

personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects in 26 CFR Part 301

Administrative practice and procedure, Bankruptcy, Courts, Crime, Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Investigations, Law enforcement, Penalties, Pensions, Statistics, Taxes, Disclosure of information, Filing requirements.

Adoption of Amendments to the Regulations

Accordingly, Part 301 of Title 26 of the Code of Federal Regulations is amended as follows:

PART 301—[AMENDED]

Paragraph 1. The authority for Part 301 is amended as follows:

(1) By removing the following citation:

Authority: 26 U.S.C. 7805 * * * Section 301.6323(f)-1T(c) is also issued under 26 U.S.C. 6323(f)(3); and

(2) By adding the following citation:

Authority: 26 U.S.C. 7805 * * * Section 301.6323(f)-1(c) is also issued under 26 U.S.C. 6323(f)(3).

Par. 2. 26 CFR Part 301 is amended as follows:

§ 301.6323(f)-11 [Removed]

(1) By removing § 301.6323(f)-1T; and

(2) By revising § 301.6323(f)-1(c) to read as follows:

§ 301.6323(f)-1 Place for filing notice; form.

(c) *Form*—(1) *In general*. The notice referred to in § 301.6323(a)-1 shall be filed on Form 668, "Notice of Federal Tax Lien Under Internal Revenue Laws". Such notice is valid notwithstanding any other provision of law regarding the form or content of a notice of lien. For example, omission from the notice of lien of a description of the property subject to the lien does not affect the validity thereof even though State law may require that the notice contain a description of the property subject to the lien.

(2) *Form 668 defined*. The term "Form 668" generally means a paper form. However, if a state in which a notice referred to in § 301.6323(a)-1 is filed permits a notice of Federal tax lien to be filed by the use of an electronic or magnetic medium, the term "Form 668" includes a Form 668 filed by the use of any electronic or magnetic medium permitted by that state. A Form 668 must

identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose regardless of the method used to file the notice of Federal tax lien.

* * * * *
Lawrence B. Gibbs,
Commissioner of Internal Revenue.

November 2, 1988. Approved:

O. Donaldson Chapoton,
Assistant Secretary of the Treasury.
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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1978

Rules Implementing Section 405 of the Surface Transportation Assistance Act of 1982

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

ACTION: Final rule.

SUMMARY: Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter the "STAA"), Pub. L. 97-424, 96 Stat. 2097, 2157-58, enacted January 6, 1983 (49 U.S.C. app. 2301 *et seq.*), provides protection to employees in the trucking industry from discrimination because of activity related to commercial motor vehicle safety and health matters. On November 21, 1986, OSHA published an interim final rule which provided for rules of practice and procedure to implement section 405 of STAA. At that time the agency requested comments concerning the interim final rules. Since then, the agency has received several comments from interested parties and the U.S. Supreme Court has ruled on an important provision in STAA. OSHA has reviewed those comments and the Court's decision and it now adopts these rules which have been revised to a certain extent to comply with the Court's ruling on the statute and its method of implementation and to address problems perceived by the agency or the commentators.

DATES: These rules are effective December 27, 1988. They apply to all cases docketed on or after that date. They also apply to further proceedings in cases then pending, except to the extent that their application would be infeasible or would work an injustice, in which event present rules (i.e., those published at 51 FR 42091) apply.

FOR FURTHER INFORMATION CONTACT: James Foster, Office of Information, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 523-8151.

SUPPLEMENTARY INFORMATION:

Rulemaking Proceedings

On November 21, 1986, the Occupational Safety and Health Administration (OSHA) published in the *Federal Register* an Interim Final Rule promulgating rules which implemented section 405 of STAA. 51 FR 42091-42095. In addition to promulgating the interim final rule, OSHA's notice included a request for public comment on the interim rules.

In response, five organizations and individuals filed comments with the agency. These commentators represented the full spectrum of those who will be affected by the rules. The International Brotherhood of Teamsters, a labor organization representing a significant portion of drivers covered by STAA, filed a comment which supported the rules as drafted. Two trucking industry associations, American Trucking Association Inc. (ATA) and Specialized Carriers and Rigging Association (SCRA), filed comments, which generally supported the rule but also pointed to specific problems which they perceived in the rules. In addition, two attorneys, Michael C. Towers of Fisher and Phillips, Atlanta, Georgia, and Jeffrey I. Pasek of Cohen, Shapiro, Polisher, Shiekman and Cohen, Philadelphia, Pennsylvania, who have participated in section 405 proceedings, filed comments which address both specific problems they faced under practice prior to rule promulgation and also problems that they perceive under the interim rule.

After promulgation of the interim rule, in *Brock v. Roadway Express, Inc.*, — U.S. —, 107 S. Ct. 1740 (1987), the Supreme Court ruled on a constitutional challenge to the temporary reinstatement provision in STAA. (49 U.S.C. app. 2305(c)(2)(A)). The Supreme Court's ruling, which upheld the constitutionality of that statutory provision and the rules promulgated thereunder, directly affected several of the rules and accordingly, OSHA has decided to redraft certain subsections of the rule to better comport with the Supreme Court's holding.

Following the receipt of the comments and the issuance of the decision in *Brock v. Roadway Express, Inc.*, *id.* (hereinafter "*Roadway Express*"), OSHA has reviewed the comments and the decision and, in response, has

developed a final rule which makes some changes in the interim final rule. Other changes urged by commentators were considered but rejected. OSHA addresses the comments and the changes in the discussion which follows. The comments and OSHA's response are discussed seriatim in the order of the provisions of the rule.

Definitions

OSHA received only one comment on the definition section. SCRA questioned whether the meaning of "employee" as defined in § 1978.101(d) included the employee of an independent contractor.

OSHA believes that a person is an employee, whether he or she works for a major multistate trucking firm or for an independent contractor, if that person meets the criteria found in 49 U.S.C. 2301, *i.e.*, if that person drives in interstate commerce a vehicle which meets the criteria of the definition of "commercial motor vehicle" found at 49 U.S.C. app. 2301(1) and is employed by a commercial motor carrier as that term is defined in a new definition in the regulation at § 1978.101(e). For example, if an independent contractor is a motor carrier and has an employee who drives a vehicle in interstate commerce which has a gross vehicle weight rating of ten thousand or more pounds, that employee is covered by section 405. Because the statute and rule did not previously provide a definition for "commercial motor carrier," OSHA has added a definition at § 1978.101(e).

OSHA also notes that the definition of "employee" specifically includes an independent contractor if that person personally operates the commercial motor vehicle in interstate commerce. In that instance, if the independent contractor insisted upon meeting DOT regulations and subsequently the company which had contracted with him refused to honor the contract because of the independent contractor's safety activity, the independent contractor has the right to complain to OSHA about such adverse action.

Filing of Complaint

SCRA has suggested that § 1978.102(c) be changed because the rule permits the filing of section 405 cases with "any OSHA officer or employee," with the result that the employer would have to travel to a remote location to contest the filing. This comment misapprehends OSHA practice and the intent of the rule. Section 1978.102(c) simply permits the employee to file at a convenient location. Thereafter, OSHA will assign the case to a regional office responsible for enforcement activities in the geographical area where the employee

resides or was employed. Usually, this location is equally convenient to the employer, since most employees are domiciled near the terminal which may have discriminated against them. Thus, OSHA does not see this rule, which permits quick and convenient filing of a complaint, to impinge unduly upon employer or employee.

In § 1978.102(f), OSHA has made a change in accordance with *Roadway Express* and several comments. The interim rule called for OSHA to notify the "named person" *i.e.*, the person against whom the complaint had been filed, of the filing of a complaint without transmittal of the actual complaint filed by the employee. Several commentators suggested that this withholding of the actual complaint is unfair. Likewise, the Supreme Court has suggested that the named person be given notice of the complaint and the substance of the relevant evidence to satisfy due process requirements. *Roadway Express*, 107 S. Ct. at 1748. Accordingly, OSHA has changed 102(f) to provide that, upon receipt of a valid section 405 complaint, the agency will transmit to the named person a copy of the complaint as filed by the complainant, as long as the complaint does not identify any potential confidential witnesses.

Nevertheless, OSHA notes that often-times the complaint as received from the employee is frequently an inarticulate, non-legal statement of the facts as a non-lawyer perceives them. After receipt and transmittal of the complaint, when OSHA conducts its investigation, the agency may discover evidence which expands or narrows the basis and the scope of the complaint's allegation. See *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18 (1942). Of course, as provided for in the new § 1978.103(b) (discussed below), if the nature or scope of the investigation changes, OSHA shall notify the named person of any new or additional bases for the claim of discrimination.

Investigation

In response to *Roadway Express* and several comments, OSHA has significantly revamped § 1978.103(b). In *Roadway Express*, the Court upheld the facial constitutionality of the statute and the regulations under the Due Process clause of the Fifth Amendment and thus ruled that the statute's provision permitting temporary reinstatement of a discharged employee after a preliminary investigation and issuance of findings and order was permissible. However, in the Court's analysis of the facts, because the record failed to show that OSHA investigators had informed Roadway of the substance of the evidence to support

reinstatement of the discharged employee, the plurality concluded that the statute and OSHA's rules were unconstitutionally applied.

Under OSHA's reading of this decision, it has been determined that, while OSHA's current procedures are facially constitutional, the rule governing the investigation process should be changed to permit a more clear-cut and orderly exchange of information at the investigative phase. Thus, as noted above, OSHA will provide to the named person a copy of the employee complaint. Additionally, OSHA has changed § 1978.103(b) to provide for the named person's appraisal of any new or amended charges which may have been discovered during the course of the investigation, and OSHA has also added a new section, § 1978.103(c), which provides for giving the named person notice of the substance of the evidence which supports the complaint, if OSHA has reason to believe that it may be necessary to order temporary reinstatement of the complainant. In addition to providing the named person with the substance of the relevant evidence supporting a finding of discrimination and temporary reinstatement, § 1978.103(c) provides the named person the opportunity to meet with the investigator to submit rebuttal evidence.

When OSHA provides the named person with notice of the substance of the relevant supporting evidence, OSHA shall provide the named person with a synopsis of the evidence and may provide sanitized witness statements. However, OSHA will not provide the names of the witnesses and, if the statements cannot be sanitized to the extent that the identity of the witnesses is protected, OSHA will not provide the written statements themselves, but instead it will provide the company with the substance of the evidence.

This decision to withhold names and copies of statements has been made in conformity with the Department of Labor's longstanding practice of protecting the identity of confidential witnesses. See, *e.g.* *Stephenson Enterprises Inc. v. Marshall*, 578 F.2d 1021, 1025 (5th Cir. 1978); *Hodgson v. Charles Martin Inspectors of Petroleum Inc.*, 459 F.2d 303 (5th Cir. 1972). See also *Roviaro v. U.S.*, 353 U.S. 53 (1957). OSHA takes statements from witnesses with the promise that witness identity will not be disclosed unless and until a witness is called to testify at trial. This decision to withhold names is a commonsense approach to a particularly difficult problem. The government is

investigating in these cases because an employee has accused an employer of discrimination after the employee contacted or threatened to contact the government. Fellow employees, who are often the best sources of information concerning the allegation of discrimination, are unlikely to come forward with the correct information if they perceive that the employer will learn of their identity, particularly in cases such as these where the employer is accused of discriminating against employees who contact the government. Any premature disclosure of witness identities at an early stage prior to hearing will likely hinder an effective investigation.

OSHA's analysis of *Roadway Express*, leads to the conclusion that the Court did not require disclosure of the names of confidential witnesses. Indeed, OSHA has concluded that the plurality's holding supports OSHA's decision. The plurality held that the minimum that due process requires is notice of the employee's allegations, "notice of the substance of the relevant supporting evidence" and the opportunity to rebut that evidence in writing and in meetings with OSHA. 107 S. Ct. 1748. At no point in the plurality decision does the court require OSHA to provide the names or identities of the witnesses. In fact, in three separate places in the plurality opinion, the court distinguishes between the term "substance of the evidence" and a witness' statement. Additionally, OSHA notes that Justice Brennan also discusses OSHA's obligation in terms of provision of the substance of evidence as opposed to furnishing actual witness statements. Accordingly, under the new rule at § 1978.103(c), OSHA will not disclose to the named person the identities of confidential witnesses.

However, recognizing that the employer has a constitutional right to know the substance of the relevant evidence supporting OSHA's preliminary finding, OSHA, as it has in the past, will disclose to the employer the substance of the evidence by meeting with the named person to discuss the evidence, and to provide sanitized copies of witness statements, if such provision will not jeopardize the identity of witnesses. If there is no way to sanitize the statements, OSHA will discuss with the employer the substance of the relevant evidence contained in those statements without providing the actual statements.

During or after the disclosure meeting, the named person may furnish rebuttal evidence. However, due to the Congressional mandate that section 405 proceedings be conducted expeditiously,

OSHA cannot permit a named person any more than five days after notification to present rebuttal evidence, unless the interests of justice so require. After OSHA has considered the rebuttal evidence, it will issue findings and, if necessary, a preliminary order.

Issuance of Findings and the Preliminary Order

OSHA received several comments from the trade associations regarding the award of attorney's fees to the complainant if complainant prevails. SCRA requested that § 1978.104 be redrafted to permit award of attorney's fees to the named person if he or she prevailed. However, neither the statute nor the legislative history permit an interpretation of the statutory language to provide award of attorney's fees to the named person. The statutory language specifies that the Secretary may award attorney's fees only to a complainant if he or she prevails. There is no mention of award of attorney's fees to any other party. Relying on the fundamental canon of construction, *expressio unius est exclusio alterius*, OSHA has concluded that, since Congress mentioned only the complainant in the statutory provision regarding fees, Congress must have intended to exclude an award of attorney's fees to the named person. Thus, OSHA is unable to agree with SCRA's comment. Moreover, OSHA notes that the Secretary has already addressed this question in *Abrams v. Roadway Express, Inc.*, 84-STA-2, May 23, 1985, wherein the Secretary concluded that the statute did not authorize the award of fees to an employer.

In connection with § 1978.104, which provides for OSHA's issuance of findings and a preliminary order which may award attorney's fees, among other things, ATA commented that the rule as it relates to § 1978.109 is ambiguous with regard to an employer's liability for attorney's fees. ATA states that § 1978.109 does not provide specifically for vacation of a preliminary order by OSHA which awarded attorney's fees and accordingly, it believes that a named person may incur some liability for OSHA's preliminary order award of fees. However, OSHA notes in response that § 1978.109(c)(4) specifically states that when the Secretary determines that the named person did not violate the Act, "the final order shall deny the complaint." The Secretary's order is the final order of the Department and it takes precedence over all previous orders and rulings. Consequently, if the Secretary finds no validity to an employee's complaint, there can be no

basis on which to award any damages to complainant, including attorney's fees.

Attorney Towers commented that § 1978.104(a) should provide for detailed findings of fact by OSHA at the conclusion of its investigation. OSHA agrees that its findings should be sufficiently detailed as to apprise the parties of the complained of activity and the facts upon which OSHA has based its determination regarding whether a violation of the statute occurred. However, OSHA believes that it is not necessary to specify in its rule the elements which must be found in each finding of fact issued by OSHA. The amount of detail and explanation in the findings depends on the facts of each case. Accordingly, OSHA will not revise § 1978.104 to specify the amount of detail in its investigative findings.

Scope of Rules, Notice of Hearing; Litigation Complaint

Attorney Pasek commented on § 1978.106(d); he believed that the rule should provide for the filing of a litigation complaint to frame the issues for trial. OSHA has determined for several reasons that this would be an unnecessary step and has chosen not to implement such a rule. First, the findings of fact issued by OSHA in most circumstances should be sufficiently detailed to apprise the parties of the legal and factual issues presented in the matter. Moreover, a requirement that the prosecuting party file a litigation complaint after issuance of findings and the filing of objections thereto would only tend to delay the proceedings which are to be conducted in a very time-shortened process. The Congressional mandate is that the Department is to conduct hearings expeditiously after the filing of objections. Given that the findings and objections have already served to narrow the issues and given the need for an expeditiously conducted hearing, OSHA has decided that the current rule at § 1978.106(d) which provides for the filing of a prehearing statement of positions, if ordered by the judge, is sufficient to give the parties notice of the issues and the remedy sought.

Parties

Section 1978.107 generated a number of comments regarding the role of the Assistant Secretary in administrative hearings. Section 1978.107(a) provides that if the Assistant Secretary finds reasonable cause to believe the employee's complaint, the Assistant Secretary will ordinarily be the prosecuting party at any administrative

hearing conducted pursuant to § 1978.106. Section 1978.107(b) provides that if no merit to the employee's complaint is found at the investigative level, the Assistant Secretary will ordinarily not participate in the hearing.

SCRA and ATA commented that this rule is unfair in that it does not permit the Assistant Secretary to provide assistance to the employer when OSHA has found no merit to the employee's complaint. SCRA has proposed that, to remedy this unfairness, OSHA set up a "public defender" office which will defend the employer's actions in cases arising under § 1978.107(b). Similarly, ATA and Attorney Towers believed that OSHA should participate in the hearings even when the agency has found no merit to the complaint.

OSHA has carefully considered these comments and finds that the commentators have misunderstood the purpose of the statute and the manner in which the rules implement the statute. The purpose of the statute is to ensure that the government's channels of information are not dried up by employer intimidation of prospective complainants and witnesses. *Brock v. Roadway Express, Inc.*, supra, 107 S. Ct. 1745. See also, *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972); *Mitchell v. Robert De Mario Jewellery, Inc.*, 361 U.S. 288, 292; *Square D. Company v. Donovan*, 709 F.2d 335, 5th Cir. 1983) (long-term effect and primary purpose of antiretaliation suits is to promote effective enforcement of statutes by protecting employee communications with governmental authorities.) As Congress noted in the legislative history to STAA:

the Section was considered necessary to encourage "whistle-blowing" by employees. Enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of the employer, employees, State safety agencies, and the Department of Transportation. Therefore, the committee considered it necessary to specifically provide protection for those employees who are discharged or discriminated against for exercising their rights and responsibilities under this title.

Senate Commerce Committee Section by Section Analysis of Title IV, S. 3044, Commercial Motor Vehicle Safety, 97th Cong., 2d Sess., 128 Cong. Rec. S 14028 (Dec. 7, 1982).

Based on this reasoning, OSHA has found that it is extremely important that, if the Assistant Secretary determines that section 405 has been violated, the case be properly prosecuted at a hearing to ensure that the government's channels of communication with employees are kept open. Accordingly,

the Solicitor will normally prosecute this type of claim.

On the other hand, if after an investigation OSHA does not find reasonable cause to believe the employee's complaint, in essence OSHA does not believe that the government's channels of information have been interfered with and accordingly, the government's interest in protecting whistleblowing is not as likely to be implicated in a hearing. For that reason, OSHA will ordinarily not participate in such a hearing.

ATA and SCRA urge that this position is unfair in that it denies the named person the benefit of the government's investigative report and expertise. However, a requirement that OSHA appear to defend its investigative findings does not further any governmental purpose, for the government has preliminarily, at least, concluded that whistleblowing is not implicated in the hearing, and appearance at a hearing would use up scarce resources.

Furthermore, the hearing is conducted *de novo* and is not a review of OSHA's findings. OSHA's conclusions are no longer directly at issue. Instead the critical factors at the hearing are the evidence adduced by the complainant as prosecuting party and the employer's rebuttal of that evidence. Since the employer knows the true reasons for the employment action and can best adduce facts to support its reasons for taking that action, the party in the best position to refute the complainant's evidence is the named person. The Assistant Secretary will not have any special knowledge of the employer's reasons for the discharge or other action and thus, would not likely be able to contribute to the proceeding.

In a related comment, Attorney Towers raises a constitutional objection to § 1978.107(b) which, as noted, provides that if the Assistant Secretary does not find reasonable cause to believe that the employee's complaint has merit, he or she will ordinarily not participate in the administrative hearing which may be held after the employee files objections. Mr. Towers' objection is based on the proposition that, if the Assistant Secretary does not participate in the hearing, the complainant then seeks to remedy a private dispute in an administrative tribunal, which is an Article I of the U.S. Constitution tribunal. Under Mr. Towers' argument, private disputes can be constitutionally adjudicated only in Article III courts. See *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (Bankruptcy Act of 1978 is unconstitutional to the extent

bankruptcy judges were not Article III judges.)

OSHA believes that his objection is based on an erroneous assumption. The objection assumes that when the Assistant Secretary finds no reasonable cause to believe the employee's claim, the matter becomes a purely private dispute if it goes to an administrative hearing without the Assistant Secretary's participation. On the contrary, with or without the Assistant Secretary's participation, the employee's claim is still very much a claim that a Congressionally created right to be protected from discrimination has been violated. An employee's claim of discrimination based on engagement in the protected activity of "whistleblowing" with regard to commercial motor vehicle safety and health matters is a claim which did not exist at common law. It only came into existence when Congress, on January 8, 1983, determined that the government had to protect its sources of information and accordingly, the STAA process was formulated. In this regard, then, OSHA's investigative finding is merely the first step in a Congressionally-created process to determine whether the claim is correct. The *de novo* hearing before an administrative law judge, followed by the Secretary of Labor's review are additional steps in this process and in no way are they resolution of "private disputes". Since these are all steps in a Department of Labor process to determine the existence of a statutory violation, the Assistant Secretary's non-participation in the proceeding does not render the Congressionally-created right a private dispute.

Indeed, as explained in various Supreme Court decisions, when Congress has created a special right, not known at common law, such as the right to be free from discrimination because of an employee's safety-related activities, Congress can remove adjudication of this Congressionally-created substantive Federal right from Article III courts and delegate it to administrative agencies for factual determination. See *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S. Ct. 2858, 2878. See also, *Crowell v. Benson*, 285 U.S. 22, 51-65 (1932); *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 450 n. 7 (1977); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, (1937). In fact, Congress has used the same or similar approaches in numerous other whistleblower statutes administered by the Secretary. See, e.g., Energy Reorganization Act, 42 U.S.C. 5851; Toxic Substances Control Act, 15 U.S.C. 2622; Safe Water Drinking Act, 42

U.S.C. 300; 9(i); Water Pollution Control Act, 33 U.S.C. 1367; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610; and Resource Conservation and Recovery Act, 42 U.S.C. 6971.

Finally, OSHA notes that the final administrative decision of the Secretary is reviewable in the Federal courts of appeals, 49 U.S.C. app. 2305(d)(1), and the Secretary must go to U.S. district court to enforce his final order. 49 U.S.C. app. 2305(e).

Two other comments were raised with regard to § 1978.107. Attorney Pasek noted that this section contains the only direct reference to the right of the parties to obtain discovery in STAA proceedings and he requested that the rules provide more explicitly for discovery. The rule does not provide for specific discovery measures because the rule in § 1978.106(a), has incorporated by reference 29 CFR Part 18, the Rules of Procedure governing Department of Labor Administrative Hearings, which specifically provides for discovery. See 29 CFR 18.14-23.

Attorney Towers also noted that the rule did not provide for joinder of necessary parties. OSHA believes that it is unnecessary to have a specific provision regarding joinder because 29 CFR Part 18 specifies that the Federal Rules of Civil Procedure will apply to the extent that the rules of administrative practice do not cover an area.

Decision and Orders

Section 1978.109, which covers the issuance of ALJ decisions and the final decision and order of the Secretary, generated several comments. As noted previously in OSHA's response to comments on § 1978.104, SCRA and ATA commented on the availability of attorney's fees for employers. As noted in the response to those comments, the statute provides only for awards of costs and attorney's fees to complainants.

Attorney Towers and ATA commented on the § 1978.109(a) provision for the close of the record before the administrative law judge. According to these commentators, the rule appeared to be incorrectly drafted because § 1978.106(b) provided for the holding of a hearing within 30 days of the filing of objections, and yet § 1978.109(a) provided for the closing of the record "no later than 30 days after the objection." According to the comments, the rules conflicted and presented the parties with an impossibility of performance in that the

hearing would open on the same day as the record would close.

OSHA has reviewed this provision and believes that the rules as drafted are correct and operable. In § 1978.106(b), the hearing must commence within 30 days after the filing of an objection to the Assistant Secretary's findings and order. This rule means that a hearing can commence at any time within that 30 day period, unless the parties agree to an extension.

In § 1978.109(a), the record closes on the 30th day after the filing of objections. This rule requires that any hearing which may have been conducted and the submission of all evidence must be completed by the close of business on the 30th day after the filing of objections. In this scenario, there is no conflict between §§ 1978.106(b) and 1978.109(a) since the hearing could be conducted prior to and concluded by the 30th day after the filing of objections. Accordingly, the record can then be closed on the 30th day. If necessary, the parties may agree to a continuance. OSHA's purpose in implementing such a shortened timeframe for hearings is to satisfy the Congressional mandate that hearings be conducted "expeditiously" after objections are filed. See *Brock v. Roadway Express, Inc.*, *supra*, 107 U.S. 1746.

Withdrawal and Settlements

Attorney Pasek raised several concerns regarding § 1978.111. His first concern is that § 1978.111(a) limits the withdrawal of complaints by an employee to the time prior to the filing of objections to the Assistant Secretary's findings. Attorney Pasek found this requirement to be "unduly restrictive" and an impairment to reaching an amicable accord. OSHA has considered this concern and believes that he has misunderstood the purpose of this section. Section 1978.111(a) is aimed at the unilateral withdrawal of a complaint by the complainant prior to the start of adjudicatory proceedings. If an individual is no longer interested in pursuing his claim at the *investigative* stage, OSHA will review with the complainant his or her reasons for withdrawal and, if OSHA determines that this withdrawal has been made voluntarily and under no coercion by the named person, the withdrawal request will ordinarily be approved by OSHA.

Attorney Pasek also was concerned that § 1978.111(c) unduly restricted settlement attempts since the subsection requires the ALJ or the Secretary to affirm any portion of the findings or order with respect to which objection is withdrawn. OSHA's purpose in

promulgating this rule was to cover unilateral withdrawals of objections to findings and an order where a party has determined on his or her own that he or she no longer wishes to pursue an objection and it is not intended to cover a settlement agreement. The Secretary, in *Underwood v. Blue Springs Hatchery*, 87-STA-21, Order to Show Cause, issued September 23, 1987, has also ruled that § 1978.111(c) covers the withdrawal of complaint after the filing of objections. If the parties, including the Assistant Secretary, agree, a settlement which includes a withdrawal of objections without admitting liability may be reached without engaging the provisions in § 1978.111(c). Such a settlement falls not under § 1978.111(c) but rather § 1978.111(d), where settlements are to be tri-partite as required by the statute.

In § 1978.111(d), OSHA intended to require that all parties who have chosen to participate in the hearing agree to the settlement and that the Secretary of Labor approve such agreement. In § 1978.111(d) settlements, if the Assistant Secretary has chosen not to participate in the hearing, it was OSHA's intent that it should be unnecessary to seek his approval of the agreement. Instead, the settlement section requires that the agreement be submitted for approval by the Secretary or his ALJ. In that regard, the settlement would conform with the statutory mandate that proceedings under 405 may be terminated by a settlement agreement entered into by the Secretary of Labor, the complainant and the named person.

To the extent that § 1978.111(d) does not make this intention clear, OSHA has changed the rule to provide for a distinction between settlements at the investigative phase and those at the adjudicatory phase. New § 1978.111(d)(1) provides for investigative settlements where tri-partite agreement is reached with the Assistant Secretary's approval of a settlement between complainant and the named person. New § 1978.111(d)(2) provides for the procedure in adjudicatory settlements where the parties, including the Assistant Secretary if he or she has elected to participate, must submit the agreement for approval to the ALJ or the Secretary. New § 1978.111(d)(3) incorporates the language of old § 1978.111(d) which covered the Assistant Secretary's declination to prosecute a case if the complainant refused to accept a fair and equitable settlement. OSHA believes that the new language will clarify its

intent in the previously drafted section on settlements.

Arbitration or Other Proceedings

Attorney Towers and ATA commented that, at the investigative phase prior to issuance of findings and preliminary order, the Assistant Secretary should defer to the outcome of other proceedings. OSHA intended that the provisions at § 1978.112(c) apply to the Assistant Secretary as well as the Secretary's. OSHA's reading of the current language is that § 1978.112(c)'s use of the word "Secretary" included the Assistant Secretary within its ambit. See § 1978.101(b). However, OSHA recognized that confusion may occur as the section is presently drafted and accordingly, to eliminate this confusion, § 1978.112(c) shall be changed to include a reference to the Assistant Secretary. Under this provision, the Assistant Secretary, at the investigative phase, may defer to the outcome of proceedings conducted in another forum, including arbitration and grievance proceedings, if those proceedings dealt adequately with all factual issues, were fair, regular and free of procedural defects and the outcome of the proceedings was not repugnant to the purpose and policy of the Act. See *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955).

OSHA has made one other, insignificant change in § 1978.112. As was done in § 1978.102(d)(3), OSHA has deleted any case citations which support the rule. OSHA has deleted these references since the specific citations do not add anything significant to the rule and only serve to clutter the text of the subsections.

Errata

Several errors occurred in promulgation of the interim rule. These errors are related solely to incorrect cross references within the rule itself and one instance of incorrect editing.

1. In § 1978.102(f), the reference to 29 CFR 1978.102(b) is changed to 29 CFR 1978.103 (b) and (c).

2. In § 1978.108(a), the reference to § 1978.106(a) is changed to § 1978.107(a).

3. Section 1978.108(b), the reference to § 1978.106(b) is changed to 1978.107(b).

4. In § 1978.108(c), the reference to § 1978.106(c) is changed to 1978.107(c).

5. In § 1978.110(a), the reference to § 1978.108 is changed to 1978.109.

6. In § 1978.109(b) the word "discretionary" in last sentence of that paragraph has been deleted.

Unchanged Provisions

Many of the provisions in the interim rule received no comments. Those

provisions are adopted as originally promulgated.

Authority

This document was prepared under the direction of John A. Pendergrass, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210. These rules are issued pursuant to section 405 of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424, 49 U.S.C. 2301 *et seq.*) and Secretary of Labor's Order No. 9-83, 48 FR 35736, and No. 18-75, December 10, 1975, and with respect to the procedures dealing with the relationship between section 405 and section 11(c) procedures, pursuant to section 11(c)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660(c)(2)) and section 8(g)(2) of the OSH Act (29 U.S.C. 657(g)(2)).

Classification

This rule is procedural in character in that it implements the procedures for filing, investigating, litigating, and adjudicating complaints filed pursuant to the Surface Transportation Assistance Act of 1982. Therefore, the rule is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Regulatory Flexibility Act

The Department believes that the rule will have no "significant economic impact upon a substantial number of small entities" within the meaning of section 3(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 91 Stat. 1164 (5 U.S.C. 605(b)). The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. This conclusion is reached because the rule is procedural in character in that it implements the procedures established by the Surface Transportation Assistance Act of 1982 and thus no significant economic impact is expected with respect to small entities, nor with respect to other entities as well.

Accordingly, no regulatory flexibility analysis is required.

Paperwork Reduction Act

This rule is not subject to section 3504(h) of the Paperwork Reduction Act, since it does not contain a collection of information requirement.

List of Subjects in 29 CFR Part 1978

Employer-employee relations, Administrative practice and procedure, Labor, Occupational Safety and Health.

Signed at Washington, DC this 17th day of November, 1988.

John A. Pendergrass,
Assistant Secretary for Occupational Safety and Health.

For the reasons set out in the preamble, Title 29 is amended by revising Part 1978, Subpart B to read as follows:

PART 1978—RULES FOR IMPLEMENTING SECTION 405 OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982 (STAA)

Subpart A—Interpretive Rules [Reserved]

Subpart B—Rules of Procedure

Complaints, Investigations, Findings and Preliminary Orders

- Sec.
- 1978.100 Purpose and scope.
 - 1978.101 Definitions.
 - 1978.102 Filing of discrimination complaint.
 - 1978.103 Investigation.
 - 1978.104 Issuance of findings and preliminary orders.
 - 1978.105 Objections to the findings and the preliminary order.

Litigation

- 1978.106 Scope of rules; applicability of other rules; notice of hearing.
- 1978.107 Parties.
- 1978.108 Captions, titles of cases.
- 1978.109 Decision and orders.
- 1978.110 Judicial review.
- 1978.111 Withdrawal of section 405 complaints, objections, and findings; settlement.

Miscellaneous Provisions

- 1978.112 Arbitration or other proceedings.
- 1978.113 Judicial enforcement.
- 1978.114 Statutory time periods.
- 1978.115 Special circumstances; waiver of rules.

Authority: Sec. 405 of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424, 49 U.S.C. 2301 *et seq.*) and Secretary of Labor's Order No. 9-83, 48 FR 35736, and No. 18-75, December 10, 1975, and with respect to the procedures dealing with the relationship between sec. 405 and sec. 11(c) procedures, pursuant to sec. 11(c)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660(c)(2)) and sec. 8(g)(2) of the OSH Act (29 U.S.C. 657(g)(2)).

**Subpart A—Interpretive Rules—
(Reserved)**

Subpart B—Rules of Procedure

Complaints, Investigations, Findings and Preliminary Orders

§ 1978.100 Purpose and scope.

(a) This subpart implements the procedural aspects of section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. 2305, which provides for employee protection from discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters.

(b) Procedures are established by this subpart pursuant to the statutory provision set forth above for the expeditious handling of complaints of discrimination made by employees, or persons acting on their behalf. These rules, together with those rules set forth at 29 CFR Part 18, set forth the procedures for submission of complaints under section 405, investigations, issuance of findings and preliminary orders, objections thereto, litigation before administrative law judges, post-hearing administrative review, withdrawals and settlements, judicial review and enforcement, and deferral to other forums.

§ 1978.101 Definitions.

(a) "Act" means the Surface Transportation Assistance Act of 1982 (STAA) (49 U.S.C. 2301 *et seq.*).

(b) "Secretary" means Secretary of Labor or persons to whom authority under the Act has been delegated.

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

(d) "Employee" means (1) a driver of a commercial motor vehicle (including an independent contractor while in the course of personally operating a commercial motor vehicle); (2) a mechanic; (3) a freight handler; or (4) any individual other than an employer, who is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety, but such term does not include an employee of the United States, any State, or a political subdivision of a State who is acting within the course of such employment.

(e) "Commercial motor carrier" means a person who meets the definition of "motor carrier" found at 49 U.S.C. 10102(13) (Supp. 1987) and "motor private carrier" found at 49 U.S.C. 10102(16) (Supp. 1987).

(f) "OSHA" means the Occupational Safety and Health Administration.

(g) "Complainant" means the employee who filed a section 405 complaint or on whose behalf a complaint was filed.

(h) "Named person" means the person alleged to have violated section 405.

(i) "Person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons.

§ 1978.102 Filing of discrimination complaint.

(a) *Who may file.* An employee may file, or have filed by any person on the employee's behalf, a complaint alleging a violation of section 405.

(b) *Nature of filing.* No particular form of complaint is required.

(c) *Place of filing.* The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but filing with any OSHA officer or employee is sufficient. Addresses and telephone numbers for these officials are set forth in local directories.

(d) *Time for filing.* (1) Section 405(c)(1) provides that an employee who believes that he has been discriminated against in violation of section 405 (a) or (b) " * * * may, within one hundred and eighty days after such alleged violation occurs," file or have filed by any person on the employee's behalf a complaint with the Secretary.

(2) A major purpose of the 180-day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 180 days of an alleged violation will ordinarily be considered to be untimely.

(3) However, there are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, *e.g.*, where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period. The Assistant Secretary will not ordinarily investigate complaints which are determined to be untimely.

(e) *Relationship to section 11(c) complaints.* A complaint filed by an employee within thirty days of the alleged violation or otherwise timely filed pursuant to section 11(c) of the OSHA Act, which alleges discrimination

relating to safety or health, shall be deemed to be a complaint filed under both section 405 and section 11(c). Normal procedures for investigations under both sections will be followed, except as otherwise provided.

(f) Upon receipt of a valid complaint, OSHA shall notify the named person of the filing of the complaint by providing a copy of the complaint, sanitized to protect witness confidentiality if necessary, and shall also notify the named person of his or her rights under 29 CFR 1978.103 (b) and (c).

§ 1978.103 Investigation.

(a) OSHA shall investigate and gather data concerning the case as it deems appropriate.

(b) Within twenty days of his or her receipt of the complaint the named person may submit to OSHA a written statement and any affidavits or documents explaining or defending his or her position. Within the same twenty days the named person may request a meeting with OSHA to present his or her position. The meeting will be held before the issuance of any findings or preliminary order. At the meeting the named person may be accompanied by counsel and by any persons with information relating to the complaint, who may make statements concerning the case. At such meeting OSHA may present additional allegations of violations which may have been discovered in the course of its investigation.

(c) If, on the basis of information gathered under paragraphs (a) and (b) of this section, OSHA has reasonable cause to believe that the named person has violated the Act and that temporary reinstatement is warranted, prior to the issuance of findings and preliminary order as provided for in § 1978.104, OSHA shall again contact the named person to give him or her notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. The named person shall be given the opportunity to submit a written response, to meet with the investigators and to present statements from rebuttal witnesses. The named person shall present this rebuttal evidence within five days of OSHA's notification pursuant to this subsection, or as soon thereafter as OSHA and the named person can agree, if the interests of justice so require.

§ 1978.104 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the

investigation, the Assistant Secretary will issue, within sixty days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the named person or others have discriminated against the complainant in violation of section 405 (a) or (b). If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief prescribed in section 405(c)(2)(B). Such order will include, where appropriate, a requirement that the named person abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages. At the complainant's request the order may also assess against the named party the complainant's costs and expenses (including attorney's fees) reasonably incurred in filing the complaint.

(b) The findings and the preliminary order shall be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order shall inform the parties of the right to object to the findings and/or the order and shall give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary shall file with the Chief Administrative Law Judge, U.S. Department of Labor, the original complaint and a copy of the findings and/or order.

(c) Upon the issuance of findings that there is reasonable cause to believe that a violation has occurred, any pending section 11(c) complaint will be suspended until the section 405 proceeding is completed. When the section 405 proceeding is completed the Assistant Secretary will determine what action, if any, is appropriate on the section 11(c) complaint. If the Assistant Secretary's findings indicate that a violation has occurred, the Assistant Secretary shall make a separate determination as to whether section 11(c) has been violated.

§ 1978.105 Objections to the findings and the preliminary order.

(a) *Basic procedures.* Within thirty days of receipt of the findings or preliminary order the named person or the complainant, or both, may file objections to the findings or preliminary order providing relief or both and request a hearing on the record. The objection and request shall be in writing and shall state whether the objection is to the findings or the preliminary order

or both. Such objection shall also be considered a request for a hearing. The date of the postmark shall be considered to be the date of filing. Objections shall be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC and copies of the objections shall be mailed at the same time to the other parties of record, including the Assistant Secretary's designee who issued the findings and order.

(b) *Effective date of findings and preliminary order and failure to object.*

(1) The findings and the preliminary order shall be effective thirty days after the named person's receipt thereof, or on the compliance date set forth in the preliminary order, whichever is later, unless an objection to the findings or preliminary order has been timely filed. However, the portion of any preliminary order requiring reinstatement shall be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections thereto.

(2) If no timely objection is filed with respect to either the findings or the preliminary order, such findings or preliminary order, as the case may be, shall become final and not subject to judicial review.

§ 1978.106 Scope of rules; applicability of other rules; notice of hearing.

(a) Except as otherwise noted, hearings shall be conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges promulgated at 29 CFR Part 18, 48 FR 32538 (July 15, 1983), amended at 49 FR 2739 January 20, 1984. Hearings shall be conducted as hearings *de novo*.

(b) Upon receipt of an objection, the Chief Administrative Law Judge shall immediately assign the case to a judge who shall, within seven days following the receipt of the objection, notify the parties, by certified mail, of the day, time, and place of hearing. The hearing shall commence within 30 days of the filing of the objection, except upon a showing of good cause or unless otherwise agreed to by the parties.

(c) If both complainant and the named person object to the findings and/or order, the objections shall be consolidated and a single hearing shall be conducted. If the objections are not received simultaneously, the hearing shall commence within 30 days of the receipt of the later objection.

(d) At the time the hearing order issues, the judge may order the prosecuting party to file a prehearing statement of position, which shall

briefly set forth the issues involved in the proceeding and the remedy requested. Such prehearing statement shall be filed within three days of the receipt of the hearing order and shall be served on all parties by certified mail. Thereafter, within three days of receipt of the prosecuting party's prehearing statement, the other parties to the proceeding shall file prehearing statements of position.

§ 1978.107 Parties.

(a) In any case in which only the named person objects to the findings or the preliminary order the Assistant Secretary ordinarily shall be the prosecuting party. In such a case the complainant shall also be a party and may engage in discovery, present evidence or otherwise act as a party. The named person shall be the party-respondent. If, at any time after the named person files objections, the Assistant Secretary and complainant agree, the complainant may present the case to the judge. Under such circumstances the case will be handled as if it had arisen under paragraph (b) of this section.

(b) In any case in which only the complainant objects to findings that the complaint lacks merit, to the preliminary order, or to both, the complainant shall be the prosecuting party. The Assistant Secretary may as of right intervene as a party at any time in proceedings under this paragraph. The named person shall be the party-respondent.

(c) In any case in which both the complainant and the named person object to the preliminary order the Assistant Secretary shall be the prosecuting party. The complainant and the named person shall be the party-respondents. In any such case, if the named person also objected to the findings the Assistant Secretary, complainant, and named party shall each have the party status, rights, and responsibilities set forth in paragraph (a) of this section with respect to the findings.

§ 1978.108 Captions, titles of cases.

(a) Cases described in § 1978.107(a) shall be titled:

Assistant Secretary of Labor for Occupational Safety and Health, Prosecuting Party and (Name of Complainant), Complainant v. (Name of named person), Respondent.

(b) Cases described in § 1978.107(b) shall be titled:

(Name of complainant), Complainant v. (Name of named person), Respondent.

(c) Cases described in § 1978.107(c) shall be titled:

Assistant Secretary of Labor for Occupational Safety and Health, Prosecuting Party v. (Name of named person), Respondent.

(Name of complainant), Complainant v. (Name of named person), Respondent.

(d) The titles listed in paragraphs (a), (b), and (c) of this section shall appear at the left upper portion of the initial page of any pleading or document (other than exhibits) filed.

§ 1978.109 Decision and orders.

(a) *Administrative Law Judge decisions.* The administrative law judge shall issue a decision within 30 days after the close of the record. The close of the record shall occur no later than 30 days after the filing of the objection, except upon a showing of good cause or unless otherwise agreed to by the parties. For the purposes of the statute the issuance of the judge's decision shall be deemed the conclusion of the hearing. The decision shall contain appropriate findings, conclusions, and an order pertaining to the remedy which, among other things, may provide for reinstatement of a discharged employee and also may include an award of the complainant's costs and expenses (including attorney's fees) reasonably incurred in bringing and litigating the case, if the complainant's position has prevailed. The decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee. The decision shall be served upon all parties to the proceeding.

(b) The administrative law judge's decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision by the named person. All other portions of the judge's order are stayed pending review by the Secretary.

(c) *Final order.* (1) Within 120 days after issuance of the administrative law judge's decision and order, the Secretary shall issue a final decision and order based on the record and the decision and order of the administrative law judge.

(2) The parties may file with the Secretary briefs in support of or in opposition to the administrative law judge's decision and order within thirty days of the issuance of that decision unless the Secretary, upon notice to the parties, establishes a different briefing schedule.

(3) The findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive.

(4) Where the Secretary determines that the named party has not violated the law, the final order shall deny the complaint.

(5) The final decision and order of the Secretary shall be served upon all parties to the proceeding.

§ 1978.110 Judicial review.

(a) Within 60 days after the issuance of a final order under § 1978.109, any person adversely affected or aggrieved by such 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 person resided on the date of the violation (49 U.S.C. 2305(d)(1)).

(b) A final order of the Secretary shall not be subject to judicial review in any criminal or other civil proceedings (49 U.S.C. 2305(d)(2)).

(c) The record of a case, including the record of proceedings before the administrative law judge, shall be transmitted by the Secretary to the appropriate court pursuant to the rules of such court.

§ 1978.111 Withdrawal of section 405 complaints, objections, and findings; settlement.

(a) At any time prior to the filing of objections to the findings or preliminary order, an employee may withdraw his or her section 405 complaint by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary shall thereafter determine whether the withdrawal shall be approved. The Assistant Secretary shall notify the named person of the approval of any withdrawal.

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

(c) At any time before the findings or order become final, a party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Secretary. The judge or the Secretary, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.

(d)(1) *Investigative Settlements.* At anytime after the filing of a section 405 complaint by an employee and before the finding and/or order are objected to, or become a final order by operation of

law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.

(2) *Adjudicatory settlement.* 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 such settlement is approved by the Secretary of Labor or the ALJ. A copy of the settlement shall be filed with the ALJ or the Secretary as the case may be.

(3) If, under paragraph (d) (1) or (2) of this section the named person makes an offer to settle the case which the Assistant Secretary, when acting as the prosecuting party, deems to be a fair and equitable settlement of all matters at issue and the complainant refuses to accept the offer, the Assistant Secretary may decline to assume the role of prosecuting party as set forth in § 1978.107(a). In such circumstances, the Assistant Secretary shall immediately notify the complainant that his review of the settlement offer may cause the Assistant Secretary to decline the role of prosecuting party. After the Assistant Secretary has reviewed the offer and when he or she has decided to decline the role of prosecuting party, the Assistant Secretary shall immediately notify all parties of his decision in writing and, if the case is before the administrative law judge, or the Secretary on review, a copy of the notice shall be sent to the appropriate official. Upon receipt of the Assistant Secretary's notice, the parties shall assume the roles set forth in § 1978.107(b).

Miscellaneous Provisions

§ 1978.112 Arbitration or other proceedings.

(a) *General.* (1) An employee who files a complaint under section 405 of the Act may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board. The Secretary's jurisdiction to entertain section 405 complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The Secretary may proceed with the investigation and the issuance of findings and orders regardless of the pendency of other proceedings.

(2) However, the Secretary also recognizes the national policy favoring voluntary resolution of disputes under

procedures in collective bargaining agreements. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to section 405 complaints.

(3) Where complainant is in fact pursuing remedies other than those provided by section 405, the Secretary may, in his or her discretion, postpone a determination of the section 405 complaint and defer to the results of such proceedings.

(b) *Postponement of determination.* When a complaint is under investigation pursuant to § 1978.103, postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under section 405 and those proceedings are not likely to violate rights guaranteed by section 405. The factual issues in such proceedings must be substantially the same as those raised by a section 405 complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination.

(c) *Deferral to outcome of other proceedings.* A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-by-case basis, after careful scrutiny of all available information. Before the Assistant Secretary or the Secretary defers to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the section 405 complaint.

§ 1978.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary 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 occur.

§ 1978.114 Statutory time periods.

The time requirements imposed on the Secretary by these regulations are directory in nature. While every effort will be made to meet these requirements, there may be instances when it is not possible to meet these requirements. Failure to meet these

requirements does not invalidate any action by the Assistant Secretary or Secretary under section 405.

§ 1978.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the judge or the Secretary on review may, upon application, after three days notice to all parties and intervenors, waive any rule or issue such orders as justice or the administration of section 405 requires.

[FR Doc. 88-27070 Filed 11-23-88; 8:45 am]

BILLING CODE 4510-26-M

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. 80515-8209]

Requests for Identifiable Records

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: This final rule sets forth changes that the Patent and Trademark Office (PTO) is making to the rules governing requests for records not disclosed to the public as part of the regular informational activity of the PTO: The prior rule sets out the PTO Freedom of Information Act (FOIA) procedures. The final rule updates these procedures and specifies that FOIA requests will be processed in accordance with Department of Commerce regulations contained in Part 4 of 15 CFR (Public Information).

EFFECTIVE DATE: December 30, 1988.

FOR FURTHER INFORMATION CONTACT: Albin F. Drost by telephone at (703) 557-4035 or by mail marked to his attention and addressed to Box 8, Commissioner of Patents and Trademarks, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: As presently written, 37 CFR 1.15 describes procedures for obtaining documents under the Freedom of Information Act that have been superseded. The purpose of this rule change is to bring the PTO FOIA procedures into conformity with the Department of Commerce FOIA rules. The final rule directly advises requesters that the PTO will follow the Department of Commerce rules for disclosure of information under FOIA.

A notice of proposed rulemaking was published on July 19, 1988 (53 FR 27177). Interested parties were requested to submit written comments on or before

September 20, 1988. No comments were received.

Other considerations

This rule change will not have a significant impact on the quality of the human environment or the conservation of energy resources.

This rule change is in conformity with the requirements of the Regulatory Flexibility Act (Pub. L. 96-354), Executive Orders 12291 and 12612, and the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

The General Counsel of the Department of Commerce has certified that the rule change will not have a significant adverse economic impact on a substantial number of small entities (Regulatory Flexibility Act, Pub. L. 96-354) because no increase in fees or paperwork should result from this rule change.

The Patent and Trademark Office has determined that this rule change is not a major rule under Executive Order 12991. The annual effect to the economy will be less than \$100 million. There will be no major increase in costs or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions. There will be no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The PTO has also determined that this notice has no federalism implications affecting the relationship between the National Government and the states as outlined in Executive Order 12612.

The rule change will not impose a burden under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, since no record keeping or reporting requirement within the coverage of the Act are placed upon the public.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of information, Records.

For the reasons set out in the preamble and under the authority granted to the Commissioner of Patents and Trademarks by 35 U.S.C. 6, the Patent and Trademark Office amends Title 37 of the Code of Federal Regulations as set forth below: