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*Commissioner, U.S. Customs and Border Protection.*  
 Approved: October 28, 2011.  
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*Deputy Assistant Secretary of the Treasury.*  
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**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**29 CFR Part 1980**

[Docket Number: OSHA-2011-0126]

RIN 1218-AC53

**Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended**

**AGENCY:** Occupational Safety and Health Administration, Labor.

**ACTION:** Interim Final Rule; request for comments.

**SUMMARY:** The Occupational Safety and Health Administration (OSHA) is amending the regulations governing employee protection (“retaliation” or “whistleblower”) claims under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley” or “Act”), which was amended by sections 922 and 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, enacted on July 21, 2010. Public Law 111-203. These revisions to the Sarbanes-Oxley whistleblower regulations clarify and improve the procedures for handling Sarbanes-Oxley whistleblower complaints and implement statutory changes enacted into law as part of the 2010 statutory amendments. These changes to the Sarbanes-Oxley whistleblower regulations also make the procedures for handling retaliation complaints under Sarbanes-Oxley more consistent with OSHA’s procedures for handling complaints under the employee protection provisions of the Surface Transportation Assistance Act of 1982,

29 CFR part 1978; the National Transit Systems Security Act and the Federal Railroad Safety Act, 29 CFR part 1982; the Consumer Product Safety Improvement Act of 2008, 29 CFR part 1983; and the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as amended, 29 CFR part 24.

**DATES:** This interim final rule is effective on November 3, 2011. Comments and additional materials must be submitted (post-marked, sent or received) by January 3, 2012.

**ADDRESSES:** You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

*Fax:* If your submissions, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648.

*Mail, hand delivery, express mail, messenger or courier service:* You must submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA-2011-0126, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor’s and Docket Office’s normal business hours, 8:15 a.m.–4:45 p.m., e.t.

*Instructions:* All submissions must include the Agency name and the OSHA docket number for this rulemaking (Docket No. OSHA-2011-0126). Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting personal information such as social security numbers and birth dates.

*Docket:* To read or download submissions or other material in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket are listed in the <http://www.regulations.gov> index, however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site.

All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

**FOR FURTHER INFORMATION CONTACT:** Sandra Dillon, Acting Director, Office of the Whistleblower Protection Program, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3610, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693-2199. This is not a toll-free number. This **Federal Register** publication is available in alternative formats. The alternative formats are large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System) and audiotape.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203, (Dodd-Frank) amended the Sarbanes-Oxley whistleblower provision, 18 U.S.C. 1514A. The regulatory revisions described herein reflect these statutory amendments and also seek to clarify and improve OSHA’s procedures for handling Sarbanes-Oxley whistleblower claims. To the extent possible within the bounds of applicable statutory language, these revised regulations are designed to be consistent with the procedures applied to claims under other whistleblower statutes administered by OSHA, including the Surface Transportation Assistance Act of 1982 (STAA), 29 CFR part 1978; the National Transit Systems Security Act (NTSSA) and the Federal Railroad Safety Act (FRSA), 29 CFR part 1982; the Consumer Product Safety Improvement Act of 2008 (CPSIA), 29 CFR part 1983; and the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as amended, 29 CFR part 24.

Responsibility for receiving and investigating complaints under Sarbanes-Oxley has been delegated to the Assistant Secretary of Labor for Occupational Safety and Health (Secretary of Labor’s Order No. 4-2010 (Sept. 2, 2010), 75 FR 55355 (Sept. 10, 2010)). Hearings on determinations by the Assistant Secretary are conducted by

the Office of Administrative Law Judges, and appeals from decisions by administrative law judges (ALJs) are decided by the Administrative Review Board (ARB) (Secretary of Labor's Order No. 1–2010 (Jan. 15, 2010), 75 FR 3924 (Jan. 25, 2010)).

## II. Summary of Statutory Changes to the Sarbanes-Oxley Whistleblower Provision

Dodd-Frank, enacted on July 21, 2010, amended the Sarbanes-Oxley whistleblower provision to make several substantive changes. First, section 922(b) of Dodd-Frank added protection for employees from retaliation by nationally recognized statistical rating organizations (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c)) or their officers, employees, contractors, subcontractors, and agents.<sup>1</sup> Second, section 922(c) of Dodd-Frank extended the statutory filing period for retaliation complaints under Sarbanes-Oxley from 90 to 180 days after the date on which the violation occurs or after the date on which the employee became aware of the violation. Section 922(c) of Dodd-Frank also provided parties with a right to a jury trial in district court actions brought under Sarbanes-Oxley's "kickout" provision, 18 U.S.C. 1514A(b)(1)(B), which provides that, if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such action without regard to the amount in controversy. Third, section 922(c) amended Sarbanes-Oxley to state that the rights and remedies provided for in 18 U.S.C. 1514A may not be waived by any agreement, policy form,

or condition of employment, including by a predispute arbitration agreement, and to provide that no predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

In addition, section 929A of Dodd-Frank clarified that companies covered by the Sarbanes-Oxley whistleblower provision include any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company. As explained in *Johnson v. Siemens Technologies, Inc.*, ARB No. 08–032, 2011 WL 1247202, at \*11 (Mar. 31, 2011), section 929A merely clarified that subsidiaries and affiliates are covered under the Sarbanes-Oxley whistleblower provision. Section 929A applies to all cases currently pending before the Secretary.

Dodd-Frank left the remaining requirements of the Sarbanes-Oxley whistleblower provision unchanged. Sarbanes-Oxley continues to provide that proceedings under the Act will be governed by the rules and procedures and burdens of proof of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. 42121(b). Sarbanes-Oxley continues to authorize an award to a prevailing employee of make-whole relief, including reinstatement with the same seniority status that the employee would have had but for the retaliation, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees and reasonable attorney's fees. See 18 U.S.C. 1514A(c)(2).

## III. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part are being revised to reflect the 2010 Dodd-Frank statutory amendments, to improve the procedures for handling Sarbanes-Oxley whistleblower cases, and to make the Sarbanes-Oxley whistleblower regulations more consistent with the regulations that OSHA has promulgated for the administration of other whistleblower programs to the extent possible within the bounds of the applicable statutory language.

These regulatory revisions make several non-substantive changes in terminology. First, cases under the

whistleblower provision of Sarbanes-Oxley will now be referred to as actions alleging "retaliation" rather than "discrimination." This change is not intended to have substantive effect. It simply reflects the fact that claims brought under the whistleblower provisions are prototypical retaliation claims. A retaliation claim is a specific type of discrimination claim that focuses on the actions taken as a result of an employee's protected activity rather than as a result of an employee's characteristics (e.g., race, gender, or religion).

Second, these rules previously referred to persons named in Sarbanes-Oxley whistleblower complaints as "named persons," but in the revised regulations they will be referred to as "respondents." Third, rather than referring to an employer's "unfavorable personnel action," these revisions use the term "adverse action." Again, these changes are not intended to have any substantive impact on the handling of Sarbanes-Oxley whistleblower cases. The revisions simply reflect a preference for more conventional terminology. These updated terms are already used in OSHA's procedural rules for handling whistleblower complaints under several other statutes, including STAA, 29 CFR part 1978; NTSSA and FRSA, 29 CFR part 1982; CPSIA, 29 CFR part 1983; and the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as amended, 29 CFR part 24. The minor changes here create consistency with these other programs and reduce possible confusion.

### Subpart A—Complaints, Investigations, Findings and Preliminary Orders

#### Section 1980.100 Purpose and Scope

This section describes the purpose of the regulations implementing Sarbanes-Oxley and provides an overview of the procedures covered by these regulations. This section has been revised to reflect the 2010 statutory amendments to Sarbanes-Oxley.

#### Section 1980.101 Definitions

This section includes general definitions applicable to Sarbanes-Oxley's whistleblower provision. The definition of the term "Act" has been revised to incorporate the 2010 Dodd-Frank statutory amendments within that definition. Also, consistent with the recently promulgated interim final rules under STAA, 29 CFR part 1978; NTSSA and FRSA, 29 CFR part 1982; and CPSIA, 29 CFR part 1983, a new definition of "business days" is being

<sup>1</sup> Section 3(a) of the Securities Exchange Act of 1934 defines nationally recognized statistical rating organization as a credit rating agency that—

(1) issues credit ratings certified by qualified institutional buyers, in accordance with 15 U.S.C. 78o–7(a)(1)(B)(ix), with respect to—

(i) financial institutions, brokers, or dealers;

(ii) insurance companies;

(iii) corporate issuers;

(iv) issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations, as in effect on September 29, 2006);

(v) issuers of government securities, municipal securities, or securities issued by a foreign government; or

(vi) a combination of one or more categories of obligors described in any of clauses (i) through (v); and

(2) is registered under 15 U.S.C. 78o–7.

15 U.S.C. 78c(a)(62).

added at paragraph 1980.101(c) of these rules to clarify that the term means days other than Saturdays, Sundays and Federal holidays.

The 2010 statutory amendments to Sarbanes-Oxley define “nationally recognized statistical rating organization” by reference to the definition in the Securities Exchange Act of 1934, codified at 15 U.S.C. 78c(a)(62), and that definition has been included here. Similarly, the definition of “company” has been revised to reflect that “company” under the Sarbanes-Oxley whistleblower provision includes any subsidiary or affiliate whose financial information is included in the consolidated financial statements of a company. Thus under these regulations “company” means any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company.

These regulatory revisions also replace the term “company representative” with the term “covered person,” which is defined in subparagraph 1980.101(f) as “any company, including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or any nationally recognized statistical rating organization, or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization.” In addition, as noted above, these rules have replaced the definition of “named person” with a definition for “respondent” at paragraph 1980.101(k), and define the term “respondent” as “the person named in the complaint who is alleged to have violated the Act.” The term “employee” in 1980.101(g) has also been revised consistent with these changes, and the term “person” in 1980.101(j) has been revised to explicitly include “companies” in the definition of “person.” The order of the terms in this section has been changed as necessary to permit the inclusion and substitution of the terms described above. These changes in terminology were needed to reflect the addition of nationally recognized statistical rating organizations and their officers, employees, contractors, subcontractors, and agents to the list of potential respondents in whistleblower cases under Sarbanes-Oxley. These changes in terminology also continue to reflect that

Sarbanes-Oxley’s statutory provisions identify individuals, as well as the employer, as potentially liable for retaliation. OSHA continues to anticipate, however, that in most cases the covered person and the respondent likely will be the complainant’s employer. The definitions in this section also continue to reflect OSHA’s longstanding position that the statute protects both employees of publicly traded companies and employees of contractors, subcontractors, and agents of publicly traded companies. See Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, Final Rule, 69 FR 52104, 52106 (Aug. 24, 2004); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellees, *Lawson v. FMR, LLC*, No. 10–2240 (1st Cir. 2011).

#### Section 1980.102 Obligations and Prohibited Acts

This section describes the activities that are protected under Sarbanes-Oxley and the conduct that is prohibited in response to any protected activities. The term “covered person” has been substituted for “company or company representative” throughout this section, and other minor changes have been made to make this section consistent with OSHA’s procedural rules implementing other whistleblower provisions. It should be noted that it is the Department’s longstanding position that complaints to an individual member of Congress under this section are protected. The individual member need not be conducting an investigation or on a Committee conducting an investigation. The critical focus is on whether the employee reported conduct that he or she reasonably believed constituted a violation of one of the enumerated laws or regulations.

#### Section 1980.103 Filing of Retaliation Complaints

This section explains the requirement for filing a retaliation complaint under Sarbanes-Oxley. The terminology used in this section has been revised to reflect the updated terminology described above. The 2010 statutory amendments changed the statute of limitations for complaints under the Act from 90 to 180 days. Now, to be timely, a complaint must be filed within 180 days of when the alleged violation occurs, or after the date on which the employee became aware of the violation. This section of the regulations has been updated to reflect that

statutory change. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), the time of the alleged violation is considered to be when the retaliatory decision has been both made and communicated to the complainant.

Additionally, section 1980.103(b) has been amended to change the requirement that whistleblower complaints to OSHA under Sarbanes-Oxley “must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” Consistent with OSHA’s procedural rules under other whistleblower statutes, complaints filed under Sarbanes-Oxley need not be in any particular form. They may be either oral or in writing. When a complaint is made orally, OSHA will reduce the complaint to writing. If a complainant is not able to file the complaint in English, the complaint may be filed in any language. With the consent of the employee, complaints may be filed by any person on the employee’s behalf.

These changes are consistent with decisions of the ARB, which have permitted oral complaints under the environmental statutes. See, e.g., *Roberts v. Rivas Environmental Consultants, Inc.*, 1996–CER–1, 1997 WL 578330, at \*3 n.6 (ARB Sept. 17, 1997) (complainant’s oral statement to an OSHA investigator, and the subsequent preparation of an internal memorandum by that investigator summarizing the oral complaint, satisfies the “in writing” requirement of CERCLA, 42 U.S.C. 9610(b), and the Department’s accompanying regulations in 29 CFR part 24); *Dartey v. Zack Co. of Chicago*, No. 1982–ERA–2, 1983 WL 189787, at \*3 n.1 (Sec’y of Labor Apr. 25, 1983) (adopting administrative law judge’s findings that complainant’s filing of a complaint to the wrong DOL office did not render the filing invalid and that the agency’s memorandum of the complaint satisfied the “in writing” requirement of the Energy Reorganization Act (“ERA”) and the Department’s accompanying regulations in 29 CFR part 24). Moreover, these changes are consistent with OSHA’s longstanding practice of accepting oral complaints filed under Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c); Section 211 of the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. 2651; Section 7 of the International Safe Container Act of 1977, 46 U.S.C. 80507; and STAA, 49 U.S.C. 31105. This change also accords with the Supreme Court’s decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, in which the Court held that the anti-

retaliation provision of the Fair Labor Standards Act, which prohibits employers from discharging or otherwise discriminating against an employee because such employee has "filed any complaint," protects employees' oral complaints of violations of the Fair Labor Standards Act. 563 U.S. \_\_\_, 131 S.Ct. 1325 (2011).

OSHA believes that the changes in this section complement the ARB's decision in *Sylvester v. Parexel International, LLC*. Noting that OSHA does not require complaints under Sarbanes-Oxley to be in any form and that under 29 CFR 1980.104(b) OSHA has a duty, if appropriate, to interview the complainant to supplement the complaint, the ARB held that the Federal court pleading standards established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S.Ct. 1937 (2009) do not apply to Sarbanes-Oxley whistleblower complaints filed with OSHA. *Sylvester v. Parexel Int'l, Inc.*, ARB Case No. 07-123, 2011 WL 2165854, at \*9-10 (ARB May 26, 2011).

#### Section 1980.104 Investigation

This section describes the procedures that apply to the investigation of Sarbanes-Oxley complaints. The terminology used in this section has been updated and the content of each paragraph has been reorganized to be consistent with OSHA's investigation procedures under other whistleblower statutes, to the extent such parallel procedures are consistent with the Act.

Paragraph (a) of this section outlines the procedures for notifying the parties and the Securities and Exchange Commission of the complaint and notifying respondents of their rights under these regulations. Paragraph (a) also provides that the respondent will receive a copy of the complaint, redacted if necessary in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. Former paragraphs (b) through (d) described the statutory burdens of proof applicable to Sarbanes-Oxley whistleblower complaints. The discussion of these burdens has been consolidated without substantive change in a single paragraph 1980.104(e), consistent with the approach taken in OSHA's procedural rules under other whistleblower statutes. Paragraph (b) now describes the procedures for the respondent to submit its response to the complaint, which were formerly contained in 1980.104(c). Paragraph (c) now addresses disclosure to the complainant of respondent's submissions to the agency that are responsive to the

complaint. The revised paragraph (c) newly specifies that throughout the investigation the agency will provide to the complainant (or the complainant's legal counsel if the complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint, and the complainant will have an opportunity to respond to those submissions. Before providing such materials to the complainant, the agency will redact them in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The agency expects that sharing information with complainants in accordance with this new provision will enhance OSHA's ability to conduct full and fair investigations and permit the Assistant Secretary to more thoroughly assess defenses raised by respondents. Paragraph (d) of this section discusses confidentiality of information provided during investigations. Paragraph (f), formerly 1980.104(e), describes the procedures the Assistant Secretary will follow prior to the issuance of findings and a preliminary order when the Assistant Secretary has reasonable cause to believe that a violation has occurred. This paragraph has been amended to provide that the complainant will be sent a copy of the materials that OSHA must send to the respondent before OSHA issues a preliminary order of reinstatement should the agency have reasonable cause to believe that such an order is appropriate. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws.

As noted above, former paragraphs (b) through (d), which describe the statutory burdens of proof applicable to Sarbanes-Oxley complaints, have been consolidated in paragraph (e). The Sarbanes-Oxley whistleblower provision mandates that an action under the Act is governed by the burdens of proof set forth in AIR21, 49 U.S.C. 42121(b). The statute requires that a complainant make an initial *prima facie* showing that protected activity was "a contributing factor" in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision. The complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial

evidence to meet the required showing. Complainant's burden may be satisfied, for example, if he or she shows that the adverse action took place shortly after protected activity, giving rise to the inference that it was a contributing factor in the adverse action.

If the complainant does not make the *prima facie* showing, the investigation must be discontinued and the complaint dismissed. See *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the ERA, which is the same as that under Sarbanes-Oxley, serves a "gatekeeping function" that "stem[s] frivolous complaints"). Even in cases where the complainant successfully makes a *prima facie* showing, the investigation must be discontinued if the employer "demonstrates, by clear and convincing evidence," that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(ii). Thus, OSHA must dismiss a complaint under Sarbanes-Oxley and not investigate (or cease investigating) if either: (1) The complainant fails to meet the *prima facie* showing that protected activity was a contributing factor in the adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statutory burdens of proof require an employee to prove that the alleged protected activity was a "contributing factor" to the alleged adverse action. If the employee proves that the alleged protected activity was a contributing factor to the adverse action, the employer, to escape liability, must prove by "clear and convincing evidence" that it would have taken the same action in the absence of the protected activity. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)). In proving that protected activity was a contributing factor in the adverse action, "a complainant need not necessarily prove that the respondent's articulated reason was a pretext in order to prevail," because a complainant alternatively can prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct," and that another reason was the complainant's protected activity. See *Klopfenstein v. PCC Flow Techs.*

*Holdings, Inc.*, ARB No. 04-149, 2006 WL 3246904, at \*13 (ARB May 31, 2006) (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)) (discussing contributing factor test under the Sarbanes-Oxley whistleblower provision), *aff'd sub nom. Klopfenstein v. Admin. Review Bd.*, U.S. Dep't of Labor, 402 F. App'x 936, 2010 WL 4746668 (5th Cir. 2010).

