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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1980

[Docket Number: OSHA-2011-0126]

RIN 1218-AC53

Procedures for the Handling of Retaliation Complaints under under Section 806 of the Sarbanes-Oxley Act of 2002, As Amended

AGENCY: Occupational Safety and Health Administration, Labor

ACTION: Final Rule

SUMMARY: This document provides the final text of regulations governing employee protection (retaliation or whistleblower) claims under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or Act), which was amended by sections 922 and 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), enacted on July 21, 2010. An interim final rule (IFR) governing these provisions and request for comment was published in the Federal Register on November 3, 2011. Five comments were received. This rule responds to those comments and establishes the final procedures and time frames for the handling of retaliation complaints under Sarbanes-Oxley, 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 of

Labor's final decision. It also sets forth the Secretary of Labor's interpretations of the Sarbanes-Oxley whistleblower provision on certain matters.

DATES: This final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

I. Background

Sarbanes-Oxley was first enacted on July 30, 2002. Title VIII is designated as the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, codified at 18 U.S.C. 1514A, is the "whistleblower provision," which provides protection to employees against retaliation by certain persons covered under the Act for engaging in specified protected activity. The Act generally was designed to protect investors by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. The whistleblower provision is intended to protect employees who report fraudulent activity and violations of Securities Exchange Commission (SEC) rules and regulations that can harm innocent investors in publicly traded companies.

Dodd-Frank amended the Sarbanes-Oxley whistleblower provision, 18 U.S.C. 1514A. The regulatory revisions described herein reflect these statutory amendments and also seek to clarify and improve OSHA's procedures for handling Sarbanes-Oxley whistleblower claims, as well as to set forth OSHA's interpretations of the Act. To the extent possible within the bounds of applicable statutory language, these revised regulations are designed to be consistent with the procedures applied to claims under other whistleblower statutes administered by OSHA, including the Surface Transportation Assistance Act of 1982 (STAA), 29 CFR Part 1978; the National Transit Systems Security Act (NTSSA) and the Federal Railroad Safety Act (FRSA), 29 CFR Part 1982; the Consumer Product Safety Improvement Act of 2008 (CPSIA), 29 CFR Part 1983; the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as amended, 29 CFR Part 24; the Affordable Care Act (ACA), 29 CFR Part 1984; the Consumer Financial Protection Act (CFPA), 29 CFR Part 1985; the Seaman's Protection Act (SPA), 29 CFR Part 1986; and the FDA Food Safety Modernization Act (FSMA), 29 CFR Part 1987.

II. Summary of Statutory Procedures and Statutory Changes to the Sarbanes-Oxley

Whistleblower Provision

Sarbanes-Oxley's whistleblower provision, as amended by Dodd-Frank, includes procedures that allow a covered employee to file a complaint with the Secretary of Labor (Secretary)¹ not later than 180 days after the alleged retaliation or after the employee learns of

¹ 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 Sarbanes-Oxley. Responsibility for receiving and investigating complaints under Sarbanes-Oxley has been delegated to the Assistant Secretary for Occupational Safety and Health. Secretary of Labor's Order No. 01-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012). Hearings on determinations by the Assistant Secretary are conducted by the Office of

the alleged retaliation. Sarbanes-Oxley further provides that the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121(b), govern in Sarbanes-Oxley actions. 18 U.S.C. 1514A(b)(2)(A). Accordingly, 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 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 the employer would have taken the same adverse action in the absence of that activity (see Section 1980.104 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 the 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 which includes all relief necessary to make the employee whole, including, where

Administrative Law Judges, and appeals from decisions by administrative law judges are decided by the ARB. Secretary of Labor's Order 2-2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012).

appropriate: reinstatement with the same seniority status that the employee would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees.

The complainant and the respondent then have 30 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing before an ALJ. The filing of objections under Sarbanes-Oxley 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, Sarbanes-Oxley 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, will order all relief necessary to make the employee whole, including, where appropriate: reinstatement of the complainant to his or her former position together with the same seniority status the complainant would have had but for the retaliation; payment of back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees.

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.

Sarbanes-Oxley 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 180 days after the filing of the complaint and there is no showing that such delay is due to the bad faith of the complainant. The court will have jurisdiction over the action without regard to the amount in controversy, and the case will be tried before a jury at the request of either party.

Dodd-Frank, enacted on July 21, 2010, amended the Sarbanes-Oxley whistleblower provision to make several substantive changes. First, section 922(b) of Dodd-Frank added protection for employees from retaliation by nationally recognized statistical rating organizations (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c)) or their officers, employees, contractors, subcontractors, and agents.² Second, as noted above, section 922(c) of Dodd-Frank extended the statutory filing period for retaliation complaints under Sarbanes-Oxley from 90 days to 180 days after the date on which the violation occurs or after the date on which the employee became aware of the violation. Section 922(c) of Dodd-Frank also provided parties with a right to a jury trial in district court actions brought under Sarbanes-Oxley's "kick-out" provision, 18 U.S.C. 1514A(b)(1)(B), which provides that, if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no

² Section 3(a) of the Securities Exchange Act of 1934 defines a nationally recognized statistical ratings organization as a credit rating agency that issues credit ratings certified by qualified institutional buyers, in accordance with 15 U.S.C. 78o-7(a)(1)(B)(ix), with respect to: financial institutions, brokers, or dealers; insurance companies; corporate issuers; issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations, as in effect on September 29, 2006); issuers of government securities, municipal securities, or securities issued by a foreign government; or a combination of one or more categories of obligors described in any of clauses (i) through (v); and is registered under 15 U.S.C. 78o-7 (15 U.S.C. 78c(a)(62)).

showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such action without regard to the amount in controversy. Third, section 922(c) amended Sarbanes-Oxley to state that the rights and remedies provided for in 18 U.S.C. 1514A may not be waived by any agreement, policy form, or condition of employment, including by a pre-dispute arbitration agreement, and to provide that no pre-dispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this section.

In addition, section 929A of Dodd-Frank clarified that companies covered by the Sarbanes-Oxley whistleblower provision include any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company. As explained in Johnson v. Siemens Building Technologies, Inc., ARB No. 08-032, 2011 WL 1247202, at *11 (Mar. 31, 2011), section 929A merely clarified that subsidiaries and affiliates are covered under the Sarbanes-Oxley whistleblower provision. Section 929A applies to all cases currently pending before the Secretary.

III. Summary of Regulations and Rulemaking Proceedings.

On November 3, 2011, OSHA published in the Federal Register an IFR revising rules governing the whistleblower provisions of Section 806 of Sarbanes-Oxley. 76 FR 68084. OSHA included a request for public comment on the interim rules by January 3, 2012.

In response, four organizations and one individual filed comments with OSHA within the public comment period. Comments were received from Mr. Hunter Levi; the National Whistleblower Center (NWC); Katz, Marshall & Banks, LLP (Marshall); the Equal Employment Advisory Council (EEAC); and the Society of Corporate Secretaries & Governance Professionals (SCSGP).

OSHA has reviewed and considered the comments and now adopts this final rule with minor revisions. The following discussion addresses the comments, OSHA's responses, and any other changes to the provisions of the rule. The provisions in the IFR are adopted and continued in this final rule, unless otherwise noted below.

General Comments

Marshall commented that “in large part, the rules simply effectuate changes made by [Dodd-Frank] and are rather modest in scope,” and wrote in support of several changes made in the IFR. Marshall stated that Congress enacted Sarbanes-Oxley whistleblower provisions to ensure that employees could raise concerns about potentially harmful fraud on shareholders and others without fear of retaliation. In response to anticipated comments that the rules “will make pursuing a SOX whistleblower claim far less daunting,” Marshall noted, “why should OSHA procedures make pursuing a whistleblower complaint daunting for an employee in a procedural sense?” (emphasis in original). Marshall explained, “If the purpose of SOX whistleblower protections is to encourage and facilitate the timely reporting of financial fraud that can cause tremendous harm to the public good, the administrative process should be as accessible as possible.” Marshall also commented on specific provisions of the rule; those comments are addressed below.

SCSGP noted that Section 806 of Sarbanes-Oxley provides whistleblowers with broad protection against retaliation, and its safeguards were enhanced by the enactment of Dodd-Frank. SCSGP also pointed to recent ARB case law and other provisions of Dodd-Frank that provide expanded whistleblower protections. SCSGP commented that these developments “underscore the need to ensure that employers are provided adequate due process in the context of DOL’s administration of Section 806 complaints.” SCSGP comments then focused on four aspects of the IFR that SCSGP considers are “unauthorized by statute, imbalanced, and unduly prejudicial to employers’ reasonable interests.” Those specific comments and provisions are discussed in detail below.

Mr. Levi asserted his belief that the IFR contained “new provisions that violate the intent of Congress, ignore longstanding precedent concerning the authority of the Secretary, and seek to create a bogus legal exception to SOX Section 802, [18 U.S.C. §1519]; which deals with the criminal obstruction of SOX in government proceedings.” Mr. Levi also asserted his belief that the revisions to which he objects violate the rights of Sarbanes-Oxley complainants and increase the risk of employer securities fraud. Mr. Levi’s comments additionally addressed two specific portions of the IFR Federal Register notice: Section 1980.112 and the preamble discussion of Section 1980.114. OSHA has addressed Mr. Levi’s comments in the discussion of the specific provisions below.

EEAC commented that the IFR accurately reflected the changes made by Dodd-Frank, and commended OSHA for this effort. EEAC further submitted that many of the additional changes incorporated in the IFR, for purposes of clarification and improvement of the procedures, were not directed by Dodd-Frank. EEAC respectfully submitted that many of these changes “seem intentionally designed to make it easier for claimants to file and prosecute, and

more difficult for respondents to defend,” Sarbanes-Oxley whistleblower complaints. EEAC then commented on several specific provisions of the rule, and those comments are addressed below.

NWC, in support of its various suggested revisions, discussed the overall remedial purpose of the Sarbanes-Oxley whistleblower provisions, as well as the employee protection provisions of various other statutes that OSHA enforces. NWC also commented specifically on several provisions of the IFR, which are discussed below.

Subpart A – Complaints, Investigations, Findings and Preliminary Orders.

Section 1980.100 Purpose and scope.

This section describes the purpose of the regulations implementing Sarbanes-Oxley and provides an overview of the procedures covered by these regulations. No comments were received on this section. However, OSHA has added a statement in subparagraph (b) noting that these rules reflect the Secretary’s interpretations of the Act.

Section 1980.101 Definitions.

This section includes general definitions applicable to Sarbanes-Oxley’s whistleblower provision. The interim final rule updated and revised this section in light of Dodd-Frank’s amendments to Sarbanes-Oxley. In March 2014, the Supreme Court issued its decision in Lawson v. FMR LLC, 134 S. Ct. 1158 (2014), in which it affirmed the Department’s view that protected employees under Sarbanes-Oxley’s whistleblower provision include employees of contractors to public companies. No changes have been made to the definition of “employee” in this rule, as the interim final rule’s definition of “employee” is consistent with the Supreme Court’s decision. No comments were received on this section of the interim final rule and no changes have been made to this section.

Section 1980.102 Obligations and prohibited acts.

This section describes the activities that are protected under Sarbanes-Oxley and the conduct that is prohibited in response to any protected activities.

The final rule, like the interim final rule, provides that an employee is protected against retaliation by a covered person for any lawful act done by the employee:

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

(i) A Federal regulatory or law enforcement agency;

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

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

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

In order to have a “reasonable belief” under Sarbanes-Oxley, a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the enumerated categories of law. See Lockheed Martin Corp. v. ARB,

717 F.3d 1121, 1132 (10th Cir. 2013); Wiest v. Lynch, 710 F.3d 121, 131-32 (3d Cir. 2013); Sylvester v. Parexel Int'l LLC, ARB No. 07-123, 2011 WL 2165854, at *12 (ARB May 25, 2011). 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. See Sylvester, 2011 WL 2165854, at *12 (citing Harp v. Charter Commc'ns, 558 F.3d 722, 723 (7th Cir. 2009)); Day v. Staples, Inc., 555 F.3d 42, 54 n.10 (1st Cir. 2009) (quoting Welch v. Chao, 536 F.3d 269, 277 n.4 (4th Cir. 2008) (“Subjective reasonableness requires that the employee ‘actually believed the conduct complained of constituted a violation of pertinent law.’”)). “[T]he legislative history of Sarbanes-Oxley makes clear that its protections were ‘intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise.’” Sylvester, 2011 WL 2165854, at *11 (quoting Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1002 (9th Cir. 2009) (citing 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002))).

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.” Sylvester, 2011 WL 2165854, at *12 (internal quotation marks and citation omitted); Harp, 558 F.3d at 723. However, the complainant need not show that the conduct complained of constituted an actual violation of law. Pursuant to this standard, an employee’s whistleblower activity is protected where it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred or is likely to occur. See Sylvester, 2011 WL 2165854, at *13 (citing Welch, 536 F.3d at 277); Allen v. Admin. Rev. Bd., 514 F.3d 468, 476-77 (5th Cir. 2008); Melendez v. Exxon Chemicals Americas, ARB No. 96-051, slip op. at 21 (ARB July 14, 2000) (“It is also well established that

the protection afforded whistleblowers who raise concerns regarding statutory violations is contingent on meeting the aforementioned ‘reasonable belief’ standard rather than proving that actual violations have occurred.”).

NWC commented on this section and suggested that an additional paragraph be added to this section, addressing the question of extraterritorial application of Section 806 of Sarbanes-Oxley. At the time of its comment, this question was before the ARB for consideration. NWC noted that because the issue of extraterritorial application was pending, the Department of Labor (Department) could “facilitate determination of these issues by making a few clarifications in the regulations.” NWC suggested OSHA add a paragraph 29 CFR § 1980.102(c), that provides as follows: “(c) The employee protections of the Act shall have the same extraterritorial application as the Securities Exchange Act, including the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78dd-1.” However, since the writing of the comment, the ARB has issued its decision on this question, holding that “Section 806(a)(1) does not allow for its extraterritorial application.” Villanueva v. Core Laboratories NV, No. 09-108, 2011 WL 7021145, at *9 (ARB Dec. 22, 2011), affirmed on other grounds, Villanueva v. U.S. Dep’t of Labor, 743 F.3d 103 (5th Cir. 2014). The ARB’s decision in Villanueva provides the Secretary’s views on the extraterritorial application of the SOX whistleblower provision and OSHA therefore declines to include NWC’s suggested paragraph on this issue. No other comments were received on this section and no changes have been made to it.

Section 1980.103 Filing of retaliation complaints.

This section explains the requirements for filing a retaliation complaint under Sarbanes-Oxley. The Dodd-Frank 2010 statutory amendments changed the statute of limitations for filing a complaint from 90 to 180 days after the date on which the violation occurs, or after the date on

which the employee became aware of the violation. This change was reflected in the IFR and is continued here. Therefore, to be timely, a complaint must be filed within 180 days of when the alleged violation occurs, or after the date on which the employee became aware of the violation. Under Delaware State College v. Ricks, 449 U.S. 250, 258 (1980), the time of the alleged violation is considered to be when the retaliatory decision has been both made and communicated to the complainant. The time for filing a complaint under Sarbanes-Oxley may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a Sarbanes-Oxley complaint equitably tolled if the complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation. EEAC expressed its support for this revision.

The IFR also amended Section 1980.103(b) to change the requirement that whistleblower complaints to OSHA under Sarbanes-Oxley “must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” Consistent with OSHA’s procedural rules under other whistleblower statutes, complaints filed under Sarbanes-Oxley now need not be in any particular form. They may be either oral or in writing. When a complaint is made orally, OSHA will reduce the complaint to writing. If a complainant is not able to file the complaint in English, the complaint may be filed in any language. With the consent of the employee, complaints may be filed by any person on the employee’s behalf. As noted below, several comments were received on this section of the interim final rule. No changes have been made in response to the comments. However, the term “e-mail” in paragraph (d) has been changed to “electronic communication transmittal” because OSHA has published an on-line complaint form on its website, http://www.whistleblowers.gov/complaint_page.html.

SCSGP commented that it is “very concerned that the proposed ‘oral complaint’ provision will have unintended negative consequences, and [it] urge[s] OSHA not to enact it.” SCSGP further commented that the new rule is “unnecessary because SOX complaints most often are filed by sophisticated professionals,” and that the rule shifts the OSHA investigator’s role from one of a neutral fact-finder to an advocate for the complainant. SCSGP also commented that the rule lacks any standard for the investigator’s creation of the complaint. SCSGP also raised the concern that the new rule “presents the risk that the complainant will later treat the investigator as an adverse witness in the litigation.” SCSGP explained that in cases where a complainant who proceeds to further stages of the administrative proceeding, or a complainant who transfers their case to federal district court, may seek to modify or expand their original complaint by arguing that the OSHA investigator did not accurately record the complainant’s allegations at the time of the initial complaint. SCSGP explained this could place the investigator in the role of an adverse witness and subject him or her to scrutiny for failing to capture the oral complaint in totality.

Similarly, EEAC commented that it questioned the “rationale of eliminating the requirement that a written complaint contain the full details concerning the alleged violation.” EEAC commented that written complaints emphasize the gravity of invoking protection under Sarbanes-Oxley and discourage frivolous complaints. The EEAC also commented on the provision that complaints may be made in any language, stating that “[t]he agency offers no guidance on by whom, if at all, the complaint will be translated into English” nor how a respondent may submit its own proposed translation. EEAC respectfully recommended that this final rule make clear how these issues would be resolved. Conversely, Marshall wrote in support of these revisions.

OSHA has considered these comments and adopts the changes made in the IFR. The statutory text of SOX does not require written complaints to OSHA. See 29 U.S.C. 1514A(b)(1)(A). Further, as Marshall noted in his comment, “[m]aking it clear that OSHA can accept oral complaints is better described as a clarification than as an amendment to existing procedures.” Indeed, the Department has long permitted oral complaints under the environmental statutes. See, e.g., Roberts v. Rivas Environmental Consultants, Inc., ARB No. 97-026, 1997 WL 578330, at *3 n.6 (ARB Sept. 17, 1997) (complainant’s oral statement to an OSHA investigator, and the subsequent preparation of an internal memorandum by that investigator summarizing the oral complaint, satisfies the “in writing” requirement of CERCLA, 42 U.S.C. 9610(b), and the Department’s accompanying regulations in 29 CFR part 24); Dartey v. Zack Co. of Chicago, No. 1982-ERA-2, 1983 WL 189787, at *3 n.1 (Sec’y of Labor Apr. 25, 1983) (adopting administrative law judge’s findings that complainant’s filing of a complaint to the wrong DOL office did not render the filing invalid and that the agency’s memorandum of the complaint satisfied the “in writing” requirement of the Energy Reorganization Act (“ERA”) and the Department’s accompanying regulations in 29 CFR part 24). Moreover, accepting oral complaints under Sarbanes-Oxley is consistent with OSHA’s longstanding practice of accepting oral complaints filed under Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c); Section 211 of the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. 2651; Section 7 of the International Safe Container Act of 1977, 46 U.S.C. 80507; and STAA, 49 U.S.C. 31105. This change also accords with the Supreme Court’s decision in Kasten v. Saint-Gobain Performance Plastics Corp., in which the Court held that the anti-retaliation provision of the Fair Labor Standards Act, which prohibits employers from discharging or otherwise discriminating against an employee because such employee has “filed any complaint,” protects

employees' oral complaints of violations of the Fair Labor Standards Act. 563 U.S. ___, 131 S. Ct. 1325 (2011).

Furthermore, OSHA believes that its acceptance of oral complaints under Sarbanes-Oxley is most consistent with the ARB's decisions in Sylvester and Evans v. U.S. Environmental Protection Agency, ARB No. 08-059 (ARB Jul. 31, 2012). In Sylvester, noting that OSHA does not require complaints under Sarbanes-Oxley to be in any form and that under 29 CFR 1980.104(b) OSHA has a duty, if appropriate, to interview the complainant to supplement the complaint, the ARB held that the federal court pleading standards established in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009) do not apply to Sarbanes-Oxley whistleblower complaints filed with OSHA. 2011 WL 2165854, at *9-10. In Evans, the ARB articulated the legal standard for analyzing the sufficiency of a whistleblower complaint brought before an ALJ. The ARB held that the whistleblower complaint need only give "fair notice" of the protected activity and adverse action to withstand a motion to dismiss for failure to state a claim. ARB No. 08-059, slip op. at *9. Furthermore, the ARB instructed that an ALJ should not act on a motion to dismiss for failure to state a claim until it is clear that the complainant has filed a document that articulates the claims presented to the OALJ for hearing following OSHA's findings. Id., at *8. Complaints filed with OSHA under this section are simply "informal documents that initiate an investigation into allegations of unlawful retaliation in violation of the [Act]." Id., at *7. Permitting a complainant to file a complaint orally or in writing or in any language is consistent with the purpose of the complaint filed with OSHA, which is to trigger an investigation regarding whether there is reasonable cause to believe that retaliation occurred.

Furthermore, upon receipt of a complaint, OSHA must provide the respondent notice of the filing of the complaint, the allegations contained in the complaint, and the substance of the evidence supporting the complaint. 49 U.S.C. 42121(b)(2)(A); 29 CFR 1980.104(a). OSHA may not undertake an investigation of the complaint unless the complaint, supplemented as appropriate by interviews of the complainant, makes a prima facie allegation of retaliation. 49 U.S.C. 42121(b)(2)(B); 29 CFR 1980.104(e). If OSHA commences an investigation, the respondent has the opportunity to submit a response to the complaint and meet with the investigator to present statements from witnesses. 49 U.S.C. 42121(b)(2)(A); 29 CFR 1980.104(b). To fulfill these statutory responsibilities, when OSHA receives an oral complaint, OSHA gathers as much information as it can from the complainant about the complainant's allegations so that the respondent will be able to adequately respond to the complaint and so that OSHA may properly determine the scope of any investigation into the complaint. OSHA also generally provides the respondent with a copy of its memorandum memorializing the complaint, and the respondent has the opportunity to request that OSHA clarify the allegations in the complaint if necessary.

Regarding SCSGP's comment that the investigator may be later called as an adverse witness in litigation, OSHA understands this comment to be implicating the issue of adding untimely claims or exhaustion of remedies. Under Section 806, an employee must file a complaint with OSHA alleging a violation of this provision and allow OSHA an opportunity to investigate before pursuing the claim before an ALJ or in federal court. 18 U.S.C. 1514A(b)(1)(A). Failure to raise a particular claim or allegation before OSHA can result in that claim being barred in subsequent administrative or federal court proceedings for failure to "exhaust administrative remedies." See, e.g., Willis v. Vie Financial Group, Inc., No. Civ. A.

04-435, 2004 WL 1774575 (E.D. Pa. Aug. 6, 2004) (barring a complainant's claim because he did not amend his OSHA complaint to assert post-complaint retaliation); Carter v. Champion Bus, Inc., ARB No. 05-076, slip op. at *9 (ARB Sept. 29, 2006) (the ARB generally will not consider arguments or evidence first raised on appeal); Saporito v. Central Locating Services, Ltd., ARB No. 05-004, slip op. at *9 (ARB Feb. 28, 2006) (the ARB was unwilling to entertain an argument from the complainant that he had engaged in certain activity where he had not presented that theory to the ALJ, and where the argument was supported by no “references to the record, legal authority or analysis.”). While a dispute could arise in a whistleblower complaint filed orally regarding whether OSHA properly recorded the allegations at issue in the complaint and whether the complainant properly exhausted his administrative remedies, this possibility is not new, as OSHA’s historical practice has been to accept complaints orally and reduce them to writing and to supplement complaints with interviews of the complainant as necessary. In addition, the possibility that a dispute could arise regarding the claims raised to OSHA does not outweigh the benefits to whistleblowers and the public of allowing such complaints to be filed orally with OSHA.

In response to EEAC’s comment regarding OSHA’s acceptance of complaints in any language, OSHA believes that its procedures are fair and ensure the accuracy of the complaint and evidence submitted to OSHA. Under current practices for receiving complaints, OSHA uses professional interpretive services to communicate with employees speaking a language other than English. The OSHA investigator will reduce the complaint to writing, in English, as communicated to him or her through the interpretive service. Translation services are also available to interview complainants throughout an investigation. Additionally, should the complainant wish to submit his or her complaint in another language in writing, or submit

additional documents throughout the investigation in another language, OSHA will use document translation services. Should a respondent wish to see an original document, as well as any translation, this information may be exchanged in accordance with the procedures and privacy protections set forth in Section 1980.104 (discussed in detail below). A respondent then would be free to submit his or her own translation of any such document to the OSHA investigator in accordance with the investigation procedures set forth in Section 1980.104.

Section 1980.104 Investigation.

This section describes the procedures that apply to the investigation of Sarbanes-Oxley complaints. Paragraph (a) of this section outlines the procedures for notifying the parties and the SEC of the complaint and notifying respondents of their rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) of the IFR specified 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. Paragraph (c) further provided that 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. 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.

The Sarbanes-Oxley whistleblower provision mandates that an action under the Act is governed by the burdens of proof set forth in AIR21, 49 U.S.C. 42121(b). The statute requires that a complainant make an initial prima facie showing that 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. 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.*, 419 F.3d 885, 895 (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 prima facie showing, the investigation must be discontinued and the complaint dismissed. *See Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the ERA, which is the same as that under Sarbanes-Oxley, serves a “gatekeeping function” that “stem[s] frivolous complaints”). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the employer “demonstrates, by clear and convincing evidence,” that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(ii). Thus, OSHA must dismiss a complaint under Sarbanes-

Oxley and not investigate 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) (Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); see, e.g., Lockheed Martin Corp., 717 F.3d at 1136. 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 alternatively can prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct” and that another reason was the complainant’s protected activity. See Klopfenstein v. PCC Flow Techs. Holdings, Inc., No. 04-149, 2006 WL 3246904, at *13 (ARB May 31, 2006) (citing Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004)) (discussing contributing factor test under the Sarbanes-Oxley whistleblower provision), aff’d sub nom. Klopfenstein v. Admin. Review Bd., U.S. Dep’t of Labor, 402 F. App’x 936, 2010 WL 4746668 (5th Cir. 2010).

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 49 U.S.C. 42121(b)(2)(B)(iv). 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 v. Navajo Express, Inc., No. 09-114, 2011 WL 2614326, at *3 (ARB June 29, 2011) (discussing burdens of proof under analogous whistleblower provision in STAA).

NWC and the EEAC commented on this section. NWC suggested clarification of what “other applicable confidentiality laws” might apply to redaction of respondent’s submissions, before providing them to the complainant. NWC also suggested several additions and revisions to this section, as well as to Section 1980.107, to further protect the confidentiality of complainants. NWC pointed to the confidentiality provisions of Section 922 of the Dodd-Frank Act, creating a whistleblower program under section 21F of the Securities Exchange Act,³ as well as recent developments in the United States Tax Court, and suggested that the Department bring its own confidentiality practices into conformity.

The EEAC commented that it was extremely concerned that the modifications made in this section in the IFR would increase the amount of information provided to the complainant during the investigation but reduce information provided to the respondent. As OSHA explained in the preamble to the IFR, those revisions were aimed at aiding OSHA’s ability to conduct a “full and fair investigation.” EEAC submitted that the same logic supports providing respondents with all of the information that OSHA receives from the complainant during the investigation. Specifically, EEAC suggested that OSHA retain the former language in paragraph

³ Section 21F(h)(2)(A) prevents disclosure of identifying information by the Commission and its officers, except in accordance with the provisions of the Privacy Act, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any other specified entity. 15 U.S.C. 78u-6(h)(2).

(a) regarding notice to the respondent upon receipt of a complaint, and revise paragraph (c) to provide that the same information will be provided to respondents as is provided to complainants during the investigation. EEAC also suggested paragraph (f) include language that if the complainant submits new information at this stage, the employer will be given a copy and the opportunity to respond before OSHA makes a final determination on the complaint.

Regarding NWC's suggestion that OSHA provide more specific information about the confidentiality laws that may protect portions of the information submitted by a respondent, OSHA anticipates that the vast majority of respondent submissions will not be subject to any confidentiality laws. However, in addition to the Privacy Act, a variety of confidentiality provisions may protect information submitted during the course of an investigation. For example, a respondent may submit information that the respondent identifies as confidential commercial or financial information exempt from disclosure under the Freedom of Information Act (FOIA). OSHA's procedures for handling information identified as confidential during an investigation are explained in OSHA's Whistleblower Investigations Manual available at: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=506.

Additionally, OSHA has considered NWC's suggestions regarding complainants' confidentiality. OSHA agrees that protecting complainants' confidentiality and privacy to the extent possible under the law is essential. However, OSHA believes that existing procedures and the Privacy Act of 1974, 5 U.S.C. 552a, et seq., provide sufficient safeguards. The Whistleblower Investigations Manual instructs that while a case is an open investigation, information contained in the case file generally may not be disclosed to the public. Once a case is closed, complainants continue to be protected from third party public disclosure under the Privacy Act. 5 U.S.C. 552a(k)(2). However, if a case moves to the ALJ hearing process, it

becomes a public proceeding and the public has a right of access to information under various laws and the Constitution. See Newport v. Calpine Corp., ALJ No. 2007-ERA-00007, slip op. at *6 (Feb. 12, 2008), available at http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/DECISIONS/ALJ_DECISIONS/ERA/2007ERA00007A.PDF (discussing hearings before the ALJ under the analogous statutory provisions of the ERA and the public right of access). Information submitted as evidence during these proceedings becomes the exclusive record for the Secretary's decision. Public disclosure of the record for the Secretary's decision is governed by the Freedom of Information Act and the Privacy Act. Id. A party may request that a record be sealed to prevent disclosure of such information. However, the Constitution and various federal laws cited in Newport govern the granting of such a motion; OSHA cannot circumvent these authorities by rulemaking. See also Thomas v. Pulte Homes, Inc., ALJ No. 2005-SOX-00009, slip op. at *2-3 (Aug. 9, 2005) (noting that in order to prevent disclosure of such information, a moving party must request a protective order pursuant to the OALJ rules of procedure; the standard for granting such a motion is high and the burden of making a showing of good cause rests with the moving party).

In response to EEAC's comments and suggestions, OSHA agrees that respondents must be afforded fair notice of the allegations and substance of the evidence against them. OSHA also believes that the input of both parties in the investigation is important to ensuring that OSHA reaches the proper outcome during its investigation. Thus, in response to EEAC's comments, Section 1980.104(a) has been revised to more closely mirror AIR21's statutory requirement, incorporated by Sarbanes-Oxley, in 49 U.S.C. §42121(b)(1) that after receiving a complaint, the Secretary shall 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. In response to

EEAC's comment regarding paragraph (c), OSHA notes that its current policy is to request that each party provide the other parties with a copy of all submissions to OSHA that are responsive to the whistleblower complaint. Where the parties do not so provide, OSHA will ensure that each party is provided with such information, redacted as appropriate. OSHA will also ensure that each party is provided with an opportunity to respond to the other party's submissions. OSHA has revised paragraph (c) to clarify these policies regarding information sharing during the course of an investigation. Further information regarding OSHA's nonpublic disclosure and information sharing policies may also be found in the Whistleblower Investigations Manual. Regarding EEAC's suggestion for paragraph (f), it is already OSHA's policy to provide the respondent a chance to review any additional evidence on which OSHA intends to rely that is submitted by the complainant at this stage and to provide the respondent an opportunity to respond to any such additional evidence. This policy is necessary to achieve the purpose of paragraph (f), which is to afford respondent due process prior to ordering preliminary reinstatement as required by the Supreme Court's decision in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987). OSHA also notes that the Whistleblower Investigations Manual provides guidance to investigators on sharing information with both parties throughout the investigation.

OSHA has made additional minor edits throughout this section to clarify the applicable procedures and burdens of proof.

Section 1980.105 Issuance of findings and preliminary orders.

Throughout this section, minor changes were made as needed to clarify the provision without changing its meaning. This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint

has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, in accordance with the statute, 18 U.S.C. 1514A(c), the Assistant Secretary will order “all relief necessary to make the employee whole,” including preliminary reinstatement, back pay with interest, and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees.

Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. In the Secretary’s view, 26 U.S.C. 6621 provides the appropriate rate of interest to ensure that victims of unlawful retaliation under Sarbanes-Oxley are made whole. The Secretary has long applied the interest rate in 26 U.S.C. 6621 to calculate interest on back pay in whistleblower cases. Doyle v. Hydro Nuclear Servs., Nos. 99-041, 99-042, 00-012, 2000 WL 694384, at *14–15, 17 (ARB May 17, 2000); see also Cefalu v. Roadway Express, Inc., ARB Case No. 09-070, 2011 WL 1247212, at *2 (ARB Mar. 17, 2011); Pollock v. Cont’l Express, ARB Case Nos. 07-073, 08-051, 2010 WL 1776974, at *8 (ARB Apr. 10, 2010); Murray v. Air Ride, Inc., ARB Case No. 00-045, slip op. at 9 (ARB Dec. 29, 2000). Section 6621 provides the appropriate measure of compensation under Sarbanes-Oxley and other DOL-administered whistleblower statutes because it ensures the complainant will be placed in the same position he or she would have been in if no unlawful retaliation occurred. See Ass’t Sec’y v. Double R. Trucking, Inc., ARB Case No. 99-061, slip op. at 5 (ARB July 16, 1999) (interest awards pursuant to § 6621 are mandatory elements of complainant’s make-whole remedy). Section 6621 provides a reasonably accurate prediction of market outcomes (which represents the loss of investment opportunity by the complainant and the employer’s benefit from use of the withheld money) and thus provides the complainant with appropriate make-whole relief. See EEOC v. Erie Cnty., 751 F.2d 79, 82 (2d Cir. 1984)

(“[s]ince the goal of a suit under the [Fair Labor Standards Act] and the Equal Pay Act is to make whole the victims of the unlawful underpayment of wages, and since [§ 6621] has been adopted as a good indicator of the value of the use of money, it was well within” the district court’s discretion to calculate prejudgment interest under § 6621); New Horizons for the Retarded, 283 N.L.R.B. No. 181, 1173 (May 28, 1987) (observing that “the short-term Federal rate [used by § 6621] is based on average market yields on marketable Federal obligations and is influenced by private economic market forces”). Similarly, as explained in the interim final rule, daily compounding of the interest award ensures that complainants are made whole for unlawful retaliation in violation of Sarbanes-Oxley. 76 FR 68088.

In ordering back pay, OSHA also will require the respondent to submit the appropriate documentation to the Social Security Administration (SSA) allocating the back pay to the appropriate calendar quarters. Requiring the reporting of back pay allocation to the SSA serves the remedial purposes of Sarbanes-Oxley by ensuring that employees subjected to retaliation are truly made whole. See Don Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB No. 10 (NLRB Aug. 8, 2014). As the NLRB explained, when back pay is not properly allocated to the years covered by the award, a complainant may be disadvantaged in several ways. First, improper allocation may interfere with a complainant’s ability to qualify for any old-age Social Security benefit. Id. at *3 (“Unless a [complainant’s] multiyear backpay award is allocated to the appropriate years, she will not receive appropriate credit for the entire period covered by the award, and could therefore fail to qualify for any old-age social security benefit.”). Second, improper allocation may reduce the complainant’s eventual monthly benefit. Id. As the NLRB explained, “if a backpay award covering a multi-year period is posted as income for 1 year, it may result in SSA treating the [complainant] as having received wages in that year in excess of

the annual contribution and benefit base.” Id. Wages above this base are not subject to Social Security taxes, which reduces the amount paid on the employee’s behalf. “As a result, the [complainant’s] eventual monthly benefit will be reduced because participants receive a greater benefit when they have paid more into the system.” Id. Finally, “social security benefits are calculated using a progressive formula: although a participant receives more in benefits when she pays more into the system, the rate of return diminishes at higher annual incomes.” Therefore, a complainant may “receive a smaller monthly benefit when a multiyear award is posted to 1 year rather than being allocated to the appropriate periods, even if social security taxes were paid on the entire amount.” Id. The purpose of a make-whole remedy such as back pay is to put the complainant in the same position the complainant would have been absent the prohibited retaliation. That purpose is not achieved when the complainant suffers the disadvantages described above. The Secretary believes that requiring proper SSA allocation is necessary to achieve the make-whole purpose of a back pay award.

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. 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.

The provision that reinstatement would not be appropriate where the respondent establishes that the complainant is a security risk was removed from 1980.105(a)(1) in the IFR. OSHA believes that the determination of whether reinstatement is inappropriate in a given case

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

SCSGP, EEAC, and Marshall commented on this removal, as well as on the overall guidance provided when determining whether preliminary reinstatement is appropriate. SCSGP commented that the IFR lacked “any standards governing the issuance of preliminary reinstatement orders” and that the rule should contain appropriate safeguards that preliminary reinstatement is warranted under the circumstances, rather than presuming that reinstatement is proper. SCSGP suggested that OSHA include in the final rule a list of non-exhaustive factors to be considered by the courts to determine when reinstatement is appropriate, including whether hostility exists between the employee and the company, and whether the employee’s position no longer exists. EEAC “urge[d] OSHA to reinstate this ‘security risk’ exception” in the final rule. EEAC also submitted that OSHA’s reasoning for removing the exception is flawed (that the determination of whether reinstatement is inappropriate in a given case should be based on the factual circumstances of that case). EEAC first pointed to Sarbanes-Oxley’s incorporation of the AIR21 rules and procedures and that the security risk exception is consistent with OSHA’s whistleblower regulations promulgated under AIR21. EEAC also noted that the security risk exception was predicated on the respondent establishing that the complainant is in fact a security risk prior to the exception taking effect and thus would be determined on a case-by-case basis in this manner. Marshall wrote in support of the removal of the security risk language and supported the explanation that determinations of whether reinstatement is appropriate should be

based on the facts of the particular case. Marshall noted that the Act itself does not contain any statutory prohibition of reinstatement under certain circumstances.

OSHA disagrees that the rule requires any further guidance on when preliminary reinstatement is appropriate. First, OSHA emphasizes that Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of Sarbanes-Oxley, thus creating the presumption it is the appropriate remedy. Neither Sarbanes-Oxley nor AIR21 specify any statutorily predetermined circumstances under which preliminary reinstatement would be inappropriate. Furthermore, although the regulations governing proceedings under AIR21 reference a security risk exception, this exception is not in the statutory text incorporated by Sarbanes-Oxley. See 18 U.S.C. §1514(b)(1)(A) (. . . shall be governed “under the rules and procedures set forth in section 42121(b) of title 49, United States Code.”). This reference to AIR21’s statutory procedures does not impose an obligation for OSHA to also incorporate any procedural regulations promulgated under AIR21 not mandated by the statute.

OSHA agrees that there may be circumstances where preliminary reinstatement is inappropriate. However, OSHA believes that the rule as drafted provides sufficient safeguards for these situations, as well as sufficient guidance to OSHA, ALJs, and the ARB as to when those safeguards may be appropriate. First, the rule provides the ALJ and ARB discretion to grant a stay of an order of preliminary reinstatement (See Sections 1980.106(b) and 1980.110(b)). As discussed in detail in the discussion of Section 1980.106, ALJs and the ARB can refer to long-standing precedential case law in making this determination. Second, in appropriate circumstances, OSHA may order economic reinstatement in lieu of actual reinstatement, which is also discussed in detail below. In Hagman v. Washington Mutual Bank,

Inc., the ALJ delineated several factors to consider when making this determination. ALJ No. 2005-SOX-73, 2006 WL 6105301, at *32 (Dec. 19, 2006) (noting that while reinstatement is the “preferred and presumptive remedy” under Sarbanes-Oxley, “[f]ront pay may be awarded as a substitute when reinstatement is inappropriate due to: (1) an employee’s medical condition that is causally related to her employer’s retaliatory action; (2) manifest hostility between the parties; (3) the fact that claimant’s former position no longer exists; or (4) the fact that employer is no longer in business at the time of the decision”) (internal citations omitted). Many of these factors are similar to the factors SCSGP suggested be included in the rule. Thus, given the existing safeguards in place and sufficient guidance for when such safeguards are appropriate, OSHA declines to include the security risk exception in the final rule and declines to add additional guidance to the rule for when preliminary reinstatement is appropriate.

As mentioned above, in appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he received prior to his termination, but not actually return to work. Such “economic reinstatement” is akin to an order of front pay and is frequently employed in cases arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977, which protects miners from retaliation. 30 U.S.C. 815(c); see, e.g., Sec’y of Labor on behalf of York v. BR&D Enters., Inc., 23 FMSHRC 697, 2001 WL 1806020, at *1 (June 26, 2001). Front pay has been recognized as a possible remedy in cases under Sarbanes-Oxley and other whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. See, e.g., Hagman, 2006 WL 6105301; 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); Brown v. Lockheed Martin Corp., ALJ No. 2008-SOX-00049, 2010 WL 2054426, at *55 -56 (ALJ Jan. 15, 2010) (same). Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of Sarbanes-Oxley. When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement. Neither an employer nor an employee has a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to 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 might be delayed until after the administrative adjudication is completed as long as the employee continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating an employee should the employer ultimately prevail in the whistleblower adjudication.

SCSGP and Marshall commented on the issue of economic reinstatement. Marshall commented that the inclusion of the above language in the preamble is of "crucial significance for whistleblowers," but continued that OSHA's recognition that actual reinstatement remains the presumptive remedy is "essential as well." Marshall explained that "[a]ctual reinstatement protects interests that economic reinstatement cannot. Nonetheless, economic reinstatement must be available as a remedy for situations where a whistleblower cannot return to the workplace."

SCSGP addressed the issue of allowing an employer to recover the costs of economically reinstating an employee should the employer ultimately prevail in the whistleblower adjudication. SCSGP believes OSHA's interpretation, that there is no statutory basis for

allowing such reimbursement, “compromises an employer’s due process rights” and raises other concerns. SCSGP commented that conversely there is “no statutory basis for allowing the employee to keep the value of economic reinstatement where his or her claim is unfounded.” SCSGP noted that in situations where economic reinstatement is awarded, an employer may have to pay both the labor cost of filling the position, and the cost of the economic reinstatement awarded to the complainant. Where the employer ultimately prevails, it would not recover the duplicative cost, an outcome which SCSGP believes is grossly unfair. SCSGP recommended that OSHA include an additional paragraph in this section, allowing that economic reinstatement be available only upon consent of all parties, or upon the condition that the complainant will reimburse the employer in the event the employer ultimately prevails.

OSHA disagrees that economic reinstatement without a mechanism for reimbursement violates the employer’s rights under the Due Process clause. The Supreme Court has addressed the issue of what is required to afford an employer procedural due process prior to ordering preliminary reinstatement in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987). In Roadway Express, the Court held that “minimum due process for the employer in this context requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses.” Id. at 264. The Court did not require any mechanism for reimbursing the employer for wages paid during actual preliminary reinstatement should the employer ultimately prevail in the litigation. Because economic reinstatement is akin to actual reinstatement, OSHA believes the same requirements apply when ordering economic reinstatement.

Furthermore, OSHA disagrees that there is no statutory basis for precluding reimbursement of economic reinstatement. As discussed above, Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of Sarbanes-Oxley. However, the statutory procedural scheme does not allow for reimbursement to the employer if actual preliminary reinstatement was ordered and yet the employer ultimately prevailed. Thus, there is no statutory basis to reimburse an employer in that instance. Because economic reinstatement is a substitute for preliminary reinstatement, this same reasoning would apply for not awarding an employer reimbursement for any front pay the employee receives should the employer ultimately prevail. OSHA therefore declines to allow for such reimbursement where Congress has not so provided.

Subpart B – Litigation.

Section 1980.106 Objections to the findings and the preliminary order and request 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 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). Throughout this section, minor changes were made as needed to clarify the provision without changing its meaning.

The IFR revised paragraph (b) to note that a respondent's motion to stay the Assistant Secretary's preliminary order of reinstatement will be granted only based on exceptional circumstances. This revision clarified that a stay is only available in "exceptional circumstances," because the Secretary believes that a stay of the Assistant Secretary's preliminary order of reinstatement under Sarbanes-Oxley would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties, and the public interest favors a stay.

SCSGP, EEAC, and Marshall commented on this section. Marshall wrote in support of this revision, noting that "[p]reliminary reinstatement protects a number of important values; it should be ordered and enforced unless the respondent is able to make a credible and persuasive showing that these values are overwhelmed." SCSGP and EEAC requested that OSHA provide additional guidance regarding when a stay of an order for preliminary reinstatement would be appropriate. SCSGP suggested that OSHA modify paragraph (b) to provide "meaningful standards governing when an ALJ should stay a preliminary order of reinstatement." SCSGP's comment included concerns that the current standard, based on "exceptional circumstances," may unduly constrain the ALJ's discretion and authority, as well as leave the ALJ without guidance as to when a stay is appropriate. EEAC commented that in its view, the term "exceptional circumstances" implies a limitation far narrower than OSHA says that it intends." EEAC recommended that the language in the preamble referring to the requirements to obtain

equitable injunctive relief be added to the regulatory text. EEAC also suggested this addition to Section 1980.110(b), which covers appeals to the ARB.

It is well established that the standard for a stay of preliminary reinstatement is the standard needed to obtain a preliminary injunction. A party must prove: likely irreparable injury; likelihood of success on the merits; the balancing of hardships favors an injunction; and the public interest favors an injunction. Johnson v. U.S. Bancorp, ARB No. 13-014, 2013 WL 2902820, at *2 (ARB May 21, 2013); see also Evans v. T-Mobil USA, Inc., ALJ No. 2012-SOX-00036 (ALJ May 21, 2013) (granting stay of reinstatement). This traditional four-element test is applied in all federal courts. See Winter v. N.R.D.C., 555 U.S. 7, 20 (2008). The Department's ALJs and ARB have also applied this standard in a number of cases prior to the issuance of the IFR. See, e.g., Welch v. Cardinal Bankshares Corp., No. 06-062, 2006 WL 3246902 (ARB Mar. 31, 2006); Bechtel and Jacques v. Competitive Technologies, Inc., ALJ Nos. 2005-SOX-0033, 2005-SOX-0034, 2005 WL 4888999 (ALJ Mar. 29, 2005). The regulation and its preamble, existing ALJ and ARB decisions, and other federal case law clearly delineate the standard for a successful motion to stay a preliminary order of reinstatement. OSHA thus declines to provide further guidance on this issue.

EEAC also commented that there may be situations in which the complainant does not desire reinstatement, preliminary or otherwise. EEAC suggested the final rule contain language addressing this situation, allowing for the parties to come to an agreement to not order reinstatement. OSHA declines to include such language in this rule. Under Sarbanes-Oxley, reinstatement of the complainant to his or her former position is the presumptive remedy in merit cases and is a critical component of making the complainant whole. As Marshall notes in his comment, actual reinstatement protects interests that economic reinstatement cannot so

effectively address. For example, reinstatement serves to reassure other employees through the complainant's presence in the workplace that they too will be protected from retaliation for reporting violations of the law. By ordering preliminary reinstatement in cases involving discharge where OSHA has reasonable cause to believe that a statutory violation has occurred, OSHA properly places the burden upon the employer to make a bona fide offer of reinstatement. In doing so, OSHA also ensures that the employee is not forced to make a decision about whether he or she wants to return to the workplace until the employer actually makes such an offer.

Section 1980.107 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. Hearings are 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 continue to have broad discretion to limit discovery where necessary to expedite the hearing. Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious. Throughout this section, minor changes were made as needed to clarify the provision without changing its meaning.

NWC commented in part on this section, requesting language be added to further protect the confidentiality of complainants. The discussion of the agency's consideration of this comment is included in the discussion of Section 1980.104, above.

Section 1980.108 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 Sarbanes-Oxley. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the ARB proceeding. Although OSHA anticipates that ordinarily the Assistant Secretary will not participate, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, multiple employees, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Securities and Exchange Commission, if interested in a proceeding, also may participate as amicus curiae at any time in the proceedings.

No comments were received on this section. However, paragraph (a)(2) has been revised to specify that parties must send copies of documents to OSHA and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of OSHA, or when OSHA is participating in the proceeding, or when service on OSHA and the Associate Solicitor is otherwise required by these rules. Other minor changes were made as needed to clarify the provision without changing its meaning.

Section 1980.109 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 Sarbanes-Oxley. 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, 514 F.3d at 475 n.1

(“The term ‘demonstrates’ 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 id.

Paragraph (c) provides that OSHA’s determination to dismiss the complaint without an investigation or without a complete investigation pursuant to Section 1980.104 is not subject to review. Thus, Section 1980.109(c) clarifies that OSHA’s determinations on whether to proceed with an investigation under Sarbanes-Oxley and whether to make particular investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases de novo and, therefore, as a general matter, may not remand cases to OSHA to conduct an investigation or make further factual findings. Paragraph (c) also clarifies that the ALJ can dispose of a matter without a hearing if the facts and circumstances warrant. In its comments, EEAC expressed support for this clarification.

Paragraph (d) notes the remedies that the ALJ may order under the Act and 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. Paragraph (d) has been revised to note that when back pay is ordered, the order will also require the respondent to submit appropriate documentation to the Social Security Administration 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, the Assistant Secretary, 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.

No comments were received on this section. However, the statement that 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 was deleted from Section 1980.110(a) and moved to paragraph (e) of this section. Additionally, OSHA has revised the period for filing a timely petition for review with the ARB to 14 days rather than 10 business days. With this change, the final rule expresses the time for a petition for review in a way that is consistent with the other deadlines for filings before the ALJs and the ARB in the rule, which are also expressed in days rather than business days. This change also makes the final rule congruent with the 2009 amendments to Rule 6(a) of the Federal Rules of Civil Procedure and Rule 26(a) of the Federal Rules of Appellate Procedure, which govern computation of time before the federal courts and express filing deadlines as days rather than business days. Accordingly, the ALJ's order will become the final order of the Secretary 14 days after the date of the decision, rather than after 10 business days, unless a timely petition for review is filed. As a practical matter, this revision does not substantively alter the window of time for filing a petition for review before the ALJ's order becomes final.

Other minor changes were made as needed to clarify the provision without changing its meaning.

Section 1980.110 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. If no timely petition for review is filed with the

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

This section also provides that, based on exceptional circumstances, the ARB may grant a motion to stay an ALJ's preliminary order of reinstatement under the Act, 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 Sarbanes-Oxley would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and the public interest favors a stay. The EEAC's comment regarding guidance on when a stay of preliminary reinstatement is appropriate addressed this provision of the rule, as well Section 1980.106(b). OSHA's response to this comment is explained in detail above, in the discussion of Section 1980.106.

If the ARB concludes that the respondent has violated the law, it will order the remedies listed in paragraph (d). 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. Paragraph (d) has been revised to note that when back pay is ordered, the order will also require the respondent to submit appropriate documentation to the Social Security Administration 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.

NWC requested that the agency make several revisions to this section that would “further the goal of deciding cases on their merits.” The requested revisions included: (1) change the time limit for a petition for review from 10 days to 30 days; (2) require that a petition for review set forth legal issues showing good cause to allow full briefing; (3) change the provision that objections to legal conclusions not raised in petitions for review “will ordinarily” be deemed waived, to “may” be deemed waived; and (4) specify in the regulation that the ARB may extend the time to submit petitions for review upon good cause shown. NWC stated that these revisions would “advance the remedial purposes of the Act by lowering the procedural hurdles to a decision on the merits.”

OSHA first notes that the IFR did use the phrase “may” be deemed waived regarding objections not specifically raised in a petition for review. This change was made as a result of comments submitted by NWC on other whistleblower rules published by OSHA. See, e.g., Procedures for the Handling of Retaliation Complaints Under Section 219 of the Consumer Product Safety Improvement Act of 2008, 77 FR 40494, 40500-01 (July 10, 2012); Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the

Surface Transportation Assistance Act of 1982 (STAA), as Amended, 77 FR 44121, 44131-32 (July 27, 2012).

However, OSHA declines to adopt NWC's additional suggestions relating to this section. First, OSHA declines to extend the time limit to petition for review because the shorter review period is consistent with the practices and procedures followed in OSHA's other whistleblower programs. Furthermore, parties may file a motion for extension of time to appeal an ALJ's decision, and the ARB has discretion to grant such extensions. However, as explained above, OSHA has revised the period to petition for review of an ALJ decision to 14 days rather than 10 business days. As a practical matter, this revision does not substantively alter the window of time for filing a petition for review before the ALJ's order becomes final. In addition, Section 1980.110(c), which provides that the ARB will issue a final decision within 120 days of the conclusion of the ALJ hearing, was similarly revised to state that the conclusion of the ALJ hearing will be deemed to be 14 days after the date of the decision of the ALJ, rather than after 10 business days, unless a motion for reconsideration has been filed with the ALJ in the interim. Like the revision to Section 1980.110(a), this revision does not substantively alter the length of time before the ALJ hearing will be deemed to have been concluded.

Finally, OSHA believes that use of the word "may," as discussed above, adequately addresses NWC's underlying concern that grounds not raised in a petition for review may be barred from consideration before the ARB.

Non-substantive changes were made to paragraph (c) of this section to clarify when all hearings before an ALJ are considered concluded, and thus when the time for the ARB to issue a final decision begins to run.

Subpart C – Miscellaneous Provisions.

Section 1980.111 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 also provides for approval of settlements at the investigative and adjudicative stages of the case. No comments were received on this section. Minor changes were made as needed to this section and section title to clarify the provision without changing its meaning.

Section 1980.112 Judicial review.

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, that the ARB or the ALJ submit the record of proceedings to the appropriate court pursuant to the rules of such court.

Mr. Levi commented on this section, stating that paragraph (b) created a new rule. Paragraph (b) provided, “A final order of the ARB is not subject to judicial review in any criminal or other civil proceeding.” As explained in the IFR, no new rules were added to this section; rather, the section was simply reorganized and renumbered. The 2004 version of the rule concluded paragraph (a) with the sentence, “A final order of the Board is not subject to judicial review in any criminal or other civil proceeding.” This sentence implemented the statutory provision found at 49 U.S.C. 42121(b)(4)(B), “Limitation on Collateral Attack,” adopted by the Act, which provides, “[a]n order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.” This sentence was moved to be a stand-alone provision in paragraph (b) of the IFR. The word “Board” was changed to “ARB;” however, both

designations refer to the same body (Administrative Review Board). The old paragraph (b) was then renumbered to paragraph (c) in the IFR. The text of this paragraph was also slightly revised, as discussed in the preamble to the IFR, to clarify that “rules of the court” refers to the Federal Rules of Appellate Procedure and local rules of the relevant federal court of appeals. Most of these non-substantive revisions have been adopted in this final rule. Paragraph (c) of the final rule has been revised to provide that “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.” This revision simply reflects that in some instances the ALJ, and not the ARB, will have possession of the record to be reviewed in the U.S. court of appeals.

However, upon further review of the statutory language, OSHA has revised paragraph (b) in the final rule to more accurately reflect the statutory provisions found in AIR21, adopted by Sarbanes-Oxley. The rule as written previously and in the IFR referred only to limitation on collateral attack of final orders of the ARB. AIR21’s limitation on collateral attacks applies to all final orders of the Secretary. 49 U.S.C. 42121(b)(4)(A) - (B). Thus, paragraph (b) has been revised accordingly.

Section 1980.113 Judicial enforcement.

This section describes the Secretary’s power under Sarbanes-Oxley to obtain judicial enforcement of orders and the terms of a settlement agreement. While some courts have declined to enforce preliminary orders of reinstatement under Sarbanes-Oxley, the Secretary’s consistent position has been that such orders are enforceable in federal district court. See Solis v. Tenn. Commerce Bancorp, Inc., No. 10-5602 (6th Cir. 2010)(order granting stay of preliminary

injunction); Bechtel v. Competitive Technologies, Inc., 448 F.3d 469 (2d Cir. 2006); Welch v. Cardinal Bankshares Corp., 454 F. Supp. 2d 552 (W.D. Va. 2006) (decision vacated, appeal dismissed, No. 06-2295 (4th Cir. Feb. 20, 2008)). See also Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, Solis v. Tenn. Commerce Bancorp, Inc., No. 10-5602 (6th Cir. 2010); Brief for the Intervenor/Plaintiff-Appellant United States of America, Welch v. Cardinal Bankshares Corp., No. 06-2295 (4th Cir. Feb. 20, 2008); Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, Bechtel v. Competitive Technologies, Inc., 448 F.3d 469 (2d Cir. 2006)(No. 05-2402).

In its comments, SCSGP asserted that “this position is directly at odds with the express language of the statute and the federal court decisions that have addressed this issue. . . .” In support of its position, SCSGP cited the above decisions in Solis, Bechtel, and Welch. However, as noted by Marshall in its comment, an inspection of these cases shows that none of these decisions held by a majority that federal courts lack jurisdiction to enforce preliminary orders of reinstatement. In Bechtel, the Second Circuit vacated the preliminary order of reinstatement but failed to agree on a basis for which to do so. 448 F.3d at 476. In the three-judge panel, one judge found that the court lacked jurisdiction to enforce the order, thus holding to vacate the order. Id. at 470-76. A second judge found that the order could not be enforced on separate, due process grounds, and concurred in the result on this basis. Id. at 476-81. The third judge dissented from the result and found that the court did have jurisdiction to enforce orders of preliminary reinstatement. Id. at 483-90. Additionally, in Solis, the Sixth Circuit applied traditional injunctive relief standards (“balancing of the harms”) to grant a stay of a preliminary order of reinstatement and thus did not reach the jurisdictional issue on the merits. No. 10-5602, slip op. at 2 (6th Cir. May 25, 2010). Finally, in Welch, the district court granted the defendant’s

motion to dismiss the complainant's enforcement proceeding because the ALJ's opinion did not make clear whether he was ordering preliminary reinstatement, as opposed to simply recommending reinstatement. 407 F. Supp. 2d at 776-77. The court in Welch specifically noted that it was "unnecessary to consider whether it would have had the authority to enforce the preliminary order of reinstatement had such an order been properly entered." Id. at 777 n.2. Therefore, the Secretary's position is not at odds with the federal courts that have addressed this issue, as none has reached the issue on the merits with a majority of the court.

Additionally, the Secretary's position is consistent with the plain language of the statute. By incorporating the procedures of AIR21, Sarbanes-Oxley authorizes district courts to enforce orders, including preliminary orders of reinstatement, issued by the Secretary under the Act. See 18 U.S.C. 1514A(b)(2)(A) (adopting the rules and procedures set forth in AIR21, 49 U.S.C. 42121(b)). Under 49 U.S.C. 42121(b), which provides the procedures applicable to investigations of whistleblower complaints under Sarbanes-Oxley, the Secretary must investigate complaints under the Act and determine whether there is reasonable cause to believe that a violation has occurred. "[I]f the Secretary of Labor concludes that there is a reasonable cause to believe that a violation ... has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B)," which includes reinstatement of the complainant to his or her former position. 49 U.S.C. § 42121(b)(2)(A) and (b)(3)(B)(ii). The respondent may file objections to the Secretary's preliminary order and request a hearing. However, the filing of such objections "shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. 42121(b)(2)(A).

Paragraph (5) of 49 U.S.C. 42121(b) provides for judicial enforcement of the Secretary's orders, including preliminary orders of reinstatement. That paragraph states "[w]henver any

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

This analysis is not altered by the fact that paragraph (3) bears the heading “Final Order.” SCSGP asserted that this title and paragraph (5)’s reference to only paragraph (3) provides clear and unmistakable language that preliminary orders are not final orders enforceable under paragraph (3). However, sections of a statute should not be read in isolation, but rather in conjunction with the provisions of the entire Act, considering both the object and policy of the Act. See, e.g., Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 162 (4th Cir. 1998), aff’d, 529 U.S. 120 (2000). See also United States v. Buculei, 262 F.3d 322, 331 (4th Cir. 2001) (a statute's title cannot limit the plain meaning of its text), cert. denied, 535 U.S. 962 (2002). Focusing on the title to subsection (b)(3) instead of reading section 42121(b) as a coherent whole negates the congressional directives that preliminary reinstatement must be ordered upon a finding of reasonable cause and that such orders not be stayed pending appeal. 49 U.S.C. 42121(b)(2)(A)’s clear statement that objections shall not stay any preliminary order of reinstatement demonstrates Congress’s intent that the Secretary’s preliminary orders of reinstatement be immediately effective. Reading 49 U.S.C. 42121(b)(5) to allow enforcement of such orders is the only way to effectuate this intent.

Furthermore, the Secretary's interpretation is buttressed by the legislative history of Sarbanes-Oxley and AIR21. Before Congress enacted Sarbanes-Oxley, the Department of Labor had interpreted this AIR21 provision to permit judicial enforcement of preliminary reinstatement orders. Accordingly, Congress is presumed to have been aware of the Department's interpretation of 49 U.S.C. 42121(b)(5) and to have adopted that interpretation when it incorporated that provision by reference. See Lorillard v. Pons, 434 U.S. 575, 580–81 (1978) (“[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”). The Secretary's interpretation is further supported by the legislative history of AIR21, which makes clear that Congress regarded preliminary reinstatement as crucial to the protections provided in the statute. Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, Solis v. Tenn. Commerce Bancorp, Inc., No. 10-5602, at 41-44 (6th Cir. 2010) (reviewing legislative history of AIR21). Interpreting 49 U.S.C. 42121(b)(5) to permit judicial enforcement of the Secretary's preliminary orders of reinstatement is necessary to carry out Congress' clearly expressed intent that whistleblowers be immediately reinstated upon the Secretary's finding of reasonable cause to believe that retaliation has occurred. Sarbanes-Oxley also permits the person on whose behalf the order was issued under Sarbanes-Oxley to obtain judicial enforcement of orders and the terms of a settlement agreement. 18 U.S.C. 1514A(b)(2)(A) incorporating 49 U.S.C. 42121(b)(6). Accordingly, OSHA declines to make the changes to this section suggested by SCSGP.

OSHA has made two changes that are not intended to have substantive effects. First, OSHA has revised this section slightly to more closely parallel the provisions of the statute regarding the proper venue for an enforcement action. Second, the list of remedies that formerly

appeared in this section has been moved to Section 1980.114. This revision does not reflect a change in the Secretary's views regarding the remedies that are available under Sarbanes-Oxley in an action to enforce an order of the Secretary. The revision has been made to better parallel the statutory structure of Sarbanes-Oxley and AIR21, which contemplate enforcement of a Secretary's order and specify the remedies that are available in an action for de novo review of a retaliation complaint in district court. Compare 49 U.S.C. 42121(b)(5) and (6) to 18 U.S.C. 1514A(c).

Section 1980.114 District court jurisdiction over retaliation complaints.

This section sets forth Sarbanes-Oxley's provisions allowing a complainant to bring an original de novo action in district court, alleging the same allegations contained in the complaint filed with OSHA, if there has been no final decision of the Secretary within 180 days of the filing of the complaint. It is the Secretary's position that complainants may not initiate an action in federal court after the Secretary issues a final decision, even if the date of the final decision is more than 180 days after the filing of the complaint. The purpose of the "kick-out" provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties' rights to seek judicial review of the Secretary's final decision in the court of appeals.

OSHA received two comments on the inclusion of this statement of the Secretary's position in the preamble to the IFR. Mr. Levi wrote in opposition to this language, while the EEAC wrote in support of this language, and requested that it be inserted into the regulatory text. Mr. Levi noted his belief that this position is in conflict with the rule itself, which allows

complainants to “kick-out” under the specified circumstances. To support his position, Mr. Levi quoted from the preamble to the 2004 version of the rules. In that preamble, the agency stated, and Mr. Levi quoted, “The Act might even be interpreted to allow a complainant to bring an action in Federal court after receiving a final decision from the Board, if that decision was issued more than 180 days after the filing of the complaint.” 69 FR 52111(Aug. 24, 2004). The 2004 preamble used the words “might even” to denote that this is a possible interpretation of the language. However, in that preamble, the agency went on to state, “The Secretary believes that it would be a waste of the resources of the parties, the Department, and the courts for complainants to pursue duplicative litigation.” *Id.* The language in the preamble to the 2011 IFR, continued and retained above, simply asserts the Secretary’s longstanding position, which is consistent with the statute, the 2004 rule, the 2004 preamble language, and the 2011 rule, that once a complainant has received a final decision from the Secretary, the goal of the “kick-out” provision is no longer implicated.

Mr. Levi also commented that this position creates an impediment to a complainant’s right to access the federal district courts, and forces the complainant to give up one right or another: access to the ARB or access to the district courts. However, as discussed above, the Secretary believes that access to district courts under this provision is intended to provide the complainant with a speedy adjudication of his complaint; it is not intended to create two simultaneous proceedings or a de novo review of an unfavorable determination by the Secretary. Congress provided a clear avenue for review in federal courts of a final order. As provided in Section 1980.112, either party aggrieved by a final order of the ALJ or ARB may still appeal to the federal courts of appeals. The Secretary’s position does not adversely affect this right, but rather is intended to prevent interference with this right. Therefore, after considering Mr. Levi

and EEAC's comments, the agency has decided to retain the language in the preamble to the rule, but refrain from adding it to the regulatory text.

The IFR amended paragraph (b) of this section to require complainants to provide file-stamped copies of their complaint within seven days after filing a complaint in district court to the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending, rather than requiring such notice fifteen days in advance of such filing. The IFR noted a copy of the complaint also must be provided to the Regional Administrator, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. This provision is necessary to notify the agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant's compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed. These revisions are continued in this final rule. However, OSHA has replaced the requirement of providing a copy of the complaint to the Regional Administrator with a requirement that a copy be provided to the "OSHA official who issued the findings and/or preliminary order." This non-substantive change is intended to reflect that an official other than the Regional Administrator may be the official who issued the findings and/or preliminary order.

The NWC noted its appreciation for this revision to the rule, and suggested that "[t]he Department's wise policy on notice . . . should now be replicated in the Department's regulations under other whistleblower protection laws." OSHA is conducting several rulemakings for whistleblower proceedings at this time and intends to include this revised notice provision where applicable.

In addition to the changes noted above, OSHA has revised this section to clarify the provision and more closely mirror the language used in the statute. For example, paragraph (b) now incorporates the provisions of the statute specifying the remedies and burdens of proof in a district court action.

Section 1980.115 Special circumstances; waiver of rules.

This section provides that in circumstances not contemplated by these rules or for good cause the ALJ or the ARB may, upon application and notice to the parties, waive any rule as justice or the administration of Sarbanes-Oxley requires. No comments were received on this section.

IV. Paperwork Reduction Act.

This rule contains a reporting provision (filing a retaliation complaint, Section 1980.103) which was previously reviewed and approved for use by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13). The assigned OMB control number is 1218-0236.

V. Administrative Procedure Act.

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA) do not apply to “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Part 1980 sets forth interpretive rules and rules of agency procedure and practice within the meaning of that section. Therefore, publication in the Federal Register of a notice of proposed rulemaking and request for comments was not required. Although Part 1980 was not subject to the notice and comment procedures of the APA, the Assistant Secretary sought and considered comments to enable the agency to improve the rules by taking into account the concerns of interested persons.

Furthermore, because this rule is procedural and interpretive rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule not be effective until at least 30 days after publication in the Federal Register is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this 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. Most of the provisions of this rule were in the IFR and have already been in effect since November 3, 2011, so a delayed effective date is unnecessary.

VI. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132.

The Department has concluded that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866, reaffirmed by Executive Order 13563, because it is not likely to: (1) have an annual effect on the economy 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, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no economic impact analysis under Section 6(a)(3)(C) of Executive Order 12866 has been prepared. For the same reason, and because no notice of proposed rulemaking was published, no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532. In any event, this rulemaking is procedural and interpretive in nature and is thus not expected to have a significant economic impact. Finally,

this rule does not have “federalism implications.” The rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” and therefore is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis.

The notice and comment rulemaking procedures of Section 553 of the 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 1980

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

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.

Signed at Washington, D.C. on February 25, 2015.

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

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

PART 1980 -- Procedures for the Handling of Retaliation Complaints under Section 806 of the Sarbanes-Oxley Act of 2002, As Amended.

Subpart A – Complaints, Investigations, Findings and Preliminary Orders.

Sec:

- 1980.100 Purpose and scope.
- 1980.101 Definitions.
- 1980.102 Obligations and prohibited acts.
- 1980.103 Filing of retaliation complaints.
- 1980.104 Investigation.
- 1980.105 Issuance of findings and preliminary orders.

Subpart B – Litigation.

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

Subpart C – Miscellaneous Provisions.

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

Authority: 18 U.S.C. 1514A, as amended by the Dodd-Frank Wall Street Reform and

Consumer Protection Act of 2010, Pub. L. 111-203 (July 21, 2010); Secretary of Labor’s Order

No. 01-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary of Labor's Order No. 2-2012 (Oct. 19, 2012), 77 FR 69378 (Nov. 16, 2012).

Subpart A – Complaints, Investigations, Findings and Preliminary Orders.

§ 1980.100 Purpose and scope.

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

(b) This part establishes procedures pursuant to Sarbanes-Oxley for the expeditious handling of retaliation complaints made by employees, or by persons acting on their behalf and sets forth the Secretary's interpretations of the Act on certain statutory issues. These rules, together with those codified at 29 CFR part 18, set forth the procedures for submission of complaints under Sarbanes-Oxley, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges, post-hearing administrative review, withdrawals, and settlements.

§ 1980.101 Definitions.

As used in this part:

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

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

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

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

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

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

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

affected by a covered person.

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

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

(i) Financial institutions, brokers, or dealers;

(ii) Insurance companies;

(iii) Corporate issuers;

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

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

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

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

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

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

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

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

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

§ 1980.102 Obligations and prohibited acts.

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

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

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

(i) A Federal regulatory or law enforcement agency;

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

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

(2) To file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged

violation of 18 U.S.C. 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

§ 1980.103 Filing of retaliation complaints.

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

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

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

<http://www.osha.gov>

(d) Time for filing. Within 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act, any employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, 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 the another agency instead of OSHA within 180 days after becoming aware of the alleged violation.

§ 1980.104 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, et seq., and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1980.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or complainant's legal counsel, if complainant is represented by counsel) and to the Securities and Exchange Commission.

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

(c) During the investigation, OSHA will request that each party provide the other parties to the whistleblower complaint with a copy of submissions to OSHA that are pertinent to the whistleblower complaint. Alternatively, if a party does not provide its submissions to OSHA to the other party, OSHA will provide them to the other party (or the party's legal counsel if the party is represented by counsel) at a time permitting the other party an opportunity to respond. Before providing such materials to the other party, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable

confidentiality laws. OSHA will also provide each party with an opportunity to respond to the other party's submissions.

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

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

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

- (i) The employee engaged in a protected activity;
- (ii) The respondent knew or suspected that the employee engaged in the protected activity;
- (iii) The employee suffered an adverse action; and
- (iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complaint shows that the adverse personnel action took place within a

temporal proximity after the protected activity, or at the first opportunity available to 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, further 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 § 1980.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated the Act 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 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. The respondent will be given the opportunity to submit a written response, to meet with the investigator, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent will present this evidence within 10 business days of OSHA's notification pursuant to this paragraph, or as soon afterwards as OSHA and the respondent can agree, if the interests of justice so require.

§ 1980.105 Issuance of findings and preliminary orders.

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

(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 include all relief necessary to make the employee whole, including reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order will also require the respondent to submit appropriate documentation to the Social Security Administration 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 administrative law judge (ALJ) regardless of whether the respondent has filed objections, if the complaint was frivolous or brought in bad faith. The findings, and where appropriate, the preliminary order, also will give the address of the Chief Administrative Law Judge, 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 the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and/or a request for hearing has been timely filed as provided at § 1980.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

Subpart B – Litigation.

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

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad

faith who seeks an award of attorney fees under the Act, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to §1980.105(b). The objections and/or request for a hearing must be in writing and state whether the objections are to the findings and/or 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 a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or preliminary order will become the final decision of the Secretary, not subject to judicial review.

§ 1980.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative

Law Judges, codified at subpart A of part 18 of this title.

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

§ 1980.108 Role of Federal agencies.

(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.

(2) Parties must send copies of documents to OSHA and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of OSHA, or when OSHA is participating in the proceeding, or when service on OSHA and the Associate Solicitor is otherwise required by these rules.

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

§ 1980.109 Decision and orders of the administrative law judge.

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

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

(c) Neither OSHA's determination to dismiss a complaint without completing an investigation pursuant to §1980.104(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 order will provide all relief necessary to make the employee whole, including, reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation,

including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration 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 judge 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). 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.

§ 1980.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney 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 the order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB shall be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the date of 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, 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 all relief necessary to make the complainant whole, including reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration 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.

§ 1980.111 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 because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

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

(c) At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw 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, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if 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 § 1980.113.

§ 1980.112 Judicial review.

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

(b) A final order 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.

§ 1980.113 Judicial enforcement.

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

§ 1980.114 District court jurisdiction over retaliation complaints.

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

(b) A proceeding under paragraph (a) of this section shall be governed by the same legal burdens of proof specified in § 1980.109. An employee prevailing in any action under paragraph (a) of this section shall be entitled to all relief necessary to make the employee whole, including:

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

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

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

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

(c) 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.

§ 1980.115 Special circumstances; waiver of rules.

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

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