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***VIA* e-mail to mspb@mspb.gov**

William D. Spencer
Clerk of the Board
Merit Systems Protection Board
1615 M Street NW
Washington, DC 20419

Re: Comments Regarding Proposed Rule

Dear Mr. Spencer:

Passman & Kaplan, P.C. (P&K) respectfully submits the following comments in response to the Merit System Protection Board's Proposed Rule concerning 5 CFR Parts 1200, 1201, 1203, 1208 and 1209, 77 Fed.Reg. 22,663 (June 7, 2012). P&K generally supports the Board's overall proposal to review and update its procedural regulations, and agrees with most of the Board's proposed revisions appearing in the Proposed Rule. However, P&K has the following specific concerns and objections with certain of the modifications identified in the Proposed Rule:

5 C.F.R. § 1201.14(c): P&K is concerned about the present phrasing of the proposed new 5 C.F.R. § 1201.14(c)(4). The present Transportation Security Administration (TSA) regulations defining Sensitive Security Information (SSI) are extremely broad, and as such would interfere with TSA appellants' ability to e-file their cases. For example, a federal air marshal written self-identification as a federal air marshal is itself deemed SSI, and so a federal air marshal appellant would not be able to e-file any document listing their own job title. *See* 49 C.F.R. § 15.5(b)(11)(i)(D). Indeed, TSA may be able to retroactively remove appeals from e-filing, as current Board precedent permits TSA to retroactively designate information as SSI, so long as the designation is done consistent with contemporaneous TSA SSI regulations. *See, e.g., MacLean v. Dept. of Homeland Security,* 112 M.S.P.R. 4 (2009), *aff'd* 2011 MSPB 70 (2011).

P&K also opposes the continued inclusion of class appeal-related filings and requests to appear as *amicus curiae* in the exclusion from e-filing, as currently appearing in proposed 5 C.F.R. § 1201.14(c)(1, 6). P&K believes that any possible Privacy Act concerns could be easily addressed and should be revisited by the Board, especially in light of the current Board's policy favoring more oral argument and *amicus* briefing in cases of public policy import.

5 C.F.R. § 1201.22(b)(3): P&K believes that the regulation should be modified to clarify that, in the event of a date discrepancy between the date of receipt by the appellant and the date of receipt by the appellant's representative, then the date of the representative's receipt should control. This approach is somewhat similar to that which has been used by EEOC for many years under 29 C.F.R. § 1614.605(d).

5 C.F.R. § 1201.28: First, P&K is aware of numerous cases under the present regulations in which administrative judges have even rejected joint requests for case suspension. P&K believes that these abuses of discretion by administrative judges need to be curtailed. To correct the disadvantages caused by agencies' superior position in collecting information prior to imposing adverse actions, which renders discovery far more important in practice for appellants than for agencies, P&K believes that granting requests for case suspension should be mandatory if requested by appellants and/or by the parties jointly.

The proposed revisions to 5 C.F.R. § 1201.28 do not provide the administrative judges with any standards for exercising their discretion in adjudicating requests for case suspensions. Due to the abuses noted in the prior paragraph, P&K believes that, for any case suspension request that the Administrative Judge is not required to automatically grant, the Board should set standards to guide the administrative judge's exercise of discretion in deciding case suspension requests.

P&K believes that proposed revised 5 C.F.R. § 1201.28 who needs to be modified to deal with motions to compel discovery where discovery continues during case suspension. Under both the current and the proposed revised 5 C.F.R. §§ 1201.28, 1201.73, parties receiving deficient discovery responses are often required to move to compel discovery during the case suspension period—and such a filing could potentially terminate a case suspension under proposed revised 5 C.F.R. § 1201.28(b). Allowing a second case suspension period does not solve this problem, as the adjudication of the pending motion to compel discovery would be presumably stopped (with all other case processing) during the second suspension period, thus leaving the dispute on written discovery unresolved. To resolve this issue, 5 C.F.R. § 1201.28(b) should specify that adjudication of a motion to compel discovery does not require termination of case suspension.

Finally, P&K proposes that an additional section should be added to the regulation (perhaps as a new 5 C.F.R. § 1201.28(f)) to provide that, in the event that the parties jointly request that the case be referred for mediation (such as under the Board's Mediation Appeals Program (MAP)), then the administrative judge shall be required to place the case on case suspension of indefinite duration, until such time as the case is referred back to the administrative judge by the MAP coordinator or mediator (either because the case settled or because mediation was unsuccessful).

5 C.F.R. § 1201.51: P&K is aware of numerous cases in which administrative judges have issued orders scheduling hearings and prehearing deadlines (including prehearing submission deadlines) far before the parties have had the chance to complete discovery. This practice is highly prejudicial to appellants through denial of their ability to conduct discovery in support of their appeals. Further, many administrative judges unilaterally select hearing dates, and then burden the parties with filing verified motions to reschedule pursuant to 5 C.F.R. § 1201.51(c); in some cases administrative judges have denied *unopposed* requests to reschedule

hearings (including for self-interested reasons such as the administrative judge's own personal scheduled leave). The Proposed Rule seemingly takes the approach of cutting short discovery to meet the prehearing dates set by the administrative judge (*see* proposed revised 5 C.F.R. § 1201.73(d)(4)), when the prehearing deadlines should be set to accommodate discovery.

P&K believes that these abuses of discretion by administrative judges need to be curtailed, and to do so supports modifying 5 C.F.R. § 1201.51 to restrict administrative judges' scheduling authority in three respects. First, 5 C.F.R. § 1201.51 should require that, before setting the hearing date, the administrative judge should convene a prehearing conference with the parties to establish dates acceptable (to the extent practicable) to both the administrative judge and to the parties. Second, 5 C.F.R. § 1201.51 should require administrative judges, when setting deadlines, to allow the parties sufficient time to complete the discovery process (including depositions and adjudication of discovery motions) prior to prehearing and hearing. Third, 5 C.F.R. § 1201.51 should require that, absent the consent of the parties, the administrative judge may set the hearing no sooner than 90 days from the Acknowledgement Order, and the administrative judge may set the deadline for prehearing submissions no sooner than 80 days from the Acknowledgement Order.

5 C.F.R. § 1201.52: P&K vigorously objects to permitting administrative judges to close hearings "when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding". P&K believes that hearing should always remain public, save to the limited extent necessary to protect classified information, or in cases where the administrative judge has granted a motion for a pseudonymous/anonymous "John or Jane Doe" appeal under MSPB Judges' Handbook, Ch. 2, § 5.

5 C.F.R. § 1201.61: Although not specifically identified in the Proposed Rule, P&K believes that this regulation should be modified in the Final Rule as part of the overall revisions to the Board's procedural regulations. Specifically, the regulation should be clarified to state that documentary evidence (in addition to testimony) is included in the record for review by the Board, through addition of an extra sentence at the end of the regulation, "Furthermore, excluded evidence shall become part of the record, segregated and identified as 'excluded evidence.'" P&K believes that this modification is necessary to ensure that the Board can properly review and oversee administrative judges' admissibility decisions at hearing.

5 C.F.R. § 1201.73: As noted *supra* concerning 5 C.F.R. § 1201.51(d)(4), P&K opposes limiting the discovery period to meet prehearing dates set by the administrative judge, and instead favors setting prehearing deadlines to accommodate completion of discovery.

P&K has observed problems with the present discovery initiation deadlines in cases where the Board's jurisdiction over the appeal is challenged (either through a motion to dismiss, or more frequently through a *sua sponte* order to show cause). Specifically, the discovery initiation often deadlines overlap with the parties' briefing schedule for briefing jurisdictional issues. To address this recurrent problem—and to ensure that the Board has the benefit of well-drafted jurisdictional submissions to facilitate appellate review—P&K believes that an additional provision should be incorporated into 5 C.F.R. § 1201.73 mandating an automatic stay of all

discovery deadlines if the Board's jurisdiction over the appeal is called into question (whether by show cause order or by motion), and that the stay shall remain in place until the jurisdictional issues are adjudicated.

Finally, P&K opposes 5 C.F.R. § 1201.73(c)(1)(i) and its requirement that the party moving to compel discovery produce "a statement showing that the information is relevant and material and that the scope of the request is reasonable". This provision seemingly requires all discovery requests to be relevant in order to be enforceable, when the proper standard for *discovery* is whether or not the information sought is likely to lead to the discovery of admissible evidence. *See, e.g.*, 5 C.F.R. § 1201.72(a). This provision is unnecessary, in that administrative judges routinely decide these issues under the present regulations without any apparent difficulty. Practice in the federal courts place the burden of raising objections on the basis of relevance (or burdensomeness, in the case of scope issues) on the party resisting discovery requests; the proposed change would deviate from that practice and place that burden upon the requesting party/movant. *See, e.g., United Oil Co., Inc. v. Parts Associates, Inc.*, 227 F.R.D. 404. 411 (D.Md. 2005). Finally, 5 C.F.R. § 1201.73(c)(1)(i) would be an extra formalistic burden making it even harder for *pro se* appellants to be able to successfully represent themselves at the Board.

5 C.F.R. § 1209.2: P&K believes that the proposed regulation needs to clarify that an election of the Independent Right of Action (IRA) procedure is solely made if the appellant files a whistleblower reprisal complaint on the *final* adverse action, and not if the appellant files with the Office of Special Counsel (OSC) regarding a *proposed* adverse action (*e.g.*, a notice of proposed removal). The Whistleblower Protection Act (WPA) separately protects whistleblowers against *threatened* personnel actions. *See, e.g.*, 5 U.S.C. § 2302(b)(8) ("Any employee […] shall not […] take or fail to take, *or threaten to take or fail to take*, a personnel action…" [emphasis added]). Accordingly, an appellant can hypothetically file a whistleblower reprisal claim under the WPA for a notice of proposed adverse action, and then independently file a separate reprisal claim for the final adverse action itself. P&K believes that the regulation should clearly state that no procedural election occurs when the appellant only files with OSC regarding a threatened personnel action, and that a procedural election for the IRA process only occurs if the appellant files with OSC regarding the final adverse action itself.

This distinction is especially important due to the stay mechanism of 5 U.S.C. § 1214(b)(1), Appellants facing a notice of proposed adverse action will contact OSC for assistance in seeking a stay from the Board of the final adverse action before it is implemented, allowing OSC time to investigate the whistleblower reprisal claims on the threatened personnel action. P&K strongly believes that appellants should not be required to choose between seeking a stay and their right to a merits appeal of the ultimate adverse action outside of the IRA framework.

Again, P&K appreciates the opportunity to comment on the proposed regulations, and wishes to thank the Board for its attention and consideration.

Respectfully submitted,

Joseph V. Kaplan
Passman & Kaplan, P.C.