

equal to or greater than 19.7 GHz or "spectral efficiency" greater than 3 bit/s/Hz; (B) Fiber optic systems or equipment operating at a wavelength greater than 1000 nm; (C) "Telecommunications transmission systems" or equipment with a "digital transfer rate" at the highest multiplex level exceeding 45 Mb/s.

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■ 4. On page 422, in § 748.5, in paragraph (b), add the third sentence to read "Designation of another party to receive the license does not alter the responsibilities of the applicant, licensee or exporter."

■ 5. On page 446, in Supplement No. 2 to part 748, in paragraph (o)(3)(i), correct "E:2" to read "E:1".

■ 6. On page 466, in § 750.7, in paragraph (c)(1)(ii), correct "quality" to read "quantity" and correct "tolerance" to read "tolerances".

■ 7. On page 486, in Supplement No. 1 to part 752, in block 11, correct "SF ##" to read "SF #".

■ 8. On page 487, in Supplement No. 3 to part 752, in block 6, correct "BIS-748P-B" to read "BIS-748P-A".

■ 9. On page 568, in Supplement No. 7 to part 760, add the fourth paragraph to read as follows:

**Supplement No. 7 to Part 760— Interpretation**

\* \* \* \* \*

The United States person may also provide certain services in advance of the unilateral selection by the boycotting country, such as the compilation of lists of qualified suppliers, so long as such services are customary to the type of business the United States person is engaged in, and the services rendered are completely non-exclusionary in character (i.e., the list of qualified suppliers would have to include the supplier whose goods had previously been rejected by the boycotting country, if they were fully qualified). See § 760.2(a)(6) of this part for a discussion of the requirements for the provision of these services.

\* \* \* \* \*

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**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**29 CFR Part 1983**

[Docket Number: OSHA-2010-0006]

RIN 1218-AC47

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

**AGENCY:** Occupational Safety and Health Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** This document provides the final text of regulations governing the employee protection (whistleblower) provisions of the Consumer Product Safety Improvement Act of 2008 (CPSIA). An interim final rule governing these provisions and request for public comment was published in the **Federal Register** on August 31, 2010. Three comments were received. This rule responds to those comments and establishes the final procedures and time frames for the handling of retaliation complaints under CPSIA, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration (OSHA), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor), and judicial review of the Secretary's final decision.

**DATES:** This final rule is effective on July 10, 2012.

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

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Consumer Product Safety Improvement Act of 2008 (CPSIA or the Act), Public Law 110-314, 122 Stat. 3016, was enacted on August 14, 2008.

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

**II. Summary of Statutory Procedures**

CPSIA's whistleblower provisions include procedures that allow a covered employee to file, within 180 days of the alleged retaliation, a complaint with the Secretary of Labor (Secretary).<sup>1</sup> Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated the Act (respondent) of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation. The Secretary must then, within 60 days of receipt of the complaint, afford the complainant and respondent an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation.

<sup>1</sup> The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of CPSIA. Responsibility for receiving and investigating complaints under CPSIA also has been delegated to the Assistant Secretary for Occupational Safety and Health (Secretary's Order 1-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012)). 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 (Secretary's Order 1-2010 (Jan. 15, 2010), 75 FR 3924 (Jan. 25, 2010)).

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

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

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

If a hearing is held, CPSIA requires the hearing to be conducted "expeditiously." The Secretary then has 120 days after the conclusion of any hearing in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary, where appropriate, will assess against the respondent a sum equal to the total amount of all costs and expenses, including attorney's and expert witness fees, reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the Secretary issued the order. The Secretary also may award a

prevailing employer a reasonable attorney's fee, not exceeding \$1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith.

Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation.

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

### III. Summary of Regulations and Rulemaking Proceedings

On August 31, 2010, OSHA published in the **Federal Register** an interim final rule promulgating rules governing the employee protection (whistleblower) provisions of CPSIA. 75 FR 53533. In addition to promulgating the interim final rule, OSHA included a request for public comment on the interim rules by November 1, 2010.

In response, two organizations and one individual filed comments with the agency within the public comment period. Comments were received from the National Whistleblower Center (NWC); Government Accountability Project (GAP); and Todd Miller.

OSHA has reviewed and considered the comments. The following discussion addresses the comments and OSHA's responses in the order of the provisions of the rule.

#### General Comment

Mr. Todd Miller commented generally that the regulations do not provide a means for redress where OSHA does not meet the timelines provided for in the statute. Courts and the ARB have long recognized that the statutory timelines provided in the whistleblower statutes are directory. Failure to complete the investigation or issue a final decision within the statutory time frame does not deprive the Secretary of jurisdiction over a whistleblower complaint. *See, e.g., Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 477 n.7 (3d Cir. 1993); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Lewis v. Metropolitan Transp. Authority, New York*, ARB No.

11-070, 2011 WL 3882486, at \*2 (ARB Aug. 8, 2011); *Welch v. Cardinal Bankshares*, ARB No. 04-054, 2004 WL 5030301 (ARB May 13, 2004). The Secretary is cognizant of CPSIA's statutory directives regarding completion of the OSHA investigation and administrative proceedings and the need to resolve whistleblower complaints expeditiously. However, in those instances where the agency cannot complete the administrative proceedings within the statutory timeframes, CPSIA's "kick-out" provision—which allows a complainant to file a complaint for de novo review in Federal district court if the Secretary has not issued a final decision within 210 days of the filing of the complaint, or within 90 days of receiving a written determination—affords the complainant an alternative avenue for resolution of the whistleblower complaint.

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

##### Section 1983.100 Purpose and Scope

This section describes the purpose of the regulations implementing CPSIA and provides an overview of the procedures covered by these regulations. No comments were received on this section and no substantive changes were made to it.

