

**DEPARTMENT OF LABOR****Occupational Safety and Health Administration****29 CFR Part 1980**

RIN 1218 AC10

**Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002****AGENCY:** Occupational Safety and Health Administration, Labor.**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This document provides the text of regulations governing the employee protection (“whistleblower”) provisions of 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 on July 30, 2002, to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. This rule establishes procedures and time frames for the handling of discrimination complaints under Title VIII of 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, appeals of ALJ decisions to the Administrative Review Board (acting on behalf of the Secretary) and judicial review of the Secretary’s final decisions.

**DATES:** This interim final rule is effective on May 28, 2003. Comments on the interim final rule are due on or before July 28, 2003.

**ADDRESSES:** Submit written comments to: OSHA Docket Office, Docket No. C-09, Room N-2625, U.S. Department of Labor—OSHA, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card or to submit them by certified mail, return receipt requested. As a convenience, comments may be transmitted by facsimile (“FAX”) machine to (202) 693-1648 (not a toll-free number) or by electronic means through the Internet at <http://www.ecomments.osha.gov>. All comments should reference docket No.

C-09. If commenters transmit comments by FAX or through the Internet and also submit a hard copy by mail, please indicate on the hard copy that it is a duplicate copy of the FAX or Internet transmission.

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

**SUPPLEMENTARY INFORMATION:****I. Background**

The Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”), Public Law No. 107-204, was enacted on July 30, 2002. Title VIII of Sarbanes-Oxley is designated as the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, codified at 18 U.S.C. 1514A, provides protection to employees against retaliation by companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such companies, because the employee provided information to the employer or a Federal agency or Congress relating to alleged violations 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. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation. These rules establish procedures for the handling of discrimination complaints under Title VIII of Sarbanes-Oxley. In drafting these regulations, consideration has been given to the regulations implementing the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), codified at 29 CFR 1979, the Surface Transportation Assistance Act (“STAA”), codified at 29 CFR part 1978, and the Energy Reorganization Act (“ERA”), codified at 29 CFR part 24, where deemed appropriate.

**II. Summary of Statutory Provisions**

The Sarbanes-Oxley whistleblower provisions provide that a covered employee may file, within 90 days of the alleged discrimination, a complaint with the Secretary of Labor (“the Secretary”).<sup>1</sup> The statute requires the Secretary to notify the person named in the complaint and the employer of the filing of the complaint. The statute further provides that proceedings under Sarbanes-Oxley will be governed by the rules and procedures and burdens of proof of AIR21, 49 U.S.C. 42121(b). These rules and procedures are described below in Section III.

Sarbanes-Oxley authorizes an award to a prevailing employee of make-whole relief, including reinstatement with the same seniority status that the employee would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees and reasonable attorney’s fees. 18 U.S.C. 1514A(c)(2). 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 claimant, the claimant 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.

**III. Summary of Procedures**

These rules and procedures provide that upon receipt of a complaint, the Secretary must give written notice to both the person named in the complaint who is alleged to have violated the Act and the employer (if the complainant did not allege that the employer violated the Act) of the allegations contained in the complaint, the substance of the evidence submitted with the complaint, and the rights of the named person throughout the investigation. The person named in the complaint and the employer are defined collectively in the regulations and referred to collectively throughout this preamble as “the named person.” The Secretary must then, within 60 days of receipt of the complaint, afford the named person an opportunity to submit a response and

<sup>1</sup> Responsibility for receiving and investigating these complaints has been delegated to the Assistant Secretary for OSHA. Secretary’s Order 5-2002, 67 FR 65008 (Oct. 22, 2002). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges are decided by the Administrative Review Board. Secretary’s Order 1-2002, 67 FR 64272 (Oct. 17, 2002).

meet with the investigator to present statements from witnesses, conduct an investigation, and make a determination of reasonable cause. However, the Secretary may conduct an investigation only if the complainant has made a *prima facie* showing that the alleged protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint and the named person has not demonstrated, through clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity. This provision is similar to the 1992 amendments to the ERA, codified at 42 U.S.C. 5851.

After investigating a complaint, the Secretary will issue a determination letter. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that discriminatory behavior has occurred, the Secretary must notify the named person of those findings and issue a preliminary order providing appropriate make whole relief. The complainant and the named person then have 30 days after receipt of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing on the record before an administrative law judge ("ALJ"). The filing of objections will stay any remedy in the preliminary order except for preliminary reinstatement. If a hearing before an administrative law judge is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, it must be conducted "expeditiously" by the ALJ. The Secretary then has 120 days after the "conclusion of a 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, complainant and the named person may enter into a settlement agreement, which terminates this proceeding. If the Secretary finds that a violation has occurred, the Secretary will order appropriate make whole relief. If the Secretary finds that the complaint is frivolous or has been brought in bad faith, the Secretary may award each prevailing named person a reasonable attorney's fee not exceeding \$1,000. 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.

#### **IV. Summary and Discussion of Regulatory Provisions**

##### *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 new regulations.

##### *Section 1980.101 Definitions*

In addition to the general definitions, the regulations define "company" and "company representative" to together include all entities and individuals covered by Sarbanes-Oxley. The definition of "named person" includes the employer as well as the company and company representative who the complainant alleges in the complaint to have violated the Act. Thus, the definition of "named person" will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action. We anticipate, however, that in most cases the named person likely will be the employer.

##### *Section 1980.102 Obligations and Prohibited Acts*

This section describes the whistleblower activity which is protected under the Act and the type of conduct which is prohibited in response to any protected activity. Complaints to an individual member of Congress are protected, even if such member is not conducting an ongoing Committee investigation within the jurisdiction of a particular Congressional committee, provided that the complaint relates to conduct that the employee reasonably believes to be a violation of one of the enumerated laws or regulations.

##### *Section 1980.103 Filing of Discrimination Complaint*

This section explains the requirements for filing a discrimination complaint under Sarbanes-Oxley. To be timely, a complaint must be filed within 90 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), this is considered to be when the discriminatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision. *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001). Complaints filed under the Act must be made in writing, but do not need to be made in any particular form. With the

consent of the employee, complaints may be made by any person on the employee's behalf.

##### *Section 1980.104 Investigation*

Sarbanes-Oxley follows the AIR21 requirement that a complaint will be dismissed if it fails to make a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Also included in this section is the AIR21 requirement that an investigation of the complaint will not be conducted if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct, notwithstanding the *prima facie* showing of the complainant. Upon receipt of a complaint in the investigating office, the Assistant Secretary notifies the named person of these requirements and the right of each named person to seek attorney's fees from an ALJ or the Board if the named person alleges that the complaint was frivolous or brought in bad faith.

Under this section also, the named person has the opportunity within 20 days of receipt of the complaint to meet with representatives of OSHA and present evidence in support of its position. If, upon investigation, OSHA has reasonable cause to believe that the named person has violated the Act and therefore that preliminary relief for the complainant is warranted, OSHA again contacts the named person with notice of this determination and provides the substance of the relevant evidence upon which that determination is based, consistent with the requirements of confidentiality of informants. The named person is afforded the opportunity, within ten business days, to provide written evidence in response to the allegation of the violation, meet with the investigators, and present legal and factual arguments why preliminary relief is not warranted. This section provides due process procedures in accordance with the Supreme Court decision under STAA in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

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

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue a finding regarding whether or not the complaint has merit. If the finding is that the complaint has merit, the Assistant Secretary will order appropriate preliminary relief. The

letter accompanying the findings and order advises the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing, and of the right of the named person to request attorney's fees from the ALJ, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final findings 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.

Where the named party establishes that the complainant would have been discharged even absent the protected activity, there would be no reasonable cause to believe that a violation has occurred. Therefore, a preliminary reinstatement order would not be issued. Furthermore, as under AIR21, a preliminary order of reinstatement would not be an appropriate remedy where, for example, the named party establishes that the complainant is, or has become, a security risk based upon information obtained after the complainant's discharge in violation of Sarbanes-Oxley. See *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360-62 (1995), in which the Supreme Court recognized that reinstatement would not be an appropriate remedy for discrimination under the Age Discrimination in Employment Act where, based upon after-acquired evidence, the employer would have terminated the employee upon lawful grounds. Finally, 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" frequently is employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977. See, e.g., *Secretary of Labor on behalf of York v. BR&D Enters., Inc.*, 23 FMSHRC 697, 2001 WL 1806020 \*\*1 (June 26, 2001).

#### *Section 1980.106 Objections to the Findings and the Preliminary Order*

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. within 30 days of receipt of the findings. The date of the postmark, facsimile

transmittal or e-mail communication is considered the date of the filing; if the filing of objections is made in person, by hand-delivery or other means, the date of receipt is considered the date of the filing. The filing of objections is also considered a request for a hearing before an ALJ.

#### *Section 1980.107 Hearings*

This section adopts the rules of practice of the Office of Administrative Law Judges at 29 CFR part 18, subpart A. In order to assist in obtaining full development of the facts in whistleblower proceedings, formal rules of evidence do not apply. The section specifically provides for consolidation of hearings if both the complainant and the named person object to the findings and/or order of the Assistant Secretary. In order for hearings to be conducted as expeditiously as possible, and particularly in light of the unique provision in Sarbanes-Oxley allowing complainants to seek a *de novo* hearing in Federal court if the Secretary has not issued a final decision within 180 days of the filing of the complaint, this section provides that the ALJ has broad authority to limit discovery. For example, an ALJ may limit the number of interrogatories, requests for production of documents, or depositions allowed. An ALJ also may exercise discretion to limit discovery unless the complainant agrees to delay filing a complaint in Federal court for some definite period of time beyond the 180-day point. If a complainant seeks excessive or burdensome discovery or fails to adhere to an agreement to delay filing a complaint in Federal court, a district court considering a request for *de novo* review might conclude that such conduct resulted in delay due to the claimant's bad faith.

#### *Section 1980.108 Role of Federal Agencies*

The ERA and STAA regulations provide two different models for agency participation in administrative proceedings. Under STAA, OSHA ordinarily prosecutes cases where a complaint has been found to be meritorious. Under ERA and the other environmental whistleblower statutes, on the other hand, OSHA does not ordinarily appear as a party in the proceeding. The Department has found that in most environmental whistleblower cases, parties have been ably represented and the public interest has not required OSHA's participation. The Department believes this is even more likely to be the situation in cases involving allegations of corporate fraud. Therefore, as in the AIR21 regulations,

this provision utilizes the approach of the ERA regulation at 29 CFR 24.6(f)(1). The Assistant Secretary, at his or her discretion, may participate as a party or *amicus curiae* at any time in the administrative proceedings. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an administrative law judge; petition for review of a decision of an administrative law judge, including a decision based on a settlement agreement between complainant and the named person, regardless of whether the Assistant Secretary participated before the ALJ; or participate as *amicus curiae* before the ALJ or in the Administrative Review Board proceeding. Although we anticipate that ordinarily the Assistant Secretary will not participate in Sarbanes-Oxley proceedings, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations which appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Securities and Exchange Commission ("SEC"), at that agency's discretion, also may participate as *amicus curiae* at any time in the proceedings. OSHA believes it is unlikely that its preliminary decision ordinarily not to prosecute meritorious Sarbanes-Oxley cases will discourage employees from making complaints about corporate fraud.

The Department seeks comment regarding its preliminary decision that the Assistant Secretary should not ordinarily participate in Sarbanes-Oxley proceedings, but should participate in appropriate cases, or whether instead the Department should follow the STAA model under which it ordinarily participates where a complaint is found to have merit. The Department will consider these comments, as well as its experience under this program in the interim, in issuance of the final rule.

#### *Section 1980.109 Decision of the Administrative Law Judge.*

This section sets forth the content of the decision and order of the administrative law judge, and includes the statutory standard for finding a violation. The section further provides that the Assistant Secretary's determination as to whether to dismiss the complaint without an investigation or conduct an investigation pursuant to § 1980.104 is not subject to review by the ALJ, who hears the case on the merits.

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

The decision of the ALJ is the final decision of the Secretary unless a timely petition for review is filed with the Administrative Review Board. Appeals to the Board are not a matter of right, but rather petitions for review are accepted at the discretion of the Board. Upon the issuance of the ALJ's decision, the parties have ten business days within which to petition the Board for review of that decision. The parties must specifically identify the findings and conclusions to which they take exception, or the exceptions are deemed waived by the parties. The Board has 30 days to decide whether to grant the petition for review. If the Board does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If the Board grants the petition, the Act requires the Board to issue a decision not later than 120 days after the date of the conclusion of the hearing before the ALJ. The conclusion of the hearing is deemed to be the conclusion of all proceedings before the administrative law judge—*i.e.*, ten days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed in the interim. If a timely petition for review is filed with the Board, any relief ordered by the ALJ, except for a preliminary order of reinstatement, is inoperative while the matter is pending before the Board. This section further provides that, when the Board accepts a petition for review, its review of factual determinations will be conducted under the substantial evidence standard. This standard also is applied to Board review of ALJ decisions under the whistleblower provision of STAA. 29 CFR 1978.109(b)(3).

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

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

### 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, the Administrative Review Board to submit the record of proceedings to the

appropriate court pursuant to the rules of such court.

### Section 1980.113 *Judicial Enforcement*

This section describes the Secretary's power under the statute to obtain judicial enforcement of orders and the terms of a settlement agreement. It also provides for enforcement of orders of the Secretary by the person on whose behalf the order was issued.

### Section 1980.114 *District Court Jurisdiction of Discrimination Complaints*

This section sets forth the Sarbanes-Oxley provision allowing complainants to bring an action in district court for *de novo* review if there has been no final decision of the Secretary within 180 days of the filing of the complaint and there is no delay due to the complainant's bad faith. It provides that complainants will provide notice 15 days in advance of their intent to file a Federal court complaint. This provision authorizing a Federal court complaint is unique among the whistleblower statutes administered by the Secretary. This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending on review by the Board. 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. 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. The Secretary notes that the courts have recognized that, when a party has had a full and fair opportunity to litigate a claim, an adversary should be protected from the expense and vexation of multiple lawsuits and that the public interest is served by preserving judicial resources by prohibiting subsequent suits involving the same parties making the same claims. *Montana v. United States*, 440 U.S. 147, 153 (1979). When an administrative agency acts in a judicial capacity and resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply the principles of issue preclusion (collateral estoppel) or claim preclusion (*res judicata*) on the basis of that administrative decision. *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986), citing *United States v. Utah*

*Construction and Mining Co.*, 384 U.S. 394, 422 (1966). Therefore, the Secretary anticipates that Federal courts will apply such principles if a complainant brings a new action in Federal court following extensive litigation before the Department that has resulted in a decision by an administrative law judge or the Secretary. Where an administrative hearing has been completed and a matter is pending before an administrative law judge or the Board for a decision, a Federal court also might treat a complaint as a petition for mandamus and order the Department to issue a decision under appropriate time frames.

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

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

## V. Paperwork Reduction Act

This rule contains a reporting requirement (§ 1980.103) which was previously reviewed and approved for use by the Office of Management and Budget ("OMB") under 29 CFR 24.3 and assigned OMB control number 1218-0236 under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13). The estimated reporting activity under OMB control number 1218-0236 has been revised to reflect the projected reporting under this interim rule.

## VI. Administrative Procedure Act

This is a rule of agency procedure and practice within the meaning of Section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. 553(b)(A). Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments is not required for these regulations, which provide procedures for the handling of discrimination complaints. Although this rule is not subject to the notice and comment procedures of the APA, persons interested in this interim final rule may submit comments within 60 days. A final rule will be published after the agency receives and reviews the public's comments.

Furthermore, because this rule is procedural rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this 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.

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

The Department has concluded that this rule should be treated as a "significant regulatory action" within the meaning of Section 3(f)(4) of Executive Order 12866 because Sarbanes-Oxley is a new program and because of the importance to investors that "whistleblowers" be protected from retaliation. E.O. 12866 requires a full economic impact analysis only for "economically significant" rules, which are defined in Section 3(f)(1) as rules that may "have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Because the rule is procedural in nature, it is not expected to have a significant economic impact; therefore no economic impact analysis has been prepared. For the same reason, the rule does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*). Furthermore, because this is a rule of agency procedure or practice, it is not a "rule" within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), and does not require Congressional review. Finally, this rule does not have "federalism implications." The rule does not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government" and therefore is not subject to Executive Order 13132 (Federalism).

**VIII. Regulatory Flexibility Analysis**

The Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation simply implements procedures necessitated by enactment of Sarbanes-Oxley, in order to allow resolution of whistleblower complaints. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

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

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

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

Signed at Washington, DC this 20th day of May, 2003.

**John L. Henshaw,**

*Assistant Secretary for Occupational Safety and Health.*

■ Accordingly, for the reasons set out in the preamble part 1980 of title 29 of the Code of Federal Regulations is added as follows:

**PART 1980—PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER SECTION 806 OF THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002, TITLE VIII OF THE SARBANES-OXLEY ACT OF 2002**

**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 discrimination complaint.
- 1980.104 Investigation.
- 1980.105 Issuance of findings and preliminary orders.

**Subpart B—Litigation**

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

**Subpart C—Miscellaneous Provisions**

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

**Authority:** 18 U.S.C. 1514A; Secretary of Labor's Order No. 5–2002, 67 FR 65008 (October 22, 2002).

**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. Sarbanes-Oxley provides for employee protection from discrimination by companies and representatives of companies 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.

(b) This part establishes procedures pursuant to Sarbanes-Oxley for the expeditious handling of discrimination complaints made by employees, or by persons acting on their behalf. These rules, together with those rules 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, and withdrawals and settlements.

**§ 1980.101 Definitions.**

*Act* means section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, Public Law No. 107–204, July 30, 2002, codified at 18 U.S.C. 1514A.

*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.

*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) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).

*Company representative* means any officer, employee, contractor, subcontractor, or agent of a company.

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

*Employee* means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could

be affected by a company or company representative.

*Named person* means the employer and/or the company or company representative named in the complaint who is alleged to have violated the Act.

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

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

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

#### **§ 1980.102 Obligations and prohibited acts.**

(a) No company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against 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, engaged in any of the activities specified in paragraphs (b)(1) through (2) of this section.

(b) A company or company representative is deemed to have violated the Act if it intimidates, threatens, restrains, coerces, blacklists, or in any other manner discriminates against an employee in the terms and conditions of employment because of 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 discrimination complaint.**

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

(b) *Nature of filing.* No particular form of complaint is required, except that a complaint 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.

(c) *Place of filing.* The complaint should be filed with the OSHA Area Director 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 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.

#### **§ 1980.104 Investigation.**

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the named person (or named persons) of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identity of any confidential informants). The Assistant Secretary also will notify the named person of its right under paragraphs (b) and (c) of this section and paragraph (e) of § 1980.110. A copy of the notice to the named person will also be provided to the Securities and Exchange Commission.

(b) A complaint of alleged violation will be dismissed unless the complainant has made a *prima facie* showing that protected behavior or conduct was a contributing factor in the

unfavorable personnel action alleged in the complaint.

(1) 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 or conduct;

(ii) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;

(iii) The employee suffered an unfavorable personnel action; and

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

(2) 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 named person knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action. Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If the required showing has not been made, the complainant will be so advised and the investigation will not commence.

(c) Notwithstanding a finding that a complainant has made a *prima facie* showing, as required by this section, an investigation of the complaint will not be conducted if the named person, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. Within 20 days of receipt of the notice of the filing of the complaint, the named person may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the named person may request a meeting with the Assistant Secretary to present its position.

(d) If the named person fails to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the behavior protected by the Act, the Assistant Secretary will

conduct an investigation. 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) Prior to the issuance of findings and a preliminary order as provided for in § 1980.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the named person has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the named person 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 named person will be given the opportunity to submit a written response, to meet with the investigators to present statements from witnesses in support of its position, and to present legal and factual arguments. The named person will be directed to present this evidence within ten business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the named person 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 will issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she 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: Where appropriate, reinstatement with the same seniority status that the employee would have had but for the discrimination; back pay with interest; and compensation for any special damages sustained as a result of

the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees. Where the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge), a preliminary order of reinstatement would not be appropriate.

(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 the preliminary order will be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order will inform the parties of their right to file objections and to request a hearing, and of the right of the named person to request attorney's fees from the ALJ, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. The letter also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and order.

(c) The findings and the preliminary order will be effective 30 days after receipt by the named person pursuant to paragraph (b) of this section, unless an objection and a request for a hearing has been filed as provided at § 1980.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon receipt of the findings and preliminary 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 named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorneys' fees, must file any objections and 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 objection or request for attorneys' fees and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorneys' fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person,

by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b)(1) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement. The portion of the preliminary order requiring reinstatement will be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order.

(2) If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order, as the case may be, 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, part 18 of title 29 of the Code of Federal Regulations.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge 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 as hearings *de novo*, on the record. Administrative law judges will have broad discretion to limit discovery in order to expedite the hearing.

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

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

##### **§ 1980.108 Role of Federal agencies.**

(a)(1) The complainant and the named person will be parties in every proceeding. At the Assistant Secretary's

discretion, the Assistant Secretary may participate as a party or may participate as *amicus curiae* at any time in the proceedings. This right to participate includes, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a decision based on a settlement agreement between complainant and the named person, to dismiss a complaint or to issue an order encompassing the terms of the settlement.

(2) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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

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

(a) The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1980.104(b) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, 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 administrative law judge will hear the case on the merits.

(b) If the administrative law judge concludes that the party charged has violated the law, the order will provide all relief necessary to make the employee whole, including

reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees. If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding \$1,000.

(c) The decision will be served upon all parties to the proceeding. Any administrative law judge'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 named person, and may not be stayed. All other portions of the judge's order will be effective ten business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

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

(a) Any party desiring to seek review, including judicial review, of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board ("the Board"), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary,

Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the administrative law judge will become the final order of the Secretary unless the Board, 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 administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement will be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. The Board will review the factual determinations of the administrative law judge under the substantial evidence standard.

(c) The final decision of the Board will be issued within 120 days of the conclusion of the hearing, which will be deemed to be the conclusion of all proceedings before the administrative law judge—*i.e.*, 10 business days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed with the administrative law judge in the interim. The decision will be served upon all parties and the Chief Administrative Law Judge by mail to the last known address. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210, even if the Assistant Secretary is not a party.

(d) If the Board concludes that the party charged has violated the law, the final order will order the party charged to provide all relief necessary to make the employee whole, including reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorneys' fees.

(e) If the Board determines that the named person has not violated the law, an order will be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was

brought in bad faith, the Board may award to the named person a reasonable attorneys' fee, not exceeding \$1,000.

### Subpart C—Miscellaneous Provisions

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

(a) At any time prior to the filing of objections to the findings or preliminary order, a complainant may withdraw his or her complaint under the Act by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether the withdrawal will be approved. The Assistant Secretary will notify the named person of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section.

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

(c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether the withdrawal will be approved. If the objections are withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by

operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.

(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 administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement will be filed with the administrative law judge or the Board, as the case may be.

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

#### § 1980.112 Judicial review.

(a) Within 60 days after the issuance of a final order under § 1980.110, 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. A final order of the Board is not subject to judicial review in any criminal or other civil proceeding.

(b) If a timely petition for review is filed, the record of a case, including the record of proceedings before the administrative law judge, will be transmitted by the Board to the appropriate court pursuant to the rules of the court.

#### § 1980.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf

the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

#### § 1980.114 District Court jurisdiction of discrimination complaints.

(a) If the Board 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.

(b) Fifteen days in advance of filing a complaint in Federal court, a complainant must file with the administrative law judge or the Board, depending upon where the proceeding is pending, a notice of his or her intention to file such a complaint. The notice must be served upon all parties to the proceeding. If the Assistant Secretary is not a party, a copy of the notice must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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

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

[FR Doc. 03-13082 Filed 5-27-03; 8:45 am]

BILLING CODE 4510-26-P