the Board's e-Appeal site (<https://e-appeal.mspb.gov>) in accordance with § 1201.14 of this chapter.

■ 28. Section 1209.8 is amended by deleting paragraphs (e) and (f), and by revising paragraph (d) to read as follows:

§ 1209.8 Filing a request for a stay.

(d) *Method of filing.* A stay request must be filed with the appropriate Board regional or field office by mail, by facsimile, by commercial or personal delivery, or by electronic filing in accordance with § 1201.14 of this chapter.

Dated: September 22, 2004.

Bentley M. Roberts, Jr.,
Clerk of the Board.

[FR Doc. 04-21589 Filed 9-24-04; 8:45 am]

BILLING CODE 7400-01-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 04-038-2]

Karnal Bunt; Regulated Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the regulations to make changes to the list of areas regulated because of Karnal bunt, a fungal disease of wheat. The interim rule removed certain areas in Arizona and Texas from the list of regulated areas based on our determination that the fields in those areas met our criteria for release from regulation. That action was necessary to relieve restrictions that were no longer warranted.

EFFECTIVE DATE: The interim rule became effective on May 12, 2004.

FOR FURTHER INFORMATION CONTACT: Dr. Matthew Royer, Senior Program Adviser, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737-1236; (301) 734-7819.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective May 12, 2004, and published in the **Federal Register** on May 17, 2004 (69 FR 27821-27823, Docket No. 04-038-1), we amended the regulations in "Subpart—Karnal Bunt" (7 CFR 301.89-1 through 301.89-16) by removing certain areas in Arizona and Texas from the list of quarantined areas in § 301.89-3(e). That action, which was based on our determination that the fields in these areas met our criteria for release from regulation, relieved restrictions on the interstate movement of regulated articles from those areas that were no longer warranted.

Comments on the interim rule were required to be received on or before July 16, 2004. We received one comment by that date, from a private citizen. The commenter stated that the interstate movement of all wheat from States

containing regulated areas should be prohibited. Given that the regulations require wheat grown in regulated areas to be tested prior to movement and restrict the interstate movement of wheat found to be Karnal-bunt positive, we do not believe it is necessary to prohibit the interstate movement of all wheat from States containing regulated areas in order to prevent the spread of Karnal bunt.

Therefore, for the reasons given in the interim rule and in this document, we are adopting the interim rule as a final rule without change.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

PART 301—DOMESTIC QUARANTINE NOTICES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 301 and that was published at 69 FR 27821-27823 on May 17, 2004.

Authority: 7 U.S.C. 7701-7772; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75-15 also issued under Sec. 204, Title II, Pub. L. 106-113, 113 Stat. 1501A-293; sections 301.75-15 and 301.75-16 also issued under Sec. 203, Title II, Pub. L. 106-224, 114 Stat. 400 (7 U.S.C. 1421 note).

Done in Washington, DC, this 20th day of September 2004.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04-21575 Filed 9-24-04; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003-NM-90-AD; Amendment 39-13804; AD 2004-19-10]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 737-100, -200, -200C, -300, -400, and -500 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 737-100, -200, -200C, -300, -400, and -500 series airplanes, that requires repetitive inspections for corrosion and cracking of the pivot hinge pins of the horizontal stabilizer, certain follow-on inspections, and replacement of the hinge pins with new or serviceable pins if necessary. This action is necessary to prevent failure of the outer and inner hinge pins due to corrosion or cracking, which could allow the pins to migrate out of the joint and result in intermittent movement of the horizontal stabilizer structure and consequent loss of controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective November 1, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of November 1, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

FOR FURTHER INFORMATION CONTACT: Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 917-6440; fax (425) 917-6590.