

(11) *Disregarded payment loss rules.* Section 1.1503(d)–1(d) applies to taxable years beginning on or after January 1, 2026. See also § 301.7701–2(e)(10) of this chapter (applicability dates for the entity classification provisions relevant to the disregarded payment loss rules).

(12) [Reserved].

(13) [Reserved].

(14) [Reserved].

(15) *Anti-avoidance rule.* Section 1.1503(d)–1(f) applies to dual consolidated losses incurred in taxable years ending on or after August 6, 2024, and to disregarded payment losses in taxable years beginning on or after January 1, 2026.

(16) [Reserved].

(17) *Deemed ordering rule.* Section 1.1503(d)–3(c)(3) applies to dual consolidated losses incurred in taxable years beginning on or after January 1, 2026, and to disregarded payment losses in taxable years beginning on or after January 1, 2026. For the application of the deemed ordering rule to dual consolidated losses incurred in taxable years beginning before January 1, 2026, but on or after April 18, 2007, see § 1.1503(d)–3(c)(3) as contained in 26 CFR part 1 revised as of April 1, 2024.

(18) *Exception to mirror legislation rule for disregarded payment losses.* Section 1.1503(d)–3(e)(4) applies to taxable years beginning on or after January 1, 2026.

**PART 301—PROCEDURE AND ADMINISTRATION**

■ **Par. 6.** The authority citation for part 301 is amended by adding an entry for § 301.7701–2 to read as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

\* \* \* \* \*

Section 301.7701–2 also issued under 26 U.S.C. 7701.

\* \* \* \* \*

■ **Par. 7.** Section 301.7701–2 is amended by:

- 1. In the last sentence of paragraph (a), removing the language “(vi)” and adding in its place the language “(vii)”;
- 2. Adding paragraph (c)(2)(vii); and
- 3. Adding paragraph (e)(10).

The additions read as follows:

**§ 301.7701–2 Business entities; definitions.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(vii) *Special rules for certain disregarded payments—(A) Disregarded payment loss rules.* To the extent provided in § 1.1503(d)–1(d) of this chapter, certain payments involving a business entity that, under paragraph

(c)(2)(i) of this section is otherwise disregarded as an entity separate from its owner, are in effect taken into account as if the entity were regarded and the deduction was denied, and therefore give rise to an income inclusion, and corresponding suspended deduction, to the entity’s owner.

(B) *Non-application of the sixty-month limitation.* If an eligible entity that is disregarded as an entity separate from its owner would become a disregarded payment entity (within the meaning of § 1.1503(d)–1(d)(5)(i)(A) of this chapter) when this paragraph (c)(2)(vii) applies, the sixty-month limitation under § 301.7701–3(c)(1)(iv) does not apply with respect to an election by such eligible entity to change its classification to an association effective before January 1, 2026 (such that it would not become a disregarded payment entity).

\* \* \* \* \*

(e) \* \* \*

(10) Paragraph (c)(2)(vii) of this section (special rules for certain disregarded payments) applies to taxable years beginning on or after January 1, 2026, except that paragraph (c)(2)(vii)(B) of this section (non-application of sixty-month limitation) applies as of August 6, 2024.

**Douglas W. O’Donnell,**

*Deputy Commissioner.*

Approved: January 2, 2025.

**Aviva R. Aron-Dine,**

*Deputy Assistant Secretary of the Treasury (Tax Policy).*

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**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**29 CFR Part 1992**

[Docket Number: OSHA–2022–0005]

RIN 1218–AD37

**Procedures for the Handling of Retaliation Complaints Under the Anti-Money Laundering Act of 2020 (AMLA)**

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This document provides the interim final text of regulations governing the anti-retaliation provisions of the Anti-Money Laundering Act of 2020 (AMLA or the Act). This rule

establishes procedures and timeframes for the handling of retaliation complaints under AMLA, 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 (Secretary)), and judicial review of the Secretary’s final decision. It also sets forth the Secretary’s interpretations of the AMLA anti-retaliation provision on certain matters.

**DATES:** This interim final rule is effective on January 14, 2025. Comments and additional materials must be submitted (post-marked, sent or received) by March 17, 2025.

**ADDRESSES:** Submit comments by the following method:

*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 <https://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** document (OSHA–2022–0005). OSHA will place comments and requests to speak, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates. For further information on submitting comments, see the “Public Participation” heading in the section of this document titled **SUPPLEMENTARY INFORMATION**.

*Extension of comment period:* Submit requests for an extension of the comment period on or before January 29, 2025 to the Directorate of

Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-3647, Washington, DC 20210, or by fax to (202) 693-2199.

**FOR FURTHER INFORMATION CONTACT:**

Philippe Blancato, Investigative Specialist, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3647, 200 Constitution Avenue NW, Washington, DC 20210; telephone (202) 693-2199 (this is not a toll-free number) or email: [osha.dwpp@dol.gov](mailto:osha.dwpp@dol.gov). This Federal Register publication is available in alternative formats.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On January 1, 2021, Congress enacted the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, 134 Stat. 3388 (January 1, 2021) which included significant reforms to the U.S. anti-money laundering framework, including the Anti-Money Laundering Act of 2020. That law was, in turn, amended by the Anti-Money Laundering Whistleblower Improvements Act, Sec. 401 of the Consolidated Appropriations Act of 2023, Public Law 117-328, 136 Stat 4459 (enacted December 29, 2022). The anti-retaliation provisions, codified at 31 U.S.C. 5323 (g)(1)-(3) & (5)-(6), and referred to throughout this interim final rule as AMLA, the Act, or the AMLA anti-retaliation provisions, prohibit retaliation by an employer against a whistleblower in the terms and conditions of employment or post-employment in reprisal for the whistleblower having engaged in protected activity.<sup>1</sup> Protected activity under AMLA includes any lawful act done by a whistleblower in reporting certain information to the Secretary of the Treasury; Attorney General; a Federal regulatory or law enforcement agency; any Member of Congress or any committee of Congress; or the employer of the individual, including as part of the job duties of the individual. The employer includes “a person with supervisory authority over the whistleblower, or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.” 31 U.S.C. 5323(g)(1)(A)(iv). Protected activity also

includes any lawful act done by a whistleblower in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Department of the Treasury or the Department of Justice based upon or related to such information. 31 U.S.C. 5323(g)(1)(B).

The information must relate to violations of certain enumerated statutes, including violations of 31 U.S.C. chapter 53, subchapter II (31 U.S.C. 5311-5336), chapter 35 or section 4305 or 4312 of title 50, U.S.C., or the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901 *et seq.*), or conspiracies to violate the aforementioned provisions. 31 U.S.C. 5323(a)(5) (as amended). 31 U.S.C. chapter 53, subchapter II is part of the Bank Secrecy Act (BSA). The legislative framework generally referred to as the BSA consists of the Currency and Foreign Transactions Reporting Act of 1970, Title II of Public Law 91-508 (October 26, 1970), as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107-56 (October 26, 2001), and other legislation, including the AMLA.<sup>2</sup> The Secretary of the Treasury is authorized to administer the BSA and to require financial institutions to keep records and file reports that “are highly useful in criminal, tax, or regulatory investigations or proceedings” or in the conduct of “intelligence or counterintelligence activities, including analysis, to protect against international terrorism”.<sup>3</sup> Authority to implement, administer, and enforce compliance with the BSA and its implementing regulations has been delegated to the Director of the Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury.<sup>4</sup> See <https://www.fincen.gov/resources/statutes-and-regulations/bank-secrecy-act>; <https://bsaaml.fdic.gov/>. “Chapter 35 of Title 50” refers to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, as amended, which authorizes the President to take certain actions, including, but not limited to, the regulation of transactions subject to U.S. jurisdiction involving property in which any foreign country or foreign national has an interest, to deal with any unusual

or extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President has declared a national emergency with respect to such threat. 50 U.S.C. 4305 and 4312 are provisions of the Trading with the Enemy Act (TWEA); section 4305 authorizes during time of war, among other measures, regulation of transactions subject to U.S. jurisdiction involving any property in which a foreign country or foreign national has an interest, while section 4312 authorizes seizure and holding of foreign-owned property in trust during times of war. The Foreign Narcotics Kingpin Designation Act, 21 U.S.C. 1901 *et seq.*, effectively applies the authorities in the IEEPA, 50 U.S.C. 1701 *et seq.*, to significant foreign narcotics traffickers and their organizations operating worldwide. See <https://ofac.treasury.gov/> (explaining the Office of Foreign Asset Control (OFAC) administration and enforcement of IEEPA, TWEA, and the Foreign Narcotics Kingpin Designation Act).

Providing information regarding any conduct that the whistleblower reasonably believes constitutes a violation of any law, rule, or regulation subject to the jurisdiction of the Department of the Treasury, or a violation of section 1956, 1957, or 1960 of title 18 (or any rule or regulation under any such provision) is also protected, if the information is provided to a person with supervisory authority over the whistleblower at the employer of the whistleblower; or to another individual working for the employer who the whistleblower reasonably believes has the authority to investigate, discover, or terminate the misconduct; or take any other action to address the misconduct. See 31 U.S.C. 5323(g)(1)(C). 18 U.S.C. 1956 and 1957 are Federal criminal statutes which prohibit money laundering and related financial transactions, while 18 U.S.C. 1960 is a Federal criminal statute that prohibits unlicensed money transmitting businesses.

While the AMLA anti-retaliation provision at 31 U.S.C. 5323(g) provides broad protection against retaliation in employment and post-employment for whistleblowers, it also contains a statutory exclusion from protection under 31 U.S.C. 5323(g) for employees of federally insured depository institutions and credit unions covered by the anti-retaliation provisions of two separate federal statutes. 31 U.S.C. 5323(g)(6) (“This subsection [31 U.S.C. 5323(g)] shall not apply with respect to any employer that is subject to section

<sup>1</sup> In addition to the AMLA anti-retaliation provisions, 31 U.S.C. 5323 establishes a whistleblower award program administered by the Department of the Treasury. That award program is not a subject of this rulemaking.

<sup>2</sup> The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1960, and 31 U.S.C. 5311-5314 and 5316-5336, and includes notes thereto, with implementing regulations at 31 CFR chapter X.

<sup>3</sup> 31 U.S.C. 5311(1).

<sup>4</sup> Treasury Order 180-01 (Jan. 14, 2020).

33 of the Federal Deposit Insurance Act (12 U.S.C. 23 1831j) or section 213 or 214 of the Federal Credit Union Act (12 U.S.C. 1790b, 1790c)").

This interim final rule establishes procedures for the handling of retaliation complaints under the Act.

## II. Summary of Statutory Procedures

AMLA 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. 31 U.S.C. 5323(g)(3)(A). Under AMLA, 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 90 days of the alleged retaliation. 31 U.S.C. 5323(g)(3)(A), incorporating the requirements of 49 U.S.C. 42121(b). Upon receipt of the complaint, the Secretary must provide written notice to each person 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. 49 U.S.C. 42121(b)(1). 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. 49 U.S.C. 42121(b)(2)(A).

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. (See § 1992.104 for a summary of the investigation process) OSHA interprets the prima facie case requirement as allowing the complainant to meet this burden through the information the complainant provides in the complaint as supplemented by interviews of the complainant.

After investigating a complaint, the Secretary will issue written findings. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the complainant and respondent of those

findings, and issue a preliminary order providing relief including reinstatement with the same seniority status that the individual would have had, but for the retaliation, two times the amount of back pay otherwise owed to the individual, with interest; compensatory damages, which shall include compensation for litigation costs, expert witness fees, and reasonable attorney fees; and any other appropriate remedy with respect to the conduct that is the subject of the complaint or action, as applicable.

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 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 hearing must be conducted "expeditiously." 49 U.S.C. 42121(b)(2)(A). 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. 49 U.S.C. 42121(b)(3)(A). 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. *Id.* Where the Secretary has determined that a violation has occurred, the Secretary will order relief including reinstatement with the same seniority status that the individual would have had, but for the retaliation, two times the amount of back pay otherwise owed to the individual, with interest; compensatory damages, which shall include compensation for litigation costs, expert witness fees, and reasonable attorney fees; and any other appropriate remedy with respect to the conduct that is the subject of the complaint or action, as applicable. 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. 49 U.S.C. 42121(b)(4).

The Act permits the whistleblower to bring an AMLA retaliation claim against the employer in the appropriate United States district court if the Secretary has not issued a final decision within 180 days after the filing of the complaint and there is no showing that the delay is due to the bad faith of the complainant. The court will have jurisdiction over the action without regard to the amount in controversy and either party is entitled to request a trial by jury.

The Act also states that the rights and remedies provided in the AMLA anti-retaliation provision may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement. No predispute arbitration agreement is valid or enforceable, to the extent that the agreement requires arbitration of a dispute arising under the AMLA anti-retaliation provision. 31 U.S.C. 5323(j). Finally, under the Act, nothing in the AMLA anti-retaliation provision shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement. 31 U.S.C. 5323(g)(5).

## 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) by 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 13024–01 (Mar. 6, 2020) (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board).

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

#### Section 1992.100 Purpose and Scope

This section describes the purpose of the regulations in this interim final rule implementing the anti-retaliation provisions of AMLA and provides an overview of the procedures covered by these regulations.

### Section 1992.101 Definitions

This section includes the general definitions of certain terms used in this rule. In particular, 31 U.S.C. 5323(a)(5) defines the statutory term “whistleblower.” 31 U.S.C. 5323(a)(5)(A) provides that the term “whistleblower” means “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of this subchapter, chapter 35 or section 4305 or 4312 of title 50, the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901 *et seq.*),” and “for conspiracies to violate the aforementioned provisions to the employer of the individual or individuals, including as part of the job duties of the individual or individuals, or to the Secretary or the Attorney General.” 31 U.S.C. 5323(a)(5)(B) provides a special rule that expands the definition of the term “whistleblower” solely for purposes of the anti-retaliation provisions at 31 U.S.C. 5323(g)(1) to include “any individual who takes, or 2 or more individuals acting jointly who take, an action described in subsection (g)(1)(A).” Thus, a whistleblower who is protected against retaliation under AMLA includes any individual who meets the criteria in 31 U.S.C. 5323(a)(5)(A) and/or 31 U.S.C. 5323(a)(5)(B). To reflect the provisions that define a “whistleblower” that is protected from retaliation, OSHA has defined a “whistleblower” in these rules as “any individual, or two or more individuals acting jointly, who take any of the actions described in § 1992.102(b).” Section 1992.102(b) in turn, as described below, encompasses all of the activities listed in 31 U.S.C. 5323(a)(5) and (g)(1). Consistent with the broad language of the statutory definition of “whistleblower,” which refers to “any individual” or two or more individuals acting jointly (31 U.S.C. 5323(a)(5)), the approach that OSHA has taken in defining covered employees under other whistleblower protection provisions, and applicable ARB case law, the interim final rule includes in the definition of “whistleblower” the explanation that “[a] whistleblower includes an individual presently or formerly working for an employer, an individual applying to work for an employer, or an individual whose employment could be affected by an employer.” 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). This section also provides that the term “FinCEN” means the Financial Crimes Enforcement Network, a bureau of the

Department of the Treasury. As explained below, under these rules FinCEN will receive copies of complaints and OSHA findings in AMLA cases and the Department of the Treasury may participate in AMLA proceedings pending before an ALJ or the ARB.

### Section 1992.102 Obligations and Prohibited Acts

This section describes the activities that are protected under the Act and the conduct that is prohibited in response to any protected activities. The Act prohibits an employer from directly or indirectly discharging, demoting, suspending, threatening, blacklisting, harassing or in any other manner discriminating against a whistleblower in the terms and conditions of employment or post-employment because of any lawful act done by the whistleblower to engage in protected activity. Protected activity under AMLA includes any lawful act done by the whistleblower in providing certain information to the Secretary of the Treasury or the Attorney General, a Federal regulatory or law enforcement agency, a Member of Congress or a Committee of Congress, or the employer. The employer includes a person with supervisory authority over the whistleblower or such other person working for the employer who has authority to investigate, discover, or terminate misconduct. The information must relate to a violation of 31 U.S.C. chapter 53, subchapter II (31 U.S.C. 5311–5336, requiring records and reports on monetary instruments transactions); 50 U.S.C. chapter 35 (50 U.S.C. 1701 *et seq.*, as amended (IEEPA)); 50 U.S.C. 4305 or 4312 (provisions of the Trading with the Enemy Act); 21 U.S.C. 1901 *et seq.* (the Foreign Narcotics Kingpin Designation Act), or conspiracies to violate any of the aforementioned provisions. 31 U.S.C. 5323(a)(5), (g)(1)(A).

Protected activity also includes any lawful act done by the whistleblower in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Department of the Treasury or the Department of Justice based upon or related to the information described above. 31 U.S.C. 5323(g)(1)(B).

Finally, protected activity also includes any lawful act done by the whistleblower in providing information regarding any conduct that the whistleblower reasonably believes constitutes a violation of any law, rule, or regulation subject to the jurisdiction of the Department of the Treasury, or a violation of section 1956, 1957, or 1960

of title 18 (or any rule or regulation under any such provision) to a person with supervisory authority over the whistleblower at the employer of the whistleblower; or another individual working for the employer who the whistleblower reasonably believes has the authority to investigate, discover, or terminate the misconduct; or take any other action to address the misconduct. 31 U.S.C. 5323(g)(1)(C).

However, in keeping with the statutory exclusion for employees of federally insured depository institutions and credit unions at 31 U.S.C. 5323(g)(6), which applies only to the anti-retaliation provisions in 31 U.S.C. 5323(g), this section (29 CFR 1992.102) does not apply with respect to any employer that is subject to section 33 of the Federal Deposit Insurance Act (12 U.S.C. 1831j) or section 213 or 214 of the Federal Credit Union Act (12 U.S.C. 1790b, 1790c). 31 U.S.C. 5323(g)(6), which provide separate protections from retaliation for certain categories of whistleblowing for those employees.

To engage in protected activity under this section, the whistleblower need not show that the conduct complained of is an actual violation of one of the provisions of law listed in the statute. The statute protects the provision of information relating to a violation of a relevant law or a conspiracy to violate a relevant law (31 U.S.C. 5323(a)(5)) and information regarding conduct that the employee reasonably believes constitutes a violation of a relevant law (31 U.S.C. 5323(g)(1)(C)). In providing broad protection for such information, the statutory language reflects Congress’s desire to encourage reporting not only to expose but also to prevent money laundering and related violations of law. *Cf. Sylvester v. Paraxel Int’l LLC*, ARB No. 07–123, 2011 WL 2165854, at \*18 (ARB May 25, 2011) (explaining with respect to an analogous SOX whistleblower provision that “[t]he purpose of Section 806, and the SOX in general, is to protect and encourage greater disclosure. Section 806 exists not only to expose existing fraud, *i.e.*, conduct satisfying the elements of a fraud claim, but also to prevent potential fraud in its earliest stages.”). Indeed, case law under analogous anti-retaliation provisions, such as SOX, makes clear that a report based on a whistleblower’s reasonable but mistaken belief that reported conduct could lead to a violation is protected. See *Van Asdale v. Int’l Game Techs.*, 577 F.3d 989, 1001 (9th Cir. 2009); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008).

To have a reasonable belief that there is a violation of relevant law, the

whistleblower must subjectively believe that the conduct is a violation 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*, 2011 WL 2165854, at \*11–12 (same). The requirement that the whistleblower have a subjective, good faith belief is satisfied so long as the whistleblower actually believed that the conduct at issue violated the relevant law or regulation. See *Sylvester*, 2011 WL 2165854, at \*11–12 (citing *Harp*, 558 F.3d at 723; *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (1st Cir. 2009)). The objective reasonableness of a whistleblower'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*, 514 F.3d at 477).

#### Section 1992.103 Filing of Retaliation Complaint

This section explains the requirements for filing a retaliation complaint under the AMLA anti-retaliation provisions. To be timely, a complaint must be filed within 90 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), an alleged violation occurs when the retaliatory decision has been made and communicated to the complainant. In other words, the limitations period commences once the 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 AMLA may be tolled or equitably modified 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 90 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); see also *Martin v. Paragon Foods*, ARB No. 2022–0058 (June 8, 2023) (explaining the distinction between equitable estoppel and tolling). Retaliation complaints filed under this section 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 whistleblower, complaints may be filed by any person on the whistleblower's behalf.

#### Section 1992.104 Investigation

This section describes the procedures that apply to OSHA's investigation of AMLA retaliation complaints. Paragraph (a) of this section outlines the procedures for notifying the respondent, the employer (if different from the respondent), and FinCEN of the complaint and notifying the respondent of the rights under these regulations. 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. AMLA incorporates the burdens of proof in AIR21. 31 U.S.C. 5323(g)(3)(A), incorporating the burdens of proof in 49 U.S.C. 42121(b). Thus, in order for OSHA to conduct an investigation, AMLA 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 AMLA, serves a “gatekeeping function” intended to “stem[] 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, 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). The evidence must show that the protected activity was a contributing factor in the unfavorable personnel action but the whistleblower does not need to prove that his or her employer acted with “retaliatory intent.” *Murray v. UBS Securities, LLC*, 601 U.S. 23, 39 (2024).

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 1992.105 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 reinstatement with the same seniority status that the complainant would have had, but for the retaliation; double back pay with interest; and compensatory damages, including litigation costs, expert witness fees, and reasonable attorney fees, as well as any other appropriate remedy for the retaliation, as applicable. The findings and, where appropriate, 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 AMLA 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, benefits, 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 AMLA 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 AMLA. Lost benefits may also be included in a back pay award under AMLA when there is evidence to support an award for lost benefits. Such benefits 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 AMLA. Other damages, including non-pecuniary damages, such as damages for emotional distress due to the retaliation, are also available under AMLA. 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 an 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 any back pay award

under AMLA, 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 generally 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 whistleblowers to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of AMLA. 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. Admin. Review Bd.*, 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 whistleblower 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 whistleblower.

#### Subpart B—Litigation

##### Section 1992.106 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 AMLA 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 1992.107 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 1992.108 Role of Federal Agencies

The Assistant Secretary may participate as a party or *amicus curiae* at any time in the administrative proceedings under AMLA. 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 whistleblowers, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Department of the Treasury, if interested in a proceeding, also may participate as *amicus curiae* at any time in the proceedings.

##### Section 1992.109 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 AMLA. Specifically, because AMLA 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 whistleblower 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 § 1992.104 is not subject to review. Thus, § 1992.109(c) clarifies that OSHA’s determinations on whether to proceed with an investigation under AMLA and whether to make particular investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases *de novo* and, therefore, as a general matter, may not remand cases to OSHA to conduct an investigation or make further factual findings.

Paragraph (d) notes the remedies that the ALJ may order under AMLA and, as discussed under § 1992.105 above, provides that interest on any back pay award will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 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 1992.110 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 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 with some specificity in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. Simply attaching the order objected to will not suffice for a petition for review. 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, while questions of law will be reviewed *de novo*. *Sylvester*, 2011 WL 2165854, at \*6.

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 AMLA (which otherwise would be effective immediately), while the ARB reviews the order. The Secretary believes that a stay of an ALJ's preliminary order of reinstatement under AMLA 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 the ARB concludes that the respondent has violated the law, it will issue an order providing relief. The order will require, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; double back pay with interest; and compensatory damages, including litigation costs, expert witness fees, and reasonable attorney fees, as well as any other appropriate remedy for the retaliation, as applicable. Interest on any back pay award will be calculated using the interest rate applicable to underpayment of taxes pursuant to 26 U.S.C. 6621 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 13024–01 (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, which 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 1992.111 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 1992.112 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 1992.113 Judicial Enforcement

This section describes the ability of the Secretary, the complainant, and the respondent under AMLA to obtain judicial enforcement of orders and terms of settlement agreements. Through the incorporation of the rules and procedures in AIR21, AMLA authorizes



district courts to enforce orders issued by the Secretary under the provisions of 49 U.S.C. 42121(b). Specifically, 49 U.S.C. 42121(b)(5) provides that “[w]henver any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief, including injunctive relief and compensatory damages.” 49 U.S.C. 42121(b)(5). Similarly, 49 U.S.C. 42121(b)(6) provides that a person on whose behalf an order was issued “may commence a civil action against the person to whom such order was issued to required compliance with such order” in the appropriate United States district court, which will have jurisdiction without regard to the amount in controversy or the citizenship of the parties, to enforce such order. The Secretary views these provisions as permitting district courts to enforce both final orders of the Secretary and preliminary orders of reinstatement for the same reasons that the Secretary has expressed with regard to SOX, which incorporates the rules and procedures of AIR21 using identical language to that in AMLA. See Procedures for the Handling of Retaliation Complaints Under section 806 of the Sarbanes-Oxley Act of 2002, as Amended, Final Rule, 80 FR 11865–02, 11877 (Mar. 5, 2015) (discussing district court enforcement of preliminary reinstatement orders under SOX); see also Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, *Solis v. Tenn. Commerce Bancorp, Inc.*, No. 10–5602 (6th Cir. 2010); *Solis v. Tenn. Commerce Bancorp, Inc.*, 713 F. Supp. 2d 701 (M.D. Tenn. 2010); but see *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006); *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006), decision vacated, appeal dismissed, No. 06–2295 (4th Cir. Feb. 20, 2008)).

#### Section 1992.114 District Court Jurisdiction of Retaliation Complaints

This section sets forth AMLA’s provisions allowing a complainant to bring an original de novo civil 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. See 31 U.S.C. 5323(g)(2)(B). This section also incorporates the statutory provision that allows for a jury trial at the request of

either party in a district court action. See 31 U.S.C. 5323(g)(3)(B). A civil action may not be brought under AMLA more than 6 years after the date on which the violation occurs or more than 3 years after the date on which when facts material to the right of action are known, or reasonably should have been known, by the whistleblower alleging a violation. See 31 U.S.C. 5323(g)(3)(B)(ii).

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 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 the Secretary issues a final decision, even if the date of the final decision is more than 180 days after the filing of the complaint. 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 1992.115 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 AMLA requires.

#### IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, § 1992.103) which was previously reviewed as a statutory requirement of AMLA 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 interim final rule 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 interim final rule 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 interim final 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. 5 U.S.C. 553(d)(2). 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: Regulatory Planning and Review, Executive Order 14094: Modernizing Regulatory Review, and Executive Order 13563: Improving Regulation and Regulatory Review; Unfunded Mandates Reform Act of 1995; Executive Order 13132 (Federalism)**

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, as reaffirmed and amended by Executive Orders 14094 and 13563, because it is not likely to: (1) have an annual effect on the economy of \$200 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, Territorial 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 for which centralized review would meaningfully further the President’s priorities or the principles set forth in Executive Order 12866. Modernizing Regulatory Review, 88 FR 21879, 21879 (Apr. 11, 2023). 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 1992**

Administrative practice and procedure, Anti-money laundering, Employment, 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.

**Douglas L. Parker,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

Accordingly, for the reasons set out in the preamble, 29 CFR part 1992 is added to read as follows:

**PART 1992—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE ANTI-MONEY LAUNDERING ACT (AMLA)**

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

Sec.

- 1992.100 Purpose and scope.
- 1992.101 Definitions.
- 1992.102 Obligations and prohibited acts.
- 1992.103 Filing of retaliation complaint.
- 1992.104 Investigation.
- 1992.105 Issuance of findings and preliminary orders.

**Subpart B—Litigation**

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- 1992.115 Special circumstances; waiver of rules.

**Authority:** 31 U.S.C. 5323(a)(5), (g), and (j); Secretary of Labor’s Order 08–2020, 85 FR 58393; Secretary of Labor’s Order 01–2020, 85 FR 13024–01.

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

**§ 1992.100 Purpose and scope.**

(a) This part sets forth procedures for, and interpretations of the anti-retaliation protections of the Anti-Money Laundering Act of 2020 contained in section 6314 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, 134 Stat. 3388 (January 1, 2021), as amended, codified at 31 U.S.C. 5323 (g)(1)–(3) and (g)(6) and referred to herein as AMLA. AMLA provides for protection from retaliation because a whistleblower has engaged in protected activity by providing information relating to a violation of 31 U.S.C. chapter 53, subchapter II (relating to records and reports on monetary instruments transactions, 31 U.S.C. 5311–5336); chapter 35 or section 4305 or 4312 of title 50; the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901 *et seq.*), or conspiracies to violate the aforementioned provisions; or initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Department of the Treasury or the Department of Justice based upon or related to such information; or providing information relating to any conduct that the whistleblower reasonably believes constitutes a violation of any law, rule, or regulation subject to the jurisdiction of the Department of the Treasury, or a violation of section 1956, 1957, or 1960 of title 18 (or any rule or regulation under any such provision).

(b) This part establishes procedures under AMLA for the expeditious handling of retaliation complaints filed by whistleblowers, or by persons acting on their behalf. This part, together with 29 CFR parts 18 and 26, set forth the procedures under AMLA 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, this part provide the Secretary's interpretations of certain statutory provisions.

#### § 1992.101 Definitions.

As used in this part:

*AMLA* means the provisions relating to anti-retaliation of the Anti-Money Laundering Act of 2020 contained in Sec. 6314 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, 134 Stat. 3388 (January 1, 2021), as amended, codified at 31 U.S.C. 5323(g)(1)–(3) and (6).

*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 AMLA.

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

*Complainant* means the whistleblower who filed an AMLA complaint or on whose behalf a complaint was filed.

*FinCEN* means the Financial Crimes Enforcement Network, a bureau of the United States Department of the Treasury.

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

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

*Secretary* means the Secretary of Labor or the person or persons to whom the Secretary delegates authority under certain anti-retaliation provisions of AMLA, 31 U.S.C. 5323(g)(1)–(3).

*Whistleblower* means any individual, or two or more individuals acting jointly, who take any of the actions described in § 1992.102(b). A whistleblower includes an individual presently or formerly working for an employer, an individual applying to work for an employer, or an individual whose employment could be affected by an employer.

#### § 1992.102 Obligations and prohibited acts.

(a) No employer may directly or indirectly discharge, demote, suspend, threaten, blacklist, harass, or in any other manner discriminate against a whistleblower in the terms and conditions of employment or post-employment because of any lawful act done by the whistleblower to engage in any of the activities specified in

paragraphs (b)(1), (2) and (3) of this section.

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

(1) In providing information relating to a violation of 31 U.S.C. chapter 53, subchapter II (Records and Reports on Monetary Instruments Transactions, 31 U.S.C. 5311–5336); chapter 35 or section 4305 or 4312 of title 50; or the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. 1901 *et seq.*, or a conspiracy to violate the aforementioned provisions to:

(i) The employer of the whistleblower, including as part of the job duties of the whistleblower. The employer includes a person with supervisory authority over the whistleblower or such other person working for the employer who has authority to investigate, discover, or terminate misconduct;

(ii) The Secretary of the Treasury or the Attorney General;

(iii) A Federal regulatory or law enforcement agency; or

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

(2) In initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Department of the Treasury or the Department of Justice based upon or related to the information described in paragraph (b)(1) of this section; or

(3) In providing information regarding any conduct that the whistleblower reasonably believes constitutes a violation of any law, rule, or regulation subject to the jurisdiction of the Department of the Treasury, or a violation of section 1956, 1957, or 1960 of title 18 (or any rule or regulation under any such provision) to:

(i) A person with supervisory authority over the whistleblower at the employer of the whistleblower; or

(ii) Another individual working for the employer who the whistleblower reasonably believes has the authority to investigate, discover, or terminate the misconduct; or take any other action to address the misconduct.

(c) This section shall not apply with respect to any employer that is subject to section 33 of the Federal Deposit Insurance Act (12 U.S.C. 1831j) or section 213 or 214 of the Federal Credit Union Act (12 U.S.C. 1790b, 1790c).

#### § 1992.103 Filing of retaliation complaint.

(a) *Who may file.* Any individual who believes that they have been discharged or otherwise retaliated against, or is otherwise aggrieved by an employer in violation of AMLA 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: <https://www.osha.gov>. Complaints may also be filed online using OSHA's online complaint form, currently available at <https://www.osha.gov/whistleblower/WBComplaint.html>.

(d) *Time for filing.* Within 90 days after an alleged violation of AMLA occurs, an individual who believes that they have been retaliated against in violation of AMLA must 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 or equitably modified 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 90 days after an alleged adverse action.

#### § 1992.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, OSHA will notify the respondent 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 § 1992.110(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 FinCEN.

(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 part 70 of this title.

(e)(1) A complaint 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 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 paragraph (e)(4) of this section, 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 § 1992.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated AMLA 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 (f). 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

(f), or as soon thereafter as OSHA and the respondent can agree, if the interests of justice so require.

#### **§ 1992.105 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 AMLA.

(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, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; two times the amount of back pay otherwise owed to the individual with interest; compensatory damages, including litigation costs, expert witness fees, and reasonable attorney fees; and any other appropriate remedy for the retaliation, as applicable. Interest on any back pay award will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 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. 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 § 1992.106. 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

##### § 1992.106 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 AMLA, 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 § 1992.105. 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.

##### § 1992.107 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.

##### § 1992.108 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 this part. 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 Department of the Treasury, if interested in a proceeding, may participate as *amicus curiae* at any time in the proceeding, at its discretion. At the request of The Department of the Treasury, copies of all documents in a case must be sent to the Department of the Treasury, whether or not it is participating in the proceeding.

##### § 1992.109 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 paragraph (a) of this section, 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 § 1992.104(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 reinstatement with the same seniority status that the complainant would have had, but for the retaliation; two times the amount of back pay otherwise owed to the individual with interest; compensatory damages, including litigation costs, expert witness fees, and reasonable attorney fees; and any other appropriate remedy for the retaliation, as applicable. Interest on any back pay award will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate 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.

**§ 1992.110 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 part 26 of this title. The date of the postmark, 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, and will review legal conclusions de novo. 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 reinstatement with the same seniority status that the complainant would have had, but for the retaliation; two times the amount of back pay otherwise owed to the individual with interest; compensatory damages, including litigation costs, expert witness fees, and reasonable attorney fees; and any other appropriate remedy for the retaliation, as applicable. Interest on any back pay award will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate 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**

**§ 1992.111 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 § 1992.106, 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 filed with the ARB for approval 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 § 1992.113.

#### § 1992.112 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.

#### § 1992.113 Judicial enforcement.

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

#### § 1992.114 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. Either party shall be entitled to a trial by jury.

(b) 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.

#### § 1992.115 Special circumstances; waiver of rules.

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

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## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

#### 33 CFR Part 234

[Docket ID: COE-2023-0005]

RIN 0710-AB41

#### Corps of Engineers Agency Specific Procedures To Implement the Principles, Requirements, and Guidelines for Federal Investments in Water Resources; Correction

**AGENCY:** U.S. Army Corps of Engineers, Army, Department of Defense (DoD).

**ACTION:** Final rule; correction.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) ACF is correcting a final rule (FR) that was published in the **Federal Register** on December 19, 2024, with an effective date of January 17, 2025. This rule establishes Agency Specific Procedures (ASPs) for the Corps to implement the Principles, Requirements, and Guidelines (PR&G) for Federal water resources investments. It provides a framework to govern how the Corps would evaluate proposed water resources investments, subject to the PR&G. The rule incorporates recommendations from interested parties. This correction ensures that this final rule will be effective 30 days after