

approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and preliminary order.

(b) The Assistant Secretary may withdraw his or her findings and/or a preliminary order at any time before the expiration of the 30-day objection period described in § 1982.106, provided that no objection yet has been filed, and substitute new findings and/or a 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 its objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If a case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

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

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ, or by the ARB if the ARB has

accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced pursuant to § 1982.113.

§ 1982.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§ 1982.109 and 1982.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

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

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

§ 1982.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under NTSSA, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. Whenever a person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under FRSA, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. In such civil actions under NTSSA and FRSA, the district court will have jurisdiction to grant all appropriate relief, including, but not limited to, injunctive relief and compensatory damages, including:

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

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

(3) Compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees.

§ 1982.114 District Court jurisdiction of retaliation complaints.

(a) If there is no final order of the Secretary, 210 days have passed since the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.

(b) Fifteen days in advance of filing a complaint in Federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending upon where the proceeding is pending, a notice of his or her intention to file such complaint. The notice must be served on all parties to the proceeding. A copy of the notice must be served on the Regional Administrator, the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. The complainant shall file and serve a copy of the district court complaint on the above as soon as possible after the district court complaint has been filed with the court.

§ 1982.115 Special circumstances; waiver of rules.

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

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1983

[Docket Number OSHA-2010-0006]

RIN 1218-AC47

Procedures for the Handling of Retaliation Complaints Under Section 219 of the Consumer Product Safety Improvement Act of 2008

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 employee protection (or “whistleblower”) provisions of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”). This rule establishes procedures and time frames for the handling of retaliation complaints under CPSIA, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration (“OSHA”), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (“ALJ”) for a hearing *de novo*, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (“ARB”) (acting on behalf of the Secretary) and judicial review of the Secretary’s final decision.

DATES: This interim final rule is effective on August 31, 2010. Comments and additional materials must be submitted (post-marked, sent or received) by November 1, 2010.

ADDRESSES: You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

Fax: If your submissions, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648.

Mail, hand delivery, express mail, messenger or courier service: You must submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA-2010-0006, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor’s and Docket Office’s normal business hours, 8:15 a.m.–4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and the OSHA docket number for this rulemaking (Docket No. OSHA-2010-0006). Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting personal information such as social security numbers and birth dates.

Docket: To read or download submissions or other material in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket are listed in the <http://www.regulations.gov> index, however, some information (e.g., copyrighted material) is not publicly available to

read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

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

SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Product Safety Improvement Act of 2008 (“CPSIA” or “the Act”), Public Law 110-314, was enacted on August 14, 2008. Section 219 of the Act, codified at 15 U.S.C. 2087, provides protection to employees against retaliation by a manufacturer, private labeler, distributor, or retailer, because they provided to their employer, the Federal Government or the attorney general of a State, information relating to any violation of, or any act or omission the employees reasonably believe to be a violation of, any provision of an Act enforced by the Consumer Product Safety Commission (“Commission”), or any order, rule, regulation, standard, or ban under any such Act. The statutes enforced by the Commission include the Consumer Product Safety Act (“CPSA”), as amended by the CPSIA (15 U.S.C. 2051 *et seq.*), the Children’s Gasoline Burn Prevention Act (Pub. L. 110-278, 122 Stat. 2602 (2008)), the Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*), the Flammable Fabrics Act (15 U.S.C. 1191 *et seq.*), the Poison Prevention Packaging Act (15 U.S.C. 1471 *et seq.*), the Refrigerator Safety Act (15 U.S.C. 1211 *et seq.*), and the Virginia Graeme Baker Pool and Spa Safety Act (15 U.S.C. 8001 *et seq.*). These rules establish procedures for the handling of whistleblower complaints under CPSIA.

II. Summary of Statutory Procedures

CPSIA’s whistleblower provisions include procedures that allow a covered employee to file, within 180 days of the alleged retaliation, a complaint with the Secretary of Labor (“the Secretary”). Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated the Act (“respondent”) of the filing of the complaint, the allegations contained in

the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation. The Secretary must then, within 60 days of receipt of the complaint, afford the respondent an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation.

The Secretary may conduct an investigation only if the complainant has made a prima facie showing that the protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent has not demonstrated, through clear and convincing evidence, that the employer would have taken the same adverse action in the absence of that activity.

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

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

If a hearing is held, CPSIA requires the hearing to be conducted “expeditiously.” The Secretary then has 120 days after the conclusion of any hearing in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary’s final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary, where

appropriate, will assess against the respondent a sum equal to the total amount of all costs and expenses, including attorney's and expert witness fees, reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the Secretary issued the order. The Secretary also may award a prevailing employer a reasonable attorney's fee, not exceeding \$1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation.

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

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 CPSIA. Responsibility for receiving and investigating complaints under CPSIA also has been delegated to the Assistant Secretary (Secretary's Order 5-2007, 72 FR 31160, June 5, 2007). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges are decided by the ARB (Secretary's Order 1-2010 (Jan. 15, 2010), 75 FR 3924-01, (Jan. 25, 2010)).

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

Section 1983.100 Purpose and Scope

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

Section 1983.101 Definitions

This section includes general definitions from the CPSA, which are

applicable to the whistleblower provisions of the CPSIA, including a definition of the term "consumer product." See 15 U.S.C. 2052(a)(5). The CPSA defines "distributor" as "a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product." 15 U.S.C. 2052(a)(8). The CPSA defines "manufactured" as "to manufacture, produce, or assemble," and defines "manufacturer" as "any person who manufactures or imports a consumer product." 15 U.S.C. 2052(a)(10) and (11), respectively. "Private labeler" is defined by the CPSA as "an owner of a brand or trademark on the label of a consumer product which bears a private label." 15 U.S.C. 2052(a)(12). Section 2052(a)(12)(B) further provides that a "consumer product bears a private label if (i) the product (or its container) is labeled with the brand or trademark of a person other than a manufacturer of the product, (ii) the person with whose brand or trademark the product (or container) is labeled has authorized or caused the product to be so labeled, and (iii) the brand or trademark of a manufacturer of such product does not appear on such label." 15 U.S.C. 2052(a)(12)(B). The CPSA defines "retailer" as "a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer." 15 U.S.C. 2052(a)(13).

Section 1983.102 Obligations and Prohibited Acts

This section describes the activities that are protected under CPSIA, and the conduct that is prohibited in response to any protected activities. For purposes of § 1983.102(c), the ARB has interpreted the phrase "deliberate violations" for the purpose of denying protection to an employee under the Energy Reorganization Act's similar provision as including an element of willfulness. See *Fields v. U.S. Dep't of Labor, Admin. Review Bd.*, 173 F.3d 811, 814 (11th Cir. 1999) (petitioners knowingly conducted unauthorized and potentially dangerous experiments).

Section 1983.103 Filing of Retaliation Complaint

This section explains the requirement for filing a retaliation complaint under CPSIA. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), this is considered to be when the retaliatory decision has been both made and communicated to

the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision. *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001). Complaints filed under CPSIA need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the employee, complaints may be filed by any person on the employee's behalf.

Section 1983.104 Investigation

This section describes the procedures that apply to the investigation of CPSIA complaints. Paragraph (a) of this section outlines the procedures for notifying the parties and the Consumer Product Safety Commission of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) addresses disclosure to the complainant of respondent's submissions to the agency that are responsive to the complaint. Paragraph (d) of this section discusses confidentiality of information provided during investigations. Paragraph (e) of this section sets forth CPSIA's statutory burdens of proof. Paragraph (f) describes the procedures the Assistant Secretary will follow prior to the issuance of findings and a preliminary order when the Assistant Secretary has reasonable cause to believe that a violation has occurred.

The statute requires that a complainant make an initial prima facie showing that 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. If the complainant does not make the prima facie showing, the investigation must be discontinued and the complaint dismissed. See *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the ERA, which is the same as that under CPSIA, served a "gatekeeping function" that "stemm[ed] frivolous complaints"). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the employer "demonstrates, by clear and convincing evidence," that it would have taken the same adverse action in the absence of the protected activity. Thus, the

Secretary must dismiss a complaint under CPSIA and not investigate (or cease investigating) if either: (1) The complainant fails to meet the prima facie showing that protected activity was a contributing factor in the adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statutory burdens of proof require an employee to prove that the alleged protected activity was a “contributing factor” to the alleged adverse action. If the employee proves that the alleged protected activity was a contributing factor to the adverse action, the employer, to escape liability, must prove by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)). In proving that protected activity was a contributing factor in the adverse action, “a complainant need not necessarily prove that the respondent’s articulated reason was a pretext in order to prevail,” because a complainant alternatively can prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct,” and that another reason was the complainant’s protected activity. See *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No. 04–149, 2006 WL 3246904, *13 (ARB May 31, 2006) (discussing contributing factor test under the whistleblower provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C. 1514A) (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

CPSIA’s burdens of proof do not address the evidentiary standard that applies to a complainant’s proof that protected activity was a contributing factor in an adverse action. CPSIA simply provides that the Secretary may find a violation only “if the complainant demonstrates” that protected activity was a contributing factor in the alleged adverse action. See 15 U.S.C. 2087(b)(2)(B)(iii). It is the Secretary’s position that the complainant must prove by a “preponderance of the evidence” that his or her protected activity contributed to the adverse action; otherwise the burden never

shifts to the employer to establish its defense by “clear and convincing evidence.” See, e.g., *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008) (“The term ‘demonstrate’ [under 42121(b)(2)(B)(iii)] means to prove by a preponderance of the evidence.”). Once the complainant establishes that the protected activity was a contributing factor in the adverse action, the employer can escape liability only by proving by clear and convincing evidence that it would have reached the same decision even in the absence of the prohibited rationale. The “clear and convincing evidence” standard is a higher burden of proof than a “preponderance of the evidence” standard.

Section 1983.105 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 appropriate relief, including preliminary reinstatement. The findings and, where appropriate, preliminary order, advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings and, where appropriate, preliminary order, also advise the respondent of the right to request attorney’s fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final decision and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he received prior to his termination, but not actually return to work. Such “economic reinstatement” frequently is employed in cases arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977. See, e.g., *Secretary of Labor on behalf of York v. BR&D*

Enters., Inc., 23 FMSHRC 697, 2001 WL 1806020, at *1 (June 26, 2001). Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause that they were discharged in violation of CPSIA. When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement. An employer does not have a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA’s satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the employee. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the employee continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating an employee should the employer ultimately prevail in the whistleblower adjudication.

Subpart B—Litigation

Section 1983.106 Objections to the Findings and the Preliminary Order and Request for a Hearing

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, or e-mail communication is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections also is considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the other parties of record, as well as the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, 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.*, No. 04–101, 2005 WL 2865915, *7 (ARB Oct. 31, 2005).

Section 1983.107 Hearings

This section adopts the rules of practice and evidence of the Office of Administrative Law Judges at 29 CFR part 18. The section specifically provides for consolidation of hearings if both the complainant and respondent object to the findings and/or order of the Assistant Secretary. Otherwise, this section does not address procedural issues, *e.g.*, place of hearing, right to counsel, procedures, evidence and record of hearing, oral arguments and briefs, and dismissal for cause, because the Office of Administrative Law Judges has adopted its own rules of practice that cover these matters.

Section 1983.108 Role of Federal Agencies

Under CPSIA it is not expected that the Secretary will ordinarily appear as a party in the proceeding. Nevertheless, the Assistant Secretary, at his or her discretion, may participate as a party or *amicus curiae* at any time in the administrative proceedings. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as *amicus curiae* before the ALJ or in the ARB proceeding. Although we anticipate 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, large numbers of employees, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Consumer Product Safety Commission, at its own discretion, also may participate as *amicus curiae* at any time in the proceedings.

Section 1983.109 Decision and Orders of the Administrative Law Judge

This section sets forth the content of the decision and order of the ALJ, and includes the standard for finding a violation under CPSIA. The section further provides that the Assistant Secretary's determination to dismiss the complaint without an investigation or without a complete investigation pursuant to section 1983.104 is not subject to review. Thus, paragraph (c) of section 1983.109 clarifies that the Assistant Secretary's determinations on whether to proceed with an

investigation under CPSIA and whether to make particular investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases *de novo* and, therefore, as a general matter, may not remand cases to the Assistant Secretary to conduct an investigation or make further factual findings. A full discussion of the burdens of proof used by the Department of Labor to resolve whistleblower cases under this part is set forth above in the discussion of section 1983.104.

Section 1983.110 Decision of the Administrative Review Board

Upon the issuance of the ALJ's decision, the parties have 10 business days within which to petition the ARB for review of that decision. If no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review. The date of the postmark, facsimile transmittal, or e-mail communication is considered the date of filing of the petition; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt.

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

This section also provides that in the exceptional case, the ARB may grant a motion to stay an ALJ's preliminary order of reinstatement under CPSIA, which otherwise would be effective, while review is conducted by the ARB. The Secretary believes that a stay of an ALJ's preliminary order of reinstatement under CPSIA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public favors a stay.

Subpart C—Miscellaneous Provisions

Section 1983.111 Withdrawal of Complaints, Objections, and Petitions for Review; Settlement

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

Section 1983.112 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 to submit the record of proceedings to the appropriate court pursuant to the rules of such court.

Section 1983.113 Judicial Enforcement

This section describes the Secretary's power under CPSIA to obtain judicial enforcement of orders and the terms of a settlement agreement.

CPSIA expressly authorizes district courts to enforce orders, including preliminary orders of reinstatement, issued by the Secretary under 15 U.S.C. 2087(b)(6) ("Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur, or in the United States district court for the District of Columbia, to enforce such order."). Specifically, reinstatement orders issued under 15 U.S.C. 2087(b)(2)(A) are immediately enforceable in district court under 15 U.S.C. 2087(b)(6) and (7). Subsection 2087(b)(3)(B)(ii) provides that the Secretary shall order the person who has committed a violation to reinstate the complainant to his or her former position. Subsection 2087(b)(2)(A) instructs the Secretary to accompany any reasonable cause finding that a violation occurred with a preliminary order containing the relief prescribed by subsection (b)(3)(B), which includes reinstatement. *See* 15 U.S.C. 2087(b)(3)(B)(ii). Subsection (b)(2)(A) also declares that the subsection (b)(3)(B)'s relief of reinstatement contained in a preliminary order is not stayed upon the filing of objections. 15 U.S.C. 2087(b)(2)(A) ("The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order."). Thus, under the statute, enforceable orders issued under subsection (b)(3) include preliminary

orders that contain the relief of reinstatement prescribed by subsection (b)(3)(B). This statutory interpretation is consistent with the Secretary's interpretation of similar language in AIR21 and SOX. *But see Bechtel v. Competitive Technologies, Inc.*, 448 F.3d 469 (2d Cir. 2006); *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006) (decision vacated, appeal dismissed, No. 06–2995 (4th Cir. Feb. 20, 2008)). CPSIA also permits the person on whose behalf the order was issued under CPSIA to obtain judicial enforcement or orders and the terms of a settlement agreement.

Section 1983.114 District Court Jurisdiction of Retaliation Complaints

This section sets forth CPSIA'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 210 days of the filing of the complaint, or within 90 days after receiving a written determination. It also requires complainants to provide notice 15 days in advance of their intent to file a complaint in district court.

It is the Secretary's position that complainants may not initiate an action in federal court after the Secretary issues a final decision, even if the date of the final decision is more than 210 days after the filing of the complaint. The purpose of the "kick-out" provisions 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.

Section 1983.115 Special Circumstances; Waiver of Rules

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

IV. Paperwork Reduction Act

This rule does not contain a reporting provision that is subject to review by the Office of Management and Budget ("OMB") under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

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 and practice within the meaning of that section. Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments are not required for these regulations, which provide the procedures for the handling of retaliation complaints. Although this is a procedural rule not subject to the notice and comment procedures of the APA, we are providing persons interested in this interim final rule 60 days to submit comments. A final rule will be published after the agency receives and reviews the public's comments.

Furthermore, because this rule is procedural rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this 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 Order 12866; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996; Executive Order 13132

The Department has concluded that this rule should be treated as a "significant regulatory action" within the meaning of Section 3(f)(4) of Executive Order 12866 because the CPSIA whistleblower provisions are new. Executive Order 12866 requires a full economic impact analysis only for "economically significant" rules, which are defined in Section 3(f)(1) as rules that may "have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Because the rule is procedural in nature, it is not expected to have a significant economic impact, therefore, no economic impact analysis has been prepared. For the same reason, the rule does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*). Furthermore, because this is a rule of agency

procedure and practice, it is not a "rule" within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804(3)(C)), and does not require Congressional review. Finally, this rule does not have "federalism implications." The rule does not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government" and therefore is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis

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

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

List of Subjects in 29 CFR Part 1983

Administrative practice and procedure, Employment, Consumer protection, Investigations, Reporting and recordkeeping requirements, Whistleblower.

Signed at Washington, DC, August 19, 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

■ Accordingly, for the reasons set out in the preamble, 29 CFR part 1983 is added to read as follows:

PART 1983—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER SECTION 219 OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008.

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

| Sec. | |
|----------|--|
| 1983.100 | Purpose and scope. |
| 1983.101 | Definitions. |
| 1983.102 | Obligations and prohibited acts. |
| 1983.103 | Filing of retaliation complaint. |
| 1983.104 | Investigation. |
| 1983.105 | Issuance of findings and preliminary orders. |

Subpart B—Litigation

- 1983.106 Objections to the findings and the preliminary order and request for a hearing.
- 1983.107 Hearings.
- 1983.108 Role of Federal agencies.
- 1983.109 Decision and orders of the administrative law judge.
- 1983.110 Decision and orders of the Administrative Review Board.

Subpart C—Miscellaneous Provisions

- 1983.111 Withdrawal of complaints, objections, and findings; settlement.
- 1983.112 Judicial review.
- 1983.113 Judicial enforcement.
- 1983.114 District court jurisdiction of retaliation complaints.
- 1983.115 Special circumstances; waiver of rules.

Authority: 15 U.S.C. 2087; Secretary of Labor's Order No. 5–2007, 72 FR 31160 (June 5, 2007); Secretary of Labor's Order No. 1–2010 (Jan. 15, 2010), 75 FR 3924–01 (Jan. 25, 2010).

Subpart A—Complaints, Investigations, Findings and Preliminary Orders**§ 1983.100 Purpose and scope.**

(a) This part implements procedures of the employee protection provision of the Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. 2087. CPSIA provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to consumer product safety.

(b) This part establishes procedures under the CPSIA for the expeditious handling of retaliation complaints filed by employees, or by persons acting on their behalf. These rules, together with those codified at 29 CFR part 18, set forth the procedures for submission of complaints under CPSIA, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges, post-hearing administrative review, and withdrawals and settlements.

§ 1983.101 Definitions.

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

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

(c) *Commission* means the Consumer Product Safety Commission.

(d) *Complainant* means the employee who filed a CPSIA complaint or on whose behalf a complaint was filed.

(e) (1) *Consumer product* means any article, or component part thereof,

produced or distributed for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise (the term “consumer product” includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site, but does not include such a device that is permanently fixed to a site).

(2) The term *consumer product* does not include:

(i) Any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer;

(ii) Tobacco and tobacco products;

(iii) Motor vehicles or motor vehicle equipment (as defined by 49 U.S.C. 30102(a)(6) and (7));

(iv) Pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*));

(v) Any article or any component of any such article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by 26 U.S.C. 4181;

(vi) Aircraft, aircraft engines, propellers, or appliances (as defined in 49 U.S.C. 40102(a));

(vii) Boats which could be subjected to safety regulation under 46 U.S.C. chapter 43; vessels, and appurtenances to vessels (other than such boats), which could be subjected to safety regulation under title 52 of the Revised Statutes or other marine safety statutes administered by the department in which the Coast Guard is operating; and equipment (including associated equipment, as defined in 46 U.S.C. 2101(1)) to the extent that a risk of injury associated with the use of such equipment on boats or vessels could be eliminated or reduced by actions taken under any statute referred to in this definitional section;

(viii) Drugs, devices, or cosmetics (as such terms are defined in 21 U.S.C. 321(g), (h), and (i)); or

(ix) Food (the term “food” means all “food,” as defined in 21 U.S.C. 321(f), including poultry and poultry products (as defined in 21 U.S.C. 453(e) and (f)), meat, meat food products (as defined in

21 U.S.C. 601(j)), and eggs and egg products (as defined in 21 U.S.C. 1033)).

(f) *CPSIA* means Section 219 of the Consumer Product Safety Improvement Act of 2008, Public Law 110–314, August 14, 2008, codified at 15 U.S.C. 2087.

(g) *Distributor* means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.

(h) *Employee* means an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by a manufacturer, private labeler, distributor, or retailer.

(i) *Manufacturer* means any person who manufactures or imports a consumer product. A product is manufactured if it is manufactured, produced, or assembled.

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

(k) *Private labeler* means an owner of a brand or trademark on the label of a consumer product which bears a private label. A consumer product bears a private label if:

(i) The product (or its container) is labeled with the brand or trademark of a person other than a manufacturer of the product,

(ii) The person with whose brand or trademark the product (or container) is labeled has authorized or caused the product to be so labeled, and

(iii) The brand or trademark of a manufacturer of such product does not appear on such label.

(l) *Retailer* means a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer.

(m) *Respondent* means the employer named in the complaint who is alleged to have violated the Act.

(n) *Secretary* means the Secretary of Labor or person to whom authority under CPSIA has been delegated.

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

§ 1983.102 Obligations and prohibited acts.

(a) No manufacturer, private labeler, distributor, or retailer may discharge or otherwise retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions, or privileges of employment

because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee), engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section.

(b) An employee is protected against retaliation (as described in paragraph (a) of this section) by a manufacturer, private labeler, distributor, or retailer because he or she:

(1) Provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government or the attorney general of a State, information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of the Consumer Product Safety Act, as amended by CPSIA, or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

(2) Testified, or is about to testify, in a proceeding concerning such violation;

(3) Assisted or participated, or is about to assist or participate, in such a proceeding; or

(4) Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of the Consumer Product Safety Act, as amended by CPSIA, or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.

(c) This part shall have no application with respect to an employee of a manufacturer, private labeler, distributor, or retailer who, acting without direction from such manufacturer, private labeler, distributor, or retailer (or such person's agent), deliberately causes a violation of any requirement relating to any violation or alleged violation of any order, regulation, or consumer product safety standard under the Consumer Product Safety Act, as amended by CPSIA, or any other law enforced by the Commission.

§ 1983.103 Filing of retaliation complaints.

(a) *Who may file.* An employee who believes that he or she has been retaliated against by a manufacturer, private labeler, distributor, or retailer in violation of CPSIA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

(b) *Nature of filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral

complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

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

(d) *Time for filing.* Within 180 days after an alleged violation of CPSIA occurs, any employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, e-mail communication, 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.

§ 1983.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint by providing a copy of the complaint, redacted, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.*, and other applicable confidentiality laws, and will also notify the respondent of its rights under paragraphs (b) and (f) of this section. The Assistant Secretary will provide a copy of the unredacted complaint to the complainant (or complainant's legal counsel, if complainant is represented by counsel) and to the Consumer Product Safety Commission.

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

(c) Throughout the investigation, the agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the agency will redact

them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.*, and other applicable confidentiality laws.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of title 29 of the Code of Federal Regulations.

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

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

(i) The employee engaged in a protected activity;

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

(iii) The employee suffered an adverse action; and

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

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

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint will not be conducted or will be discontinued if the respondent, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the

same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, the Assistant Secretary 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 § 1983.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated CPSIA and that preliminary reinstatement is warranted, the Assistant Secretary will again 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 respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent will present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

§ 1983.105 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 CPSIA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include, where appropriate, a requirement that the respondent abate the violation;

reinstatement of the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

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

(b) The findings and the preliminary order will be sent by certified mail, return receipt requested, to all parties of record (and the respondent's legal counsel if the respondent 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 attorney's fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the complaint was frivolous or brought in bad faith. The findings and, where appropriate, preliminary order, also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and the 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 § 1983.106. 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 the order.

Subpart B—Litigation

§ 1983.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees under CPSIA, 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 § 1983.105(b). The objections, request for a hearing, and/or request for attorney's fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or e-mail communication 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, Washington, DC 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which shall 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. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or the preliminary order shall become the final decision of the Secretary, not subject to judicial review.

§ 1983.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure and the rules of evidence for administrative hearings before the Office of Administrative Law Judges, codified at Part 18 of Title 29 of the Code of Federal Regulations.

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

(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.

§ 1983.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as *amicus curiae* at any time at any stage of the proceedings. This right to participate includes, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

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

(b) The Consumer Product Safety Commission, if interested in a proceeding, may participate as *amicus curiae* at any time in the proceeding, at the agency's discretion. At the request of the Commission, copies of all pleadings in a case must be sent to the Commission, whether or not it is participating in the proceeding.

§ 1983.109 Decision and orders of the administrative law judge.

(a) The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (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 behavior.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1983.104(e) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is

jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the order will direct the respondent to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the ALJ shall assess against the respondent all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ALJ determines that a complaint was frivolous or was brought in bad faith, the judge may award to the respondent a reasonable attorney's 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. 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 judge's order will be effective 10 business days after the date of the decision unless a timely petition for review has been filed with the ARB.

§ 1983.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board, U.S. Department of Labor, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the ALJ will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the ARB and the ARB accepts the petition for review. The petition for review must specifically identify the legal conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the

parties. A petition must be filed within 10 business days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(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 a preliminary order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 10 business days after the date of the decision of the ALJ unless a motion for reconsideration has been filed with the ALJ in the interim. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the final order will order the respondent to take appropriate affirmative action to abate the violation, including

reinstatement of the complainant to that person's former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of employment, and compensatory damages. At the request of the complainant, the ARB will assess against the respondent all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

(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's fee, not exceeding \$1,000.

Subpart C—Miscellaneous Provisions

§ 1983.111 Withdrawal of complaints, objections, and petitions for review; settlement.

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

(b) The Assistant Secretary may withdraw his or her findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1983.106, provided that no objection yet has been filed, and substitute new findings and/or a 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 its 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 its 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 or order, and there are no other pending objections, the Assistant Secretary's findings and 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 to review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant, and the respondent agree to a settlement. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates his or her 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 judge, or by the ARB if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced pursuant to § 1983.113.

§ 1983.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§ 1983.109 and 1983.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

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

(c) If a timely petition for review is filed, the record of a case, including the record of proceedings before the ALJ, will be transmitted by the ARB to the appropriate court pursuant to the

Federal Rules of Appellate Procedure and local rules of the court.

§ 1983.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order, including one ordering reinstatement, or a final order, including one approving a settlement agreement, issued under the CPSIA, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. In such civil actions, the district court will have jurisdiction to grant all appropriate relief, including, but not limited to, injunctive relief and compensatory damages, including:

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

(b) The amount of back pay, with interest; and

(c) Compensation for any special damages sustained as a result of the discharge or retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees.

§ 1983.114 District court jurisdiction of retaliation complaints.

(a) If there has been no final decision of the Secretary within 210 days of the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.

(b) Fifteen days in advance of filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending, a notice of his or her intention to file such a complaint. The notice must be served upon all parties to the proceeding. A copy of the notice must be served on the Regional Administrator, the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. The complainant shall file and serve a copy of the district court complaint on the above as soon as possible after the district court complaint has been filed with the court.

§ 1983.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these

rules, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days notice to all parties, waive any rule or issue such orders that justice or the administration of CPSIA requires.

[FR Doc. 2010-21122 Filed 8-30-10; 8:45 am]

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1978

[Docket Number OSHA-2008-0026]

RIN 1218-AC36

Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is amending the regulations governing employee protection (or “whistleblower”) claims under the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. 31105. The amendments clarify and improve procedures for handling STAA whistleblower complaints and implement statutory changes enacted into law on August 3, 2007, as part of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act), Public Law 110-53, 121 Stat. 266. These changes to the STAA whistleblower regulations also make the procedures for handling retaliation complaints under STAA more consistent with OSHA’s procedures for handling retaliation complaints under Section 211 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851 and other whistleblower provisions.

DATES: This interim final rule is effective on August 31, 2010. Comments on the interim final rule must be submitted (postmarked, sent or received) on or before November 1, 2010.

ADDRESSES: You may submit comments and additional materials by any of the following methods:

Electronically: You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking

Portal. Follow the instructions online for making electronic submissions.

Fax: If your submissions, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648.

Mail, hand delivery, express mail, messenger or courier service: You must submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA-2008-0026, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW., Washington, DC 20210.

Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor’s and Docket Office’s normal business hours, 8:15 a.m.–4:45 p.m., e.t.

Instructions: All submissions must include the agency name and the OSHA docket number for this rulemaking (Docket No. OSHA-2008-0026).

Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting personal information such as Social Security numbers and birth dates.

Docket: To read or download submissions or other material in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket are listed in the <http://www.regulations.gov> index, however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

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

SUPPLEMENTARY INFORMATION:

I. Background

Among other provisions of the 9/11 Commission Act, section 1536 reenacted the whistleblower provision in STAA, 49 U.S.C. 31105 (previously referred to as “Section 405”), with certain amendments. The regulatory revisions described herein reflect these statutory changes and also seek to clarify and

improve OSHA’s procedures for handling STAA whistleblower claims. To the extent possible within the bounds of applicable statutory language, these revised regulations are designed to be consistent with the procedures applied to claims under other whistleblower statutes administered by OSHA, including the ERA, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121, and Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. 1514A. Responsibility for receiving and investigating complaints under 49 U.S.C. 31105 has been delegated to the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) (Secretary’s Order 5-2007, 72 FR 31160, June 5, 2007). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges (ALJs) are decided by the Administrative Review Board (ARB) (Secretary’s Order 1-2010 (Jan. 15, 2010), 75 FR 3924-01 (Jan. 25, 2010)).

II. Summary of Statutory Changes to STAA Whistleblower Provisions

The 9/11 Commission Act amended 49 U.S.C. 31105, and the related definitions provision at 49 U.S.C. 31101, by making the changes described below.

Expansion of Protected Activity

Before passage of the 9/11 Commission Act, STAA protected certain activities related to commercial motor vehicle *safety*. The 9/11 Commission Act expanded STAA’s coverage to commercial motor vehicle *security*. In particular, 49 U.S.C. 31105(a)(1)(A) previously made it unlawful for a person to discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of employment because the employee, or another person at the employee’s request, filed a complaint or began a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order, or testified or planned to testify in such a proceeding. The 9/11 Commission Act expanded this provision to include complaints and proceedings related to violations of commercial motor vehicle security regulations, standards, and orders.

Prior to the 2007 amendments, paragraph (a)(1)(B) of STAA’s whistleblower provision prohibited a person from discharging, disciplining, or discriminating against an employee regarding pay, terms or privileges of employment for refusing to operate a