the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect 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.

For the reasons discussed above, I certify that this AD:

1. Is not a “significant regulatory action” under Executive Order 12866.
3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2012–26–14, Amendment 39–17309 (78 FR 2195, January 10, 2013) and adding the following new AD:


(a) Effective Date

This AD is effective May 8, 2014.

(b) Affected ADs

This AD supersedes AD 2012–26–14, Amendment 39–17309 (78 FR 2195, January 10, 2013).

(c) Applicability

This AD applies to all Rolls-Royce Deutschland Ltd & Co KG (RRD) BR700–715A1–30, BR700–715B1–30, and BR700–715C1–30 turbofan engines with high-pressure (HP) compressor stages 1 to 6 rotor disc assemblies that were ever installed using nuts, part number (P/N) AS44862 or P/N AS64367.

(d) Unsafe Condition

This AD was prompted by a report of silver chloride-induced stress corrosion cracking of the HP compressor stages 1 to 6 rotor disc assembly. We are issuing this AD to prevent failure of the HP compressor stages 1 to 6 rotor disc assembly, which could lead to an uncontained engine failure and damage to the airplane.

(e) Compliance

Comply with this AD within the compliance times specified, unless already done.

1. For BR700–715A1–30 turbofan engines operated under the Hawaiian Flight Mission only, remove the HP compressor stages 1 to 6 rotor disc assembly from service before exceeding 16,000 flight cycles since new (CSN) or before further flight after the effective date of this AD, whichever occurs later.

2. For BR700–715A1–30, BR700–715B1–30, and BR700–715C1–30 turbofan engines (all flight missions except Hawaiian Flight Mission), remove the HP compressor stages 1 to 6 rotor disc assembly from service before exceeding 14,000 flight CSN or before further flight after the effective date of this AD, whichever occurs later.

(f) Prohibition Statement

After the effective date of this AD, do not install an HP compressor stages 1 to 6 rotor disc assembly into an engine, or an engine with an HP compressor stage 1 to 6 rotor disc assembly onto an aircraft, if the HP compressor stages 1 to 6 rotor disc assembly has ever been operated with nuts, P/N AS44862 or P/N AS64367, and has more CSN than specified in the applicable portion of the compliance section of this AD.

(g) Definition

For the purpose of this AD, flight cycles are defined as the total flight CSN on the HP compressor stages 1 to 6 rotor disc assembly, without any pro-rated calculations applied for different flight missions.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(i) Related Information

1. For more information about this AD, contact Robert Morlath, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: (781) 238–7154; fax: (781) 238–7199; email: robert.c.morlath@faa.gov.


(j) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on March 27, 2014.

Robert J. Ganley,
Acting Assistant Directorate Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2014–07444 Filed 4–2–14; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1985

[Docket Number: OSHA–2011–0540]

RIN 1218–AC58

Procedures for Handling Retaliation Complaints Under the Employee Protection Provision of the Consumer Financial Protection Act of 2010

AGENCY: Occupational Safety and Health Administration.

ACTION: Interim Final Rule; request for comments.

SUMMARY: This document provides the interim final text of regulations governing the employee protection (or whistleblower) provisions of the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (CFPA). This rule establishes procedures and time frames for the handling of retaliation complaints under CFPA, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration (OSHA), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor) and judicial review of the Secretary’s final decision.

DATES: This interim final rule is effective on April 3, 2014. Comments and additional materials must be submitted by May 5, 2014.
submitted (post-marked, sent or received) by June 2, 2014.

ADDRESSES: You may submit your comments by using one of the following methods:

Electronically: 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 may submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA—2011–0540, 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—2011–0540). 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:
Katelyn Wendell, Program Analyst, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–4624, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2199. This is not a toll-free number. Email: wendell.katelyn@dol.gov. This Federal Register publication is available in alternative formats. The alternative formats available are: Large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System) and audiotape.

SUPPLEMENTARY INFORMATION:

I. Background


The Bureau also has authority to issue and enforce new rules, orders, standards and prohibitions which will apply to banks and other covered persons who provide consumer financial products and services as defined in the CFPA, in addition to the existing Federal consumer financial protection laws and regulations listed above. These include, but are not limited to, providers of the following consumer financial products or services: (1) Residential mortgage loan origination, brokerage, and servicing, modification and foreclosure relief services; (2) private education loans; (3) payday loans; (4) consumer debt collection; (5) consumer credit reporting; (6) finance companies, consumer lending, and loan servicing and brokerage; (7) money transmitting and check cashing services; (8) prepaid card services; (9) debt relief services, and (10) any service provider or affiliate which is related to such an entity.


Section 1057 of the Dodd-Frank Act, codified at 12 U.S.C. 5671 and referred to throughout these interim final rules as CFPA, provides protection to covered employees, and authorized representatives of such employees, against retaliation because they provided information to their employer, to the Bureau, or to any other Federal, State, or local government authority or law enforcement agency relating to any violation of (or any act or omission that the employee reasonably believes to be a violation of) any provision of the Act or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau; testified or will testify in any proceeding resulting from the administration or enforcement of any provision of the Act or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau; filed, instituted, or caused to be filed or instituted any proceeding under any Federal consumer financial law; or objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau.

These interim final rules establish procedures for the handling of whistleblower complaints under CFPA.

II. Summary of Statutory Procedures

CFPA’s whistleblower provisions include procedures that allow a covered
employee to file a complaint with the Secretary of Labor (Secretary) within 180 days of the alleged retaliation. Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated the Act (respondent) of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation. The Secretary must then, within 60 days of receipt of the complaint, afford the complainant and respondent an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation.

The statute provides that the Secretary may conduct an investigation only if the complainant has made a prima facie showing that the protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent has not demonstrated, through clear and convincing evidence, that it would have taken the same adverse action in the absence of that activity (see section 1985.104 for a summary of the investigation process). OSHA interprets the prima facie case requirement as allowing the complainant to meet this burden through the complaint as supplemented by interviews of the complainant.

After investigating a complaint, the Secretary will issue written findings. If, as a result of an investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the respondent of those findings, along with a preliminary order that requires the respondent to, where appropriate: take affirmative action to abate the violation; reinstate the complainant to his or her former position together with the compensation of that position (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and provide compensatory damages to the complainant, as well as all costs and expenses (including attorney fees and expert witness fees) reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

The complainant and the respondent then have 30 days after the date of receipt of the Secretary’s notification in which to file objections to the findings and/or preliminary order and request a hearing before an administrative law judge (ALJ). The filing of objections under CFPA will stay any remedy in the preliminary order except for preliminary reinstatement. If a hearing before an ALJ is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, CFPA requires the hearing to be conducted “expeditiously.” The Secretary then has 120 days after the conclusion of any hearing in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary’s final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary, where appropriate, will assess against the respondent a sum equal to the total amount of all costs and expenses, including attorney and expert witness fees, reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the Secretary issued the order. The Secretary also may award a prevailing employer reasonable attorney fees, not exceeding $1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary’s final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation.

CFPA permits the employee to seek de novo review of the complaint by a United States district court in the event that the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after the date of receipt of a written determination. The provision provides that the court will have jurisdiction over the action without regard to the amount in controversy and that the case will be tried before a jury at the request of either party.

Finally, CFPA provides that except in very limited circumstances, and notwithstanding any other provision of law, the rights and remedies provided for in the CFPA whistleblower provision may not be waived by any agreement, policy, form, or condition of employment, including any predispute arbitration agreement, and no predispute arbitration agreement shall be valid or enforceable to the extent it would bar or limit a dispute arising under CFPA’s whistleblower provision.

III. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of CFPA. Responsibility for receiving and investigating complaints under CFPA has been delegated to the Assistant Secretary for Occupational Safety and Health (Assistant Secretary) by Secretary’s Order 1–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by ALJs are decided by the ARB. Secretary’s Order 1–2012, 77 FR 69378 (Nov. 16, 2012).

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

Section 1985.100 Purpose and Scope

This section describes the purpose of the regulations implementing CFPA and provides an overview of the procedures covered by these regulations.

Section 1985.101 Definitions

This section includes the general definitions from Section 1002 of the Dodd-Frank Act, 12 U.S.C. 5481, which are applicable to CFPA’s whistleblower provisions. The Act defines the term “affiliate” as “any person that controls, is controlled by, or is under common control with another person.” 12 U.S.C. 5481(1). It defines the term “consumer” as “an individual or an agent, trustee, or representative acting on behalf of an individual.” 12 U.S.C. 5481(4).

The Act defines a “consumer financial product or service” to include a wide variety of financial products or services offered or provided for use by consumers primarily for personal, family, or household purposes. See 12 U.S.C. 5481(5). [15] Included within the definition of consumer financial product or service are residential mortgage origination, lending, brokerage and servicing, and related products and services such as mortgage loan modification and foreclosure relief; private student loans; payday loans; and certain other financial services such as consumer debt collection, consumer credit reporting, credit cards and related activities, money transmitting, check cashing and related activities, prepaid cards, and debt relief services. See, e.g., Notice and Request for Comment, Defining Larger Participants in Certain Consumer Financial Products and Services Markets, 76 FR 38050–62 (June 29, 2011) [Bureau request for comment]
on exercise of jurisdiction over consumer debt collection, consumer credit reporting, consumer credit and related activities, money transmitting, check cashing and related activities, prepaid cards, and debt relief services). More information about the Bureau is available at its Web site, http://www.consumerfinance.gov/the-bureau.

The Act defines “covered person” as “any person that engages in offering or providing a consumer financial product or service” and “any affiliate of [such] a person. . . .” See 12 U.S.C. 5481(26)(A). The term “service provider” does not include a person who solely offers or provides general business support services or advertising services. 12 U.S.C. 5481(26)(B). Anyone who is a “service provider” is also deemed to be a covered person to the extent that such person participates in designing, operating, or maintaining the consumer financial product or service; or (ii) processes transactions related to the consumer financial product or service. . . .” 12 U.S.C. 5481(26)(A). The term “service provider” does not include a person who solely offers or provides general business support services or advertising services. 12 U.S.C. 5481(26)(B).

CFPA defines “covered employee” as “any individual performing tasks related to the offering or provision of a consumer financial product or service.” 12 U.S.C. 5567(b). Consistent with the other whistleblower protection provisions administered by OSHA, OSHA interprets the term “covered employee” to also include individuals presently or formerly working for, individuals applying to work for, and individuals whose employment could be affected by a covered person or service provider where such individual was performing tasks related to the offering or provision of a consumer financial product or service at the time that the individual engaged in protected activity under CFPA. See, e.g., 29 CFR 1979.101; 29 CFR 1980.101(g); 29 CFR 1981.101; 29 CFR 1982.101(d); 29 CFR 1983.101(h). OSHA believes this interpretation of the term “covered employee” best implements the broad statutory protections of CFPA, which aim to protect individuals who perform tasks related to the offering or provision of a consumer financial product or service from termination or any other form of retaliation resulting from their protected activity under CFPA.

Section 1985.102 Obligations and Prohibited Acts

This section describes the activities that are protected under CFPA and the conduct that is prohibited in response to any prohibited activities. As described above, CFPA protects individuals who provide information to their employer, to the Bureau, or to any other Federal, State, or local government authority or law enforcement agency relating to any violation of (or any act or omission that the employee reasonably believes to be a violation of) any provision of the Act or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau. CFPA also protects individuals who object to or refuse to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believes to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau. More information about the Bureau is available at its Web site, http://www.consumerfinance.gov/the-bureau.

In order to have a “reasonable belief” under CFPA, a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of law. See Sylvester v. Parexel Int’l LLC, ARB No. 07–123, 2011 WL 2165854, at *11–12 (ARB May 25, 2011) (discussing the reasonable belief standard under analogous language in the Sarbanes-Oxley Act whistleblower provision, 18 U.S.C. 1514A). The requirement that the complainant have a subjective, good faith belief is satisfied so long as the complainant actually believed that the conduct complained of violated the relevant law, rule, order, standard, or prohibition. See id. The objective “reasonableness” of a complainant’s belief is typically determined “based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” Id. at *12 (internal quotation marks and citation omitted).

However, the complainant need not show that the conduct complained of constituted an actual violation of law. Pursuant to this standard, an employee’s whistleblowing activity is protected where it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred. Id. at *13.

Section 1985.103 Filing of Retaliation Complaint

This section explains the requirements for filing a retaliation complaint under CFPA. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs. Under Delaware State College v. Ricks, 449 U.S. 250, 258 (1980), this is considered to be when the retaliatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer’s decision to take an adverse action. Equal Emp’t Opportunity Comm’n v. United Parcel Serv., Inc., 249 F.3d 557, 561–62 (6th Cir. 2001). The time for filing a complaint under CFPA may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

Complaints filed under CFPA need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the employee, complaints may be filed by any person on the employee’s behalf.

OSHA notes that a complaint of retaliation filed with OSHA under CFPA is not a formal document and need not conform to the pleading standards for complaints filed in federal district court articulated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). See Sylvester v. Parexel Int’l, Inc., ARB No. 07–123, 2011 WL 2165854, at *9–10 (ARB May 25, 2011) (holding that whistleblower complaints filed with OSHA under analogous provisions in the Sarbanes-Oxley Act need not conform to federal court pleading standards). Rather, the complaint filed with OSHA under this section simply alerts OSHA to the existence of the alleged retaliation and the complainant’s desire that OSHA investigate the complaint. Upon receipt of the complaint, OSHA is to determine whether the “complaint, supplemented as appropriate by interviews of the complainant” alleges “the existence of both a subjective and an objective violation of law.” 12 U.S.C. 5481(6). As explained in section 1985.104(e), if the

http://www.consumerfinance.gov/the-bureau
complaint, supplemented as appropriate, contains a prima facie allegation, and the respondent does not show clear and convincing evidence that it would have taken the same action in the absence of the alleged protected activity, OSHA conducts an investigation to determine whether there is reasonable cause to believe that retaliation has occurred. See 12 U.S.C. 5567(c)(2)(B), 29 CFR 1985.104(e).

Section 1985.104 Investigation

This section describes the procedures that apply to the investigation of CFPA complaints. Paragraph (a) of this section outlines the procedures for notifying the parties and the Bureau of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) specifies that OSHA 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 OSHA that are responsive to the complainant’s whistleblower complaint at a time permitting the complainant an opportunity to respond to those submissions. Before providing such materials to the complainant, OSHA will redact them in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. Paragraph (d) of this section discusses confidentiality of information provided during investigations.

Paragraph (e) of this section sets forth the applicable burdens of proof. CFPA requires that a complainant make an initial prima facie showing that a 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. The complainant’s burden may be satisfied, for example, if he or she shows that the adverse action took place within a temporal proximity of the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action. See, e.g., Porter v. Cal. Dep’t of Corr., 485 U.S. 555 (9th Cir. 2005) (years between the protected activity and the retaliatory actions did not defeat a finding of a causal connection where the defendant did not have the opportunity to retaliate until he was given responsibility for making personnel decisions).

If the complainant does not make the required prima facie showing by raising a non-frivolous allegation of retaliation, 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 Energy Reorganization Act of 1974 (ERA), which is the same as that under CFPA, 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. Thus, OSHA must dismiss a complaint under CFPA and not investigate further 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 statute requires OSHA to determine whether there is reasonable cause to believe that protected activity was a contributing factor in the alleged adverse action. 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) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); see also Addis v. Dep’t of Labor, 575 F.3d 688, 689–91 (7th Cir. 2009) (discussing Marano as applied to analogous whistleblower provision in the ERA); Clarke v. Navajo Express, Inc., 2614326, at *3 (ARB June 29, 2011) (discussing burdens of proof under analogous whistleblower provision in the Surface Transportation Assistance Act (STAA)). For protected activity to be 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 alternates with the burden 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) (quoting Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004)) (discussing contributing factor test under the Sarbanes-Oxley Act of 2002 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).

If OSHA finds reasonable cause to believe that the alleged protected activity was a contributing factor in the adverse action, OSHA may not order relief if the employer demonstrates by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 12 U.S.C. 5567(c)(3)(C). The “clear and convincing evidence” standard is a higher burden of proof than a “preponderance of the evidence” standard. Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain. Clarke; 2011 WL 2614326, at *3.

Paragraph (f) describes the procedures OSHA will follow prior to the issuance of findings and a preliminary order when OSHA has reasonable cause to believe that a violation has occurred. Its purpose is to ensure compliance with the Due Process Clause of the Fifth Amendment, as interpreted by the Supreme Court in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) (requiring OSHA to give a STAA respondent the opportunity to review the substance of the evidence and respond, prior to ordering preliminary reinstatement).

Section 1985.105 Issuance of Findings and Preliminary Orders

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 and preliminaries 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, the Assistant Secretary will order appropriate relief, including preliminary reinstatement, affirmative action to abate the violation, back pay with interest, and compensatory damages. 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, the preliminary order, also advise the respondent of the right to request an award of attorney fees not exceeding $1,000 from the ALJ, 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.

In ordering interest on back pay under the whistleblower statutes, “front pay may be an appropriate substitute when the parties prove the impossibility of a productive and amicable working relationship, or the company no longer has a position for which the complainant is qualified”); Hobby v. Georgia Power Co., ARB Nos. 98–166, 98–169 (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); Michaud v. BSP Transport, Inc., ARB Nos. 97–113, 1997 WL 626849, at *4 (ARB Oct. 9, 1997) (under STAA, front pay appropriate where employee was unable to work due to major depression resulting from the retaliation); Doyle v. Hydro Nuclear Servs., ARB Nos. 99–041, 99–042, 00–012, 1996 WL 518592, at *6 (ARB Sept. 6, 1996) (under ERA, front pay appropriate where employer had eliminated the employee’s position); Brown v. Lockheed Martin Corp., ALJ No. 2008–SOX–00049, 2010 WL 2054426, at *55–56 (ALJ Jan. 15, 2010) (noting that while reinstatement is the “presumptive remedy” under Sarbanes-Oxley, front pay may be awarded as a substitute when reinstatement is inappropriate). Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of CFPA. When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement.

In such situations, actual reinstatement is designed to accommodate situations in which OSHA’s satisfaction that immediate reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the employee. In such situations, actual reinstatement may 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 in any situation where reinstatement would not be appropriate. See, e.g., Moder v. Vill. of Jackson, ARB Nos. 01–095, 02–039, 2003 WL 21499864, at *10 (ARB June 30, 2003) (under environmental whistleblower statutes, “front pay may be an appropriate substitute when the parties prove the impossibility of a productive and amicable working relationship, or the company no longer has a position for which the complainant is qualified”)}
Subpart B—Litigation

Section 1985.106 Objections to the Findings and the Preliminary Order and Requests for a Hearing

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, within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, or electronic communication transmittal 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 U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards, 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).

The timely filing of objections stays all provisions of the preliminary order, except for the portion requiring reinstatement. A respondent may file a motion to stay the Assistant Secretary’s preliminary order of reinstatement with the Office of Administrative Law Judges. However, such a motion will be granted only based on exceptional circumstances. The Secretary believes that a stay of the Assistant Secretary’s preliminary order of reinstatement under CFPA 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, a balancing of possible harms to the parties, and the public interest favors a stay. If no timely objection to the Assistant Secretary’s findings and/or preliminary order is filed, then the Assistant Secretary’s findings and/or preliminary order become the final decision of the Secretary not subject to judicial review.

Section 1985.107 Hearings

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, as set forth in 29 CFR part 18 subpart A. This section provides 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. As noted in this section, formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

Section 1985.108 Role of Federal Agencies

The Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings under CFPA. 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, multiple employees, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Bureau, if interested in a proceeding, also may participate as amicus curiae at any time in the proceedings.

Section 1985.109 Decision and Orders of the Administrative Law Judge

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 CFPA. Specifically, the complainant must demonstrate (i.e. prove by a preponderance of the evidence) that the protected activity was a “contributing factor” in the adverse action. See, e.g., Allen v. Admin. Review Bd., 514 F.3d 468, 475 n.1 (5th Cir. 2008) (“The term ‘demonstrates’ [under identical burden-shifting scheme in the Sarbanes-Oxley whistleblower provision] means to prove by a preponderance of the evidence.”). If the employee demonstrates that the alleged protected activity was a contributing factor in the adverse action, the employer, to escape liability, must demonstrate by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 12 U.S.C. 5567(c)(3)(C).

Paragraph (c) of this section further provides that OSHA’s determination to dismiss the complaint without an investigation or without a complete investigation under section 1985.104 is not subject to review. Thus, section 1985.109(c) clarifies that OSHA’s determinations on whether to proceed with an investigation under CFPA 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 OSHA to conduct an investigation or make further factual findings. Paragraph (d) notes the remedies that the ALJ may order under CFPA and, as discussed under section 1985.105 above, 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, and that the respondent will be required to submit appropriate documentation to the Social Security Administration (SSA) allocating any back pay award to the appropriate calendar quarters. Paragraph (e) requires that the ALJ’s decision be served on all parties to the proceeding, OSHA, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards. Paragraph (e) also provides that any ALJ 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 14 days after the date of the decision unless a timely petition for review has been filed with the ARB. 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.

Section 1985.110 Decision and Orders of the Administrative Review Board

Upon the issuance of the ALJ’s decision, the parties have 14 days within which to petition the ARB for review of that decision. The date of the postmark, facsimile transmittal, or electronic communication transmittal 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 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 CFPA, which otherwise would be
effective, while review is conducted by
the ARB. The Secretary believes that a
stay of an ALJ’s preliminary order of
reinstatement under CFPA 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, a balancing of possible
harm to the parties, and the public
interest favors a stay.

If the ARB concludes that the
respondent has violated the law, it will
issue a final order providing relief to the
complainant. The final order will
require, where appropriate: Affirmative
action to abate the violation;
reinstatement of the complainant to his
or her former position, together with the
compensation (including back pay and
interest), terms, conditions, and
privileges of employment; and payment
of compensatory damages, including, at
the request of the complainant, the
aggregate amount of all costs and
expenses (including attorney and expert
witness fees) reasonably incurred.
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,
and the respondent will be required to
submit appropriate documentation to the
Social Security Administration
(SSA) allocating any back pay award to
the appropriate calendar quarters. 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
reasonable attorney fees, not exceeding
$1,000.

Subpart C—Miscellaneous Provisions
Section 1985.111 Withdrawal of
Complaints, Findings, Objections, and
Petitions for Review; Settlement

This section provides 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 permits complainants to withdraw
their complaints orally, and provides that, in such circumstances, OSHA will
confirm a complainant’s desire to
withdraw in writing. It also provides for approval of settlements at the
investigative and adjudicative stages of the
case.

Section 1985.112 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,
the ARB or the Secretary submit the
record of proceedings to the appropriate
court pursuant to the rules of such court.

Section 1985.113 Judicial Enforcement

This section describes the Secretary’s
authority under CFPA to obtain judicial
enforcement of orders and terms of
settlement agreements. CFPA expressly
authorizes district courts to enforce
orders issued by the Secretary under 12
U.S.C. 5567. Specifically, the statute
provides that “[i]f any person has failed
to comply with a final order issued
under paragraph (4), 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 have occurred, or in the United
States district court for the District of
Columbia, to enforce such order. In
actions brought under this paragraph,
the district courts shall have jurisdiction
to grant all appropriate relief including
injunctive relief and compensatory
All orders issued under 12 U.S.C. 5567 may also be
enforced by any person on whose behalf
an order was issued in district court,
under 12 U.S.C. 5567(c)(5)(B). The
Secretary interprets these provisions to
grant the district court authority to
enforce preliminary orders of
reinstatement. Subsection (c)(2)(B)
provides that the Secretary shall order
the person who has committed a
violation to reinstate the complainant
to his or her former position (12 U.S.C.
5567(c)(2)(B)). Subsection (c)(2)(B) also
instructs the Secretary to accompany
any reasonable cause finding that a
violation has occurred with a
preliminary order containing the
relief prescribed by paragraph (4)(B), which
includes reinstatement. (see 12 U.S.C.
5567(c)(2)(B)). Subsection (c)(2)(C)
declares that any reinstatement remedy
contained in a preliminary order is not
stayed upon the filing of objections. 12
U.S.C. 5567(c)(2)(C) (“The filing of such
objections shall not operate to stay any
reinstatement remedy contained in the
preliminary order.”). Thus, under the
statute, enforceable orders under
paragraph (c)(5) include both
preliminary orders issued under
subsection (c)(2)(B), and final orders
issued under subsection (c)(4)(A), both
of which may contain the relief of
reinstatement as prescribed by
subsection (c)(4)(B).

This statutory interpretation is
consistent with the Secretary’s
interpretation of similar language in the
Wendell H. Ford Aviation Investment
and Reform Act for the 21st Century, 49
U.S.C. 42121, and Section 806 of the
Corporate and Criminal Fraud
Accountability Act of 2002, Title VIII of
the Sarbanes-Oxley Act of 2002, 18
U.S.C. 1514A. See Brief for the
Intervenor/Appellee Secretary of Labor,
Solis v. Tenn. Commerce
Bancorp, Inc., No. 10–5602 (6th Cir.
2010); Solis v. Tenn. Commerce
Bancorp, Inc., 713 F. Supp. 2d 701
(M.D. Tenn. 2010); but see Bechtel v.
Competitive Techs., 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, 2006)).

Section 1985.114 District Court
Jurisdiction of Retaliation Complaints

This section sets forth CFPA’s
provisions allowing a complainant to
bring an original de novo action in
district court, alleging the same
allegations contained in the complaint
cited to OSHA, under certain
circumstances. CFPA permits a
complainant to file an action for de
novo review in the appropriate district
court if there has been no final
decision of the Secretary within 210 days
after the date of the filing of the
complaint, or within 90 days after the date
of receipt of a written determination. 12
determination” refers to the Assistant
Secretary’s written findings issued at
the close of OSHA’s investigation under
5567(c)(2)(A)(ii). The Secretary’s final
decision is generally the decision of the
ARB issued under section 1985.110. In
other words, a complainant may file an
action for de novo review in the
appropriate district court in either of the
following two circumstances: (1) A
complainant may file a de novo action in district court within 90 days of receiving the Assistant Secretary’s written findings issued under section 1985.105(a), or (2) a complainant may file a de novo action in district court if more than 210 days have passed since the filing of the complaint and the Secretary has not issued a final decision. The plain language of 12 U.S.C. 5567(c)(4)(D)(i), by distinguishing between actions that can be brought if the Secretary has not issued a “final decision” within 210 days and actions that can be brought within 90 days after a “written determination,” supports allowing de novo actions in district court under either of the circumstances described above.

However, 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 210 days after the filing of the complaint or within 90 days of the complaint’s receipt by the Assistant Secretary’s written findings. Thus, for example, after the ARB has issued a final decision denying a whistleblower complaint, the complainant no longer may file an action for de novo review in federal district court. 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. See 12 U.S.C. 5567(c)(4)(E) (providing that an order with respect to which review could have been obtained in the court of appeals shall not be subject to judicial review in any criminal or other civil proceeding).

Under CFPA, the Assistant Secretary’s written findings become the final order of the Secretary, not subject to judicial review, if no objection is filed within 30 days. See 12 U.S.C. 5567(c)(2)(C). Thus, a complainant may need to file timely objections to the Assistant Secretary’s findings in order to preserve the right to file an action in district court.

This section also requires that, within seven days after filing a complaint in district court, a complainant must provide a file-stamped copy of the complaint to OSHA, the ALJ, or the ARB, where the proceeding is pending. A copy of the District Court complaint also must be provided to the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards. This provision is necessary to notify OSHA 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. The section also incorporates the statutory provisions which allow for a jury trial at the request of either party in a district court action, and which specify the remedies and burdens of proof in a district court action.

Section 1985.115 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 CFPA requires.

IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, section 1985.103) which was previously reviewed as a statutory requirement of CFPA and approved for use by the Office of Management and Budget (OMB), and was assigned OMB control number 1218–0236 under the provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995). A non-material change has been submitted to OMB to include the regulatory citation.

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, practice, and interpretation 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, persons interested in this interim final rule 60 days to submit comments. A final rule will be published after OSHA receives and reviews the public’s comments.

Furthermore, because this rule is procedural and interpretative 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. OSHA 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 Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132

The Office of Management and Budget has concluded that this rule is a “significant regulatory action” within the meaning of Section 3(f)(4) of Executive Order 12866. Executive Order 12866, reaffirmed by Executive Order 13563, requires a full economic impact analysis only for “economically significant” rules, which are defined in Section 3(f)(1) of Executive Order 12866 as rules that may “[l]ead to a net increase in the cost of compliance for all persons, nationwide, of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, State, local, or tribal governments or communities.” The rule is procedural and interpretative in nature. Because it simply implements procedures necessitated by enactment of CFPA, the rule is expected to have a negligible economic impact. Therefore, no economic impact analysis under Section 6(a)(3)(C) of Executive Order 12866 has been prepared. For the same reason, and the fact that no notice of proposed rulemaking has been published, the rule does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995. 2 U.S.C. 1531 et seq. Finally, this rule does not have “federalism implications,” in that it 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 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). Rules that are exempt from APA notice and comment requirements are also exempt from the Regulatory Flexibility Act (RFA). See SBA Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act 9 (May 2012); also found at: http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf. This is a rule of agency procedure, practice, and interpretation within the meaning of that section; and therefore the rule is exempt from both the notice and comment rulemaking procedures of the APA and the requirements under the RFA.

List of Subjects in 29 CFR Part 1985


Authority and Signature

This document was prepared under the direction and control of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health.


David Michaels,
Assistant Secretary of Labor for Occupational Safety and Health.

Accordingly, for the reasons set out in the preamble, 29 CFR part 1985 is added to read as follows:

PART 1985—PROCEDURES FOR HANDLING RETALIATION COMPLAINTS UNDER THE EMPLOYEE PROTECTION PROVISION OF THE CONSUMER FINANCIAL PROTECTION ACT OF 2010

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

Sec.
1985.100 Purpose and scope.
1985.102 Obligations and prohibited acts.
1985.103 Filing of retaliation complaint.
1985.104 Investigation.
1985.105 Issuance of findings and preliminary orders.

Subpart B—Litigation

1985.106 Objections to the findings and the preliminary order and requests for a hearing.
1985.107 Hearings.
1985.109 Decision and orders of the administrative law judge.

Subpart C—Miscellaneous Provisions

1985.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.
1985.112 Judicial review.
1985.113 Judicial enforcement.
1985.115 Special circumstances; waiver of rules.


§1985.100 Purpose and scope.

(a) This part implements procedures of the employee protection provision of the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (CFPA or the Act), Public Law 111–203, 124 Stat. 1376, 1955 (July 21, 2010) (codified at 12 U.S.C. 5567). CFPA provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to the offering or provision of consumer financial products or services.

(b) This part establishes procedures under CFPA for the expeditious handling of retaliation complaints filed by employees, or by persons acting on their behalf, and sets forth OSHA’s interpretations of CFPA. These rules, together with those codified at 29 CFR part 19, set forth the procedures under CFPA for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges (ALJs), post-hearing administrative review, and withdrawals and settlements.

§1985.101 Definitions.

As used in this part:

(a) Affiliate means any person that controls, is controlled by, or is under common control with another person.

(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 CFPA.

(c) Bureau means the Bureau of Consumer Financial Protection.

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


(f) Complainant means the person who filed a CFPA complaint or on whose behalf a complaint was filed.

(g) Consumer means an individual or an agent, trustee, or representative acting on behalf of an individual.

(h) Consumer financial product or service means any financial product or service that is:

(1) Described in one or more categories in 12 U.S.C. 5481(15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(2) Described in clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in paragraph (h)(1) of this section.

(i) Covered employee means any individual performing tasks related to the offering or provision of a consumer financial product or service. The term “covered employee” includes an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by a covered person or service provider where such individual was performing tasks related to the offering or provision of a consumer financial product or service at the time that the individual engaged in protected activity under CFPA.

(j) Covered person means—

(1) Any person that engages in offering or providing a consumer financial product or service, or

(2) Any affiliate of such a person if such affiliate acts as a service provider to such person, or

(3) Any service provider to the extent that such person engages in the offering or provision of its own consumer financial product or service.


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

(m) Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

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

(o) Secretary means the Secretary of Labor or person to whom authority under CFPA has been delegated.

(p) Service provider means any person that provides a material service to a
covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that—

(1) Participates in designing, operating, or maintaining the consumer financial product or service; or

(2) Processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes);

(3) The term “service provider” does not include a person solely by virtue of such person offering or providing to a covered person:

(i) A support service of a type provided to businesses generally or a similar ministerial service; or

(ii) Time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.

(g) 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.

§ 1985.102 Obligations and prohibited acts.

(a) No covered person or service provider may terminate or in any other way retaliate against, or cause to be terminated or retaliated against, including, but not limited to, intimidating, threatening, restraining, coercing, blackmailing or disciplining, any covered employee or any authorized representative of covered employees because such employee or representative, whether at the employee’s initiative or in the ordinary course of the employee’s duties (or any person acting pursuant to a request of the employee), engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section.

(b) A covered employee or authorized representative is protected against retaliation (as described in paragraph (a) of this section) by a covered person or service provider because he or she:

(1) Provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency, information relating to any violation of, or any act or omission that the employee reasonably believes to be a violation of, any provision of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203, 124 Stat. 1376, 1955 (July 21, 2010), or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(2) Testified or will testify in any proceeding resulting from the administration or enforcement of any provision of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203, 124 Stat. 1376, 1955 (July 21, 2010), or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(3) Filed, instituted, or caused to be filed or instituted any proceeding under any Federal consumer financial law; or

(4) Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition subject to the jurisdiction of, or enforceable by, the Bureau.

§ 1985.103 Filing of retaliation complaint.

(a) Who may file. A person who believes that he or she has been discharged or otherwise retaliated against by any person in violation of CFPA may file, or have filed by any person on his or her 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 complaint 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 complainant 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 CFPA occurs, any person who believes that he or she has been retaliated against in violation of the Act may file, or have filed by any person on his or her behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, 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. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

§ 1985.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1985.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant’s legal counsel if complainant is represented by counsel) and to the Bureau.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent and the complainant each may request a meeting with OSHA to present its position.

(c) OSHA 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 OSHA that are responsive to the complainant’s whistleblower complaint at a time permitting the complainant an opportunity to respond. Before providing such materials to the complainant, OSHA will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA 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 (i.e. a non-frivolous allegation) that a protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint will be dismissed 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 action
took place within a temporal proximity
of the protected activity, or at the first
opportunity available to the respondent,
giving rise to the inference that it was
a contributing 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,
the investigation of the complaint
will not be conducted 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,
OSHA 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 §1985.105, if OSHA has reasonable
cause, on the basis of information
gathered under the procedures of this
part, to believe that the respondent has
violated CFPA and that preliminary
reinstatement is warranted, OSHA will
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, OSHA 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 must present this evidence
within 10 business days of OSHA’s
notification pursuant to this paragraph,
or as soon thereafter as OSHA and the
respondent can agree, if the interests
of justice so require.

§1985.105 Issuance of findings and
preliminary orders.

(a) After considering all the relevant
information collected during the
investigation, the Assistant Secretary
will issue, within 60 days of the 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 CFPA.

(1) If the Assistant Secretary
concludes that there is reasonable cause
to believe that a violation has occurred,
the Assistant Secretary will accompany
the findings with a preliminary order
providing relief to the complainant.
The preliminary order will require, where
appropriate: affirmative action to abate
the violation; reinstatement of the
complainant to his or her former
position, together with the
compensation (including back pay and
interest), terms, conditions and
privileges of the complainant’s
employment; and payment of
compensatory damages, including, at
the request of the complainant, the
aggregate amount of all costs and
expenses (including attorney and expert
witness fees) reasonably incurred.
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 preliminary order will also require
the respondent to submit appropriate
documentation to the Social Security
Administration (SSA) allocating any
back pay award to the appropriate
calendar quarters.

(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 (or other means that allow
OSHA to confirm receipt), 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 fees not exceeding $1,000 from
the ALJ, regardless of whether the
respondent has filed objections, if the
respondent alleges that 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, U.S. Department of Labor. At the
same time, the Assistant Secretary will
file with the Chief Administrative Law
Judge 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
complainant 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 §1985.106. 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

§1985.106 Objections to the findings
and the preliminary order and requests for a
hearing.

(a) Any party who desires review,
including judicial review, of the
findings and/or preliminary order, or a
respondent alleging that the complaint
was frivolous or brought in bad faith
who seeks an award of attorney fees
under CFPA, must file any objections
and/or a request for a hearing on the
record within 30 calendar days of
receipt of the findings and preliminary order pursuant
to §1985.105. The objections, request
for a hearing, and/or request for attorney 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 fees. The date of the postmark, facsimile transmittal, or electronic communication transmittal 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, 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 will 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 an exception 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 the preliminary order will become the final decision of the Secretary, not subject to judicial review.

§ 1985.107 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. ALJs 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 ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.


(a)(1) The complainant and the respondent will be parties in every proceeding and must be served with copies of all documents in the case. 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 proceeding. 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.

(b) The Bureau, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at the Bureau’s discretion. At the request of the Bureau, copies of all documents in a case must be sent to the Bureau, whether or not it is participating in the proceeding.

§ 1985.109 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 complaint has satisfied the burden of proof 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 OSHA’s determination to dismiss a complaint without completing an investigation pursuant to § 1985.104(e) nor OSHA’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 ALJ will issue an order that will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant’s employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. 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 order will also require the respondent to submit appropriate documentation to the Social Security Administration (SSA) allocating any back pay award to the appropriate calendar quarters.

(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 ALJ may award to the respondent reasonable attorney fees, 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 14 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board (ARB), U.S. Department of Labor. The decision of the ALJ will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review.

(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 fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. 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 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal 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 must be served on the Assistant Secretary 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 any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that 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 will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 14 days after a new decision is issued. 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 and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will require, where appropriate: Affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant’s employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. 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 order will also require the respondent to submit appropriate documentation to the Social Security Administration (SSA) allocating any back pay award to the appropriate calendar quarters.

(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 reasonable attorney fees, not exceeding $1,000.

Subpart C—Miscellaneous Provisions

§ 1985.111 Withdrawal of complaints, findings, objections, and petitions for review; 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 OSHA, orally or in writing, of his or her withdrawal. OSHA then will confirm in writing the complainant’s desire to withdraw and determine whether to approve the withdrawal. OSHA 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 before 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 the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1985.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings 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 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 a 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 and/or order, and there are no other pending objections, the Assistant Secretary’s findings and/or 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, but before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if OSHA, the complainant, and the respondent agree to a settlement. OSHA’s approval of a settlement reached by the respondent and the complainant demonstrates OSHA’s 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 ALJ, 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 appropriate.

(e) Any settlement approved by OSHA, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in United States district court pursuant to §1985.113.

§1985.110 Filing of complaint.

(a) Within 60 days after the issuance of a final order under §§1985.109 and 1985.110, 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 complaining party resided on the date of the violation.

(b) A final order 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 or the ALJ, as the case may be, to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

§1985.111 Judicial enforcement.

Whenever any person has failed to comply with a final order, including one approving a settlement agreement, issued under CFPA, 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. The Secretary also may file a civil action seeking enforcement of the order in the United States district court for the District of Columbia. Whenever any person has failed to comply with a preliminary order of reinstatement, the person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the appropriate district court of the United States.

§1985.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§1985.109 and 1985.110, 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 complaining party resided on the date of the violation.

(b) A final order 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 or the ALJ, as the case may be, to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

§1985.113 Judicial enforcement.

Whenever any person has failed to comply with a final order, including one approving a settlement agreement, issued under CFPA, 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. The Secretary also may file a civil action seeking enforcement of the order in the United States district court for the District of Columbia. Whenever any person has failed to comply with a preliminary order of reinstatement, the person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the appropriate district court of the United States.

§1985.114 District court jurisdiction of retaliation complaints.

(a) 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, either:

(1) Within 90 days after receiving a written determination under §1985.105(a) provided that there has been no final decision of the Secretary; or

(2) If there has been no final decision of the Secretary within 210 days of the filing of the complaint.

(b) At the request of either party, the action shall be tried by the court with a jury.

(c) A proceeding under paragraph (a) of this section shall be governed by the same legal burdens of proof specified in §1985.109. The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including:

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

(2) The amount of back pay, with interest;

(3) Compensation for any special damages sustained as a result of the discharge or discrimination; and

(4) Litigation costs, expert witness fees, and reasonable attorney fees.

(d) Within seven days after filing a complaint in Federal court, a complainant must file with OSHA, 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 OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

§1985.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, 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 such orders that justice or the administration of CFPA requires.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of Delaware pursuant to the Clean Air Act (CAA). Whenever new or revised national ambient air quality standards (NAAQS) are promulgated, the CAA requires states to submit a plan for the implementation, maintenance, and enforcement of such NAAQS. The plan is required to address basic program elements, including, but not limited to regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the standards. These elements are referred to as infrastructure requirements. The State of Delaware has made a submittal addressing the infrastructure requirements for the 2008 ozone NAAQS.

DATES: This final rule is effective on May 5, 2014.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2013–0408. All documents in the docket are available in the www.regulations.gov Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control (DNREC), 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by email at quinto.rose@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On August 30, 2013 (78 FR 53709), EPA published a notice of proposed rulemaking (NPR) for the State of Delaware. In the NPR, EPA proposed approval of Delaware’s submittal that provides the basic elements specified in section 110(a)(2) of the CAA, necessary to implement, maintain, and enforce the 2008 ozone NAAQS.