Sarbanes-Oxley's burdens of proof do not address the evidentiary standard that applies to a complainant's proof that protected activity was a contributing factor in an adverse action. Sarbanes-Oxley simply provides that the Secretary may find a violation only "if the complainant demonstrates" that protected activity was a contributing factor in the alleged adverse action. See 49 U.S.C. 42121(b)(2)(B)(iii). It is the Secretary's position that the complainant must prove by a "preponderance of the evidence" that his or her protected activity contributed to the adverse action; otherwise the burden never shifts to the employer to establish its defense by "clear and convincing evidence." See, e.g., *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008) ("The term 'demonstrate' [under 42121(b)(2)(B)(iii)] means to prove by a preponderance of the evidence."). Once the complainant establishes that the protected activity was a contributing factor in the adverse action, the employer can escape liability only by proving by clear and convincing evidence that it would have reached the same decision even in the absence of the prohibited rationale. The "clear and convincing evidence" standard is a higher burden of proof than a "preponderance of the evidence" standard.

#### Section 1980.105 Issuance of Findings and Preliminary Orders

As provided in the previous procedures for handling retaliation complaints under Sarbanes-Oxley, this section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, in accordance with the statute, 18 U.S.C. 1514A(c), the Assistant Secretary will order "all relief necessary to make the employee whole," including preliminary reinstatement; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation

costs, expert witness fees, and reasonable attorney's fees.

In ordering interest on back pay under Sarbanes-Oxley, the Secretary has determined that, instead of computing the interest due by compounding quarterly the Internal Revenue Service ("IRS") interest rate for the underpayment of taxes, which under 26 U.S.C. 6621 is generally the Federal short-term rate plus three percentage points, the Secretary will instead compound such interest daily. This is a change from the way interest has been calculated. See *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, and 99-012, 2000 WL 694384, at \*15-16 (ARB May 17, 2000). The Secretary believes that daily compounding of interest better achieves the make-whole purpose of a back pay award. Daily compounding of interest has become the norm in private lending and recently was found to be the most appropriate method of calculating interest on back pay by the National Labor Relations Board. See *Jackson Hospital Corp. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC*, 356 NLRB No. 8, 2010 WL 4318371, at \*3-4 (Oct. 22, 2010). Additionally, interest on tax underpayments under the Internal Revenue Code, 26 U.S.C. 6621, is compounded daily pursuant to 26 U.S.C. 6622(a).

As in the previous procedures for handling retaliation complaints under Sarbanes-Oxley, the findings and, where appropriate, preliminary order, advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings and, where appropriate, preliminary order, also advise the respondent of the right to request attorney's fees not exceeding \$1,000 regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final decision and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

Finally, the statement that reinstatement would not be appropriate where the respondent establishes that the complainant is a security risk has been removed from 1980.105(a)(1). OSHA believes that the determination of whether reinstatement is inappropriate in a given case is best made on the basis

of the facts of each case and the relevant case law, and thus it is not necessary in these procedural rules to define the circumstances in which reinstatement is not a proper remedy. This amendment also makes these procedural regulations consistent with the recent interim final rules under STAA, NTSSA, FRSA, and CPSIA, which do not contain this statement.

In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he received prior to his termination, but not actually return to work. Such "economic reinstatement" is akin to an order of front pay and is frequently employed in cases arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977. See, e.g., *Sec'y of Labor on behalf of York v. BR&D Enters., Inc.*, 23 FMSHRC 697, 2001 WL 1806020, at \*1 (June 26, 2001). Front pay has been recognized as a possible remedy in cases under Sarbanes-Oxley and other whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. *Hagman v. Washington Mutual Bank, Inc.*, 2005-SOX-73, 2006 WL 6105301, \*32 (Dec. 19, 2006) (noting that while reinstatement is the "preferred and presumptive remedy" under Sarbanes-Oxley, "[f]ront pay may be awarded as a substitute when reinstatement is inappropriate due to: (1) An employee's medical condition that is causally related to her employer's retaliatory action \* \* \*; (2) manifest hostility between the parties \* \* \*; (3) the fact that claimant's former position no longer exists \* \* \*; or (4) the fact that employer is no longer in business at the time of the decision"); see, e.g., *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), *aff'd sub nom. Hobby v. U.S. Dept. of Labor*, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (noting circumstances where front pay may be available in lieu of reinstatement but ordering reinstatement); *Brown v. Lockheed Martin Corp.*, 2008-SOX-49, 2010 WL 2054426, at \*55-56 (Jan. 15, 2010) (same). Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of Sarbanes-Oxley. When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement. An employer does not have a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA's

satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer's retaliatory discharge of the employee. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the employee continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating an employee should the employer ultimately prevail in the whistleblower adjudication.

#### Subpart B—Litigation

##### Section 1980.106 Objections to the Findings and the Preliminary Order and Request for a Hearing

As under the prior procedures for whistleblower complaints under Sarbanes-Oxley, to be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, or email communication is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections also is considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the other parties of record, as well as the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, the failure to serve copies of the objections on the other parties of record does not affect the ALJ's jurisdiction to hear and decide the merits of the case. See *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04-101, 2005 WL 2865915, at \*7 (ARB Oct. 31, 2005). Paragraph (b) has been revised to note that a respondent's motion to stay OSHA's preliminary order of reinstatement will be granted only based on exceptional circumstances. This revision clarifies that a stay is only available in "exceptional circumstances," because the Secretary believes that a stay of the Assistant Secretary's preliminary order of reinstatement under Sarbanes-Oxley would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of

success on the merits, and a balancing of possible harms to the parties and the public favors a stay.

##### Section 1980.107 Hearings

As under the prior procedures for whistleblower complaints under Sarbanes-Oxley, this section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR part 18 subpart A. It specifically allows hearings to be consolidated if both the complainant and respondent object to the findings and/or order of the Assistant Secretary. This section continues to provide that the hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted *de novo*, on the record. Administrative law judges continue to have broad discretion to limit discovery where necessary to expedite the hearing. As under the prior procedures, formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious. Minor revisions have been made throughout this section to update the terminology used.

##### Section 1980.108 Role of Federal Agencies

As noted in this section, 1980.108(a)(1) previously, the Assistant Secretary, at his or her discretion, may participate as a party or *amicus curiae* at any time in the administrative proceedings under Sarbanes-Oxley. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as *amicus curiae* before the ALJ or in the ARB proceeding. Although OSHA anticipates that ordinarily the Assistant Secretary will not participate, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary.

Consistent with OSHA's procedural rules under other whistleblower statutes, paragraph (a)(2) has been

amended to require the parties to send all documents to each other, in addition to the Assistant Secretary.

Paragraph (b) has been revised to state that "The Securities and Exchange Commission, if interested in a proceeding, may participate as *amicus curiae* at any time in the proceeding, at the Commission's discretion." This revision makes this provision consistent with the analogous provisions in the Secretary's procedural rules under other whistleblower statutes. However, the revision is not intended to materially change the circumstances in which the Securities and Exchange Commission may participate in proceedings under Sarbanes-Oxley. The Securities and Exchange Commission may participate as *amicus curiae* at any time in the proceedings.

##### Section 1980.109 Decision and Orders of the Administrative Law Judge

Revisions have been made to this section to make it consistent with OSHA's procedural rules for handling complaints under other whistleblower statutes. This section sets forth the requirements for the content of the decision and order of the ALJ, and includes the standard for finding a violation under Sarbanes-Oxley. Former paragraph (a) has been divided into three paragraphs—(a), (b) and (c). Paragraph (a) now states that a determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint. Paragraph (b) now explains that if the complainant has satisfied this burden, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. A full discussion of the burdens of proof used by the Department of Labor to resolve whistleblower cases under this part is presented above in the discussion of section 1980.104. Paragraph (c) now provides that the Assistant Secretary's determination to dismiss the complaint without an investigation or without a complete investigation pursuant to section 1980.104 is not subject to review. Thus, paragraph (c) of section 1980.109 clarifies that the Assistant Secretary's determinations on whether to proceed with an investigation under Sarbanes-Oxley and whether to make particular investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases *de novo* and, therefore, as a general

matter, may not remand cases to the Assistant Secretary to conduct an investigation or make further factual findings. Paragraph (c) now also clarifies that the ALJ can dispose of a matter without a hearing if the facts and circumstances warrant. The provisions formerly contained in paragraph (b) have been moved to new paragraphs (d)(1) and (2). Paragraph (d)(1) additionally provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The provisions formerly contained in paragraph (c) have been moved to new paragraph (e), which also requires that the ALJ's decision be served on the Assistant Secretary and the Associate Solicitor of the Division of Fair Labor Standards.

#### Section 1980.110 Decision of the Administrative Review Board

As in section 1980.110(a) previously, upon the issuance of the ALJ's decision, the parties have 10 business days within which to petition the ARB for review of that decision. Subsection (b) has been revised to clarify that if no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review. The date of the postmark, facsimile transmittal, or email communication is considered the date of filing of the petition; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt.

The appeal provisions in this part provide that an appeal to the ARB is not a matter of right but is accepted at the discretion of the ARB. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. When the ARB accepts a petition for review, the ALJ's factual determinations will be reviewed under the substantial evidence standard.

This section also provides that based on exceptional circumstances, the ARB may grant a motion to stay an ALJ's preliminary order of reinstatement under Sarbanes-Oxley, which otherwise would be effective, while review is conducted by the ARB. Subsection (b)

has been amended to clarify that a stay is only available in "exceptional circumstances," because the Secretary believes that a stay of an ALJ's preliminary order of reinstatement under Sarbanes-Oxley would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public favors a stay.

Finally, paragraph (d) has been revised to provide that interest on back pay ordered under this section will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

#### Subpart C—Miscellaneous Provisions

##### Section 1980.111 Withdrawal of Complaints, Objections, and Findings; Settlement

This section provides for the procedures and time periods for withdrawal of complaints, the withdrawal of findings and/or preliminary orders by the Assistant Secretary, and the withdrawal of objections to findings and/or orders. It also provides for approval of settlements at the investigative and adjudicative stages of the case.

Paragraph (a) has been revised to allow the complainant to notify the Assistant Secretary of his withdrawal orally or in writing. Minor revisions also have been made to this section to make it consistent with the procedural rules under other whistleblower statutes. These minor revisions do not reflect substantive changes in the requirements for withdrawals of complaints, objections or petitions for review, or substantive changes in the requirements for submission and Departmental approval of settlement agreements. Rather, these amendments simply incorporate the procedures that the Department has been using under Sarbanes-Oxley. Paragraph (a) now notes that complainant may not withdraw a complaint after filing objections to an ALJ's order. Paragraph (d)(1) now notes that the Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates his or her consent and achieves the consent of all three parties.

##### Section 1980.112 Judicial Review

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought

that the ARB submit the record of proceedings to the appropriate court pursuant to the rules of such court. The section has been renumbered for clarity and consistency with OSHA's other whistleblower protection regulations. Paragraph (c) has been revised to clarify that "rules of the court" refers to the Federal Rules of Appellate Procedure and local rules of the relevant Federal court of appeals.

##### Section 1980.113 Judicial Enforcement

This section describes the Secretary's power under Sarbanes-Oxley to obtain judicial enforcement of orders and the terms of a settlement agreement. It has been amended for consistency with OSHA's other whistleblower programs and clarifies that Federal district courts have authority to grant all appropriate relief in an action to enforce a preliminary order of reinstatement or a final order of the Secretary, including a final order approving a settlement agreement.

While some courts have declined to enforce preliminary orders of reinstatement under Sarbanes-Oxley, the Secretary's consistent position has been that such orders are enforceable in Federal district court. *See Solis v. Tenn. Commerce Bancorp, Inc.*, No. 10–5602 (6th Cir. 2010) (order granting stay of preliminary injunction); *Bechtel v. Competitive Technologies, Inc.*, 448 F.3d 469 (2d Cir. 2006); *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006) (decision vacated, appeal dismissed, No. 06–2295 (4th Cir. Feb. 20, 2008)).

By incorporating the procedures of AIR21, Sarbanes-Oxley authorizes district courts to enforce orders, including preliminary orders of reinstatement, issued by the Secretary under the Act. *See* 18 U.S.C. 1514A(b)(2)(A) (adopting the rules and procedures set forth in AIR21, 49 U.S.C. 42121(b)). The Secretary consistently has interpreted Sarbanes-Oxley to permit her to obtain civil enforcement of preliminary orders of reinstatement. *See* Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, *Solis v. Tenn. Commerce Bancorp, Inc.*, No. 10–5602 (6th Cir. 2010); Brief for the Intervenor/Plaintiff-Appellant United States of America, *Welch v. Cardinal Bankshares Corp.*, No. 06–2295 (4th Cir. Feb. 20, 2008); Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, *Bechtel v. Competitive Technologies, Inc.*, 448 F.3d 469 (2d Cir. 2006) (No. 05–2402).

Under 49 U.S.C. 42121(b), which provides the procedures applicable to investigations of whistleblower complaints under Sarbanes-Oxley, the

Secretary must investigate complaints under the Act and determine whether there is reasonable cause to believe that a violation has occurred. “[I]f the Secretary of Labor concludes that there is a reasonable cause to believe that a violation \* \* \* has occurred, the Secretary shall accompany the Secretary’s findings with a preliminary order providing the relief prescribed by paragraph (3)(B),” which includes reinstatement of the complainant to his or her former position. 49 U.S.C. 42121(b)(2)(A) and (b)(3)(B)(ii). The respondent may file objections to the Secretary’s preliminary order and request a hearing. However, the filing of such objections “shall not operate to stay any reinstatement remedy contained in the preliminary order.” 49 U.S.C. 42121(b)(2)(A).

Paragraph (5) of 49 U.S.C. 42121(b) provides for judicial enforcement of the Secretary’s orders, including preliminary orders of reinstatement. That paragraph states “[w]henver any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.” 49 U.S.C. 42121(b)(5). Preliminary orders that contain the relief of reinstatement prescribed by paragraph (3)(B) are judicially enforceable orders, issued under paragraph (3). Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, *Solis v. Tenn. Commerce Bancorp, Inc.*, No. 10–5602 at 23–25 (6th Cir. 2010).

This analysis is not altered by the fact that paragraph (3) bears the heading “Final Order.” See *United States v. Buculei*, 262 F.3d 322, 331 (4th Cir. 2001) (a statute’s title cannot limit the plain meaning of its text), *cert. denied*, 535 U.S. 962 (2002). Focusing on the title to subsection (b)(3) instead of reading section 42121(b) as a coherent whole negates the congressional directives that preliminary reinstatement must be ordered upon a finding of reasonable cause and that such orders not be stayed pending appeal.

Sections of a statute should not be read in isolation, but rather in conjunction with the provisions of the entire Act, considering both the object and policy of the Act. See, e.g., *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998), *aff’d*, 529 U.S. 120 (2000). 49 U.S.C.

42121(b)(2)(A)’s clear statement that objections shall not stay any preliminary order of reinstatement demonstrates Congress’s intent that the Secretary’s preliminary orders of reinstatement be immediately effective. Reading 49 U.S.C. 42121(b)(5) to allow enforcement of such orders is the only way to effectuate this intent.

The Secretary’s interpretation is buttressed by the legislative history of Sarbanes-Oxley and AIR21. Before Congress enacted Sarbanes-Oxley, the Department of Labor had interpreted this AIR21 provision to permit judicial enforcement of preliminary reinstatement orders. Accordingly, Congress is presumed to have been aware of the Department’s interpretation of 49 U.S.C. 42121(b)(5) and to have adopted that interpretation when it incorporated that provision by reference. See *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) (“[W]here \* \* \* Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute”). The Secretary’s interpretation is further supported by the legislative history of AIR21, which makes clear that Congress regarded preliminary reinstatement as crucial to the protections provided in the statute. Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, *Solis v. Tenn. Commerce Bancorp, Inc.*, No. 10–5602, at 41–44 (6th Cir. 2010) (reviewing legislative history of AIR21). Interpreting 49 U.S.C. 42121(b)(5) to permit judicial enforcement of the Secretary’s preliminary orders of reinstatement is necessary to carry out Congress’ clearly expressed intent that whistleblowers be immediately reinstated upon the Secretary’s finding of reasonable cause to believe that retaliation has occurred.

Sarbanes-Oxley also permits the person on whose behalf the order was issued under Sarbanes-Oxley to obtain judicial enforcement of orders and the terms of a settlement agreement. 18 U.S.C. 1514A(b)(2)(A) incorporating 49 U.S.C. 42121(b)(6).

#### Section 1980.114 District Court Jurisdiction of Retaliation Complaints

This section sets forth Sarbanes-Oxley’s provisions allowing a complainant to bring an original *de novo* action in district court, alleging the same allegations contained in the complaint filed with OSHA, if there has been no final decision of the Secretary within 180 days of the filing of the complaint. This section has been

amended to reflect the 2010 statutory amendments which afford parties bringing cases under 18 U.S.C. 1514A(b)(1)(B) the right to a trial by jury.

This section also has been amended to require complainants to provide file-stamped copies of their complaint within seven days after filing a complaint in district court to the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending. A copy of the complaint also must be provided to the Regional Administrator, the Assistant Secretary, Occupational Safety and Health Administration, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. This provision is necessary to notify the agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant’s compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed.

It is the Secretary’s position that complainants may not initiate an action in Federal court after the Secretary issues a final decision, even if the date of the final decision is more than 180 days after the filing of the complaint. The purpose of the “kick-out” provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties’ rights to seek judicial review of the Secretary’s final decision in the court of appeals.

#### Section 1980.115 Special Circumstances; Waiver of Rules

This section provides that in circumstances not contemplated by these rules or for good cause the ALJ or the ARB may, upon application and notice to the parties, waive any rule as justice or the administration of Sarbanes-Oxley requires.

No substantive changes have been made to this section.

#### IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, section 1980.103) which was previously reviewed and approved for use by the Office of Management and Budget (“OMB”) and assigned OMB control number 1218–0236 under the provisions

of the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

#### V. Administrative Procedure Act

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (“APA”) do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). This is a rule of agency procedure and practice within the meaning of that section. Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments are not required for these regulations, which provide the procedures for the handling of retaliation complaints. Although this is a procedural rule not subject to the notice and comment procedures of the APA, we are providing persons interested in this interim final rule 60 days to submit comments. A final rule will be published after the agency receives and reviews the public’s comments.

Furthermore, because this rule is procedural rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this interim final rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

#### VI. Executive Order 12866; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996; Executive Order 13132

The Department has concluded that this rule should be treated as a “significant regulatory action” within the meaning of Section 3(f)(4) of Executive Order 12866 because this rule adds new provisions and updates the language of the former regulations to implement the statutory changes made by Dodd-Frank. Executive Order 12866 requires a full economic impact analysis only for “economically significant” rules, which are defined in Section 3(f)(1) as rules that may have an annual effect on the economy of \$100 million or more (adjusted annually for inflation), or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Because the rule is procedural in nature, it is expected to have a negligible economic impact. Therefore, no economic impact analysis has been

prepared. For the same reason, the rule does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*). Furthermore, because this is a rule of agency procedure and practice, it is not a “rule” within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804(3)(C)), and does not require Congressional review. Finally, this rule does not have “federalism implications.” The rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” and therefore is not subject to Executive Order 13132 (Federalism).

#### VII. Regulatory Flexibility Analysis

The Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation simply updates existing procedures and implements changes necessitated by enactment of Dodd-Frank. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

*Document Preparation:* This document was prepared under the direction and control of the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor.

#### List of Subjects in 29 CFR Part 1980

Administrative practice and procedure, Corporate fraud, Employment, Investigations, Reporting and recordkeeping requirements, Whistleblower.

Signed at Washington, DC, on October 26, 2011.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

Accordingly, for the reasons set out in the preamble, 29 CFR part 1980 is revised to read as follows:

#### **PART 1980—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER SECTION 806 OF THE SARBANES-OXLEY ACT OF 2002, AS AMENDED**

##### **Subpart A—Complaints, Investigations, Findings and Preliminary Orders**

Sec:

- 1980.100 Purpose and scope.
- 1980.101 Definitions.
- 1980.102 Obligations and prohibited acts.
- 1980.103 Filing of retaliation complaints.

- 1980.104 Investigation.
- 1980.105 Issuance of findings and preliminary orders.

##### **Subpart B—Litigation**

- 1980.106 Objections to the findings and the preliminary order and request for a hearing.
- 1980.107 Hearings.
- 1980.108 Role of Federal agencies.
- 1980.109 Decision and orders of the administrative law judge.
- 1980.110 Decision and orders of the Administrative Review Board.

##### **Subpart C—Miscellaneous Provisions**

- 1980.111 Withdrawal of complaints, objections, and findings; settlement.
- 1980.112 Judicial review.
- 1980.113 Judicial enforcement.
- 1980.114 District court jurisdiction of retaliation complaints.
- 1980.115 Special circumstances; waiver of rules.

**Authority:** 18 U.S.C. 1514A, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203 (July 21, 2010); Secretary of Labor’s Order No. 4–2010 (Sept. 2, 2010), 75 FR 55355 (Sept. 10, 2010); Secretary of Labor’s Order No. 1–2010 (Jan. 15, 2010), 75 FR 3924 (Jan. 25, 2010).

##### **Subpart A—Complaints, Investigations, Findings and Preliminary Orders**

###### **§ 1980.100 Purpose and scope.**

(a) This part implements procedures under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or Act), enacted into law July 30, 2002, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, enacted into law July 21, 2010. Sarbanes-Oxley provides for employee protection from retaliation by companies, their subsidiaries and affiliates, officers, employees, contractors, subcontractors, and agents because the employee has engaged in protected activity pertaining to a violation or alleged violation of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Sarbanes-Oxley also provides for employee protection from retaliation by nationally recognized statistical rating organizations, their officers, employees, contractors, subcontractors or agents because the employee has engaged in protected activity.

(b) This part establishes procedures pursuant to Sarbanes-Oxley for the expeditious handling of retaliation complaints made by employees, or by persons acting on their behalf. These

rules, together with those codified at 29 CFR part 18, set forth the procedures for submission of complaints under Sarbanes-Oxley, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges, post-hearing administrative review, withdrawals, and settlements.

#### § 1980.101 Definitions.

As used in this part:

(a) *Act* means section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, July 30, 2002, codified at 18 U.S.C. 1514A, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, July 21, 2010.

(b) *Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.

(c) *Business days* means days other than Saturdays, Sundays, and Federal holidays.

(d) *Company* means any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78j) or any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company.

(e) *Complainant* means the employee who filed a complaint under the Act or on whose behalf a complaint was filed.

(f) *Covered person* means any company, including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or any nationally recognized statistical rating organization, or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization.

(g) *Employee* means an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person.

(h) *Nationally recognized statistical rating organization* means a credit rating agency under 15 U.S.C. 78c(61) that:

(1) Issues credit ratings certified by qualified institutional buyers, in accordance with 15 U.S.C. 78o-7(a)(1)(B)(ix), with respect to:

(i) Financial institutions, brokers, or dealers;

(ii) Insurance companies;

(iii) Corporate issuers;

(iv) Issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations, as in effect on September 29, 2006);

(v) Issuers of government securities, municipal securities, or securities issued by a foreign government; or

(vi) A combination of one or more categories of obligors described in any of paragraphs (h)(1)(i) through (v) of this section; and

(2) Is registered under 15 U.S.C. 78o-7.

(i) *OSHA* means the Occupational Safety and Health Administration of the United States Department of Labor.

(j) *Person* means one or more individuals, partnerships, associations, companies, corporations, business trusts, legal representatives or any group of persons.

(k) *Respondent* means the person named in the complaint who is alleged to have violated the Act.

(l) *Secretary* means the Secretary of Labor or persons to whom authority under the Act has been delegated.

(m) Any future statutory amendments that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein.

#### § 1980.102 Obligations and prohibited acts.

(a) No covered person may discharge, demote, suspend, threaten, harass or in any other manner retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section.

(b) An employee is protected against retaliation (as described in paragraph (a) of this section) by a covered person for any lawful act done by the employee:

(1) To provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of 18 U.S.C. 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(i) A Federal regulatory or law enforcement agency;

(ii) Any Member of Congress or any committee of Congress; or

(ii) A person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) To file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of 18 U.S.C. 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

#### § 1980.103 Filing of retaliation complaints.

(a) *Who may file.* An employee who believes that he or she has been retaliated against by a covered person in violation of the Act may file, or have filed on the employee's behalf, a complaint alleging such retaliation.

(b) *Nature of filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

(c) *Place of filing.* The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: <http://www.osha.gov>

(d) *Time for filing.* Within 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act, any employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

#### § 1980.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint by providing a copy of the complaint, redacted, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws,

and will also notify the respondent of its rights under paragraphs (b) and (f) of this section and paragraph (e) of § 1980.110. The Assistant Secretary will provide a copy of the unredacted complaint to the complainant (or complainant's legal counsel, if complainant is represented by counsel) and to the Securities and Exchange Commission.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with the Assistant Secretary to present its position.

(c) Throughout the investigation, the agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The agency will also provide the complainant with an opportunity to respond to such submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a *prima facie* showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a *prima facie* showing as follows:

(i) The employee engaged in a protected activity;

(ii) The respondent knew or suspected that the employee engaged in the protected activity;

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate

through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel, if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a *prima facie* showing, as required by this section, an investigation of the complaint shall not be conducted or will be discontinued if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, the Assistant Secretary will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1980.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the respondent (or the respondent's legal counsel, if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation.

This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials to the complainant, the agency will redact them, if necessary, in

accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent will present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

#### **§ 1980.105 Issuance of findings and preliminary orders.**

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary shall issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of the Act.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she shall accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include all relief necessary to make the employee whole, including reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings, and where appropriate, the preliminary order will be sent by certified mail, return receipt requested, to all parties of record (and each party's legal counsel if the party is represented by counsel). The findings, and where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or order and to request a hearing, and of the right of the respondent to request an award of attorney's fees not exceeding \$1,000 from the administrative law judge (ALJ) regardless of whether the respondent has filed objections, if the complaint was frivolous or brought in bad faith. The findings, and where appropriate,

the preliminary order, also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and any preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and/or a request for hearing has been timely filed as provided at § 1980.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

### Subpart B—Litigation

#### § 1980.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees under the Act, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1980.105(b). The objections, request for a hearing, and/or request for attorney's fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or email communication is considered the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which shall not be automatically stayed.

The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of any objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or preliminary order shall become the final decision of the Secretary, not subject to judicial review.

#### § 1980.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of Part 18 of this title.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to an ALJ who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted *de novo*, on the record. Administrative law judges have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

#### § 1980.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as *amicus curiae* at any time at any stage of the proceedings. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

(2) Copies of documents in all cases, whether or not the Assistant Secretary is

participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, as well as all other parties.

(b) The Securities and Exchange Commission, if interested in a proceeding, may participate as *amicus curiae* at any time in the proceeding, at the Commission's discretion. At the request of the Securities and Exchange Commission, copies of all pleadings in a case must be sent to the Commission, whether or not the Commission is participating in the proceeding.

#### § 1980.109 Decision and orders of the administrative law judge.

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1980.104(e) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the order will provide all relief necessary to make the employee whole, including reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees. Interest on back pay will be calculated using the interest rate applicable to underpayment

of taxes under 26 U.S.C. 6621 and will be compounded daily.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ALJ determines that a complaint was frivolous or was brought in bad faith, the judge may award to the respondent a reasonable attorney's fee, not exceeding \$1,000.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 10 business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

**§ 1980.110 Decision and orders of the Administrative Review Board.**

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board, U.S. Department of Labor (ARB), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the ALJ will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the ARB, and the ARB accepts the petition for review. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 10 business days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or email communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that a preliminary order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay the order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB shall be issued within 120 days of the conclusion of the hearing, which will be deemed to be 10 business days after the date of the decision of the ALJ unless a motion for reconsideration has been filed with the ALJ in the interim. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the final order will include all relief necessary to make the complainant whole, including reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney's fee, not exceeding \$1,000.

**Subpart C—Miscellaneous Provisions**

**§ 1980.111 Withdrawal of complaints, objections, and findings; settlement.**

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying the Assistant Secretary, orally or in writing, of his or her withdrawal. The Assistant Secretary then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. The Assistant Secretary will notify the parties (and each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw his or her findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1980.106, provided that no objection has yet been filed, and substitute new findings and/or preliminary order. The date of the receipt of the substituted findings and/or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw its objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If the case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings or order, and there are no other pending objections, the Assistant Secretary's findings and order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the respondent agree to a settlement. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates his or her consent and achieves the consent of all three parties.

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the judge, or by the ARB if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the ALJ, or the ARB, will constitute the final order of the Secretary and may be enforced pursuant to § 1980.113.

#### § 1980.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§ 1980.109 and 1980.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

(b) A final order of the ARB is not subject to judicial review in any criminal or other civil proceeding.

(c) If a timely petition for review is filed, the record of a case, including the record of proceedings before the ALJ, will be transmitted by the ARB to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

#### § 1980.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under the Act, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. In such civil actions, the district court will have jurisdiction to grant all appropriate relief, including, but not limited to, injunctive relief and compensatory damages, including:

(a) Reinstatement with the same seniority status that the employee would have had, but for the discharge or retaliation;

(b) The amount of back pay, with interest; and

(c) Compensation for any special damages sustained as a result of the discharge or retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees.

#### § 1980.114 District court jurisdiction of retaliation complaints.

(a) If the Secretary has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy. A party to an action brought under this paragraph shall be entitled to trial by jury.

(b) Within seven days after filing a complaint in Federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. A copy of the complaint also must be served on the Regional Administrator, the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

#### § 1980.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days notice to all parties, waive any rule or issue any orders that justice or the administration of the Act requires.

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## DEPARTMENT OF DEFENSE

### Department of the Navy

#### 32 CFR Part 706

#### Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972; Correction

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Correcting amendment.

**SUMMARY:** The Department of the Navy (DoN) published a final rule in the **Federal Register** (76 FR 58399) of September 21, 2011, concerning certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS). The document added an entry to Table Four, paragraph 23, in § 706.2. The existing table has three columns and the proposed entry has four columns. This correcting amendment corrects that information.

**DATES:** Effective November 3, 2011.

#### FOR FURTHER INFORMATION CONTACT:

Lieutenant Jaewon Choi, JAGC, U.S. Navy, Admiralty Attorney (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard, DC 20374-5066, telephone number: (202) 685-5040.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority granted in 33 U.S.C. 1605, the DoN amends 32 CFR part 706.

This amendment provides notice that the Deputy Assistant Judge Advocate General (DAJAG) (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, has certified that USS FORT WORTH (LCS 3) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Rule 27, paragraph (b)i, pertaining to the verticality of the three all-round task lights. The DAJAG (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

#### List of Subjects in 32 CFR Part 706

Marine safety, Navigation (water), and Vessels.

Accordingly, 32 CFR part 706 is corrected pursuant to the authority granted in 33 U.S.C. 1605 by making the following correcting amendments: