

that it administers in that it protects employees from adverse personnel actions taken in retaliation for their having engaged in protected activity. OSHA consequently believes that its investigators have ample experience and are well able to investigate the type of employment-related disputes that typically arise under Sarbanes-Oxley.

Both SHRM and the Chamber further commented generally that the regulatory time frames are unrealistic. The Sarbanes-Oxley regulatory time frames are either mandated by the statute or are designed to effectuate Congress's desire for an expedited administrative complaint process. OSHA believes that the time frames reasonably balance the needs of both employees and employers for timely and fair resolution of whistleblower complaints.

SHRM expressed a general concern about the broad nature of activity protected under the whistleblower provision of Sarbanes-Oxley, indicating that it might generate complaints based on actions taken in the normal course of business. For example, SHRM suggested that an employee may mistakenly view an employer's decision to dispose of certain documents in the normal course of business to be a violation of section 802 of Sarbanes-Oxley, which makes it a felony for a person to destroy evidence with the intent to obstruct justice or to fail to preserve certain audit papers of companies that issue securities. Related to this comment is SHRM's concern that section 806 of Sarbanes-Oxley requires the employer to meet a higher burden of proof than other discrimination laws, in that it requires an employer to establish by clear and convincing evidence that it would have taken the unfavorable personnel action even absent the protected activity. These rules are procedural in nature and are not intended to provide interpretations of the Act. Under section 806, Congress chose to protect a broad range of disclosures about corporate practices that may adversely affect stockholders. Similarly, Congress chose to apply the "clear and convincing" burden of proof standard, which also applies under the whistleblower protection provisions of the Energy Reorganization Act ("ERA"), 42 U.S.C. 5851(b)(3)(D); AIR21, 49 U.S.C. 42121(b)(2)(B)(iv); and the Pipeline Safety Improvement Act of 2002 ("PSIA"), 49 U.S.C. 60129(b)(2)(B)(iv). OSHA also notes that SHRM's concern that innocent business behavior will become the subject of a Sarbanes-Oxley complaint is addressed by the statutory requirement that an employee "reasonably believe" that his or her disclosure is related to fraud or a violation of a Securities and Exchange

Commission rule or regulation. *See* 18 U.S.C. 1514A(a)(1). The legislative history of section 806 indicates that Congress intended to apply to 18 U.S.C. 1514A(a)(1) the normal "reasonable person" standard used and interpreted in a wide variety of legal contexts. *See* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy). If the named person establishes that the disclosures at issue in a complaint involve activities that occur in the normal course of business, an employee's belief might not be reasonable under that standard.

The American Society of Safety Engineers commented generally that it has no specific concerns with the interim final regulations, but that it hopes that OSHA will monitor their effect in encouraging corporations to be more accountable and will be flexible and willing to make changes should the regulations prove to be inadequate. OSHA intends to monitor the effectiveness of these regulations and will make any regulatory changes in the future deemed necessary.

Mr. Bremer commented generally that the regulations should be used as an opportunity to bridge a gap between industry and OSHA. OSHA always is interested in reaching out to industry and employees to ensure effective enforcement of the laws that it administers.

GAP commented generally that several of the rules evince a bias against employees. In this regard, GAP commented that the whistleblower provisions of Sarbanes-Oxley are remedial in nature and should be broadly construed and that therefore the regulations should not operate to deny a complainant the ability to fully and fairly litigate his or her complaint. As described more fully below, OSHA believes that these regulations appropriately balance a complainant's right to fully and fairly litigate his or her complaint before the agency with both the due process rights of named persons and Congress's desire for an expedited administrative complaint process.

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. No comments were received on this section.

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.

Three comments were received regarding the definitions contained in § 1980.101. Siemens commented that the regulatory definition of "company" should exclude foreign issuers to the extent that it relates to foreign national employees who do not work in United States facilities of the foreign issuers. In support, Siemens noted that many foreign industrialized nations already have laws that protect whistleblowers, that United States labor laws already apply to Siemens's affiliated United States companies, and that labor law forms part of the national sovereignty of a foreign country. Similarly, HRPA commented that the rule should be revised so as not to apply to employees employed outside of the United States by United States corporations or their subsidiaries; nor should it apply to foreign corporations that have no United States employees. HRPA suggested that applying the rule in these situations would divert the Department's resources and therefore undermine its fundamental mission. The purpose of this rule is to provide procedures for the handling of Sarbanes-Oxley discrimination complaints; this rule is not intended to provide statutory interpretations. Because the regulatory definition of "company" simply applies the language used in the statute, OSHA does not believe any changes to the definition are necessary.

Plains AAP commented that the regulatory definitions of "employee" and "company representative" work together to broaden the statutory definition of protected employees. Specifically, Plains AAP commented that section 806(a) of the Sarbanes-Oxley Act is captioned "Whistleblower protection for employees of publicly traded companies," yet the definitions of "employee" and "company representative" in the regulations provide protection to employees of contractors and subcontractors of publicly traded companies. OSHA believes that the definitions in this section accurately reflect the statutory

language. Notwithstanding its caption, section 806(a) expressly provides that no publicly traded company, "or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee. * * *." The statute thus protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies.

Accordingly, OSHA does not believe that its regulatory definitions broaden the class of employees that are protected under the plain language of Sarbanes-Oxley.

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.

Although no comments were received with regard to this section's description of adverse action under Sarbanes-Oxley, OSHA has modified § 1980.102(b) to eliminate language deemed redundant with that in § 1980.102(a). In this regard, unlike other whistleblower statutes administered by OSHA, Sarbanes-Oxley specifically describes the types of adverse actions prohibited under the Act. Because this statutory description appears in § 1980.102(a), § 1980.102(b) no longer lists actions deemed actionable under the Act.

HRPA commented that this section should be clarified to ensure that the description of protected activity covers only disclosures of fraud that harm shareholders or that relate to securities law. HRPA expressed concern that under this section's description of protected activity, employees might be able to bring claims based on ordinary business and employment disputes that the statute was not intended to address. HRPA suggested, therefore, that this section provide that to be protected, a reported violation must affect as much as 3% of a company's revenue before it is considered an issue that would implicate the securities laws. Finally, HRPA also suggested that this section delineate between the protected activity

covered by Sarbanes-Oxley and that covered under some of the more expansive state whistleblower protection statutes.

The description of protected activity in this section comes from the statute. As stated above, the purpose of these regulations is to provide procedural rules for the handling of whistleblower complaints and not to interpret the statute. Furthermore, determinations as to whether employee disclosures concerning alleged corporate fraud are protected under Sarbanes-Oxley will depend on the specific facts of each case. It is not appropriate therefore for these regulations to specify a percentage or formula for use in defining protected activity. With regard to HRPA's final comment on this section, because these rules are procedural in nature and the description of protected activity comes from the statute, a delineation between what is protected under Sarbanes-Oxley and what is protected under other laws not administered by OSHA is neither necessary nor appropriate.

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. See *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.

Both SHRM and HRPA commented that this section should require complaints to allege wrongdoing under Sarbanes-Oxley with greater specificity. To ensure that an employee's belief that a reported violation is reasonable, HRPA also suggested that this section require that complaints contain detailed analyses of the securities laws at issue and of how they were violated, and added that OSHA should not conduct investigations if the employer demonstrates by clear and convincing evidence that the employee's belief was not reasonable. It is OSHA's view that these concerns are adequately dealt with

in § 1980.104 herein, the section covering investigations. As set forth at § 1980.104(b)(2), and as directed by statute, OSHA will not investigate where a complainant has failed to make a *prima facie* showing that the protected behavior was a contributing factor in the unfavorable personnel action alleged. To make a *prima facie* showing, the complainant must allege that he or she engaged in protected activity. See § 1980.104(b)(1)(i). Activity under Sarbanes-Oxley is only protected if the employee provides information that he or she "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. OSHA believes that it would be overly restrictive to require a complaint to include detailed analyses when the purpose of the complaint is to trigger an investigation to determine whether evidence of discrimination exists. To the extent that SHRM and HRPA are suggesting that a complaint on its face must make a *prima facie* showing to avoid dismissal, OSHA has consistently believed that supplementation of the complaint by interviews with the complainant may be necessary and is appropriate. Although the Sarbanes-Oxley complainant often is highly educated, not all employees have the sophistication or legal expertise to specifically aver the elements of a *prima facie* case and/or supply evidence in support thereof. The regulations thus recognize that supplemental interviews may become part of a complaint. See §§ 1980.104(b)(1) and (2).

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, 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 10 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).

Both SHRM and the Chamber commented that OSHA's pressure to complete its investigation within 60 days (see § 1980.105(a)) will frustrate early settlement attempts. Accordingly, they suggested that this rule provide that settlement negotiations between the complainant and the named person temporarily curtail the running of the 180-day period in which a complainant may elect to go to Federal court under 18 U.S.C. 1514A(b)(1)(B). OSHA does not believe that the statute authorizes such a rule.

Moreover, it is OSHA's view that early settlements are facilitated by the provision that permits a complainant to file a *de novo* action in Federal court 180 days after the filing of his or her administrative complaint, because it provides an incentive for the employer to resolve quickly meritorious allegations. Of course, there is nothing to prevent the complainant from agreeing to delay a filing in Federal court pending the outcome of settlement negotiations.

Plains AAP commented that because the regulations protect employees of contractors and subcontractors of a publicly traded company, and because under § 1980.104(b), a complainant can make a *prima facie* showing of a violation without alleging that the named person was involved in the adverse action, public companies will become involved in whistleblower disputes stemming from the employment decisions of contractors

over which the company had no control. To avoid this perceived problem, Plains AAP suggested that § 1980.104(b)(iii) be revised to read: "The employee suffered an unfavorable personnel action for which the named person was responsible or in which the named person participated." Plains AAP commented that this revision would provide OSHA with clear grounds to dismiss a case against a person who is only being named for its nuisance value. OSHA does not believe that the suggested revision is necessary or warranted. Sarbanes-Oxley's whistleblower provision is similar to other whistleblower provisions administered by the Secretary. Under those provisions, the ARB has held that a respondent may be liable for its contractor's or subcontractor's adverse action against an employee in situations where the respondent acted as an employer with regard to the employee of the contractor or subcontractor, whether by exercising control of the work product or by establishing, modifying, or interfering with the terms, conditions, or privileges of employment. See, e.g., *Stephenson v. NASA*, ARB No. 96-080, 1997 WL 166055 *2 (DOL Adm. Rev. Bd. Apr. 7, 1997). Conversely, a respondent will not be liable for the adverse action taken against an employee of its contractor or subcontractor where the respondent did not act as an employer with regard to the employee. Furthermore, the statute and this rule provide safeguards to prevent a complainant's bringing a complaint against a named person simply for its nuisance value.

Specifically, a named person may seek from the ALJ or the Board an award of reasonable attorney's fees up to \$1,000 for a complaint determined to be frivolous or brought in bad faith. See 18 U.S.C. 1514A(b)(2)(A); 29 CFR 1980.109(b); 1980.110(e).

GAP commented that the regulations are biased in favor of the "named party" because they provide that the "named party" may meet with OSHA and challenge its findings, but do not have similar provisions for the complainant. Specifically, GAP commented that the only opportunity for the complainant to meet with OSHA lies in the discretion of the OSHA investigators. GAP suggested that in every instance that this section provides that the named party may meet with OSHA, it should also provide that the complainant may meet with OSHA. OSHA believes that such a revision is unnecessary. The regulations are drafted to provide named persons with the due process rights to which they are entitled under the Supreme

Court's decision in *Brock v. Roadway Express, Inc.* Moreover, the language of Sarbanes-Oxley, which is similar to that of other whistleblower laws administered by OSHA, makes clear that OSHA's initial investigation is to be conducted independently for the purposes of establishing the facts and facilitating an early resolution of the claim. In the conduct of such an independent investigation, complainants are given ample opportunity to meet with OSHA concerning the merits of their complaints.

GAP also commented that § 1980.104(b)(2) should include specific language explaining the burden under the "contributing factor" test. Specifically, GAP suggested that, based on the definition of "contributing factor" in the legislative history of the Whistleblower Procedure Act, 5 U.S.C. 2302(b), the first and second sentences of § 1980.104(b)(2) be revised to begin with the following language: "Contributing factor means 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" OSHA does not believe that this revision is necessary. The "contributing factor" language used in this section is identical to that used in the employee protection provisions of the ERA and AIR21, under which there is sufficient case law interpreting the phrase. For example, in *Kester v. Carolina Power & Light Co.*, No. 02-007, 2003 WL 22312696, *8 (Adm. Rev. Bd. Sept. 30, 2003), the ARB noted:

[P]rior to the 1992 amendments, the ERA complainant was required to prove that protected activity was a "motivating factor" in the employer's decision. Congress adopted the less onerous "contributing factor" standard "in order to facilitate relief for employees who have been retaliated against for exercising their [whistleblower rights]." 138 Cong. Rec. No. 142 (Oct. 5, 1992). Congress may have been recalling that in 1989 it enacted the Whistleblower Protection Act, Public Law 101-12, section 3(a)(13), 103 Stat. 29. The WPA requires a complainant to prove that a protected disclosure was a "contributing factor in the personnel action * * *" 5 U.S.C. 1221(e)(1) (West 1996).

See also Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1573 (1997) (construing the "contributing factor" provision in the ERA).

GAP also commented that § 1980.104(b)(2) should explicitly reaffirm that the "contributing factor" standard is met when an alleged adverse action is taken after protected activity, but before a new performance appraisal is made. It is OSHA's view that what must be pled and proven to establish

discrimination or retaliation under section 806 of Sarbanes-Oxley will depend upon the facts and circumstances of each individual case. Accordingly, it would not be appropriate to specify in a regulation those facts that will automatically establish a *prima facie* case of discrimination.

GAP further commented that to ensure that OSHA investigators only consider the valid reasons proffered by named persons in defense of their adverse employment actions, § 1980.104(c) should be revised to include the word "legitimately," with an explanation in the preamble as to what defenses will be considered legitimate and what defenses will not be so considered. Again, OSHA does not believe that such a revision is warranted. Its investigators have vast experience conducting fair and impartial investigations of whistleblower complaints. In evaluating the merits of a complaint, investigators only consider explanations for any adverse action taken by a named person that they consider to be non-discriminatory and credible. Moreover, for the same reasons that it is inappropriate to specify facts that will or will not constitute protected activity for purposes of a complainant's *prima facie* showing, it is inappropriate to specify facts that will or will not constitute a defense for adverse action.

GAP also commented that to foster an appearance of fairness, § 1980.104(c), in addition to stating that the named person has a right to seek attorney's fees for a frivolous complaint, should refer to the complainant's right to obtain attorney's fees should he or she prevail before OSHA. The complainant's right to obtain make-whole relief, including the right to recover attorney's fees, is fully described in other parts of this rule; therefore, no revision is necessary.

SHRM commented that under § 1980.104(c), the named person is given too short a period, *i.e.*, 20 days, in which to respond to OSHA after receiving notice of the complaint. According to SHRM, the 20-day period does not allow sufficient time for the named person to conduct an internal investigation and to request and prepare for a meeting with OSHA. The statute provides only 60 days for OSHA to complete the entire investigation and issue findings. Accordingly, OSHA believes that 20 days provides sufficient time for the named person to research and prepare a response, without impeding the agency's ability to complete the investigation in a timely manner. Moreover, the 20-day period is consistent with that provided under

OSHA's regulations for the handling of complaints under the Surface Transportation Assistance Act ("STAA") and AIR21, the other whistleblower statutes administered by OSHA that have 60-day investigation time frames. *See* 29 CFR 1978.103(b); 29 CFR 1979.104(c).

Regarding § 1980.104(e), GAP objected to allowing the named person 10 business days in which to respond to the due process letter because it delays OSHA's ordering temporary relief to the complainant. GAP also believed that to be fair, the complainant should be given another opportunity to rebut the named person's response to the letter. In contrast, SHRM commented that 10 business days is too short a time in which to expect a named person to prepare an adequate legal response to OSHA's reasonable cause determination and that the regulation should allow for great flexibility. As noted above, OSHA's investigations are conducted independently and under tight time frames, prior to the administrative hearing phase of the process, in which all parties participate fully. The purpose of § 1980.104(e) is to ensure compliance with the Supreme Court's ruling in *Brock v. Roadway Express, Inc.*, in which the Court, on a constitutional challenge to the temporary reinstatement provision in the employee protection provisions of STAA, upheld the facial constitutionality of the statute and the procedures adopted by OSHA under the Due Process Clause of the Fifth Amendment, but ruled that the record failed to show that OSHA investigators had informed Roadway of the substance of the evidence to support reinstatement of the discharged employee. OSHA believes that this purpose is met by § 1980.104(e) as currently written and that no changes are necessary.

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, within 60 days of the filing of a complaint, a finding regarding whether or not there is reasonable cause to believe that the complaint has merit. If the finding is that there is reasonable cause to believe 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 person 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 person 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) (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).

Comments on this section were received from SHRM, the Chamber, and GAP. Both SHRM and the Chamber commented that the regulatory exceptions to preliminary reinstatement should be broadened. They further commented that preliminary reinstatement should become effective only after the administrative adjudication has been completed, to which SHRM added that preliminary reinstatement is unnecessary because Sarbanes-Oxley's make-whole remedies are sufficient to protect whistleblowers. The statute, however, explicitly provides that a preliminary order of reinstatement shall be issued upon the conclusion of an investigation that determines that there is reasonable

cause to believe that a violation has occurred. See 18 U.S.C. 1514A(b), adopting 49 U.S.C. 42121(b)(2). Moreover, the purpose of interim relief, to provide a meritorious complainant with a speedy remedy and avoid a chill on whistleblowing activity, would be frustrated if reinstatement did not become effective until after the administrative adjudication was completed. The named person's due process rights will have been fully satisfied under § 1980.104(e). That section provides that the named person will be notified of the substance of the evidence OSHA has gathered against it establishing reasonable cause to believe that a violation has occurred and gives the named person an opportunity to respond.

The Chamber objected to the use of the "security risk" language in the regulations because it is not defined. In this regard, the Chamber noted that a security risk could mean security of trade secrets or security of persons or property. Thus, the Chamber suggested that the regulations should define more explicitly what constitutes a security risk or should allow the employer to determine whether an employee presents a security risk. The Chamber also commented that preliminary reinstatement should be limited to those situations where company disruption would be minimal and the evidence of violation is overwhelming.

GAP also objected to this section's "security risk" exception to preliminary reinstatement on several grounds. Specifically, GAP commented that there is no foundation for the exception in the statute or the APA, that the standard for what constitutes a "security risk" is vague, that the regulation gives OSHA unlimited discretion to cancel interim relief, and that it has a chilling effect by permitting after-the-fact investigations and the potential to create additional retaliation. GAP added that the "security risk" exception is unnecessary because if an employee were a genuine security risk, the employer would have had grounds for the action that it took in the first instance.

The "security risk" exception was first introduced in OSHA's final rule for the handling of whistleblower complaints under AIR21. The provision, which was adopted in response to the events of September 11, 2001, was designed to address situations where after-acquired evidence establishes that an employee's reinstatement might pose a significant safety risk to the public, notwithstanding the fact that the employee's discharge was retaliatory in violation of the Act. We have chosen to keep the "security risk" exception here

in large part to make these procedural rules consistent with AIR21's procedural rules. The exception is not intended to be broadly construed. Rather, it would apply only in situations where the named person clearly establishes to the Department that the reinstatement of an employee might result in physical violence against persons or property. Accordingly, the "security risk" language in this section should not have a chilling effect on potential whistleblowers or encourage further retaliation.

Both SHRM and the Chamber commented that permitting "economic reinstatement" in lieu of actual reinstatement would require an employer to pay twice for the same position and would work an economic hardship on small businesses. They commented that the regulations should provide for the reimbursement of the costs of the "economic reinstatement" should the named person ultimately prevail in the litigation. Finally, the Chamber questioned whether the concept of "economic reinstatement" belongs in the context of a Sarbanes-Oxley case.

Congress intended that employees be temporarily reinstated to their positions if OSHA finds reasonable cause that they were discharged in violation of Sarbanes-Oxley. When a violation is found, the norm is for OSHA to order immediate reinstatement. An employer does not have a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate an employer that establishes to OSHA's satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer's retaliatory discharge of the employee. If the employer can make such a showing, 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. The employer, of course, need not request the option of economic reinstatement in lieu of actual reinstatement, but if it does, 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.

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, DC,

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. No comments were received on this section.

Section 1980.106(b)(1) of this rule has been clarified to provide that although 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, the named person may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order. In making this change, OSHA conforms this rule to the recently promulgated interim final rule for the handling of whistleblower complaints under the Pipeline Safety Improvement Act of 2002 ("PSIA"). See 29 CFR 1981.106(b)(1). PSIA's legislative history indicates that Congress intended to assure that the mere filing of an objection would not automatically stay the preliminary order, but that an employer could file a motion for a stay. See 148 Cong. Rec. S11068 (Nov. 14, 2002) (section-by-section analysis). OSHA believes it would be useful for this rule to contain a similar provision. OSHA believes, however, that a stay of a preliminary reinstatement order would be appropriate only in the exceptional case. In other words, a stay only would be granted where the named person 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.

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.

GAP commented that the last sentence of § 1980.107(b), which provides ALJs with broad discretion to limit discovery to expedite hearings, should be deleted because a full and fair representation by the parties is crucial to protecting employees, discovery is a basic due process requirement, and OSHA has no justifiable interest in expediting whistleblower litigation at the expense of full and fair discovery. In this regard, GAP commented that a lack of discovery injures the complainant and not the employer, which maintains the documents and controls the access to company witnesses. GAP further commented that this section is redundant, because the ALJs already possess sufficient authority to limit discovery under 29 CFR 18.15 and the Federal Rules of Civil Procedure. Thus, GAP stated that OSHA instead should consider a regulation that formalizes Federal Rules of Civil Procedures 26(a)(1), setting forth pre-discovery disclosure requirements.

In the same vein, GAP objected to the following statement in the preamble of the interim final rule:

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.

GAP commented that OSHA has no legitimate interest in attempting to preclude complainants from exercising their right to go to district court and that exercising such a right cannot be considered "bad faith."

OSHA does not believe any changes to this section are necessary. The provisions and statements to which GAP objects are merely intended by

OSHA to implement Congress's command that administrative whistleblower hearings under Sarbanes-Oxley "shall be conducted expeditiously." See 18 U.S.C. 1514A(b)(2), incorporating 49 U.S.C. 42121(b)(2)(A). Indeed, as GAP's comments recognize, ALJs already have authority under their procedural rules at 29 CFR part 18 to limit discovery in appropriate circumstances. It is not OSHA's intent to prevent complainants from exercising their right to go to Federal court or to equate the desire to conduct reasonable discovery with bad faith. To the contrary, OSHA acknowledges that Congress essentially has adopted an alternate—administrative or Federal district court—hearing scheme. Thus, in these regulations, OSHA is attempting to modulate the wasteful consequences of potential duplicative whistleblower litigation, while implementing Congress's command for an expedited administrative whistleblower process.

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, at that agency's discretion, also may participate as *amicus curiae* at any time in the proceedings. OSHA does not believe that its decision ordinarily not to prosecute meritorious Sarbanes-Oxley cases will discourage employees from making complaints about corporate fraud.

Three comments were received regarding § 1980.108(a)(1). Both SHRM and the Chamber commented that the Assistant Secretary should not ordinarily participate in any Sarbanes-Oxley whistleblower case even as *amicus* and that the Department should have no role other than to investigate, adjudicate, and enforce the orders that are issued. GAP agreed with OSHA that it should not adopt the STAA model, but rather should adopt the ERA and AIR21 approach under which OSHA participates only in appropriate cases as noted above. As the agency responsible for administering Sarbanes-Oxley whistleblower cases, OSHA believes that the Assistant Secretary must maintain and exercise his authority to participate in appropriate cases either as a party or as *amicus curiae* at any time and at any stage in the administrative proceeding. By the same token, experience under Sarbanes-Oxley and the environmental whistleblower laws does not suggest that OSHA's participation, as a routine matter, is necessary. Accordingly, in consideration of all of the comments received, OSHA has determined to leave the language of this rule as written.

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.

Only one comment was received on this section. GAP commented that the word "legitimately" should be added to § 1980.109(a) to ensure that ALJs only

consider legitimate proffers from named persons in defense of their adverse action. As iterated in the discussion to GAP's similar comment regarding § 1980.104(c), OSHA does not believe that the word "legitimately" adds anything to the rule. The Department's ALJs are experienced whistleblower adjudicators; as such they only entertain credible proffers from named persons.

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 10 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.*, 10 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 provisions of STAA and AIR21. See 29 CFR 1978.109(b)(3) and 29 CFR 1979.110(b).

As with § 1980.106(b)(1), § 1980.110(b) of this rule has been changed to provide that in the exceptional case, the Board may grant a motion to stay a preliminary order of reinstatement that otherwise will be effective while review is conducted by the Board. As explained above, however, OSHA believes that a stay of a preliminary reinstatement order would only be appropriate where the

named person 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.

OSHA received only one comment on this section. GAP commented that the time frame for submitting a petition for review to the Board is unreasonably short and that it should be changed to allow a party 20 business days in which to file a petition. OSHA believes that 10 business days, which also is the time frame under AIR21 (see 29 CFR 1979.110(a)), is sufficient time to petition for review of an ALJ decision, particularly in light of the fact that the rule uses the date of filing to determine timeliness rather than the date of the Board's receipt of the petition.

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. No comments were received on this section.

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. No comments were received on this section.

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. No comments were received on this section.

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. See *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. See *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.

Both SHRM and the Chamber submitted comments on this section. SHRM commented that because Sarbanes-Oxley permits a complainant to bring a *de novo* action in district

court if the Secretary has not issued a final decision within 180 days after the filing of the complaint, the regulations should specifically incorporate preclusion principles to protect employers from having to defend multiple law suits. Both SHRM and the Chamber commented that the regulations should provide that once a complainant elects to go to district court, the Department's administrative procedure should cease and further commented that a complainant's decision to end his or her administrative adjudication should be a prerequisite to going to Federal court. Finally, they commented that the regulations should provide that a decision by a complainant to go to district court after having sought either an ALJ hearing or ARB review of an ALJ decision should constitute a presumption of bad faith.

There is no statutory basis for including preclusion principles in these regulations, nor does the statute delegate authority to the Secretary to regulate litigation in the Federal district courts. *See Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649–50 (1990). Similarly, no legislative history suggests that Congress intended to require that complainants end their administrative proceedings prior to seeking relief in Federal court. In any event, our experience to date under Sarbanes-Oxley is that complainants who choose to file in district court generally do so before the ALJ conducts the administrative hearing. Our experience also is that after the complainant files in district court, the ALJs dismiss any pending administrative hearing requests by such complainants, often in response to a complainant's motion to withdraw. Certainly, nothing in the statute or legislative history suggests that a complainant's decision to seek *de novo* relief in Federal court after requesting either an ALJ hearing on OSHA's findings or ARB review of an ALJ's decision should constitute a presumption of bad faith delay. Accordingly, OSHA does not believe that changes to this section are appropriate.

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.

GAP commented that this section should be omitted because it is ambiguous and contains no standards for application. GAP also commented

that the section is redundant because 29 CFR 18.29 already provides ALJs with the necessary powers to conduct fair and impartial hearings. OSHA believes that because these procedural rules cannot cover every conceivable contingency, there may be occasions when certain exceptions to the rules are necessary. Furthermore, this section is not redundant by virtue of 29 CFR 18.29, because that regulatory provision applies only to the ALJs. Also, unlike 29 CFR 18.29, this section requires that the parties be notified at least three days before the ALJ or the Board waives any rule or issues any special order. Indeed, OSHA notes that a similar section appears in the regulations for handling complaints filed under the whistleblower provisions of STAA and AIR21 and that both the ALJs and the Board have relied upon the rule on occasion. *See, e.g., Caimano v. Brink's, Inc.*, No. 97-041, 1997 WL 24368 *2 (Adm. Rev. Bd. Jan. 22, 1997).

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).

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 was not required for these regulations, which provide procedures for the handling of discrimination complaints. The Assistant Secretary, however, 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 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 in Washington, DC, this 17th day of August, 2004.

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 revised to read 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, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section.

(b) An employee is protected against discrimination (as described in paragraph (a) of this section) by a company or company representative for any lawful act:

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

(i) A Federal regulatory or law enforcement agency;

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

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

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

§ 1980.103 Filing of 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 shall 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 shall 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 present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the 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 shall issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the 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 shall accompany the findings with a preliminary order providing relief to the complainant. The preliminary order shall 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 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 attorney's fees, 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 paragraph (b) of § 1980.105. The objection or request for attorney's 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 attorney's 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, which shall not be automatically stayed. 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. The named person may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement.

(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, shall become the final decision of the Secretary, not subject to judicial review.

§ 1980.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, 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 *de novo*, on the record. Administrative law judges have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the 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 as *amicus curiae* at any time at any stage of the proceedings. This right to participate includes, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a

decision approving or rejecting a settlement agreement between the complainant and the named person.

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

§ 1980.109 Decision and orders of the administrative law judge.

(a) The decision of the 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 will not be stayed. All other portions of the judge's order will be effective 10 business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

§ 1980.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the 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 10 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, unless the Board grants a motion to stay the order. 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 shall 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 attorney's 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 attorney's fee, not exceeding \$1,000.

Subpart C—Miscellaneous Provisions

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

(a) At any time prior to the filing of objections to the 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 to approve the withdrawal. 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 to approve the withdrawal. 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 by the Board (Secretary) 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.

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