##### Section 1983.101 Definitions

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

product to be so labeled, and (iii) the brand or trademark of a manufacturer of such product does not appear on such label.” 15 U.S.C. 2052(a)(12)(B). The CPSA defines “retailer” as “a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer.” 15 U.S.C. 2052(a)(13). No comments were received on this section and no substantive changes were made to the definitions section.

#### Section 1983.102 Obligations and Prohibited Acts

This section describes the activities that are protected under CPSIA, and the conduct that is prohibited in response to any protected activities. Under CPSIA, an employer may not retaliate against an employee because the employee “provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of [CPSA, as amended by CPSIA] or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.” 15 U.S.C. 2087(a)(1). CPSIA also protects employees who testify, assist or participate in proceedings concerning such violations. 15 U.S.C. 2087(a)(2) and (3). Finally, CPSIA prohibits retaliation because an employee “objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of [CPSA, as amended by CPSIA] or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.” 15 U.S.C. 2087(a)(4).

In order to have a “reasonable belief” under CPSIA, a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of law. See *Sylvester v. Parexel Int'l LLC*, ARB No. 07–123, 2011 WL 2165854, at \*11–12 (ARB May 25, 2011) (discussing the reasonable belief standard under analogous language in the Sarbanes-Oxley Act (SOX) whistleblower provision, 18 U.S.C. 1514A). The requirement that the complainant have a subjective, good faith belief is satisfied so long as the complainant actually believed that the conduct complained of violated the relevant law. See *id.* The “reasonableness” of a complainant’s belief is typically determined “based on

the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* at \*12 (internal quotation marks and citation omitted). However, the complainant need not show that the conduct complained of constituted an actual violation of law. Pursuant to this standard, an employee’s whistleblower activity is protected where it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred. *Id.* at \*13.

Section 1983.102(c) reflects the CPSIA mandate that anti-retaliation protections are not available to employees who deliberately cause a violation of any requirement relating to any violation or alleged violation of any order, regulation, or standard under the Acts enforced by the Commission. 15 U.S.C. 2087(b)(7)(D). For purposes of section 1983.102(c), the ARB has interpreted the phrase “deliberate violations” for the purpose of denying protection to an employee under the Energy Reorganization Act’s (ERA) similar provision as including an element of willfulness. See *Fields v. U.S. Dep’t of Labor Admin. Review Bd.*, 173 F.3d 811, 814 (11th Cir. 1999) (petitioners knowingly conducted unauthorized and potentially dangerous experiments). No comments were received on this section and no changes have been made to it.

#### Section 1983.103 Filing of Retaliation Complaint

This section explains the requirements for filing a retaliation complaint under CPSIA. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), this is considered to be when the retaliatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer’s decision. *Equal Emp’t Opportunity Comm’n v. United Parcel Serv., Inc.*, 249 F.3d 557, 561–62 (6th Cir. 2001). Complaints filed under CPSIA need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the employee, complaints may be filed by any person on the employee’s behalf.

OSHA notes that a complaint of retaliation filed with OSHA under CPSIA is not a formal document and need not conform to the pleading standards for complaints filed in federal

district court articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *Sylvester v. Parexel Int'l, Inc.*, ARB Case No. 07–123, 2011 WL 2165854, at \*9–10 (ARB May 26, 2011) (holding whistleblower complaints filed with OSHA under analogous provisions in the Sarbanes-Oxley Act need not conform to federal court pleading standards). Rather, the complaint filed with OSHA under this section simply alerts the agency to the existence of the alleged retaliation and the complainant’s desire that the agency investigate the complaint. Upon the filing of a complaint with OSHA, the Assistant Secretary is to determine whether “the complaint, supplemented as appropriate by interviews of the complainant” alleges “the existence of facts and evidence to make a prima facie showing.” 29 CFR 1983.104(e). As explained in section 1983.104(e), if the complaint, supplemented as appropriate, contains a prima facie allegation, and the respondent does not show clear and convincing evidence that it would have taken the same action in the absence of the alleged protected activity, OSHA conducts an investigation to determine whether there is reasonable cause to believe that retaliation has occurred. See 15 U.S.C. 2087(b)(2), 29 CFR 1983.104(e).

GAP expressed support for sections 1983.103(b) (nature of filing) and (d) (time for filing) and commented that these sections improved protection for whistleblowers. GAP also asked that the text of section 1983.103(d) clarify that the 180-day statute of limitations for filing a complaint under CPSIA does not begin to run until an employee becomes aware of an alleged discriminatory act. Consistent with the rules under other whistleblower statutes administered by the agency, OSHA has clarified in section 1983.103(d) that the statute of limitations under CPSIA may be tolled for reasons warranted by applicable case law and made other minor clarifying changes.

#### Section 1983.104 Investigation

This section describes the procedures that apply to the investigation of complaints under CPSIA. Paragraph (a) of this section outlines the procedures for notifying the parties and the Consumer Product Safety Commission of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) specifies that throughout the investigation the agency will provide to the complainant (or the complainant’s

legal counsel if the complainant is represented by counsel) a copy of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint and the complainant will have an opportunity to respond to those submissions. Before providing such materials to the complainant, the agency will redact them in accordance 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 CPSIA's statutory burdens of proof. Paragraph (f) describes the procedures the Assistant Secretary will follow prior to the issuance of findings and a preliminary order when the Assistant Secretary has reasonable cause to believe that a violation has occurred.

The statute requires that a complainant make an initial prima facie showing that protected activity was "a contributing factor" in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision. 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. The complainant's burden may be satisfied, for example, if he or she shows that the adverse action took place shortly after protected activity, giving rise to the inference that it was a contributing factor in the adverse action.

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 ERA, which is the same as that under CPSIA, serves a "gatekeeping function" that "stem[s] 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 a complaint under CPSIA and not investigate (or cease investigating) if either: (1) The complainant fails to meet the prima facie showing that protected activity was a contributing factor in the adverse

action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statutory burdens of proof require an employee to prove that the alleged protected activity was a "contributing factor" in the alleged adverse action. If the employee proves that the alleged protected activity was a contributing factor in the adverse action, the employer, to escape liability, must prove by "clear and convincing evidence" that it would have taken the same action in the absence of the protected activity. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)). In proving that protected activity was a contributing factor in the adverse action, "a complainant need not necessarily prove that the respondent's articulated reason was a pretext in order to prevail," because a complainant alternatively can prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct," and that another reason was the complainant's protected activity. *See Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, 2006 WL 3246904, at \*13 (ARB May 31, 2006) (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)) (discussing contributing factor test under the SOX whistleblower provision), *aff'd sub nom. Klopfenstein v. Admin. Review Bd.*, *U.S. Dep't of Labor*, 402 F. App'x 936, 2010 WL 4746668 (5th Cir. 2010).

CPSIA's burdens of proof do not address the evidentiary standard that applies to a complainant's proof that protected activity was a contributing factor in an adverse action. CPSIA simply provides that the Secretary may find a violation only "if the complainant demonstrates" that protected activity was a contributing factor in the alleged adverse action. *See* 15 U.S.C. 2087(b)(2)(B)(iii). It is the Secretary's position that the complainant must prove by a "preponderance of the evidence" that his or her protected activity contributed to the adverse action; otherwise the burden never shifts to the employer to establish its defense by "clear and convincing evidence." *See, e.g., Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 n.1 (5th

Cir. 2008) ("The term 'demonstrates' [under identical language in another whistleblower provision] means to prove by a preponderance of the evidence."). Once the complainant establishes that the protected activity was a contributing factor in the adverse action, the employer can escape liability only by proving by clear and convincing evidence that it would have taken the same action even in the absence of the prohibited rationale. The "clear and convincing evidence" standard is a higher burden of proof than a "preponderance of the evidence" standard.

NWC and GAP commented on the provisions in section 1983.104. NWC suggested that the phrase "other applicable confidentiality laws" be replaced with more specific language describing the confidentiality laws that might apply to a respondent's answer. NWC also suggested that OSHA provide a copy of the response to the complainant, and give the complainant an opportunity to respond. NWC noted that to conduct a full and fair investigation, OSHA needs to obtain the available, responsive information from both parties. If one party does not have the information submitted by the other, NWC explained, that party cannot help the investigation by providing available information to shed light on the matter.

GAP commented that while it was pleased with the provisions in § 1983.104 providing copies of respondent's submissions to complainants and protecting witness confidentiality, it was concerned that the procedures under § 1983.104(f) "disenfranchise[d] the victim, giving only one side of the dispute the chance to participate in the most significant step of the process" and that "[a]t a minimum, this procedural favoritism means there will not be an even playing field in the administrative hearing." GAP advocated removing § 1983.104(f).

OSHA agrees with NWC and GAP that the input of both parties in the investigation is important to ensuring that OSHA reaches the proper outcome during its investigation. To that end, in response to the comments, the procedures under CPSIA have been revised to contain the following safeguards aimed at ensuring that complainants and respondents have equal access to information during the course of the OSHA investigation:

- Section 1983.104(a) has been revised to more closely mirror CPSIA's statutory requirement in 15 U.S.C. 2087(b)(1), that after receiving a complaint, the Secretary shall notify the respondent of the filing of the complaint, of the allegations contained

in the complaint, and of the substance of the evidence supporting the complaint.

- Section 1983.104(b) of the final rule has been revised to implement CPSIA's statutory requirement in 15 U.S.C. 2087(b)(2), that after receiving a complaint, the Secretary shall afford the complainant, as well as the respondent, the opportunity to submit a written response to the complaint, meet with a representative of the Secretary and present statements from witnesses;

- Section 1983.104(c) continues to provide that, throughout the investigation, the agency will provide the complainant (or the complainant's legal counsel if the complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint, redacted of confidential information as necessary. The final rule also specifies that the complainant will have an opportunity to respond to such submissions; and

- Section 1983.104(f) of the final rule provides that the complainant will also receive a copy of the materials that must be provided to the respondent under that paragraph.

Regarding NWC's suggestion that OSHA provide more specific information about the confidentiality laws that may protect portions of the information submitted by a respondent, OSHA anticipates that the vast majority of respondent submissions will not be subject to any confidentiality laws. However, in addition to the Privacy Act, a variety of confidentiality provisions may protect information submitted during the course of an investigation. For example, a respondent may submit information that the respondent identifies as confidential commercial or financial information exempt from disclosure under the Freedom of Information Act (FOIA). OSHA's procedures for handling information identified as confidential during an investigation are explained in OSHA's Whistleblower Investigations Manual available at: [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=5061](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=5061).

With regard to GAP's comment that § 1983.104(f) should be removed, OSHA notes that the purpose of § 1983.104(f) is to ensure compliance with the Supreme Court's ruling in *Brock v. Roadway Express*, 481 U.S. 252, 264 (1987). In that decision, the Court upheld the facial constitutionality of the analogous provisions providing for preliminary reinstatement under the Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105, and the procedures adopted by OSHA to protect the

respondent's rights under the Due Process Clause of the Fifth Amendment, but ruled that the record failed to show that OSHA investigators had informed the respondent of the substance of the evidence to support reinstatement of the discharged employee. In so finding, the Court noted that, although a formal hearing was not required before OSHA ordered preliminary reinstatement, "minimum due process for the employer in this context requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses." *Roadway Express*, 481 U.S. at 264; see *Bechtel v. Competitive Techs, Inc.*, 448 F.3d 469, 480–81 (Leval, J. concurring in the judgment) (finding OSHA's preliminary reinstatement order under SOX unenforceable because the information provided to the respondent did not meet the requirements of *Roadway Express*). Thus, OSHA declines to remove the language providing the respondent notice and opportunity to respond under § 1983.104(f).

Nonetheless, while recognizing that the purpose of § 1983.104(f) is to ensure that the respondent's Due Process rights have been met prior to OSHA ordering preliminary reinstatement, OSHA appreciates that complainants wish to stay informed regarding their case and may continue to have valuable input, even at this late stage in the investigation. Thus, under these rules, OSHA will provide complainants with a copy of the materials sent to the respondent under § 1983.104(f).

In addition to the revisions noted above, minor changes were made as needed in this section to clarify the provision without changing its meaning.

#### Section 1983.105 Issuance of Findings and Preliminary Orders

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order appropriate relief, including preliminary reinstatement, affirmative action to abate the violation, back pay with interest, and compensatory damages. To reflect the agency's current practice, wherein a preliminary order that includes compensation will

include, where appropriate, back pay and interest, the phrase "and interest" was added to this section.

In ordering interest on back pay under CPSIA, the Secretary has determined that interest due will be computed by compounding daily the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621, is generally the Federal short-term rate plus three percentage points. The Secretary believes that daily compounding of interest achieves the make-whole purpose of a back pay award. Daily compounding of interest has become the norm in private lending and recently was found to be the most appropriate method of calculating interest on back pay by the National Labor Relations Board. See *Jackson Hosp. Corp. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 356 NLRB No. 8, 2010 WL 4318371, at \*3–4 (NLRB Oct. 22, 2010). Additionally, interest on tax underpayments under the Internal Revenue Code, 26 U.S.C. 6621, is compounded daily pursuant to 26 U.S.C. 6622(a).

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

In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he or she received prior to his termination, but not actually return to work. Such "economic reinstatement" is akin to an order for front pay and frequently is 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 ex rel of York v. BR&D Enters., Inc.*, 23 FMSHRC 697, 2001 WL 1806020, at \*1 (FMSHRC June 26, 2001). Front pay has been recognized as a possible remedy in cases

under the whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. *See, e.g., Moder v. Vill. of Jackson*, ARB Nos. 01-095, 02-039, 2003 WL 21499864, at \*10 (ARB June 30, 2003) (under environmental whistleblower statutes, “front pay may be an appropriate substitute when the parties prove the impossibility of a productive and amicable working relationship, or the company no longer has a position for which the complainant is qualified.”); *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), *aff’d sub nom. Hobby v. U.S. Dep’t of Labor*, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (noting circumstances where front pay may be available in lieu of reinstatement but ordering reinstatement); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, 1996 WL 518592, at \*6 (ARB Sept. 6, 1996) (under ERA, front pay appropriate where employer had eliminated the employee’s position); *Michaud v. BSP Transport, Inc.*, ARB Nos. 97-113, 1997 WL 626849, at \*4 (ARB Oct. 9, 1997) (under STAA, front pay appropriate where employee was unable to work due to major depression resulting from the retaliation); *Brown v. Lockheed Martin Corp.*, ALJ No. 2008-SOX-49, 2010 WL 2054426, at \*55-56 (ALJ Jan. 15, 2010) (noting that while reinstatement is the “presumptive remedy” under Sarbanes-Oxley, front pay may be awarded as a substitute when reinstatement is inappropriate). Congress intended that employees be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of CPSIA. When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement. Neither an employer nor an employee 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 reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the employee. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the employee continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating an employee should the

employer ultimately prevail in the whistleblower adjudication. No comments were received on this section. In addition to the revisions noted above, which clarify the provision of interest on back pay awards, minor changes were made as needed to clarify the provision without changing its meaning.

#### Subpart B—Litigation

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

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

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 OSHA’s preliminary order of reinstatement with the Office of Administrative Law Judges. However, such a motion will be granted only based on exceptional circumstances. Language was added to paragraph (b) of this section to make this point clear. The Secretary believes that a stay of the Assistant Secretary’s preliminary order of reinstatement under CPSIA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and the public interest favors a stay. If no timely objection to OSHA’s findings and/or preliminary order is filed, then OSHA’s findings and/or preliminary order become the final decision of the Secretary not subject to judicial review.

No comments were received on this section. The term “electronic communication transmittal” was substituted for “email communication” and other minor changes were made as needed to clarify the provision without changing its meaning.

##### Section 1983.107 Hearings

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR part 18 subpart A. It specifically provides for hearings to be consolidated where both the complainant and respondent object to the findings and/or order of the Assistant Secretary. This section further 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.

In a revision from the interim final rule, paragraph (b) now notes the broad authority of ALJs to limit discovery in order to expedite the hearing. This change was made for consistency with OSHA’s rules under other whistleblower statutes, which similarly note that the ALJ has broad authority to limit discovery. *See, e.g.*, 29 CFR 1979.107 (regulations under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)); 29 CFR 1980.107 (SOX). As with other whistleblower statutes administered by OSHA, CPSIA dictates that hearings “shall be conducted expeditiously” and allows complainants to seek *de novo* review of the complaint in federal court if the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination. *See* 15 U.S.C. 2087(b)(2) and (4). The ALJ’s broad discretion to limit discovery, for example by limiting the number of interrogatories, requests for production of documents, or depositions allowed, furthers Congress’ intent to provide for expeditious hearings under CPSIA.

Finally, this section has been revised to add paragraph (d), which specifies that the formal rules of evidence will not apply to proceedings before an ALJ under § 1983.107, but rules or principles designed to assure the production of the most probative evidence will be applied. The Department has taken the same approach under the other whistleblower statutes administered by OSHA. *See, e.g.*, 29 CFR 1979.107 (AIR21); 29 CFR 1980.107 (SOX). This approach is also consistent with the Administrative Procedure Act, which provides: “Any oral or documentary

evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence \* \* \* 5 U.S.C. 556(d); see also *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 805–06 (1948) (administrative agencies not restricted by rigid rules of evidence). The Department believes that it is inappropriate to apply the rules of evidence at 29 CFR part 18 subpart B because whistleblowers often appear pro se and may be disadvantaged by strict adherence to formal rules of evidence. Furthermore, hearsay evidence is often appropriate in whistleblower cases, as there often are no relevant documents or witnesses other than hearsay to prove discriminatory intent. ALJs have the responsibility to determine the appropriate weight to be given such evidence. For these reasons, the interests of determining all of the relevant facts are best served by not requiring strict evidentiary rules. No comments were received on this section, but, as explained above, this section was revised to specify that the formal rules of evidence will not apply to proceedings before an ALJ under this section.

#### Section 1983.108 Role of Federal Agencies

The Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings under CPSIA. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the ARB proceeding. Although 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, large numbers of employees, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Consumer Product Safety Commission, if interested in a proceeding, also may participate as amicus curiae at any time in the proceedings. No comments were received on this section; however, it has been revised to specify that documents need not be sent to the Assistant

Secretary or the Department of Labor's Associate Solicitor for Fair Labor Standards unless the Assistant Secretary requests that documents be sent, the Assistant Secretary is participating in the proceeding, or service on the Assistant Secretary is otherwise required by these rules. Other minor changes were made as needed to clarify the provision without changing its meaning.

#### Section 1983.109 Decision and Orders of the Administrative Law Judge

This section sets forth the requirements for the content of the decision and order of the ALJ, and includes the standard for finding a violation under CPSIA. The section further provides that the Assistant Secretary's determination to dismiss the complaint without an investigation or without a complete investigation pursuant to § 1983.104 is not subject to review. Thus, paragraph (c) of § 1983.109 clarifies that the Assistant Secretary's determinations on whether to proceed with an investigation under CPSIA and whether to make particular investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases de novo and, therefore, as a general matter, may not remand cases to the Assistant Secretary to conduct an investigation or make further factual findings. A full discussion of the burdens of proof used by the Department of Labor to resolve whistleblower cases under this part is described above in the discussion of § 1983.104. Paragraph (d) notes the remedies that the ALJ may order under CPSIA and, as discussed under § 1983.105 above, provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621, and will be compounded daily. Paragraph (e) requires that the ALJ's decision be served on all parties to the proceeding, the Assistant Secretary, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. 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 14 days after the date of the decision unless a timely petition for review has been filed with the ARB.

No comments were received on this section. However, minor modifications were made to the description of the remedies available under CPSIA in this paragraph to more closely match the language regarding remedies in the

statute and the description of the remedies in § 1983.105(a)(1). The statement that 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 was deleted from § 1983.110(a) and moved to paragraph (e) of this section. Additionally, OSHA has revised the period for filing a timely petition for review with the ARB to 14 days rather than 10 business days. With this change, the final rule expresses the time for a petition for review in a way that is consistent with the other deadlines for filings before the ALJs and the ARB in the rule, which are also expressed in days rather than business days. This change also makes the final rule congruent with the 2009 amendments to Rule 6(a) of the Federal Rules of Civil Procedure and Rule 26(a) of the Federal Rules of Appellate Procedure, which govern computation of time before those tribunals and express filing deadlines as days rather than business days. Accordingly, the ALJ's order will become the final order of the Secretary 14 days after the date of the decision, rather than after 10 business days, unless a timely petition for review is filed. As a practical matter, this revision does not substantively alter the window of time for filing a petition for review before the ALJ's order becomes final.

#### Section 1983.110 Decision and Orders of the Administrative Review Board

Upon the issuance of the ALJ's decision, the parties have 14 days within which to petition the ARB for review of that decision. If no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review. The date of the postmark, facsimile transmittal, or electronic communication 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 not a matter of right but is accepted at the discretion of the ARB. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If a timely petition for review is filed with the ARB, any relief ordered

by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. When the ARB accepts a petition for review, the ALJ's factual determinations will be reviewed under the substantial evidence standard. In order to be consistent with the practices and procedures followed in OSHA's other whistleblower programs, and to provide further clarification of the regulatory text, OSHA has modified the language of 1983.110(c), to clarify when the ALJ proceedings conclude and when the final decision of the ARB will be issued.

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

If the ARB concludes that the respondent has violated the law, it will issue a final order providing relief to the complainant. The final order will require, where appropriate: Affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621, and will be compounded daily. If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney's fee, not exceeding \$1,000.

With regard to section 1983.110(a), NWC urged deletion of the provision in the interim final rule that "[a]ny exception not specifically urged will ordinarily be deemed waived by the parties." NWC commented that parties

should be allowed to add additional grounds for review in subsequent briefs and that allowing parties to do so would further the goal of deciding cases on the merits. OSHA's inclusion of this provision is not intended to limit the circumstances in which parties can add additional grounds for review as a case progresses before the ARB; rather, the rules include this provision to put the public on notice of the possible consequences of failing to specify the basis of an appeal to the ARB. OSHA recognizes that while the ARB has held in some instances that an exception not specifically urged may be deemed waived, the ARB also has found that the rules provide for exceptions to this general rule. *See, e.g., Furland v. American Airlines, Inc.*, ARB Nos. 09-102, 10-130, 2011 WL 3413364, at \*7, n.5 (ARB July 27, 2011), *petition for review filed*, (11th Cir. Oct. 3, 2011) (No. 11-14419-C) (where complainant consistently made an argument throughout the administrative proceedings the argument was not waived simply because it appeared in complainant's reply brief to the ARB rather than in the petition for review); *Avlon v. American Express Co.*, ARB No. 09-089, 2011 WL 4915756, at \*4, \*5 n.1 (ARB Sept. 14, 2011) (consideration of an argument not specifically raised in complainant's petition for review is within the authority of the ARB, and parallel provisions in the SOX whistleblower regulations do not mandate the ARB limit its review to ALJ conclusions assigned as error in the petition for review). However, recognizing that the interim final rule may have suggested too stringent a standard, OSHA has replaced the phrase "ordinarily will" with "may."

NWC also suggested that the review period be extended from 10 business days to 30 days to make this section parallel to the provision in § 1983.105(c), which allows for 30 days within which to file an objection. OSHA declines to extend the review period to 30 days because the shorter review period is consistent with the practices and procedures followed in OSHA's other whistleblower programs. Furthermore, parties may file a motion for extension of time to appeal an ALJ's decision, and the ARB has discretion to grant such extensions. However, as explained above, OSHA has revised the period to petition for review of an ALJ decision to 14 days rather than 10 business days. As a practical matter, this revision does not substantively alter the window of time for filing a petition for review before the ALJ's order becomes final.

Similarly, section 1983.110(c), which provides that the ARB will issue a final decision within 120 days of the conclusion of the ALJ hearing, was similarly revised to state that the conclusion of the ALJ hearing will be deemed to be 14 days after the date of the decision of the ALJ, rather than after 10 business days, unless a motion for reconsideration has been filed with the ALJ in the interim. Like the revision to section 1983.110(a), this revision does not substantively alter the length of time before the ALJ hearing will be deemed to have been concluded.

In addition to the changes noted above, OSHA has revised this section slightly to clarify that interest on back pay awards will be compounded daily and to make several minor changes to clarify the provision and more closely mirror the language used in the statute.

#### *Subpart C—Miscellaneous Provisions*

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

This section provides the procedures and time periods for withdrawal of complaints, the withdrawal of findings and/or preliminary orders by the Assistant Secretary, and the withdrawal of objections to findings and/or orders. It also provides for approval of settlements at the investigative and adjudicative stages of the case. No comments were received on this section.

The final rule adopts a revision to § 1983.111(a) that permits complainants to withdraw their complaints orally. In such circumstances, OSHA will, in writing, confirm a complainant's desire to withdraw. This revision will reduce burdens on complainants who no longer want to pursue their claims. Other minor changes were made as needed to clarify the provision without changing its meaning.

##### Section 1983.112 Judicial Review

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the ALJ or the ARB to submit the record of proceedings to the appropriate court pursuant to the rules of such court. No comments were received on this section.

##### Section 1983.113 Judicial Enforcement

This section describes the Secretary's authority under CPSIA to obtain judicial enforcement of orders and the terms of settlement agreements. CPSIA expressly authorizes district courts to enforce orders, including preliminary orders of reinstatement, issued by the Secretary under 15 U.S.C. 2087(b)(6). "Whenever



any person has failed to comply with an order issued under paragraph (3), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur, or in the United States district court for the District of Columbia, to enforce such order.” Specifically, reinstatement orders issued at the close of OSHA’s investigation under 15 U.S.C. 2087(b)(2)(A) are immediately enforceable in district court pursuant to 15 U.S.C. 2087(b)(6) and (7). Section 2087(b)(3)(B)(ii) provides that the Secretary shall order the person who has committed a violation to reinstate the complainant to his or her former position. Section 2087(b)(2)(A) instructs the Secretary to accompany any reasonable cause finding that a violation occurred with a preliminary order containing the relief prescribed by subsection (b)(3)(B), which includes reinstatement where appropriate, and provides that any preliminary order of reinstatement shall not be stayed upon the filing of objections. See 15 U.S.C. 2087(b)(2)(A) (“The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.”). Thus, under the statute, enforceable orders include preliminary orders that contain the relief of reinstatement prescribed by subsection (b)(3)(B). This statutory interpretation is consistent with the Secretary’s interpretation of similar language in AIR21 and SOX. See 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*, 448 F.3d 469; *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)). CPSIA also permits the person on whose behalf the order was issued to obtain judicial enforcement of the order. See 15 U.S.C. 2087(b)(7). No comments were received on this section. The final rule simplifies language in the first sentence and adds a sentence noting that, in accordance with the statute, 15 U.S.C. 2087(b)(6), the Secretary may file civil actions seeking enforcement of orders in the United States District Court for the District of Columbia as well as in the district court for the district in which the violation occurred.

#### Section 1983.114 District Court Jurisdiction of Retaliation Complaints

This section sets forth provisions that allow a complainant to bring an original

de novo action in district court under certain circumstances. OSHA has revised paragraph (a) of this section to more clearly explain the circumstances in which the complainant may file a complaint in district court and to incorporate the statutory provision allowing a jury trial at the request of either party in a district court action under CPSIA.

Under CPSIA, a complainant may bring an original de novo action in district court alleging the same allegations contained in the complaint filed with OSHA, if there has been no final decision of the Secretary within 210 days of the filing of the complaint, or within 90 days after receiving a written determination. “Written determination” refers to the Assistant Secretary’s written findings under § 1983.105(a). See 15 U.S.C. 2087(b)(4). The Secretary’s final decision is generally the decision of the ARB issued under § 1983.110. In other words, a complainant may file an action for de novo review in the appropriate district court in either of the following two circumstances: (1) A complainant may file a de novo action in district court within 90 days of receiving the Assistant Secretary’s written findings issued under § 1983.105(a), or (2) a complainant may file a de novo action in district court if more than 210 days have passed since the filing of the complaint and the Secretary has not issued a final decision. The plain language of 15 U.S.C. 2087(b)(4), by distinguishing between actions that can be brought if the Secretary has not issued a “final decision” within 210 days and actions that can be brought within 90 days after a “written determination,” supports allowing de novo actions in district court under either of the circumstances described above.

