

EXHIBIT C—MINIMUM PRIMARY ECONOMIC TERMS DATA—INTEREST RATE SWAPS
[Including cross-currency swaps]

Data fields for all swaps	Comment
* * * * *	
The Unique Transaction Identifier for the swap	The UTI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier or alternate identifier of the reporting counterparty.	As provided in §45.6 of this chapter.
* * * * *	
The Legal Entity Identifier or alternate identifier of the non-reporting counterparty.	As provided in §45.6 of this chapter.
* * * * *	
Floating rate index name/rate period	<i>E.g.</i> , Fed Funds.
* * * * *	

EXHIBIT D—MINIMUM PRIMARY ECONOMIC TERMS DATA—OTHER COMMODITY SWAPS

Data fields for all swaps	Comment
* * * * *	
The Unique Transaction Identifier for the swap	The UTI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier or alternate identifier of the reporting counterparty.	As provided in §45.6 of this chapter.
* * * * *	
The Legal Entity Identifier or alternate identifier of the non-reporting party.	As provided in §45.6 of this chapter.
* * * * *	
Buyer	The counterparty purchasing the product: (<i>E.g.</i> , the payer of the fixed price (for a swap), or the payer of the floating price on the underlying swap (for a put swaption), or the payer of the fixed price on the underlying swap (for a call swaption). Field values: LEI, if available, or alternate identifier.
Seller	The counterparty offering the product: (<i>E.g.</i> , the payer of the floating price (for a swap), the payer of the fixed price on the underlying swap (for a put swaption), or the payer of the floating price on the underlying swap (for a call swaption). Field values: LEI, or alternate identifier.
* * * * *	

Issued in Washington, DC, on January 26, 2023, by the Commission.

Christopher Kirkpatrick,
Secretary of the Commission.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix to Reporting, Recordkeeping, Daily Trading Records, and Swap Documentation Requirements for Swap Dealers and Major Swap Participants; Corrections—Commission Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the

affirmative. No Commissioner voted in the negative.

[FR Doc. 2023–01979 Filed 2–9–23; 8:45 am]

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1991

[Docket Number: OSHA–2021–0011]

RIN 1218–AD38

Procedures for the Handling of Retaliation Complaints Under the Criminal Antitrust Anti-Retaliation Act (CAARA)

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: This document provides the interim final text of regulations governing the anti-retaliation (whistleblower protection) provision of the Criminal Antitrust Anti-Retaliation Act (CAARA or the Act). This rule establishes procedures and timeframes for the handling of retaliation complaints under CAARA, including procedures and timeframes for complaints to the Occupational Safety and Health Administration (OSHA), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor), and judicial review of the Secretary's decisions. It also sets forth the Secretary's interpretations of the CAARA anti-retaliation provision on certain matters.

DATES: This interim final rule is effective on February 10, 2023. Comments and additional materials must be submitted (post-marked, sent or received) by April 11, 2023.

ADDRESSES: Submit comments by any of the following methods:

Electronically: You may submit comments and attachments electronically at: <https://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to <http://www.regulations.gov>. Documents in the docket are listed in the <https://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693-2350 (TTY) (877) 889-5627 for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (OSHA-2021-0011). OSHA will place comments, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties against submitting personal information such as Social Security numbers and birthdates.

Extension of comment period: Submit requests for an extension of the comment period on or before February

27, 2023 to the Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-4618, Washington, DC 20210, or by fax to (202) 693-2199.

FOR FURTHER INFORMATION CONTACT: Marisa Johnson, Program Analyst, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration; telephone (202) 693-2199 (this is not a toll-free number) or email: OSHA.DWPP@dol.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Criminal Antitrust Anti-Retaliation Act (CAARA or the Act), Public Law 116-257, 134 Stat. 1147, was enacted on December 23, 2020. Section 2 of the Act, codified at 15 U.S.C. 7a-3 and referred to throughout these interim final rules as CAARA, prohibits retaliation by an employer, defined in the statute as "a person, or any officer, employee, contractor, subcontractor, or agent of such person," against a "covered individual," defined in the statute as "an employee, contractor, subcontractor or agent of an employer," in the terms and conditions of employment in reprisal for the individual having engaged in protected activity. Protected activity under CAARA includes any lawful act done by an individual to report certain information to the Federal Government, the individual's supervisor, or a person working for the employer who has the authority to investigate, discover, or terminate misconduct. The information must relate to: a violation (or conduct the individual reasonably believes is a violation) of section 1 or 3 of the Sherman Act (15 U.S.C. 1 or 3), or a violation (or conduct the individual reasonably believes is a violation) of another criminal law committed in conjunction with a potential violation of section 1 or 3 of the Sherman Act, or in conjunction with an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Act. The Act also protects individuals from retaliation for causing to be filed, testifying in, participating in, or otherwise assisting in a Federal Government investigation or proceeding relating to a violation (or conduct the individual reasonably believes is a violation) of section 1 or 3 of the Sherman Act, or a violation (or conduct the individual reasonably believes is a violation) of another criminal law committed in conjunction with a potential violation of section 1 or 3 of the Sherman Act, or in conjunction with

an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Acts. The Federal Government is defined by the statute as a Federal regulatory or law enforcement agency, or any Member of Congress or committee of Congress. These interim final rules establish procedures for the handling of retaliation complaints under the Act.

II. Summary of Statutory Procedures

CAARA incorporates the rules, procedures, and burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121(b), with some exceptions. Under CAARA, a person who believes that they have been discharged or otherwise retaliated against in violation of the Act (complainant) may file a complaint with the Secretary of Labor (Secretary) within 180 days of the alleged retaliation. Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated the Act (respondent) and to the complainant's employer (which in most cases will be the respondent) of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation. The Secretary must then conduct an investigation, within 60 days of receipt of the complaint, after affording the respondent an opportunity to submit a written response and to meet with the investigator to present statements from witnesses.

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

After investigating a complaint, the Secretary will issue written findings. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the complainant and respondent of those findings, and issue a preliminary order providing all relief necessary to make the complainant whole, including,

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

The complainant and the respondent then have 30 days after the date of receipt of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing before an Administrative Law Judge (ALJ). The filing of objections will not stay any reinstatement order. However, under OSHA's regulations, the filing of objections will stay any other remedy in the preliminary order. If a hearing before an ALJ is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, the Act requires the hearing be conducted "expeditiously." The Secretary then has 120 days after the conclusion of any hearing to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary will order all relief necessary to make the complainant whole, including, where appropriate, reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. The Secretary also may award a prevailing employer reasonable attorney fees, not exceeding \$1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit where the complainant resided on the date of the violation.

The Act permits the covered individual to bring an action for de novo review of a CAARA retaliation claim in the appropriate United States district court in the event that the Secretary has not issued a final decision within 180 days after the filing of the complaint, and there is no showing that such delay is due to the bad faith of the

complainant. The provision provides that the court will have jurisdiction over the action without regard to the amount in controversy. Finally, nothing in the CAARA anti-retaliation provision shall be deemed to diminish the rights, privileges, or remedies of any covered individual under any Federal or State law, or under any collective bargaining agreement.

III. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of the Act. Responsibility for receiving and investigating complaints under the Act has been delegated to the Assistant Secretary for Occupational Safety and Health (Assistant Secretary) pursuant to Secretary of Labor's Order No. 08-2020 (May 15, 2020), 85 FR 58393 (September 18, 2020). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by ALJs are decided by the ARB. See Secretary of Labor's Order 01-2020 (Feb. 21, 2020), 85 FR 13186-01 (Mar. 6, 2020) (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board).

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

Section 1991.100—Purpose and Scope

This section describes the purpose of the regulations implementing the anti-retaliation provisions of CAARA and provides an overview of the procedures covered by these regulations.

Section 1991.101—Definitions

This section includes definitions of certain terms used in CAARA and this rule.

One term defined in § 1991.101 is "antitrust laws," which CAARA defines as meaning section 1 or 3 of the Sherman Act (15 U.S.C. 1 or 3). See 15 U.S.C. 7a-3(a)(3)(A).

Another term defined in the statute is "covered individual," which means an employee, contractor, subcontractor, or agent of an employer. See 15 U.S.C. 7a-3(a)(3)(B). Consistent with the approach that OSHA has taken in implementing other whistleblower protection provisions and consistent with applicable ARB case law, the interim final rule includes "an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be

affected by, another person" in the definition of "covered individual." See, e.g., 29 CFR 1979.101 (AIR21 definition of employee); 29 CFR 1980.101(g) (Sarbanes-Oxley Act of 2002 (SOX) definition of employee).

The term "employer" is defined in CAARA as meaning a person, or any officer, employee, contractor, subcontractor, or agent of such person. See 15 U.S.C. 7a-3(a)(3)(C). The term "Federal Government" is defined in CAARA as meaning a Federal regulatory or law enforcement agency; or any Member of Congress or committee of Congress. See 15 U.S.C. 7a-3(a)(3)(D).

The term "person" is defined in CAARA to have the same meaning as in 15 U.S.C. 12(a). Under that section, the term includes individuals as well as corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. See 15 U.S.C. 7a-3(a)(3)(E) (incorporating 15 U.S.C. 12(a)).

Section 1991.102 Obligations and Prohibited Acts

This section describes the activities that are protected under CAARA and the conduct that is prohibited in response to any protected activities. The Act prohibits an employer, defined to include a person or any officer, employee, contractor, subcontractor, or agent of such person, from discharging, demoting, suspending, threatening, harassing or in any other manner retaliating against a covered individual in their terms and conditions of employment because the covered individual engaged in certain protected activity relating to certain antitrust laws—sections 1 and 3 of the Sherman Act, 15 U.S.C. 1 and 3. The Act further provides a rule of construction that "[t]he term 'violation', with respect to the antitrust laws, shall not be construed to include a civil violation of any law that is not also a criminal violation." 15 U.S.C. 7a-3(a)(4).

Protected activity under CAARA includes any lawful act by a covered individual to provide information or cause information to be provided regarding conduct which is of the type that constitutes a violation of section 1 or 3 of the Sherman Act, or which the covered individual reasonably believes constitutes a violation of section 1 or 3 of the Sherman Act; or conduct which the covered individual reasonably believes to be a violation of another criminal law which is committed, or which the covered individual reasonably believes to have been committed, in conjunction with a

potential violation of section 1 or 3 of the Sherman Act or in conjunction with an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Act. To be protected, the information or assistance must be provided to a Federal regulatory or law enforcement agency, any Member of Congress or committee of Congress, a person with supervisory authority over the covered individual, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct.

The Act also protects covered individuals from discharge or other retaliation for any lawful act done to cause to be filed, testify in, participate in, or otherwise assist a Federal Government investigation or a Federal Government proceeding filed or about to be filed (with any knowledge of the employer) relating to any violation of, or any act or omission which is of the type that constitutes a violation of section 1 or 3 of the Sherman Act, or which the covered individual reasonably believes to be a violation of, section 1 or 3 of the Sherman Act; or any violation of, or any act or omission the covered individual reasonably believes to be a violation of, another criminal law committed, or which the covered individual reasonably believes was committed, in conjunction with a potential violation of section 1 or 3 of the Sherman Act or in conjunction with an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Act. The type of conduct that constitutes a violation of section 1 or 3 of the Sherman Act can include bid rigging, price fixing, and market allocation agreements between competitors.

Under the Act, a covered individual who provides information, causes information to be provided, or engages in other activities listed in the statute is protected as long as the conduct at issue is of the type that violates section 1 or 3 of the Sherman Act, or the covered individual reasonably believes that the conduct at issue is the type of conduct that violates section 1 or 3 of the Sherman Act; or the covered individual reasonably believes that the conduct at issue is a violation of another criminal law committed in conjunction with a potential violation of section 1 or 3 of the Sherman Act or in conjunction with an investigation by the Department of Justice of a potential violation. To have a reasonable belief, the individual must subjectively believe that such conduct is occurring and that belief must be objectively reasonable. See, e.g., *Rhinehimer v. U.S. Bancorp. Invs., Inc.*, 787 F.3d 797, 811 (6th Cir. 2015)

(discussing the reasonable belief standard under analogous language in the SOX whistleblower provision, 18 U.S.C. 1514A) (citations omitted); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) (agreeing with First, Fourth, Fifth, and Ninth Circuits that determining reasonable belief under the SOX whistleblower provision requires analysis of the complainant's subjective belief and the objective reasonableness of that belief); *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854, at *11-12 (ARB May 25, 2011) (same). The objective reasonableness of a complainant's belief is typically determined "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp*, 558 F.3d at 723 (quoting *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008)). Moreover, the complainant need not cite any provision of law in their communications to the employer or show that the conduct constituted an actual violation of law. See, e.g., *Sylvester*, 2011 WL 2165854, at *11-12. Pursuant to this standard, a complainant's whistleblower activity is protected when it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred. See *Van Asdale v. Int'l Game Techs.*, 577 F.3d 989, 1001 (9th Cir. 2009); *Allen*, 514 F.3d at 477.

Activity will not be protected if the covered individual is found to have planned and initiated a violation or attempted violation of section 1 or 3 of the Sherman Act, planned and initiated a violation or attempted violation of another criminal law in conjunction with a violation or attempted violation of section 1 or 3 of the Sherman Act, or planned and initiated an obstruction or attempted obstruction of an investigation by the Department of Justice of a violation of section 1 or 3 of the Sherman Act.

Section 1991.103 Filing of Retaliation Complaint

This section explains the requirements for filing a retaliation complaint under CAARA. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), an alleged violation occurs when the retaliatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the covered individual is aware or reasonably should be aware of the employer's decision to take an

adverse action. *EEOC v. United Parcel Serv., Inc.*, 249 F.3d 557, 561-62 (6th Cir. 2001). The time for filing a complaint under CAARA may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action. *Xanthopoulos v. U.S. Dep't of Labor*, 991 F.3d 823, 832 (7th Cir. 2021) (affirming ARB's refusal to toll the statute of limitations under SOX and explaining the limited circumstances in which tolling is appropriate for a timely filing in the wrong forum).

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

Section 1991.104 Investigation

This section describes the procedures that apply to the investigation of CAARA complaints. Paragraph (a) of this section outlines the procedures for notifying the respondent, the employer (if different from the respondent), and the Antitrust Division of the United States Department of Justice of the complaint and notifying the respondent of rights under these regulations. In certain circumstances, OSHA may briefly delay notification to the respondent if requested by law enforcement. See OSHA Whistleblower Investigations Manual Chapter 3.IX.B, available at https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf. Paragraph (b) describes the procedures for the respondent to submit the response to the complaint. Paragraph (c) specifies that OSHA will request that the parties provide each other with copies of their submissions to OSHA during the investigation and that, if a party does not provide such copies, OSHA generally will do so at a time permitting the other party an opportunity to respond to those submissions. Before providing such materials, OSHA will redact them consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. Paragraph (d) of this section discusses confidentiality of information provided during investigations.

Paragraph (e) of this section sets forth the applicable burdens of proof. CAARA incorporates the burdens of proof in AIR21. Thus, in order for OSHA to

conduct an investigation, CAARA requires that a complainant make an initial prima facie showing that a protected activity was “a contributing factor” in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision. The complainant will be considered to have met the required burden for OSHA to commence an investigation if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. The complainant’s burden at this stage may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity.

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. See *Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the Energy Reorganization Act of 1974, as amended (ERA), which is the same as that under CAARA, serves a “gatekeeping function” intended to “stem[] frivolous complaints”). Even in cases where the complainant successfully makes a prima facie showing, CAARA requires that the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, OSHA must dismiss the complaint and not investigate further if either: (1) the complainant fails to make the prima facie showing that protected activity was a contributing factor in the alleged adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statute requires OSHA to determine whether there is reasonable cause to believe that protected activity was a contributing factor in the alleged adverse action. A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Wiest v. Tyco Elec. Corp.*, 812 F.3d 319, 330 (3d Cir. 2016) (discussing “contributing factor standard” under SOX); *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (same); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013) (same). A

conclusion that protected activity was a contributing factor in an adverse action can be based on direct evidence or circumstantial evidence “such as the temporal proximity between the protected activity and the adverse action, indications of pretext such as inconsistent application of policies and shifting explanations, antagonism or hostility toward protected activity, the relation between the discipline and the protected activity, and the presence [or absence] of intervening events that independently justify” the adverse action. *Hess v. Union Pac. R.R. Co.*, 898 F.3d 852, 858 (8th Cir. 2018) (quoted source omitted) (discussing the contributing factor standard under the Federal Railroad Safety Act).

If OSHA finds reasonable cause to believe that the alleged protected activity was a contributing factor in the adverse action, OSHA may not order relief if the employer demonstrates by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 49 U.S.C. 42121(b)(2)(B)(iv). The “clear and convincing evidence” standard is a higher burden of proof than a “preponderance of the evidence” standard. Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain. *Clarke v. Navajo Express*, ARB No. 09–114, 2011 WL 2614326, at *3 (ARB June 29, 2011).

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

Section 1991.105 Issuance of Findings and Preliminary Orders

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order all relief necessary to make the complainant whole, including reinstatement with the

same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. The findings and, where appropriate, the preliminary order, will also advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings and, where appropriate, the preliminary order, will also advise the respondent of the right to request an award of attorney fees not exceeding a total of \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final decision and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

The remedies provided under CAARA aim to make the complainant whole by restoring the complainant to the position that the complainant would have occupied absent the retaliation and to counteract the chilling effect of retaliation on protected whistleblowing in the complainant’s workplace. The back pay and other remedies appropriate in each case will depend on the individual facts of the case and the evidence submitted, and the complainant’s interim earnings must be taken into account in determining the appropriate back pay award. When there is evidence to determine these figures, a back pay award under CAARA might include, for example, amounts that the complainant would have earned in commissions, bonuses, overtime, or raises had the complainant not been discharged in retaliation for engaging in protected activity under CAARA. Lost benefits may also be included in a back pay award when there is evidence to support an award for lost benefits. A benefits award under CAARA might include amounts that the employer would have contributed to a 401(k) plan, insurance plan, profit-sharing plan, or retirement plan on the complainant’s behalf had the complainant not been discharged in retaliation for engaging in protected activity under CAARA. Other damages, including non-pecuniary damages, such as damages for emotional distress due to

the retaliation, are also available under CAARA. See, e.g., *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 670–71 (4th Cir. 2015) (holding that emotional distress damages are available under identical remedial provision in SOX); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 264–66 (5th Cir. 2014) (same). Consistent with the rules under other whistleblower statutes enforced by the Department of Labor, in ordering interest on back pay under CAARA, OSHA will compute interest due by compounding daily the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621(a)(2) is the Federal short-term rate plus three percentage points, against back pay. See, e.g., 29 CFR 1980.105(a) (SOX); 29 CFR 1982.105(a) (Federal Railroad Safety Act (FRSA)); 29 CFR 1988.105(a) (Moving Ahead for Progress in the 21st Century Act (MAP–21)).

Consistent with the rules governing other Department of Labor-enforced whistleblower protection statutes, where appropriate, in ordering back pay, OSHA will require the respondent to submit the appropriate documentation to the Social Security Administration (SSA) allocating the back pay to the appropriate periods. See, e.g., 29 CFR 1980.105(a) (SOX); 29 CFR 1982.105(a) (FRSA); 29 CFR 1988.105(a) (MAP–21)).

The statute permits OSHA to preliminarily reinstate covered individuals to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of CAARA. See 49 U.S.C. 42121(b)(2)(A). When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement. In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that the complainant received prior to termination but not actually return to work. Such “economic reinstatement” is akin to an order of front pay and is sometimes employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, which protects miners from retaliation. 30 U.S.C. 815(c); see, e.g., *Sec’y of Labor, MSHA v. North Fork Coal Corp.*, 33 FMSHRC 589, 2011 WL 1455831, at *4 (FMSHRC Mar. 25, 2011) (explaining economic reinstatement in lieu of temporary reinstatement in the context of section 105(c)). Front pay has been recognized as an appropriate remedy in cases under the whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. See, e.g., *Deltek, Inc. v.*

Dep’t of Labor, Admin. Rev Bd., 649 Fed. App’x. 320, 333 (4th Cir. 2016) (affirming award of front pay in SOX case due to “pronounced animosity between the parties;” explaining that “front pay ‘is designed to place the complainant in the identical financial position’ that she would have occupied had she remained employed or been reinstated.”); *Continental Airlines, Inc. v. Admin. Review Bd.*, 638 Fed. App’x. 283, 289–90, 2016 WL 97461, at *4 (5th Cir. 2016) (affirming front pay award under AIR21, and explaining that “front-pay is available when reinstatement is not possible”), aff’g *Luder v. Cont’l Airlines, Inc.*, ARB No. 10–026, 2012 WL 376755, at *11 (ARB Jan. 31, 2012); see also *Brown v. Lockheed Martin Corp.*, ALJ No. 2008–SOX–00049, 2010 WL 2054426, at *55–56 (ALJ Jan. 15, 2010) (noting that while reinstatement is the “presumptive remedy” under SOX whistleblower provision, front pay may be awarded as a substitute when reinstatement is inappropriate), aff’d *Lockheed Martin Corp. v. U.S. Dept. of Labor*, 717 F.3d 1121, 1138 (10th Cir. 2013) (noting availability of all relief necessary to make the employee whole in SOX case but remanding for DOL to quantify remedies); *Indiana Michigan Power Co. v. U.S. Dept. of Labor*, 278 Fed. Appx. 597, 606 (6th Cir. 2008) (affirming front pay award under ERA). Neither an employer nor a covered individual has a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA’s satisfaction that immediate reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the individual.

Subpart B—Litigation

Section 1991.106 Objections to the Findings and the Preliminary Order and Requests for a Hearing

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, in accordance with 29 CFR part 18, as applicable, within 30 days of the receipt of the findings. The date of the postmark, facsimile transmittal, or electronic transmittal is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections also is considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the

other parties of record, as well as on the OSHA official who issued the findings and order, the Assistant Secretary, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards, the failure to serve copies of the objections on the other parties of record does not affect the ALJ’s jurisdiction to hear and decide the merits of the case. See *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04–101, 2005 WL 2865915, at *7 (ARB Oct. 31, 2005). OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, to serve them with copies of objections to OSHA’s findings.

The timely filing of objections stays all provisions of the preliminary order, except for the portion requiring reinstatement. A respondent may file a motion to stay the Assistant Secretary’s preliminary order of reinstatement with the Office of Administrative Law Judges. However, such a motion will be granted only based on exceptional circumstances. The Secretary believes that a stay of the Assistant Secretary’s preliminary order of reinstatement under CAARA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, i.e., irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and that the public interest favors a stay. If no timely objection to the Assistant Secretary’s findings and/or preliminary order is filed, then the Assistant Secretary’s findings and/or preliminary order become the final decision of the Secretary not subject to judicial review.

Section 1991.107 Hearings

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, as set forth in 29 CFR part 18 subpart A. This section provides that the hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo, on the record. As noted in this section, formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

Section 1991.108 Role of Federal Agencies

The Assistant Secretary may participate as a party or amicus curiae at any time in the administrative

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

Section 1991.109 Decisions and Orders of the Administrative Law Judge

This section sets forth the requirements for the content of the decisions and orders of the ALJ, and includes the standard for finding a violation under CAARA. Specifically, because CAARA incorporates the burdens of proof in AIR21, the complainant must demonstrate (*i.e.*, prove by a preponderance of the evidence) that the protected activity was a “contributing factor” in the adverse action. See 49 U.S.C. 42121(b)(2)(B)(iii); see, *e.g.*, *Allen*, 514 F.3d at 475 n.1 (“The term ‘demonstrates’ [under identical burden-shifting scheme in the SOX whistleblower provision] means to prove by a preponderance of the evidence.”). If the complainant demonstrates that the alleged protected activity was a contributing factor in the adverse action, then the employer must demonstrate by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 49 U.S.C. 42121(b)(2)(B)(iv).

Paragraph (c) of this section further provides that OSHA’s determination to dismiss the complaint without an investigation or without a complete investigation under § 1991.104 is not subject to review. OSHA’s determinations on whether to proceed with an investigation under CAARA and whether to make investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases *de novo* and, therefore, as a general matter, may not remand cases to OSHA to conduct an investigation or

make further factual findings. Paragraph (d) notes the remedies that the ALJ may order under CAARA and, as discussed under § 1991.105 above, provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily, and that the respondent will be required to submit appropriate documentation to the SSA allocating any back pay award to the appropriate periods. Paragraph (e) requires that the ALJ’s decision be served on all parties to the proceeding, OSHA, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of the ALJ’s decision on them. Paragraph (e) also provides that any ALJ decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ’s order will be effective 30 days after the date of the decision unless a timely petition for review has been filed with the ARB. If a timely petition for review is not filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review.

Section 1991.110 Decisions and Orders of the Administrative Review Board

Upon the issuance of the ALJ’s decision, the parties have 30 days within which to petition the ARB for review of that decision. The date of the postmark, facsimile transmittal, or electronic transmittal is considered the date of filing of the petition; if the petition is filed in person, by hand delivery, or other means, the petition is considered filed upon receipt.

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

determinations will be reviewed under the substantial evidence standard.

This section also provides that, based on exceptional circumstances, the ARB may grant a motion to stay an ALJ’s preliminary order of reinstatement under CAARA (which otherwise would be effective immediately) while the ARB reviews the order. A stay of an ALJ’s preliminary order of reinstatement under CAARA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and that the public interest favors a stay. See, *e.g.*, *Bailey v. Consol. Rail Corp.*, ARB Case Nos. 13–030 13–033, 2013 WL 1385563, at *2 (ARB Mar. 27, 2013).

If the ARB concludes that the respondent has violated the law, it will issue an order providing all relief necessary to make the complainant whole. The order will require, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes pursuant to 26 U.S.C. 6621(a)(2) and will be compounded daily, and the respondent will be required to submit appropriate documentation to the SSA allocating any back pay award to the appropriate periods. If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney fee, not exceeding a total of \$1,000.

The decision of the ARB is subject to discretionary review by the Secretary of Labor. See Secretary of Labor’s Order, 01–2020 (Feb. 21, 2020), 85 FR 13186, 13187 (Mar. 6, 2020).

As provided in that Secretary’s Order, a party may petition the ARB to refer a decision to the Secretary for further review, after which the Secretary may accept review, decline review, or take no action. If no such petition is filed, the ARB’s decision shall become the final action of the Department 28 calendar days after the date on which the decision was issued. If such a petition is filed and the ARB declines to refer the case to the Secretary, the ARB’s

decision shall become final 28 calendar days after the date on which the petition for review was filed. If the ARB refers a decision to the Secretary for further review, and the Secretary takes no action in response to the ARB's referral, or declines to accept the case for review, the ARB's decision shall become final either 28 calendar days from the date of the referral, or on the date on which the Secretary declines review, whichever comes first.

In the alternative, under the Secretary's Order, at any point during the first 28 calendar days after the date on which an ARB decision was issued, the Secretary may direct the ARB to refer the decision to the Secretary for review. If the Secretary directs the ARB to refer a case to the Secretary, or notifies the parties that the case has been accepted for review, the ARB's decision shall not become the final action of the Department and shall have no legal force or effect, unless and until the Secretary adopts the ARB's decision.

Under the Secretary's Order, any final decision made by the Secretary shall be made solely based on the administrative record, the petition and briefs filed with the ARB, and any amicus briefs permitted by the Secretary. The decision shall be in writing and shall be transmitted to the ARB, who will publish the decision and transmit it to the parties to the case. The Secretary's decision shall constitute final action by the Department and shall serve as binding precedent in all Department proceedings involving the same issue or issues.

Subpart C—Miscellaneous Provisions

Section 1991.111 Withdrawal of Complaints, Findings, Objections, and Petitions for Review; Settlement

This section provides the procedures and time periods for withdrawal of complaints, withdrawal of findings and/or preliminary orders by the Assistant Secretary, and withdrawal of objections to findings and/or orders. It permits complainants to withdraw their complaints orally, and provides that, in such circumstances, OSHA will confirm a complainant's desire to withdraw in writing. It also provides for approval of settlements at the investigative and adjudicatory stages of the case.

Section 1991.112 Judicial Review

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

Section 1991.113 Judicial Enforcement

This section describes the ability of the Secretary, the complainant, and the respondent under CAARA to obtain judicial enforcement of final orders, preliminary orders of reinstatement, and terms of settlement agreements approved by the Department of Labor as provided in § 1991.111(d) and (e). CAARA provides that “[i]f a person fails to comply with an order or preliminary order issued by the Secretary of Labor pursuant to the procedures set forth in section 42121(b) of title 49, the Secretary of Labor or the person on whose behalf the order was issued may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.” 15 U.S.C. 7a–3(b)(2)(E). As explained in section 1991.106, if a timely objection to OSHA's preliminary order is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. See also 49 U.S.C. 42121(b)(2)(A) (“The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.”). Thus, CAARA permits both private parties and the Secretary to seek district court enforcement of preliminary orders of reinstatement and final orders of the Secretary, including approved settlement agreements.

Section 1991.114 District Court Jurisdiction of Retaliation Complaints

This section sets forth CAARA's provisions allowing a complainant to bring an original de novo action in district court, alleging the same allegations contained in the complaint filed with OSHA, if there has been no final decision of the Secretary within 180 days after the date of the filing of the complaint, and there is no showing that such delay is due to the bad faith of the complainant. See 15 U.S.C. 7a–3(b)(1)(B). This section also reflects the statutory provision that specifies the burdens of proof in a district court action. See 15 U.S.C. 7a–3(b)(2)(C) (incorporating 49 U.S.C. 42121(b)).

This section also requires that, within seven days after filing a complaint in district court, a complainant must provide a file-stamped copy of the complaint to OSHA, the ALJ, or the ARB, depending on where the proceeding is pending. If the ARB has issued a decision that has not yet become final under Secretary of Labor's Order 01–2020, the case is regarded as pending before the ARB for purposes of this section and a copy of any district

court complaint should be sent to the ARB. A copy of the district court complaint also must be provided to the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. This provision is necessary to notify the agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant's compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed.

Finally, it should be noted that although a complainant may file an action in district court if the Secretary has not issued a final decision within 180 days of the filing of the complaint with OSHA, it is the Department of Labor's position that complainants may not initiate an action in federal court after any decision of the Department of Labor becomes the final decision of the Secretary, even if the date of the final decision is more than 180 days after the filing of the complaint. Thus, for example, after the ARB has issued a decision that has become final denying a whistleblower complaint, the complainant no longer may file an action for de novo review in federal district court. See *Soo Line R.R., Inc. v. Admin. Review Bd.*, 990 F.3d 596, 598 n.1 (8th Cir. 2021). The purpose of the “kick-out” provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties' rights to seek judicial review of the Secretary's final decision in the court of appeals. See 49 U.S.C. 42121(b)(4)(B) (providing that an order with respect to which review could have been obtained in the court of appeals shall not be subject to judicial review in any criminal or other civil proceeding).

Section 1991.115 Special Circumstances; Waiver of Rules

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

IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, section 1991.103) which was previously reviewed as a statutory requirement of CAARA and approved for use by the Office of Management and Budget (OMB), as part of the Information Collection Request (ICR) assigned OMB control number 1218–0236 under the provisions of the Paperwork Reduction Act of 1995 (PRA). See Public Law 104–13, 109 Stat. 163 (1995). A non-material change has been submitted to OMB to include the regulatory citation.

V. Administrative Procedure Act

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

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

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

The Office of Information and Regulatory Affairs has concluded that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866, reaffirmed by Executive Order 13563, because it is not likely to: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866. Therefore, no economic impact analysis under section 6(a)(3)(C) of Executive Order 12866 has been prepared.

Also, because this rule is not significant under Executive Order 12866, and because no notice of proposed rulemaking has been published, no statement is required under section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532. In any event, this rulemaking is procedural and interpretative in nature and is thus not expected to have a significant economic impact. Finally, this rule does not have “federalism implications.” The rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government[.]” and therefore, is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis

The notice and comment rulemaking procedures of section 553 of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Rules that are exempt from APA notice and comment requirements are also exempt from the Regulatory Flexibility Act (RFA). See Small Business Administration Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, at 9; also found at <https://www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act>. This is a rule of agency procedure, practice, and interpretation within the meaning of 5 U.S.C. 553; and, therefore, the rule is exempt from both the notice and comment rulemaking procedures of the APA and the requirements under the RFA.

List of Subjects in 29 CFR Part 1991

Administrative practice and procedure, Employment, Antitrust, Whistleblower.

Authority and Signature

This document was prepared under the direction and control of Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, DC, on February 6, 2023.

Douglas L. Parker,

Assistant Secretary of Labor for Occupational Safety and Health.

■ Accordingly, for the reasons set out in the preamble, title 29, chapter XVII, of the Code of Federal Regulations is amended by adding part 1991 to read as follows:

PART 1991—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE CRIMINAL ANTITRUST ANTI-RETALIATION ACT (CAARA).

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

Sec.

- 1991.100 Purpose and scope.
- 1991.101 Definitions.
- 1991.102 Obligations and prohibited acts.
- 1991.103 Filing of retaliation complaint.
- 1991.104 Investigation.
- 1991.105 Issuance of findings and preliminary orders.

Subpart B—Litigation

- 1991.106 Objections to the findings and the preliminary order and requests for a hearing.
- 1991.107 Hearings.
- 1991.108 Role of Federal agencies.
- 1991.109 Decisions and orders of the administrative law judge.
- 1991.110 Decisions and orders of the Administrative Review Board.

Subpart C—Miscellaneous Provisions

- 1991.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.
- 1991.112 Judicial review.
- 1991.113 Judicial enforcement.
- 1991.114 District court jurisdiction of retaliation complaints.
- 1991.115 Special circumstances; waiver of rules.

Authority: 15 U.S.C. 7a–3; Secretary of Labor’s Order 08–2020 (May 15, 2020), 85 FR 58393 (September 18, 2020); Secretary of Labor’s Order 01–2020 (Feb. 21, 2020), 85 FR 13186–01 (Mar. 6, 2020).

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

§ 1991.100 Purpose and scope.

(a) This part sets forth procedures for, and interpretations of section 2 of the Criminal Antitrust Anti-Retaliation Act (CAARA), Public Law 116–257, 134 Stat. 1147 (December 23, 2020) (codified at 15 U.S.C. 7a–3). CAARA provides for

protection from retaliation because the covered individual has engaged in protected activity pertaining to any violation of, or any act or omission which the covered individual reasonably believes constitutes a violation of, section 1 or 3 of the Sherman Act; or any violation of, or any act or omission the covered individual reasonably believes to be a violation of, another criminal law committed in conjunction with a potential violation of section 1 or 3 of the Sherman Act or in conjunction with an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Act.

(b) This part establishes procedures under CAARA for the expeditious handling of retaliation complaints filed by covered individuals, or by persons acting on their behalf. These rules, together with those codified at 29 CFR part 18, set forth the procedures under CAARA for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges (ALJs), post-hearing administrative review, and withdrawals and settlements. In addition, these rules provide the Secretary's interpretations of certain statutory provisions.

§ 1991.101 Definitions.

As used in this part:

Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom the Assistant Secretary delegates authority under CAARA.

Antitrust laws means section 1 or 3 of the Sherman Act (15 U.S.C. 1 or 3).

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

CAARA means the Criminal Antitrust Anti-Retaliation Act, Public Law 116–257, 134 Stat. 1147 (December 23, 2020) (codified at 15 U.S.C. 7a–3).

Complainant means the covered individual who filed a CAARA complaint or on whose behalf a complaint was filed.

Covered individual means an employee, contractor, subcontractor, or agent of an employer and includes an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by, another person.

DOJ means the Antitrust Division of the United States Department of Justice.

Employer means a person, or any officer, employee, contractor, subcontractor, or agent of such person.

Federal Government means a Federal regulatory or law enforcement agency; or any Member of Congress or committee of Congress.

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

Person has the same meaning as in 15 U.S.C. 12(a) and includes individuals as well as corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Respondent means the person named in the complaint who is alleged to have violated CAARA.

Secretary means the Secretary of Labor.

§ 1991.102 Obligations and prohibited acts.

(a) No employer may discharge, demote, suspend, threaten, harass, or in any other manner retaliate against, including, but not limited to, intimidating, restraining, coercing, blacklisting, or disciplining, a covered individual in the terms and conditions of employment of the covered individual because of any lawful act done by the covered individual to engage in any of the activities specified in paragraph (b)(1) and (2) of this section.

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

(1) To provide information, or cause information to be provided to the Federal Government or a person with supervisory authority over the individual, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct, regarding:

(i) Any violation of, or any act or omission the covered individual reasonably believes to be a violation of, the antitrust laws; or

(ii) Any violation of, or any act or omission the covered individual reasonably believes to be a violation of, another criminal law committed in conjunction with a potential violation of the antitrust laws or in conjunction with an investigation by the Department of Justice of a potential violation of the antitrust laws; or

(2) To cause to be filed, testify in, participate in, or otherwise assist a Federal Government investigation or a Federal Government proceeding filed or about to be filed (with any knowledge of the employer) relating to:

(i) Any violation of, or any act or omission the covered individual

reasonably believes to be a violation of, the antitrust laws; or

(ii) Any violation of, or any act or omission the covered individual reasonably believes to be a violation of, another criminal law committed in conjunction with a potential violation or in conjunction with an investigation by the Department of Justice of a potential violation of the antitrust laws.

(3) The term violation with respect to the antitrust laws shall not be construed to include a civil violation of any law that is not also a criminal violation.

(4) Paragraphs (b)(1) and (2) of this section shall not apply to any covered individual if the covered individual:

(i) Planned and initiated a violation or attempted violation of the antitrust laws;

(ii) Planned and initiated a violation or attempted violation of another criminal law in conjunction with a violation or attempted violation of the antitrust laws; or

(iii) Planned and initiated an obstruction or attempted obstruction of an investigation by the Department of Justice of a violation of the antitrust laws.

§ 1991.103 Filing of retaliation complaint.

(a) *Who may file.* A covered individual who believes that they have been discharged or otherwise retaliated against by any employer in violation of CAARA may file, or have filed by any person on their behalf, a complaint alleging such retaliation.

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

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

(d) *Time for filing.* Within 180 days after an alleged violation of CAARA occurs, any person who believes that they have been retaliated against in violation of CAARA may file, or have filed by any person on their behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic filing or

transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

§ 1991.104 Investigation.

(a) OSHA will notify the respondent(s) and the complainant's employer (if different) of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1991.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel) and to the DOJ.

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

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

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential

basis, other than the complainant, in accordance with 29 CFR part 70.

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

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

(i) The individual engaged in a protected activity;

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

(iii) The individual suffered an adverse action; and

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

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the individual engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

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

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

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1991.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this

part, to believe that the respondent has violated CAARA and that preliminary reinstatement is warranted, OSHA will contact the respondent (or the respondent's legal counsel if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigator, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of OSHA's notification pursuant to this paragraph, or as soon thereafter as OSHA and the respondent can agree, if the interests of justice so require.

§ 1991.105 Issuance of findings and preliminary orders.

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

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include all relief necessary to make the complainant whole including, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment

of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily. Where appropriate, the preliminary order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate periods.

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

(b) The findings and, where appropriate, the preliminary order will be sent by physical or electronic means that allow OSHA to confirm delivery to all parties of record (or each party's legal counsel if the party is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or order and to request a hearing, and of the right of the respondent to request an award of attorney fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. The findings and, where appropriate, the preliminary order, also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor, or appropriate information regarding filing objections electronically with the Office of Administrative Law Judges if electronic filing is available. The findings also may specify the means, including electronic means, for serving OSHA and the Associate Solicitor for Fair Labor Standards with documents in the administrative litigation as required under this part. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and any preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and/or a request for hearing has been timely filed as provided at § 1991.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

Subpart B—Litigation

§ 1991.106 Objections to the findings and the preliminary order and requests for a hearing.

(a) Any party who desires review, including judicial review, of the findings and/or preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees under CAARA, 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 § 1991.105. The objections and request for hearing and/or request for attorney fees must be in writing and must state whether the objections are to the findings, the preliminary order, or both, and/or whether there should be an award of attorney fees. The date of the postmark, facsimile transmittal, or electronic transmittal is considered the date of filing; if the objection is filed in person, by hand delivery, or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, in accordance with 29 CFR part 18, and copies of the objections must be served at the same time on the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for serving them with copies of the objections.

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

§ 1991.107 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 29 CFR part 18, subpart A.

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

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

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

§ 1991.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding and must be served with copies of all documents in the case. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as *amicus curiae* at any time at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent, and the right to seek discretionary review of a decision of the Administrative Review Board (ARB) from the Secretary.

(2) Parties must send copies of documents to OSHA and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of OSHA, or when OSHA is participating in the proceeding, or when service on OSHA and the Associate Solicitor is otherwise required by these rules. Except as otherwise provided in rules of practice and/or procedure before the OALJ or the ARB, OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for serving them with documents under this section.

(b) The DOJ, if interested in a proceeding, may participate as *amicus curiae* at any time in the proceeding, at the DOJ's discretion. At the request of

the DOJ, copies of all documents in a case must be sent to the DOJ, whether or not it is participating in the proceeding.

§ 1991.109 Decisions and orders of the administrative law judge.

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

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

(c) Neither OSHA's determination to dismiss a complaint without completing an investigation pursuant to § 1991.104(e) nor OSHA's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order providing all relief necessary to make the complainant whole, including, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate periods.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ALJ determines that a complaint was frivolous or was brought

in bad faith, the ALJ may award to the respondent a reasonable attorney fee, not exceeding \$1,000.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of decisions on them under this section. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 30 days after the date of the decision unless a timely petition for review has been filed with the ARB. The decision of the ALJ will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review.

§ 1991.110 Decisions and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue decisions under this part subject to the Secretary's discretionary review. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 30 days of the date of the decision of the ALJ. All petitions and documents submitted to the ARB must be filed in accordance with 29 CFR part 26. The date of the postmark, facsimile transmittal, or electronic transmittal will be considered to be the date of filing; if the petition is filed in person, by hand delivery, or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. The petition for review also must be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of petitions for review on them under this section.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this

section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If a timely petition for review is not filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If a timely petition for review is not filed, the resulting final order is not subject to judicial review.

(c) The decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 30 days after the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 30 days after a new decision is issued. The ARB's decision will be served upon all parties and the Chief Administrative Law Judge. The decision will also be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of ARB decisions on them under this section.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue an order providing all relief necessary to make the complainant whole. The order will require, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily. The order will also require the respondent to submit appropriate documentation to

the Social Security Administration allocating any back pay award to the appropriate periods. Such order is subject to discretionary review by the Secretary (as provided in Secretary's Order 01–2020 or any successor to that order).

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney fee, not exceeding \$1,000. An order under this section is subject to discretionary review by the Secretary (as provided in Secretary's Order 01–2020 or any successor to that order).

Subpart C—Miscellaneous Provisions

§ 1991.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.

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

(b) The Assistant Secretary may withdraw the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1991.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If the case is on review with the ARB, a party may withdraw a petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The

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

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

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

(e) Any settlement approved by OSHA, the ALJ, the ARB or the Secretary will constitute the final order of the Secretary and may be enforced in United States district court pursuant to § 1991.113.

§ 1991.112 Judicial review.

(a) Within 60 days after the issuance of a final order for which judicial review is available (including a decision issued by the Secretary upon discretionary review), any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

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

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

§ 1991.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order issued by the Secretary under CAARA, including one approving a settlement agreement, the Secretary or the 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.

§ 1991.114 District court jurisdiction of retaliation complaints.

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

(b) A proceeding under paragraph (a) of this section shall be governed by the same legal burdens of proof specified in § 1991.109.

(c) Within seven days after filing a complaint in federal court, a complainant must file with OSHA, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. A copy of the complaint also must be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

§ 1991.115 Special circumstances; waiver of rules.

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

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