However, it is the Secretary’s position that complainants may not initiate an action in federal court after the Secretary issues a final decision, even if the date of the final decision is more than 210 days after the filing of the complaint or within 90 days of the complainant’s receipt of the Assistant Secretary’s written findings. 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 15 U.S.C.

2087(b)(5)(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).

Under CPSIA, the Assistant Secretary’s written findings become the final decision of the Secretary, not subject to judicial review, if no objection is filed within 30 days. 15 U.S.C. 2087(b)(2). Thus, a complainant may need to file timely objections to the Assistant Secretary’s findings in order to preserve the right to file an action in district court.

In paragraph (b) of this section, OSHA eliminated the requirement in the interim final rule that complainants provide the agency 15 days advance notice before filing a de novo complaint in district court. Instead, this section now provides that within seven days after filing a complaint in district court, a complainant must provide a file-stamped copy of the complaint to the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending. 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, Occupational Safety and Health Administration, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards. This provision is necessary to notify the agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant’s compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed.

This change responds to NWC’s comment that the 15-day advance notice requirement for filing in suit in district court should be eliminated because it inhibits complainants’ access to federal courts. OSHA believes that a provision for notifying the agency of the district court complaint is necessary to avoid unnecessary expenditure of agency resources once a complainant has decided to remove the complaint to federal district court. OSHA believes that the revised provision adequately balances the complainant’s interest in ready access to federal court and the agency’s interest in receiving prompt notice that the complainant no longer wishes to continue with the administrative proceeding.

#### Section 1983.115 Special Circumstances; Waiver of Rules

This section provides that in circumstances not contemplated by these rules or for good cause the ALJ or the ARB may, upon application and notice to the parties, waive any rule as justice or the administration of CPSIA requires. No comments were received on this section and no changes have been made to it.

#### IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, § 1983.103) which was previously reviewed and approved for use by the Office of Management and Budget (OMB), under the provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995). The assigned OMB control number is 1218–0236.

#### V. Administrative Procedure Act

This is a rule of agency procedure and practice within the meaning of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(A). Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments was not required for these regulations, which provide procedures for the handling of retaliation complaints. The Assistant Secretary, however, sought and considered comments to enable the agency to improve the rules by taking into account the concerns of interested persons.

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

#### VI. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996; Executive Order 13132

The Department has concluded that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866, as reaffirmed by Executive Order 13563, because it is not likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or

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

Because this rulemaking is procedural in nature it is not expected to have a significant economic impact; therefore no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995. Furthermore, because this is a rule of agency procedure or practice, it is not a “rule” within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804(3)(C)), and does not require congressional review. Finally, this rule does not have “federalism implications.” The rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” and therefore is not subject to Executive Order 13132 (Federalism).

#### VII. Regulatory Flexibility Analysis

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

#### VIII. List of Subjects in 29 CFR Part 1983

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

#### Authority and Signature

This document was prepared under the direction and control of David Michaels, Ph.D., MPH, Assistant

Secretary of Labor for Occupational Safety and Health.

#### David Michaels,

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

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

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

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

Sec.

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

#### Subpart B—Litigation

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

#### Subpart C—Miscellaneous Provisions

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

**Authority:** 15 U.S.C. 2087; Secretary’s Order 1–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary’s Order 1–2010 (Jan. 15, 2010), 75 FR 3924 (Jan. 25, 2010).

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

##### § 1983.100 Purpose and scope.

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

(b) This part establishes procedures under CPSIA for the expeditious handling of retaliation complaints filed by employees, or by persons acting on their behalf. These rules, together with those codified at 29 CFR part 18, set

forth the procedures under CPSIA 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.

#### § 1983.101 Definitions.

As used in this part:

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

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

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

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

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

(i) For sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; or

(ii) For the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.

(iii) The term "consumer product" includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site, but does not include such a device that is permanently fixed to a site.

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

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

(ii) Tobacco and tobacco products;

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

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

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

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

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

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

(ix) Food (the term "food" means all "food," as defined in 21 U.S.C. 321(f), including poultry and poultry products (as defined in 21 U.S.C. 453(e) and (f)), meat, meat food products (as defined in 21 U.S.C. 601(j)), and eggs and egg products (as defined in 21 U.S.C. 1033)).

(f) *CPSIA* means Section 219 of the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 122 Stat. 3016 (Aug. 14, 2008) (codified at 15 U.S.C. 2087).

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

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

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

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

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

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

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

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

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

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

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

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

#### § 1983.102 Obligations and prohibited acts.

(a) No manufacturer, private labeler, distributor, or retailer may discharge or otherwise retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee), engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section.

(b) An employee is protected against retaliation (as described in paragraph (a) of this section) by a manufacturer, private labeler, distributor, or retailer because the employee (or any person acting pursuant to a request of the employee):

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

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

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

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

Commission, or any order, rule, regulation, standard, or ban under any such Acts.

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

#### § 1983.103 Filing of retaliation complaint.

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

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

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

(d) *Time for filing.* Within 180 days after an alleged violation of CPSIA occurs, any employee who believes that he or she has been retaliated against in violation of CPSIA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

#### § 1983.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint, of the

allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The Assistant Secretary will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1983.110(e). The Assistant Secretary will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel), and to the Consumer Product Safety Commission.

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

(c) Throughout the investigation, the agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The agency will also provide the complainant with an opportunity to respond to such 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 employee engaged in a protected activity;
- (ii) The respondent knew or suspected that the employee engaged in the protected activity;
- (iii) The employee suffered an adverse action; and

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

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

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

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

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1983.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated CPSIA and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the respondent (or the respondent's legal counsel if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot

be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

**§ 1983.105 Issuance of findings and preliminary orders.**

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

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(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 certified mail, return receipt

requested, to all parties of record (and 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's fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. The findings and, where appropriate, the preliminary order also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor. 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 § 1983.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

**Subpart B—Litigation**

**§ 1983.106 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's fees under CPSIA, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1983.105. The objections, request for a hearing, and/or request for attorney's fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or electronic communication 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, and

copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which 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.

**§ 1983.107 Hearings.**

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title.

(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, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. 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.

**§ 1983.108 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.

(2) Copies of documents must be sent to the Assistant Secretary and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of the Assistant Secretary, or where the Assistant Secretary is participating in the proceeding, or where service on the Assistant Secretary and the Associate Solicitor is otherwise required by these rules.

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

#### **§ 1983.109 Decision and orders of the administrative law judge.**

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

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

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

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

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

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. 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 14 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board (ARB), U.S. Department of Labor. 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.

#### **§ 1983.110 Decision and orders of the Administrative Review Board.**

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. 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 14 days of the date of the

decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication 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. Copies of the petition for review must be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the date of 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 14 days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision will also be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will require, where appropriate: affirmative action to abate the violation;

reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney's fee, not exceeding \$1,000.

### Subpart C—Miscellaneous Provisions

#### § 1983.111 Withdrawal of complaints, 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 his or her complaint by notifying the Assistant Secretary, orally or in writing, of his or her withdrawal. The Assistant Secretary then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. The Assistant Secretary will notify the parties (and 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 his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1983.106, provided that no objection 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, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant, and the respondent agree to a settlement. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates the Assistant Secretary'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. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be.

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

#### § 1983.112 Judicial review.

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

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

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

#### § 1983.113 Judicial enforcement.

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

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

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

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

#### § 1983.114 District court jurisdiction of retaliation complaints.

(a) 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:

(1) Within 90 days after receiving a written determination under § 1983.105(a) provided that there has been no final decision of the Secretary; or

(2) If there has been no final decision of the Secretary within 210 days of the filing of the complaint.

(3) At the request of either party, the action shall be tried by the court with a jury.

(b) Within seven days after filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is

pending, a 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.

**§ 1983.115 Special circumstances; waiver of rules.**

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

[FR Doc. 2012-16411 Filed 7-9-12; 8:45 am]

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 117

[Docket No. USCG-2012-0550]

#### Drawbridge Operation Regulation; Oakland Inner Harbor Tidal Canal, Alameda, CA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating regulation that governs the Park Street Drawbridge across Oakland Inner Harbor Tidal Canal, mile 5.2, at Alameda, CA. The deviation is necessary to allow the County of Alameda Public Works Agency to perform necessary repairs on the drawbridge. This deviation allows single leaf operation of the double leaf bascule style drawbridge during the project.

**DATES:** This deviation is effective from 7 a.m., July 9, 2012 to 6 p.m. on July 18, 2012.

**ADDRESSES:** Documents mentioned in this preamble as being available in the docket are part of the docket USCG-2012-0550 and are available online by going to <http://www.regulations.gov>, inserting USCG-2012-0550 in the "Keyword" box and then clicking "Search". They are also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE.,

Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510-437-3516, email [David.H.Sulouff@uscg.mil](mailto:David.H.Sulouff@uscg.mil). If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

**SUPPLEMENTARY INFORMATION:** The County of Alameda Public Works Department has requested a temporary change to the operation of the Park Street Drawbridge, mile 5.2, over Oakland Inner Harbor Tidal Canal, at Alameda, CA. The drawbridge navigation span provides a vertical clearance of 15 feet above Mean High Water in the closed-to-navigation position. The draw opens on signal; except that, from 8 a.m. to 9 a.m. and 4:30 p.m. to 6:30 p.m. Monday through Friday except Federal holidays, the draw need not be opened for the passage of vessels. However, the draw shall open during the closed periods for vessels which must, for reasons of safety, move on a tide or slack water, if at least two hours notice is given. Navigation on the waterway is commercial and recreational.

The Alameda (south) side of the bridge leaf of the double bascule drawspan may be secured in the closed-to-navigation position from 7 a.m., July 9, 2012 to 6 p.m. on July 18, 2012, to allow the County of Alameda Public Works Agency to perform necessary repairs on the bridge. The opposite leaf will continue to operate normally, providing unlimited vertical clearance and 120 feet horizontal clearance between leaves. This temporary deviation has been coordinated with waterway users. No objections to the proposed temporary deviation were raised.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: June 27, 2012.

**D.H. Sulouff,**

*District Bridge Chief, Eleventh Coast Guard District.*

[FR Doc. 2012-16779 Filed 7-9-12; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG-2012-0526]

RIN 1625-AA00

#### Safety Zone; Fireworks Display in Captain of the Port, Puget Sound Zone

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a safety zone in Shilshole Bay for a fireworks display. The safety zone is necessary to help ensure the safety of the maritime public during the display and will do so by prohibiting all persons and vessels from entering the safety zone unless authorized by the Captain of the Port or his Designated Representative.

**DATES:** This rule is effective from August 2, 2012, until August 3, 2012.

**ADDRESSES:** Documents mentioned in this preamble are part of docket USCG-2012-0526. To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type the docket number in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email ENS Nathaniel P. Clinger, Coast Guard Sector Puget Sound, Waterways Management Division; telephone 206-217-6045, email [SectorPugetSoundWWM@uscg.mil](mailto:SectorPugetSoundWWM@uscg.mil). If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366-9826.

**SUPPLEMENTARY INFORMATION:**

#### Table of Acronyms

DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of Proposed Rulemaking

#### A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a)