

U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

WHISTLEBLOWER PROTECTION ADVISORY COMMITTEE
MEETING

Tuesday, March 11, 2014

Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, D.C.

Diversified Reporting Services, Inc.
(202) 467-9200

WPAC MEMBERS:

PUBLIC REPRESENTATIVES:

EMILY SPIELER, Northeastern University School of Law
JONATHAN BROCK, University of Washington
RICHARD MOBERLY, University of Nebraska College of Law

MANAGEMENT REPRESENTATIVES:

DAVID EHERTS, Sikorsky Aircraft Corporation
GREGORY KEATING, Littler Mendelson P.C.
MARCIA NARINE, St. Thomas University School of Law

LABOR REPRESENTATIVES:

AVA BARBOUR, International Unions, UAW
BILLIE GARDE, ESQ., Clifford & Garde LLP
NANCY LESSIN, Steelworkers' Charitable and Educational
Organization
ERIC FRUMIN, Change to Win

STATE PLAN REPRESENTATIVES:

CHRISTINE DOUGHERTY, State of Minnesota

FEDERAL AGENCY REPRESENTATIVES:

RINA TUCKER HARRIS, Consumer Financial Protection
Bureau
ADAM MILES, Office of Special Counsel

OSHA STAFF:

DAVID MICHAELS

ANTHONY ROSA

RICHARD MENDELSON

MEGHAN SMITH

ROBERT SWICK

LAURA SEEMAN

KATELYN WENDELL

ELLIOTT GOULD

LAURA GIVENS

GAIL SWANN

BRIAN BROECKER

PHIL BLAKOTO

KEN ATHA

YOUNG WHEELER

ALSO PRESENT:

ED BAIRD, DOL Solicitors Office
MEGAN GUENTHER, DOL Solicitors Office
BOB SWAIN, DOL Solicitors Office
ANA LAURA BENNETT, DOL Solicitors Office
MARK WINNER, DOL Solicitors Office
DEREK BAXTER, DOL Solicitors Office, MSHA
CHARLIE LORD, DOL Solicitors Office, MSHA
LAFE SOLOMON, National Labor Relations Board
ANDREA HYATT, BNSF Railway
SID HOLCOMB, Senate Help
JASON ZUCKERMAN, ESQ.
JOSEPH SIRBAK, ESQ., Buchanan Ingersoll & Rooney
KATHLEEN HUGHES, ESQ., Union Pacific
SUSAN LINDQUIST, Union Pacific
HILARY BENSON, Congressional Office of Compliance
RICHARD RENNER, ESQ.
SARAH ZIELINSKI, F&H Solutions Group
SHANNA DEVINE, Government Accountability Project
PETER COCHRAN, ESQ., Morgan Lewis
RON JOHNSON, ESQ., Jones Day
DAVE BROWN, BLET
VINCE VERNA, BLET/Teamsters
TOM HEBERT, BLET
DAVE HARB, BLET
ORLANDO PENROD, BLET
BRUCE WATSON, Bloomberg writer
CONNIE VALKAN, ESQ., Canadian National
LARRY MANN, ESQ., Alper & Mann
RICK INCLIMA, Brotherhood of Maintenance of Way
Employees Division, IBT
VINCE MURRAY, FAA
BARBARA VINO, FAA
ADAM MILES, Office of Special Counsel

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1 P R O C E E D I N G S

2 (8:31 a.m.)

3 WELCOME

4 MS. SPIELER: Good morning. My name is Emily
5 Spieler. I'm the Chair of the Whistleblower Protection
6 Advisory Committee, which as you know is a Federal
7 advisory committee to the Department of Labor and OSHA.

8 I'd like to first ask Rob Swick from the
9 Directorate to just give us a few logistical
10 instructions.

11 MR. SWICK: Thank you, Emily. Good morning,
12 everyone. I'm Rob Swick from the Directorate of
13 Whistleblower Protection Programs. It is nice to see
14 you here this morning. We thank you for your service.

15 Real quickly, we have two kind of conditions
16 with regard to this building status, if there is a
17 safety event, there is something called "a shelter in
18 place," and there is something called "evacuation."

19 In shelter in place, we're going to stay right
20 here. If there is an evacuation, the nearest exit is
21 right there, we will go out that door in single file
22 and exit the building.

1 The bathrooms are located on either side of
2 this space. There is a cafeteria on the sixth floor
3 that serves pretty good food, and the snack bar is on
4 the fourth floor, and I dare you to find it, and
5 actually a soda machine that one of you went looking
6 for yesterday.

7 if you need anything, just contact me or
8 Meghan Smith or any of the other OSHA staff in the
9 back. Thank you.

10 MS. SPIELER: Thank you. This is the second
11 meeting of this Advisory Committee. It was originally
12 chartered in June of 2012. Our first meeting was in
13 January, about 14 months ago.

14 As the members of the Committee know, we, like
15 many other advisory committees, got caught in the
16 challenge of sequestration. This is the first time we
17 have been able to meet again.

18 I will talk in a minute about what we have
19 been doing in the interim but first, just a reminder,
20 the charter for this Committee charges us as follows:
21 The WPAC advises the Secretary of Labor and the
22 Assistant Secretary of Labor for OSHA on ways to

1 improve the fairness, efficiency, and transparency of
2 OSHA's whistleblower investigations.

3 Then there is a long list of specifics
4 regarding what we should be helping the Department do,
5 including better customer service, improvement of
6 investigatory and enforcement processes, improvement of
7 regulations, cooperative activities with other Federal
8 agencies and other matters of fairness, efficiency and
9 transparency, as identified by the Secretary or
10 Assistant Secretary.

11 Our job in the end is to help to improve the
12 situation for whistleblowers with the long term goal of
13 allowing people to come forward regarding their
14 concerns without any fear of retaliation, and when
15 retaliation occurs, to be able to rely on OSHA to help
16 them.

17 The Department as a whole and OSHA in
18 particular have taken this responsibility to improve
19 the investigation of whistleblower cases very
20 seriously, and I'm sure Dr. Michaels will tell us more
21 about that.

22 It is clear from the commitment of new

1 resources, the establishment of the Directorate in the
2 Central Office, the continuing focus on improving the
3 investigatory process at the regional level, and the
4 responses to the GAO and IG reports, that the staff
5 within the Department of Labor has taken this challenge
6 very seriously.

7 In fact, in his budget, the President has
8 proposed a significant increase for the whistleblower
9 program, underscoring the importance of the program for
10 OSHA and the Department of Labor.

11 Our role, the role of this Committee, is to
12 help this commitment to continuous improvement by
13 bringing shareholders formally into the conversation
14 with ideas that will help the agency achieve shared
15 goals.

16 To that end and when we were faced with the
17 sequestration problem, Dr. Michaels and I worked
18 together with the Directorate staff to set up three
19 work groups, focusing on issues in the transportation
20 industry, on defining best practices across industries,
21 and specifically on Section 11(c), the OSHA section on
22 retaliation.

1 The Chairs of these work groups are
2 respectively Eric Frumin, Jonathan Brock, and David
3 Eherts.

4 The work groups were each given a charge by
5 Dr. Michaels. They have been working independently
6 from the meetings of the full Committee, almost
7 exclusively telephonically, but transparently. These
8 meetings have been noticed publicly and the minutes are
9 being posted.

10 Today, after introductions and welcomes and a
11 report from the Interim Director, Rich Mendelson, we
12 have allocated 90 minutes for the report and discussion
13 from each work group. Part of that is designed for the
14 full Committee to hear the work in progress of all the
15 work groups and also for the full Committee to give
16 input into the work groups regarding issues they think
17 the work groups should be taking up, in addition to
18 whatever they report.

19 Later this afternoon we will hear reports from
20 three agencies outside OSHA that deal with claims of
21 retaliation, the National Labor Relations Board, the
22 Mine Safety and Health Administration, and the FAA, and

1 later, there will be time for public comments, and we
2 will discuss next steps for the Committee.

3 Before we go ahead, what I'd like to do is
4 have everyone introduce themselves, and then I will be
5 turning the mike over to Dr. Michaels.

6 Before I do that, I want to publicly thank the
7 staff of the Directorate and of the front office of
8 OSHA. I know this has been a challenge to have an
9 advisory committee at the same time you are really
10 trying to address programmatic issues that are deeply
11 important to people around the country.

12 We know these work groups take time, and we
13 thank you for all the staffing that you have done, both
14 the Interim Director and the Deputy, and also the
15 staff. I particularly would like to thank Meghan Smith
16 who has been my contact at the staff level.

17 Going around the room, I'm going to ask the
18 members of the Committee first to introduce themselves,
19 and then Dr. Michaels and the staff, and then everyone
20 else in the room. If you could just say a sentence
21 about your affiliation so that the people who don't
22 know you can understand the make up of the Committee.

1 MR. BROCK: I'm Jonathan Brock, Emeritus
2 Professor at the University of Washington here as a
3 public member. I chair something called the Hanford
4 Concerns Council, which is a special mediation
5 mechanism for whistleblowers at the Hanford nuclear
6 site.

7 MR. BAIRD: My name is Ed Baird and I'm not a
8 member of the Committee. I am with the Labor
9 Solicitors Office. I'm counsel to the Committee, so my
10 job is to make sure the Committee stays on the right
11 side of all the applicable laws, including FACA. You
12 might see me jump in once in a while, and I will be
13 marking things, documents, reports, for the record, so
14 you might hear me do that once in a while.

15 MR. KEATING: My name is Greg Keating. I am a
16 management representative to the Committee, one of
17 them. I am also a shareholder at the law firm of
18 Littler Mendelson, and I chair the Whistleblower and
19 Retaliation Practice Group there. Glad to be here.

20 MS. DOUGHERTY: Christine Dougherty. I am a
21 principal discrimination investigator for the State of
22 Minnesota, and I am the one representative for the OSHA

1 state plan states.

2 MS. GARDE: I'm Billie Garde. I'm a partner
3 in the law firm of Clifford & Garde, and I'm an
4 employee representative.

5 MS. BARBOUR: I'm Ava Barbour. I am an
6 attorney at the International Union UAW, and I'm a
7 labor representative on the Committee.

8 MS. HARRIS: Good morning. I'm Rina Tucker
9 Harris. I work for the Consumer Financial Protection
10 Bureau. I'm an enforcement attorney. I'm a Federal
11 agency representative.

12 MR. MENDELSON: Good morning. My name is
13 Richard Mendelson. I'm the Deputy Regional
14 Administrator for OSHA Region II, and I'm the Acting
15 Director for the Directorate of Whistleblower
16 Protection Programs.

17 MR. ROSA: Good morning. I'm Anthony Rosa.
18 I'm the Assistant Regional Administrator for the
19 Whistleblower Protection Program in Region IV in
20 Atlanta, and currently the Acting Deputy Director for
21 the Directorate of Whistleblower Protection Programs
22 here in Washington.

1 MR. EHERTS: I'm Dave Eherts. I'm Chief of
2 Safety at Sikorsky Aircraft and an Adjunct Professor at
3 New York Medical College, and I head the 11(c)
4 Subcommittee.

5 MS. NARINE: Marcia Narine, former Deputy
6 General Counsel and Chief Compliance Officer at Ryder
7 Transportation Logistics, now Assistant Professor of
8 Law at St. Thomas University in Miami. I'm on the
9 Transportation Subcommittee and the Best Practices
10 Subcommittee, a management representative.

11 MS. LESSIN: I'm Nancy Lessin. I'm senior
12 staff for Strategic Initiatives at the United
13 Steelworkers Union's Tony Mazzocchi Center. I've
14 worked in the field of occupational safety and health
15 for 35 years and began dealing with whistleblower
16 issues in 1979.

17 MR. MOBERLY: I'm Richard Moberly. I'm a
18 Professor of Law at University of Nebraska College of
19 Law and Associate Dean for Faculty, and I'm here as a
20 public representative.

21 MS. LESSIN: I'm a labor representative.

22 MR. MILES: I'm Adam Miles with the Office of

1 Special Counsel. I'm the Deputy Special Counsel for
2 Policy and Government Affairs, and I'm a Federal agency
3 representative.

4 MR. MICHAELS: I'm David Michaels. I'm
5 Assistant Secretary of Labor for OSHA.

6 MR. WATSON: I'm Bruce Watson, a writer at
7 Bloomberg, the Occupational Safety and Health Report.

8 MS. SMITH: Meghan Smith, Directorate of
9 Whistleblower Protection Programs.

10 MS. SWANN: Gail Swann, management analyst,
11 Directorate of Whistleblower Protection Programs.

12 MS. WENDELL: Katelyn Wendell with the
13 Directorate of Whistleblower Protection Programs.

14 MS. SEEMAN: Laura Seeman, Directorate of
15 Whistleblower Protection Programs.

16 MR. BROECKER: Brian Broecker, also with DWPP.

17 MR. BLAKOTO: Phil Blakoto, DWPP.

18 MS. GIVENS: Laura Givens, also DWPP.

19 MR. WHEELER: Good morning. Young Wheeler,
20 Office of the Assistant Secretary here in Washington.

21 MR. GOULD: Elliot Gould, I'm a program
22 analyst with the Directorate of Whistleblower

1 Protection Programs.

2 MS. LINDQUIST: Susan Lindquist, Union
3 Pacific.

4 MS. BENNETT: Ana Laura Bennett, Solicitors
5 Office here at the Department of Labor.

6 MR. SOLOMON: I'm Lafe Solomon. I'm on detail
7 from National Labor Relations Board to the Solicitors
8 Office.

9 MR. ATHA: Good morning, Ken Atha, Regional
10 Administrator for OSHA in San Francisco, Region IX, and
11 also a member of the Executive Steering Committee for
12 Whistleblowers.

13 MR. RENNER: Richard Renner, Attorney-at-Law.

14 MR. WINNER: Mark Winner, Solicitors Office,
15 Division of Occupational Safety and Health.

16 MR. SWICK: Thank you.

17 MS. SPIELER: Thank you. Please note before I
18 turn this over to Dr. Michaels that this is a public
19 committee. The law requires and we are committed to a
20 very fully transparent process. There are detailed
21 minutes prepared for all of the work group meetings
22 that are being posted on the Whistleblowers.gov

1 website.

2 If people have concerns about the issues of
3 transparency, you should get in touch with me or with
4 Ed Baird or with Rich Mendelson at this point. As a
5 committee, we are very committed to the notion that the
6 more we can provide a pathway for discussion about
7 policy level issues, the better off we will all be.

8 With the caveat, of course, that individual
9 complaints are not something that are within the
10 purview of the Committee, and although we have received
11 some correspondence from individual complainants, we
12 always simply forward those onto the staff to deal with
13 appropriately.

14 Thank you, and I'm turning this over now to
15 Dr. Michaels.

16 WELCOME FROM ASSISTANT SECRETARY DAVID MICHAELS

17 MR. MICHAELS: Thank you, Chairman Spieler.

18 MS. SPIELER: One minute. Is Eric on the
19 phone?

20 MR. SWICK: Not yet.

21 MS. SPIELER: Let me just note that one member
22 of the Committee who actually chairs one of the work

1 groups, Eric Frumin, is ill and could not come to
2 Washington, but will be on the phone, and certainly for
3 the presentation for his work group. Okay.

4 MR. MICHAELS: Thank you. Good morning. It's
5 lovely to see all of you. First, let me begin by
6 thanking you for giving us these two days and all the
7 work you have done up to this point. I know people
8 have spent a tremendous amount of time, and it goes
9 without saying this is unpaid. We are grateful and the
10 Obama Administration is grateful that you give us this
11 time, your wisdom and expertise.

12 I don't need to remind this group of the
13 importance of the mission of this Committee and also
14 the whistleblower protection programs.

15 In terms of worker safety, employers report
16 about three million injuries a year. We know from
17 various studies done from the Bureau of Labor
18 Statistics that is an under estimate. There could be
19 four million or five million workers who are injured on
20 the job every year, of course, about 4,000 of them are
21 killed, about 12 a day.

22 OSHA's mission is to prevent those injuries

1 from occurring, to prevent those fatalities. Workers
2 in workplaces play a very important role. We are a
3 small agency. We can't be in many workplaces at any
4 one time. We do about 40,000 inspections a year, our
5 state partners do 60,000 inspections a year. There are
6 between seven and eight million workplaces covering 130
7 million workers.

8 The way the OSHA law was written is to say
9 workers are the eyes and ears of OSHA. Workers have to
10 be able to raise concerns when they see them, to make
11 sure they are safe and their co-workers are safe, and
12 for that to happen successfully, they have to do that
13 without fear of retaliation.

14 OSHA's job among other things is to protect
15 them from retaliation, but we have limited abilities to
16 do that, so the charge we have and the charge you have
17 is how do we encourage workplaces to be designed and
18 function in a way that workers can raise concerns about
19 safety without fear of retaliation.

20 I know that is something that we are all
21 grappling with and something you are helping us with.

22 Of course, our Whistleblower Protection Office

1 and this Committee goes far beyond worker safety. We
2 have been given responsibility to investigate concerns
3 about fear of retaliation, concerns about retaliation,
4 under 21 additional statutes that protect not just
5 workers but the health, safety and well being of all
6 Americans.

7 Those statutes include protecting workers who
8 report violations under various airline, commercial
9 motor carrier, consumer products, environmental,
10 financial, food safety, health care, nuclear, pipeline,
11 public transportation and maritime laws. Quite a wide
12 scope that we have.

13 We know under all these laws, either health,
14 safety or well being, sometimes the financial well
15 being, of individuals can be affected by activities
16 that take place in these workplaces, and we want to
17 encourage workers to be able to raise concerns with
18 either their employer or with the appropriate Federal
19 agency.

20 To ensure that workers do have this right,
21 this voice in the workplace, we have really tried to
22 strengthen our Whistleblower Protection Program. As

1 you heard from Chairman Spieler, we have increased our
2 staff. We have elevated the office to its own
3 Directorate. We have established its own budget.
4 Before this Administration came in, it didn't have an
5 individual budget. We made the program a priority
6 within the Labor Department.

7 However, it has been a very challenging year
8 since we last met. As you heard, the sequestration had
9 a big impact on us and it impacted our work in the
10 field and hampered the ability of this Committee to
11 meet again during the last fiscal year.

12 We had the Government shutdown, which also had
13 a very impact on our work, both nationally and in the
14 field.

15 Additionally, we have had some significant
16 personnel changes. I'm very pleased that I think we
17 have a very strong active leadership right now. I want
18 to thank Rich Mendelson, who is coming from New York,
19 and Anthony Rosa, who is coming from Atlanta, to be the
20 acting heads of the program.

21 I also want to thank Bill Donovan. Many of
22 you may have dealt with Bill, who is the previous

1 Acting Director. He came in from Chicago and did an
2 excellent job.

3 The three of them brought a tremendous amount
4 of field experience which has been very useful for us
5 at the National Office to understand how we can work
6 most effectively across the country.

7 I also want to thank Ken Atha whom you met
8 briefly, who is part of our Executive Steering
9 Committee, which is a structure we set up to help
10 coordinate activities across the country.

11 Obviously our concern is doing our work
12 effectively, efficiently and consistently across the
13 country. Having an executive structure involving some
14 of our senior leadership here in the National Office
15 and from around the country that oversees the program,
16 I think, will be effective in making sure we do that.

17 We are also very fortunate to have as our
18 Secretary of Labor, Tom Perez, who has now been the
19 Secretary of Labor for a little more than half a year.

20 He has made very clear his commitment to whistleblower
21 protection from the very beginning of his term here at
22 the Labor Department and has been very supportive of

1 this program, and is working with us on the same issues
2 you are working on, to figure out ways to improve our
3 work.

4 Through all these changes and the challenges
5 of the budget, I think we have had a very successful
6 year. I will get to some of the successes but it is
7 worth noting, as Chairman Spieler noted, that we have
8 seen significant budget increases. This is the only
9 agency I'm familiar with that has seen budget increases
10 anything like this in the last few years.

11 Our fiscal year 2014 budget, the year we are
12 in now, the budget of this office, Whistleblower
13 Protections Directorate, is \$17 million with 131 FTEs,
14 full time equivalents. That is an increase of 16 FTEs
15 and over \$1 million over the previous fiscal year. It
16 is an 12 percent increase in staff and a slightly lower
17 increase in budget.

18 The President's budget, which was just
19 released last week, requests an increase from \$17
20 million to \$21.2 million, an increase from 131 FTEs to
21 158 FTEs. That is an increase of over \$4 million and
22 an increase of 27 FTEs over our current year. It's a

1 20 percent increase in budget and 17 percent in FTEs.

2 We are very grateful. This program has very
3 strong bipartisan support in Congress. We enjoy the
4 bipartisan recognition of the importance of this
5 program, and certainly your work is a piece of that.

6 In the last year, among our successes, first
7 of all, we have helped award more than \$24 million to
8 whistleblowers across the country last year. We also
9 launched a new on line complaint form for workers who
10 face retaliation.

11 In the category of no good deed goes
12 unpunished, this will of course mean we will get more
13 complaints. In fact, we are already seeing them.
14 That's okay. We just have to figure out how to do our
15 work more efficiently and better. We certainly do not
16 want to discourage people from raising these
17 allegations.

18 Some of the allegations may not be well
19 founded and we may have to dismiss them, and that is
20 more work for us, but people should feel they have that
21 voice. We think the on line complaint form will help
22 us get there.

1 We have had several very significant cases of
2 interest. One of the most notable ones was last month,
3 we filed a case against AT&T on behalf of 13 workers
4 who were suspended for reporting workplace injuries.

5 Our complaint alleges that in 13 separate
6 instances, AT&T employees were disciplined and given
7 unpaid suspensions for reporting injuries that occurred
8 on the job.

9 We investigated and found that their
10 suspensions were the result of workers reporting their
11 injuries. This was taking place mostly in Ohio, but we
12 have cases elsewhere. Our Regional Solicitors Office
13 in Cleveland is actually litigating this case right
14 now.

15 We think that sends a very important message
16 out, that workers shouldn't be suspended or otherwise
17 suspended for reporting injuries. The impact of doing
18 that discourages people from reporting injuries. If
19 injuries aren't reported, they can't be investigated.
20 If they are not investigated, then future injuries
21 can't be prevented.

22 We will see where those cases go and we will

1 certainly keep you informed.

2 Last November, we ordered Gaines Motor Lines
3 and two individuals there to compensate four former
4 truck drivers who were fired in violation of the
5 whistleblower protection provisions of the Surface
6 Transportation Assistance Act.

7 In that case, we ordered payment in back
8 wages, interest and compensatory and punitive damages.

9 We have a number of cases like that. This is
10 just one example. We have had a number of large cases,
11 which I think also send a very important message.

12 We also won a very important Court case last
13 year. We received a complaint from a teacher, actually
14 a theater arts technician, at a school in Florida, who
15 raised concerns about electrical hazards. This was in
16 Region IV. That teacher was retaliated against. He
17 was terminated by a charter school for raising those
18 concerns. That's what we found in our investigation.

19 We issued an 11(c) violation. The school
20 obviously disagreed. We went to Court. We had a
21 trial. The verdict was calling for the school and the
22 principal to pay the worker \$55,000 in back wages and

1 \$120,000 in punitive damages.

2 We think those cases also send a very
3 important message.

4 I believe our program is strengthening as a
5 result of the advice we are getting from the
6 interactions with you. I know yesterday you had a very
7 successful series of meetings, and we are already
8 getting good feedback and ideas that come from what you
9 are doing.

10 We need your help. We need your advice. We
11 know that through this, we can improve our work and
12 strengthen the protections for workers across the
13 country. I can't tell you how appreciative I am
14 personally about the time you have put into this. I'm
15 very grateful.

16 Let me thank all of you. I want to thank
17 specifically, in addition to Chairman Spieler, who puts
18 a tremendous amount of time into this, I don't know if
19 she had any idea how much time this would take her, but
20 we're grateful for it -- the three Chairs, Dave Eherts
21 of the 11(c) Work Group, Eric Frumin, the
22 Transportation Industry Work Group, and Jon Brock, Best

1 Practices and Corporate Culture.

2 These three groups and your work on them is
3 very important to us. I really can't underscore that
4 enough.

5 11(c) remains our greatest challenge. The
6 majority of our cases come from the 11(c) program. We
7 are very eager to hear your thoughts and
8 recommendations on how we can have a larger impact
9 protecting workers from retaliation after they raise
10 their health and safety concerns.

11 We have a long way to go in making this
12 program function well. We really are looking to your
13 advice on ways we can improve this program.

14 After 11(c), our largest volume of cases come
15 from the transportation industry. There are a lot of
16 reasons for that. The laws in the area of
17 transportation are quite different than 11(c), which
18 gives us an opportunity to look at things differently,
19 to identify different approaches.

20 Of course, these issues in transportation in
21 particular impact not just workers but also the public,
22 the driving public, the flying public. I think your

1 work in that area is also vitally important and I'm
2 grateful you have taken that on.

3 Finally, and in some ways the broadest
4 challenge is really around best practices and corporate
5 culture. This is an area that OSHA has not worked in
6 in the whistleblower framework at all.

7 When we think about worker safety, we talk
8 about safety health management systems, we talk about
9 injury and illness prevention programs. We know there
10 are approaches that can be implemented by employers in
11 workplaces that will reduce injuries. They are tried
12 and true methods. They are effective in ensuring
13 workers are safe.

14 (Mr. Frumin joining meeting telephonically.)

15 MR. MICHAELS: Eric, welcome.

16 MR. FRUMIN: Hi. Sorry I'm late.

17 MR. MICHAELS: No problem. I'm just wrapping
18 up my talk, and I haven't said anything that you don't
19 already know.

20 When we think about how to help an employer
21 where there is a high injury rate, reduce injuries,
22 prevent fatalities, we can tell them here is the sort

1 of program you should implement. Here is your injury
2 and illness prevention program. This works. We have
3 recognition programs, our voluntary participation
4 programs, our shop program for small employers. Get
5 involved in one of these programs.

6 We know you will reduce injuries. You will
7 actually become a more efficient company, a more
8 productive company, and you will succeed because you
9 manage for safety. There is lots of evidence for that.

10 What we haven't done is consider how to do
11 that sort of work, if it can be done, in the realm of
12 whistleblower protection and anti-retaliation, and to
13 develop what are the programs that will be most
14 effective that we can tell employers do this, and you
15 will hear the concerns. Workers will feel comfortable
16 raising those concerns, and I would like to know
17 whether that would help the employer as well. I
18 believe it does, but I haven't seen the empirical
19 evidence.

20 We are embarking on a whole new area here, and
21 I'm looking forward to your input on this.

22 Right now, all we can do for employers is say

1 don't do this. What you are doing is against the law.

2 While obviously that is a very important message, we
3 are not going to walk back from that message, I think
4 we want to offer a positive message as well, say here
5 are things you can do that will be effective, that will
6 mean we will not have to invest in you, we don't have
7 to take you to Court, we will save you these fines and
8 make you a better company.

9 We are looking for your thoughts on how to do
10 that, are there programs that really do work, how do we
11 evaluate them. Are there benchmarks we can look at.
12 It's very exciting.

13 None of this is going to be easy. We didn't
14 choose you because we thought any of you were
15 pushover's, we think this will be a very interesting
16 and important discussion. You come from very different
17 perspectives. We expect to see differences. We leave
18 it to you to figure out how you want to resolve them,
19 and maybe they can't be resolved, we hope they can be.

20 We think we have a fabulous group of advisors
21 here who bring wisdom from many different parts of the
22 country, from industries, from backgrounds, from

1 training. I am confident that together we can develop
2 ways to help us move forward, and this will be
3 effective not just for OSHA but it will be effective
4 for the workers, for the employers, and for the people
5 of the United States of America.

6 With that very modest charge --

7 (Laughter.)

8 MR. MICHAELS: I wish you best of luck, and I
9 look forward to your deliberations today and into the
10 future.

11 MS. SPIELER: If anyone has any questions for
12 you, would you be willing to take them?

13 MR. MICHAELS: Certainly.

14 MS. LESSIN: Nancy Lessin. Thank you, David,
15 for all of your work. I have just a couple questions.

16 It appears you are entering into the
17 possibility of an MOU now with the Department of
18 Transportation.

19 MR. MICHAELS: Actually, several. We have a
20 Memorandum of Understanding with the FAA, and our plan
21 is to -- we are actually in discussions with great
22 progress with other agencies within the Department of

1 Transportation, because the laws are different and the
2 requirements are different between say the motor
3 carriers and railroad, for example. Yes, we are moving
4 toward several MOUs.

5 MS. LESSIN: You have one already, is this
6 true, with FRA?

7 MR. MICHAELS: I think we have one with FRA
8 and FAA.

9 MS. LESSIN: Can you talk a little bit about
10 what you think has changed since the MOU? I'm asking
11 this because I've spent a lot of time with those who
12 work in the rail industry, all different carriers,
13 different Unions, but I'm hearing the same story, that
14 things actually are not changing, that the kind of
15 practices that they have been experiencing for years,
16 which is brutal, injury discipline, when workers report
17 injuries is still happening.

18 As you enter into these other Memorandums of
19 Understanding, is there an evaluation with the ones
20 that have existed and what you think has changed and
21 what hasn't changed and why. Has that been looked at
22 in terms of what was actually produced out of these

1 relationships?

2 MR. MICHAELS: I may turn this over to our
3 staff who are more deeply involved. My understanding
4 is the MOUs are primarily information sharing. For us
5 to do the investigations, we need certain information.

6 We are eager to share the information that we gather
7 back with the agency.

8 The MOUs don't change agency policy. The FRA
9 doesn't ask us to change our policy and we don't ask to
10 change the FRA's policy.

11 In terms of evaluating the impact of the MOU
12 on what's going on outside the agencies, I'm not sure
13 that is the focus of the MOUs.

14 It is worth a discussion and perhaps you want
15 to give us some advice whether we should think about a
16 different MOU. That would certainly be worth involving
17 those other agencies as well in those discussions.

18 MS. SPIELER: Let me intervene and just
19 suggest that maybe if it is specifically about
20 transportation, we can take it to the Transportation
21 Work Group, and perhaps the staff could bring people up
22 to speed on what is and isn't contained in MOUs and

1 whether there is advice from the Committee that might
2 be useful.

3 MS. LESSIN: The other question I have --
4 certainly tracking the cases, recent cases, with AT&T,
5 and other cases under the FRSA, and I know there have
6 been in several of the statutes some large awards -- my
7 understanding is a lot of what we have seen in the
8 press release doesn't actually end up in the pockets of
9 workers who have been retaliated against because there
10 are appeals through the Court system.

11 Is there anything that tracks how many years
12 it takes to actually win a case and end up getting to
13 the workers who have been retaliated against and what
14 those awards actually end up being?

15 I'm asking this because the issue of the kind
16 of retaliation that we see in some sectors, and rail
17 would be among them, is a chilling effect that happens
18 when workers get fired or disciplined.

19 There is a momentary blip when there is a
20 great press release with this award, but I think people
21 in these industries, the workers, are well aware there
22 is another story.

1 I am just wondering if in the Directorate at
2 all there is any kind of follow up to see what actually
3 happens, how many years it takes, what ends up actually
4 going to workers.

5 I think the large issue that I'm looking at is
6 a chilling effect that continues to chill. It is very
7 disturbing.

8 MR. MICHAELS: You certainly raise an
9 important concern. One of the issues in terms of our
10 system is once we issue a finding, it leaves our
11 authority. There is no system for us to easily track
12 cases that go to the ALJ or Court. We can attempt to
13 gather the information and we do. We have no formal
14 system to do that. We can't give you well validated
15 empirical evidence.

16 I know that's an issue that sometimes academic
17 researchers take on, and I'm looking at Professor
18 Moberly, who has done this for securities cases.
19 Certainly, we would encourage someone to take that on.

20 The issue you raise, the way the law takes, it
21 takes a long time to reach -- it can take a long time
22 to reach final settlement, which is in fact one of the

1 reasons we do our best to settle cases early.

2 While that sometimes makes it look like we're
3 not issuing findings for workers and the amounts are
4 much lower, our objective is to make people whole, to
5 get their job back as soon as we can. Those cases get
6 no press.

7 We are very pleased, for example, after our
8 agreement with BNSF -- BNSF signed a voluntary
9 agreement to change their policy -- we also settled a
10 lot of cases, to the acceptance of both the claimants
11 and BNSF.

12 That is what we would like to do, to get these
13 cases out of our system because they are settling and
14 everybody is happy.

15 Alternatively, we issue a finding, sometimes
16 with punitive damages, which sends a message, and
17 hopefully begins to move toward getting that worker the
18 justice we found they deserve. There are limits to
19 what we can do in that case. Once it leaves our
20 authority, it is just out there.

21 There is little we can do in terms of speeding
22 that up, other than if we could settle it before we

1 issue our finding.

2 For many reasons, we are eager to settle
3 quickly, if we can get someone their job back, the pay
4 they have lost, that may not send a message to not do
5 this again, but it does take care of that worker. We
6 want to do that.

7 That is sort of the back and forth we have on
8 a regular basis.

9 MS. NARINE: Marcia Narine. I know that Emily
10 did a great job reciting our charge and also talking
11 the sequester. The question is I guess we have six
12 months left on our charge, is there an extension of our
13 period of time? What do you reasonably expect from us
14 at the end of our term, whenever that is?

15 MR. MICHAELS: Thank you for that question.
16 First, we fully expect this Committee to be
17 re-chartered and to continue. All Federal advisory
18 committees have a two year charter.

19 We hope that most or all of you will continue.

20 One of the issues that ongoing advisory committees
21 face is our policy to try to stagger the terms. You
22 have to begin at one moment, everyone is appointed at

1 the same time.

2 What we hope to do is reappoint half the
3 members one year and reappoint the other half the next
4 year to make it easier when we do reappointments in the
5 future.

6 Other than that logistical issue, we expect
7 this Committee to go on and continue this work. The
8 charge will remain the same. It really is to help us
9 improve our effectiveness, improve our transparency,
10 but to think also about these policies that will impact
11 not just our effectiveness but the way anti-retaliation
12 policies exist in workplaces across the country, to
13 change that culture.

14 I look at it as trying to move from addressing
15 these issues retail to wholesale, to have a bigger
16 impact on more workplaces.

17 As long as we are a relatively small staff, a
18 small group of investigators, a small national office,
19 we can have a limited impact, and whatever message we
20 put out with our cases will be quite limited.

21 We have to think about ways this small but
22 mighty band, and I include all of you here, can really

1 change the concerns of workers around health and
2 safety, the products they are producing, are treated in
3 workplaces. It is quite a challenge. I don't mean to
4 minimize it at all.

5 It is very exciting. I am hoping you continue
6 to do that.

7 MR. KEATING: Dr. Michaels, Greg Keating. I'm
8 delighted to hear there have been more resources sent
9 your way. I know in addition to an increase in funding
10 and staff, you have taken some efforts to revise the
11 Whistleblower Manual for investigators.

12 I practice all over the country, and my
13 experience has been the experience of those in the
14 field, the investigators, is varied in the sense that
15 some are starting to really find their stride with the
16 necessary resources, while others continue to be buried
17 with very high docket and case law and what not.

18 I guess my question is with the increase this
19 year and the anticipated increase next year in FTEs, is
20 a lot of that going to be in the field, the
21 investigators?

22 As a follow up, one of the things one

1 investigator recently said to me is we do over 23 or 24
2 stat sheets, and to train someone to get up to speed,
3 not just on one statute but 20 something, is a mighty
4 big task.

5 MR. MICHAELS: Actually, both of those
6 questions are related. Most of the staffing will go to
7 the field but we will take some of the increase and
8 actually use it for dedicated whistleblower training,
9 whistleblower protection staff training positions in
10 our Chicago, Arlington Heights, Illinois, OSHA Training
11 Institute. We have never had dedicated training staff.

12 Rich, will you be addressing this at all?
13 Some of these budget issues and allocation issues are
14 going to be addressed shortly by Richard Mendelson. I
15 am going to hold that.

16 We're quite aware of that. We're concerned
17 about consistency and making sure all our offices
18 approach cases the same way. Certainly having field
19 staff as the acting leadership of the program has made
20 a big difference, something we have seen and we think
21 we will see real improvement around that.

22 We are looking at issues of backlogs and we

1 have had some successes. Training, we recognize as
2 being a very important area, certainly some of the
3 resources will go into training, both to hire trainers
4 and to get people to the training center where we will
5 do that training.

6 MS. SPIELER: Terrific. Thank you very much.

7 We are running a little bit behind. I am going to ask
8 Rich Mendelson to provide his report. That was very
9 helpful, Dr. Michaels. Thank you very much.

10 DIRECTORATE OF WHISTLEBLOWER

11 PROTECTION PROGRAMS REPORT

12 MR. MENDELSON: It is my pleasure to be here.

13 Thank you to Dr. Michaels for his powerful message and
14 for leaving me a few things to talk about, he's so
15 involved in the program, and he really does believe in
16 this stuff.

17 Just as Dr. Michaels said to Secretary Perez,
18 I think it's incumbent on us to thank him for his
19 leadership and his dedication to protecting workers,
20 including whistleblower rights.

21 In my 25 plus years with OSHA, it is fair to
22 say his level of dedication on this issue is

1 unprecedented, and while our work is still cut out for
2 us, we have also accomplished a lot under his watch.

3 As I said before, I am the Acting Director for
4 Whistleblower Protection Programs but my actual
5 position is the Deputy Regional Administrator for
6 OSHA's New York Regional Office. In that capacity, I
7 oversee whistleblower protection programs, but I'm
8 certainly a novice in this room, and I'm not an expert
9 on whistleblower issues.

10 I'd like to extend my thanks to the Chair, Ms.
11 Spieler, and of course, the Chairs of the
12 Subcommittees, Mr. Eherts, Mr. Brock, and on the phone,
13 Mr. Frumin, and to the incredibly dedicated staff
14 behind me, who introduced themselves before.

15 They do all the work year round and are
16 completely dedicated, the DWPP staff, and especially
17 the points of contact, Meghan, Rob and Katelyn, and to
18 my colleague, Mr. Atha, who also serves with me on the
19 Executive Steering Committee and is normally out in San
20 Francisco.

21 Over the past five years, OSHA has experienced
22 an increase of new whistleblower complaints every year.

1 An additional 154 in 2010, 377 in 2011, 202 in fiscal
2 year 2012, and 27 in fiscal year 2013.

3 Last year, we completed more investigations
4 than we received new complaints. We received 2,920,
5 and we completed 3,081, a decrease of 134 from our
6 backlog. That still leaves a backlog of 2,384 cases.

7 We are looking at the make up of those cases.

8 OSHA 11(c), FRSA, SOX cases combined equal 90 percent
9 of the cases completed in fiscal year 2013. We add
10 AIR21, EPA, ERA, and Food Safety, that makes up 98
11 percent of the cases completed in fiscal year 2013.

12 This is important in terms of how we manage
13 our program and how we train our investigators.
14 Currently, the only measure that we report out is our
15 total cases completed measure. Our target in fiscal
16 year 2012 was 2,180 cases or 545 per quarter. We
17 failed to meet that in the first two quarters of the
18 year. After some internal process streamlining, we
19 exceeded the targets in the third and fourth quarters,
20 and in the end, we completed 2,767 cases that year.

21 In 2013, our goal was 2,700, and we exceeded
22 that goal by completing over 3,000 cases. Our target

1 remains at 2,700, and while we did not make our quarter
2 one goal, remember that we lost two weeks to the
3 Government shutdown at the beginning of that quarter.

4 We are also looking at other measures and
5 statistics to improve management and tracking of the
6 whistleblower program. Centralizing statistical
7 reporting will help ensure that all regions are
8 measuring data the same way.

9 Here at the National Office in July of 2011,
10 the Office of Whistleblower Protection Programs was
11 moved out of the Directorate of Enforcement Programs
12 and became a free standing office.

13 In 2012, that office was reorganized as the
14 Directorate with two divisions, Operations and Policy
15 and Planning. The Directorate is still growing, and we
16 continue to reassess the distribution of duties and
17 assignments. We are also going to be adding some
18 additional staff this fiscal year.

19 To put this in perspective, in 2011, we had
20 six staff. In 2012, we had nine. In 2013, we were up
21 to 14, more than doubling the size in two years, and we
22 continue to grow.

1 Compared to the other Directorates, DWPP might
2 be small but it's full of spirit and energy, and its
3 staff is incredibly dedicated to the mission. We have
4 improved our communication process with the field and
5 we are working diligently on many projects.

6 The largest operational deliverable for DWPP
7 is 11(c) appeals. In 2013, we received 114 appeals and
8 completed 96, with the average days to complete 249.
9 In fiscal year 2014, we already have our appeals
10 inventory. At the end of fiscal year 2013, we had 117
11 pending cases. As of last week, there were only 43
12 pending cases.

13 By way of comparison, in June 2011, OSHA had
14 over 140 cases on appeal, some pending for more than
15 three years.

16 DWPP did this by revising internal processing
17 procedures, their regularly held appeals committee and
18 pre-appeals committee meetings, to relieve the
19 bottleneck of appeals waiting second level review.
20 DWPP now moves to discuss questions and issues with the
21 regional managers before deciding to remand or reverse
22 a case.

1 It is important to note we are not sacrificing
2 quality in this process. In fact, multiple staff
3 members review each case separately in parallel, and
4 any differences are moved up the line. Remanding cases
5 that are only a few months old means that an
6 unsatisfied complainant has a better opportunity than
7 when an appeal is years old.

8 The on line complaint form, which Dr. Michaels
9 mentioned, was launched in December 2013, and as of
10 last week, we received 742 on line filed complaints.

11 The Directorate sent a questionnaire to the
12 field asking for feedback on the new system and the
13 quality of information received on that form. We are
14 going to use this feedback to evaluate the system.

15 Again, we are trying to manage our system
16 strategically using data while also improving customer
17 service and ease of entry into the system.

18 We are developing an outreach plan, which is
19 new for whistleblower, working to identify
20 stakeholders, such as alliance members and subject
21 matter experts such as the Committee members, to assist
22 us with distribution of program information to

1 employers and employees.

2 Retaliation complaints are by their nature
3 reactive, but stopping retaliation before it ever
4 happens is the best outcome for employees and
5 employers. We need to find methods to get our message
6 out to workers and employers. DWPP is also
7 responsible for promulgating regulations specifying the
8 procedures and handling of retaliation complaints under
9 our 22 statutes. There are 13 regulations, 11
10 existing, two in draft, that address the OSHA
11 whistleblower statutes.

12 Since the Committee met last year, DWPP has
13 issued interim final rules in the Seaman's Protection
14 Act, Affordable Care Act, and Food Safety Modernization
15 Act. In the coming months, we will publish the IFR for
16 the Consumer Financial Protection Act and final rules
17 for the Federal Railroad Safety Act, SOX, Seaman's
18 Protection Act, and ACA.

19 So much of our work in statutes address
20 non-OSHA issues that it is critical that we strengthen
21 interagency relationships. As Dr. Michaels was just
22 addressing a question from Ms. Lessin, we have an MOU

1 in progress with the Federal Motor Carriers Safety Act,
2 and that MOU is going to address FMCSA referring
3 employees who complain of alleged discrimination to
4 OSHA, and in turn, OSHA providing FMCSA with copies of
5 the staff complaints and Secretary's findings.

6 FMCSA will provide OSHA with information from
7 their information management systems upon request, and
8 this process is ongoing, and the MOU should be
9 finalized soon.

10 We are continuing our working relationship and
11 cooperation with 11 other Federal agencies, although
12 not necessarily having new MOUs. We have good lines of
13 communications with these agencies or in some cases,
14 existing MOUs.

15 These include NHTSA, Federal Transit, Federal
16 Air, and Nuclear Regulatory Commission, the Coast
17 Guard, Pipeline Safety, Federal Rail, Centers for
18 Medicaid, FDA, Consumer Product Safety and the SEC.

19 As much as DWPP does, remember that the bulk
20 of investigative work occurs in the field. We are
21 experimenting with several pilots and we are moving to
22 institutionalize those that are successful.

1 The first and foremost of these is the new
2 Assistant Regional Administrator for Whistleblower
3 Protection Programs. This structure was piloted in
4 Regions IV and V, and both regions had overwhelmingly
5 positive results. We have already expanded this
6 structure to Region II, and our plan is to roll it out
7 to all ten OSHA regions this year.

8 The ARA model helps provide strategic
9 leadership and guidance to the program. The
10 supervisory investigators will manage the caseload and
11 supervise the investigators, but someone needs to look
12 at the big picture, manage resources, coordinate
13 priorities with the Solicitors, and manage the program.

14 This model also provides subject matter
15 expertise throughout the chain of command, from the
16 investigator all the way up to regional management. It
17 allows for a more manageable supervisor to investigator
18 ratio, leaving the supervisor attentive and available
19 to both the investigators and the complainants.

20 This is what we do in Enforcement, and it
21 works there. This is what we will now be doing in
22 Whistleblower. It also parallels the Whistleblower

1 Protection Program being elevated from an office to a
2 full Directorate. Whistleblower will now be managed
3 consistently in every region and report directly to the
4 Regional Administrator.

5 We have also piloted an alternate dispute
6 resolution or ADR program in Regions V and IX with
7 great results. We tried two different models. The
8 more successful was the early resolution where the ADR
9 Coordinator works and directly assists the parties with
10 settlement talks. It produced dozens of settlements in
11 Region V, reduced 36 cases in fiscal year 2013, and in
12 Region IX, 18 cases.

13 Basically, the ADR Coordinator completed as
14 many cases, the equivalent amount to a full time
15 investigator, the difference is that all of these cases
16 had settlements.

17 Mediation was another option that we explored
18 where we tried one day sessions with Federal mediation
19 reconciliation service mediators. They were not as
20 successful. Our goal is to expand the ADR model to all
21 regions and we are going to be rolling out specialized
22 training as well.

1 We are also working, as you heard Dr. Michaels
2 say, on developing a distinct whistleblower training
3 track at the OSHA Training Institute or OTI. We are
4 establishing a permanent whistleblower coordinator at
5 OTI, and we are working to develop a track that might
6 potentially have up to six whistleblower training
7 courses. There is a subgroup working on that meeting
8 the first week in April.

9 Recall what I said about the allocation of our
10 workload, almost all of our cases are made up from less
11 than half of our statutes. We are also looking to
12 build consistent investigative skills and core
13 competencies, and we are exploring new avenues to
14 provide additional training.

15 We are also studying other streamlining and
16 process improvement options, examining several other
17 pilots. We are also going to be strengthening our
18 internal audit program working through our existing
19 management accountability program.

20 Last but certainly not least, the WPAC
21 Advisory Committee request for nominations' Federal
22 Register Notice will be posted for public inspection

1 tomorrow, March 12, and published in the Federal
2 Register on Thursday, March 13.

3 OSHA will seek to fill 12 Committee positions
4 that will become vacant January 1, 2015. The agency is
5 initiating staggered terms whereby six members will be
6 appointed for one year terms and six for two year
7 terms. We will fill again one public, one state plan,
8 two management, two labor terms to one year, and two
9 management, two labor, and two public rep's to two year
10 terms. We will again have three non-voting members
11 selected by the Secretary from Government employees
12 among other Federal agencies. Current members may be
13 re-nominated.

14 As Dr. Michaels said, as required by the
15 Federal Advisory Committee rules, the Committee itself
16 is in the process of being re-chartered for two more
17 years.

18 That is a lot. While my time here might be
19 short as Acting Director, the work is cut out for the
20 dedicated permanent staff of DWPP. With your
21 assistance and guidance, we look forward to further
22 improving worker protection.

1 As Dr. Michaels said, workers' ability to
2 complain without fear of retaliation is central to a
3 safe and healthful workplace.

4 Thank you for helping us reach that noble
5 goal.

6 MS. SPIELER: Thank you very much, Mr.
7 Mendelson. Would you also be willing to take a few
8 questions or should we hold them through the course of
9 the day? Will you be able to be with us?

10 MR. MENDELSON: I will be here all day.

11 MS. SPIELER: My suggestion would be if you
12 have questions that relate to the work of a Work Group,
13 we should hold them until that part of the discussion,
14 but if there is something more global you would like to
15 ask about now, but I'm going to come back at some point
16 so we can get back on track.

17 MS. DOUGHERTY: Christine Dougherty. You
18 talked about the numbers, you are just talking about
19 the Federal investigation numbers, not including state
20 plans?

21 MR. MENDELSON: Correct.

22 MS. DOUGHERTY: My understanding is none of

1 the increase in whistleblower money is being passed
2 onto the state plans.

3 MR. MENDELSON: Right, the line items are
4 different. The state plan grants come out of a
5 different budget pool.

6 MS. DOUGHERTY: The state plans are still
7 static in terms of money?

8 MR. MENDELSON: Yes. I believe there was a
9 request in fiscal year 2015 in the President's budget
10 to increase state plan funding overall, not directed to
11 whistleblower.

12 MS. NARINE: Can we get those stats sent to
13 us? I was trying to write things down, it was a little
14 difficult to follow.

15 MR. MENDELSON: Yes, the staff will get that
16 to the Committee.

17 MS. NARINE: Thank you.

18 MR. MOBERLY: Thank you for all that
19 information. I was curious about the settlement versus
20 mediation programs. Could you describe the differences
21 between those?

22 MR. MENDELSON: The challenge is identifying

1 or flagging cases that would be right for that, and
2 that is part of the issue that we are going to be doing
3 additional training on, to identify those cases, find
4 that there is an interest on the part of both the
5 respondent and complainant to seek early resolution,
6 and then to bring that forward.

7 FMCS, the goal was to actually go before a
8 mediator for one day and have the parties present
9 themselves, and OSHA is really just flagging that case.

10 In the early resolution, we actually take an active
11 role and seek to hammer out a settlement.

12 That ended up being a better model for the
13 settlements, and early resolution, while it ends up
14 with some settlements, everyone might be slightly
15 unhappy or slightly happy, but everyone walks away at
16 the end of the day, which is better than us just
17 issuing findings and passing it along into the judicial
18 system or ALJ.

19 MR. MOBERLY: Do you have any sense of why the
20 early resolution worked better than the Federal
21 mediation?

22 MR. MENDELSON: I think because the way our

1 staff was involved, we have acknowledged the program
2 and an interest in working that system through, and
3 that is why we are looking to build this training and
4 we are going to take that and train the coordinators in
5 every region.

6 We are going to expand that pilot to two
7 additional regions this year, so we will have four
8 regions in the pilot. We will have people trained in
9 every region to start flagging cases and working them
10 through the system.

11 MR. MOBERLY: Thank you.

12 MS. SPIELER: Nancy?

13 MS. LESSIN: That actually goes to my
14 question. You mentioned that there were other pilots,
15 looking at streamlining. Is that what you just talked
16 about or are there other pilots? Can we get some
17 information about the different kinds of pilots that
18 are being tried, what are they, how are they working?

19 MR. MENDELSON: Sure. Some are we are
20 expanding that existing pilot, roll out ADR, but still
21 consider it a pilot before we roll it out to all the
22 regions.

1 We are trying some other things on
2 streamlining. We have ten regions out there so we have
3 ten labs, so to speak. We can try programs in
4 different regions and see if we can get things
5 streamlined. Can we streamline processing of
6 paperwork. Can we streamline inputting of data, doing
7 things like that.

8 We can take that, assess it, see was it worth
9 the pay off of time, did we lose any quality, and if
10 it's good, we will roll it out to the rest of the
11 National Office and regions.

12 MS. LESSIN: The other question had to do with
13 the alternative dispute resolution. Who gets to choose
14 which path? Is it the affected worker who gets some
15 options laid out and they choose? How is that done?

16 MR. MENDELSON: Settlement is always
17 voluntary, so nobody is ever forced to settle a case.
18 We flag a case when we think there might be a potential
19 to settle, and the earlier we can get into that, the
20 better it is for all the parties involved. That is why
21 we want to increase that training.

22 The sooner we can do that, we do that, but if

1 the parties are not interested, it will stay in the
2 traditional track. No one is forced into a settlement
3 they are not pleased with, either the complainant nor
4 the respondent.

5 MS. LESSIN: Thank you.

6 MS. SPIELER: If you could include in the data
7 that you give us on the 11(c) appeals, the rate at
8 which they were remanded or reversed, that would be
9 helpful.

10 MR. MENDELSON: Sure.

11 MS. SPIELER: Thank you.

12 MR. EHERTS: One last question. On the
13 outreach program, usually when you put a program like
14 that out, the immediate effect is an increase in the
15 number of claims coming in. Have you seen that?

16 MR. MENDELSON: We are still working on the
17 plan. We haven't gotten the product out there yet. We
18 are aware that there might be a bump up.

19 MR. EHERTS: Long term, it is exactly the
20 thing to do.

21 MR. MENDELSON: Right.

22 MS. SPIELER: Terrific. Thank you very much.

1 MR. MENDELSON: Thank you, Ms. Spieler.

2 MS. SPIELER: The next item on the agenda is
3 the report and discussion of the first of the Work
4 Groups, the Transportation Group. Eric Frumin is on
5 the phone.

6 There are members of that Work Group who are
7 not members of the Advisory Committee who are in the
8 room today. I wonder if I could ask you to come up to
9 the table, sit with us, and identify yourselves, those
10 of you who are here.

11 There is a written report that all the
12 Committee members should have. I think there were
13 copies made for members of the public as well. If you
14 don't have it, put your hands up.

15 MR. BAIRD: Let me just say for the record,
16 I'm going to mark the agenda as WPAC Exhibit 1, and
17 then the Transportation Work Group Report as WPAC
18 Exhibit 2.

19 (Exhibit No. 1 & 2 were marked
20 for identification.)

21 MS. SPIELER: Thank you, Ed. Would the three
22 of you who are members of the Work Group and not

1 members of the Advisory Committee identify yourselves?

2 MS. VALKAN: Good morning. Connie Valkan from
3 CN. I work in the railroad industry as in-house
4 counsel.

5 MR. MANN: I'm Lawrence Mann with the law firm
6 of Alper & Mann. I represent the rail labor unions.

7 MR. INCLIMA: Hello. I'm Rick Inclima,
8 Director of Safety, Brotherhood of Maintenance of Way
9 Employees Division of the Teamsters, members who do all
10 the construction, maintenance, repair of the railroad
11 track infrastructure in the United States.

12 MS. SPIELER: Let me just say for a minute,
13 this Work Group was set up in part in response to
14 requests that were made at our first meeting, and in
15 particular, concerns that while this is an industry
16 broadly, the transportation industry, in which there
17 are many concerns about both safety and retaliation,
18 there was inadequate representation on the full
19 Committee to address the concerns in this industry.

20 Therefore, after significant conversations at
21 our last meeting and then consultation with Dr.
22 Michaels, we concluded that there should be a work

1 group and we would establish a work group as we are
2 able under our charter that would include full
3 membership on the Work Group of people both from the
4 industry and labor side in that industry, because we
5 lacked that representation on the full Committee.

6 Thus, the Work Group has fewer members of the
7 Advisory Committee and more outside members than the
8 other work groups, where the expertise on the issues
9 resided within the Committee itself.

10 I am going to turn this over to Eric, who I
11 think is going to try to do this in his disembodied
12 form.

13 (Laughter.)

14 TRANSPORTATION INDUSTRY WORK
15 GROUP REPORT AND DISCUSSION

16 MR. FRUMIN: Good morning, everybody. I can
17 hear pretty well, so I appreciate the technology and
18 people's willingness to speak up. Thanks to Emily for
19 her patience here.

20 You have a copy of the report. I'm not going
21 to read over all of it. It does have some two draft
22 recommendations for the Advisory Committee to consider

1 and another one that we did not agree on that you
2 should be aware of.

3 Take a glance at that if you haven't looked at
4 it while I'm talking, and I'll walk you through the
5 parts where you need to be aware of the details.

6 First of all, I want to thank all the Work
7 Group members for their time, their cooperative spirit,
8 their insights, which were invaluable.

9 Can everybody hear me including the people in
10 the public seating session?

11 MS. SPIELER: Yes.

12 MR. FRUMIN: Great. The membership of the
13 group covers a range of industries, primarily rail and
14 trucking, but also air transport. It was primarily a
15 labor/management divide but I think we also had the
16 ability to step out of our narrow roles and look at the
17 broader public interest in general.

18 I want to thank Marcia Narine, who is the
19 other Advisory Committee member who served on it with
20 me, for helping to keep us focused on the broad issues
21 that our full Committee is concerned about and how that
22 applies in a work group.

1 We did lose a member of the Work Group early
2 on, Jack Van Steenburg, the Chief Safety Officer for
3 the Federal Motor Carrier Safety Administration, who
4 resigned from the full Advisory Committee. That was a
5 significant loss, I think, for the Work Group and for
6 the overall Advisory Committee. I'll say more about
7 that in a minute.

8 The other members of the Committee, the people
9 in the room and others, certainly made a contribution,
10 and I wanted to thank them for it.

11 Of course, also thank the staff, particularly
12 Rob Swick, for their help in keeping us moving forward
13 and handling the logistics and so forth.

14 We met several times, I think three times by
15 teleconference, courtesy of the sequester, but actually
16 that was probably a good thing because it made it easy.

17 We met in fairly rapid succession, I think, December,
18 January, February, pretty much monthly. Of course, the
19 group met in person yesterday, and we are able to bring
20 forward this report.

21 As I said, our focus was primarily on the rail
22 sector, the largest Work Group members were from rail.

1 We had a few people from trucking, including Marcia,
2 but also Mike Manley from the Teamsters and Todd Jadin
3 from Schneider National, a very large logistics
4 trucking company.

5 We did have some discussion on air transport
6 issues. Rob DeLucia from the Transport Association was
7 helpful. He couldn't participate in our meeting
8 yesterday. Ed Watt as well from Amalgamated Transit
9 Union.

10 It became clear that the status of the
11 situation in the trucking industry -- in the air
12 transport industry and the information available to us
13 about it really didn't work well with our charge.

14 Our charge was primarily to look at the
15 obstacles to reporting, rather than best practices. We
16 were looking at the glass being half empty, not half
17 full. There was not a large information base on this
18 question, this aspect of the issue, obstacles reporting
19 in the air transport, not much on what the obstacles
20 are. We are still open to looking at that and
21 hopefully we will be able to do some work in that
22 sector at some point.

1 Early on, we did try to get a handle on the
2 overall information base for our work, including the
3 gap pertaining to the different major sectors. This
4 continues to be a major issue for us, both at the
5 sectoral level, information gaps in rail and in
6 trucking, but I think also more broadly for the work of
7 the whistleblower protection program generally.

8 I am going to discuss the sectoral versions of
9 the information gaps when I review the specific draft
10 recommendations in a few minutes.

11 I just wanted to note that I think we have a
12 serious information challenge regarding the overall
13 whistleblower protection program, regarding program
14 enforcement activities.

15 If any of you are familiar with the way OSHA
16 keeps its enforcement records for its compliance
17 inspections, the old innovative management information
18 IMIS system or the new one, IOS, it is night and day
19 different between that and what the whistleblower
20 protection program monitors, publishes, and so forth.

21 If OSHA is to promote the kind of broad
22 understanding about this program, in order to grow the

1 program, get the support for it, get the word out, it
2 is going to need to really re-think how it collects
3 this information and shares it with people.

4 An editorial note here, but I think that is a
5 critical question that at some point our Committee
6 needs to come to grips with in terms of a
7 recommendation, not today, obviously, but I am just
8 editorializing based upon our recent experience in
9 trying to apply these questions to the transport
10 sector.

11 With that introduction, first, let me just ask
12 Marcia if you have any other introductory comments
13 beyond what I have said before I go into the report
14 regarding the overall work of the Work Group.

15 MS. NARINE: No, you're doing fine so far.
16 Nothing to add.

17 MR. FRUMIN: Thank you. We have two specific
18 draft recommendations to consider. The first deals
19 primarily with rail and then the other covers the broad
20 range of statutes.

21 The first in the rail sector concerns whether
22 or not OSHA is adhering to its own existing policies in

1 a consistent way regarding providing information to
2 workers and employers.

3 What emerged during our discussions was the
4 concern, initially from the employer side but shared as
5 well on the workers' side, claimants' side, that there
6 were inconsistent practices regarding disclosure by
7 investigators in the midst of investigations, even at
8 the point of informing the employer about a specific
9 complaint, even a merit finding.

10 This was a shared concern. Again, I want to
11 reiterate what was not really an issue was the
12 policies, OSHA's own policies regarding disclosure.
13 That wasn't a problem, it was more execution.

14 In the middle of page two of your document is
15 a recommendation which our Work Group is proposing that
16 the Advisory Committee approve and send to OSHA. I
17 will just read it.

18 (Greater transparency in investigations.
19 Information flow from OSHA investigators to the parties
20 is inconsistent across regions. OSHA's investigators
21 should share information gathered during the course of
22 their investigations with both parties in accordance

1 with the laws, regulations, and OSHA's internal
2 guidelines."

3 We did have some discussion about the
4 inconsistency part of it was region to region, examples
5 that people could offer were inconsistency in
6 investigation techniques and some other things, but
7 this was the primary issue.

8 We can come back to this recommendation.

9 MS. SPIELER: Why don't you finish your report
10 and then we will discuss it and at the appropriate
11 time, we will take up the specific recommendations in
12 terms of a vote of the Committee.

13 MR. FRUMIN: Okay. In my comments a second
14 ago, I was mixing two different subjects. You have the
15 one on transparency.

16 The second recommendation has to do with this
17 question of inconsistency across different regions. I
18 mentioned that a second ago in regard to the
19 transparency question. Let me step back a second.

20 This is really the genesis of a second
21 recommendation about inconsistency of application, and
22 this is not limited to the rail sector. Among the

1 problems that were offered as examples by no means
2 inclusive, were things like investigative techniques,
3 investigators' understanding of the statute, and we
4 have already discussed that this morning with regard to
5 the staffing issue, the investigators'
6 responsibilities, notwithstanding that 90 percent are
7 covered by three or four laws. They have 22 statutes
8 to deal with.

9 It is not surprising, but nonetheless, this
10 was a concern to the group. In preparing the report, I
11 went back and looked at some of the prior reviews of
12 this issue and noted that the GAO in a major review of
13 the program specifically pointed to the problems with
14 the regional inconsistencies in the program and
15 difficulties with the regional administration.

16 We have a second recommendation on consistency
17 of application which we would like the Advisory
18 Committee to consider and approve, and I'll read it
19 quickly.

20 (Consistency in application. Consistent
21 application of the various whistleblower laws and
22 regulations is necessary to give the parties clear

1 guidance as to the requirements of the various
2 statutes.

3 To that end, the Whistleblower Protection
4 Advisory Committee should recommend to OSHA that OSHA
5 take steps such as internal training programs to
6 improve consistency in the application of laws,
7 regulations, and statutes subject to OSHA's
8 jurisdiction."

9 That is the second one. It is certainly
10 consistent with Rich's report. We are happy to hear we
11 are pointed in the same direction but it is a
12 significant question for the regulated industries and
13 the workers.

14 Finally, we took up a draft recommendation
15 which is on the next page regarding the value of
16 training programs by employers, in other words,
17 training programs not necessarily by OSHA.

18 There was a lot of agreement that those were
19 important for internal compliance activities by
20 employers. Not much disagreement about that. There
21 was an interest within the group in linking the
22 provision of training programs internally by employers

1 to some mitigation of sanctions in enforcement cases.

2 That question of those two things, provision
3 of training by employers and OSHA consideration of that
4 provision of training in making enforcement decisions,
5 that linkage became quite a topic of discussion
6 yesterday. We were not able to reach agreement on it.

7 One of the ways that discussion floundered a
8 bit was we felt we really didn't have adequate
9 information about the extent to which, for instance,
10 OSHA already considers taking into account employer
11 training activities when it is making its decisions.

12 We did get help from Ed Baird on the way that
13 employer knowledge is considered in punitive damage
14 decisions but that is not really relevant to this.
15 That is on the flip side.

16 We were unable to reach consensus on it. You
17 have a copy of the draft recommendation. It basically
18 is saying training is a good thing, OSHA should do it,
19 employers should do it, and then this notion of
20 consideration being given by OSHA to employers in
21 enforcement cases.

22 We couldn't separate them out, and together as

1 an unit, we couldn't approve it.

2 Finally, leaving rail or in regard to the
3 consistency question, or multi-sector recommendation,
4 we looked at the trucking sector. We don't have a
5 draft recommendation unfortunately. We did suffer from
6 the absence of FMCSA involvement. We found out only
7 yesterday that the MOU was in the works, which was a
8 bit of a surprise I have to say. We did try, make
9 efforts, Rob Swick, thank you very much, made repeated
10 efforts to get more FMCSA involvement in our
11 discussion. We had a little bit of help but not much.

12 It's apparent that we are going to have to get
13 some help from FMCSA, and someone can correct me if I'm
14 wrong, as I understand it as of yesterday, FMCSA is
15 trying to identify someone to join the Advisory
16 Committee and then to serve on our Work Group, which
17 would be great. One way or another, we are going to
18 have to have a closer relationship with them in order
19 to tap into their considerable information resources
20 and inform our work.

21 Todd Jadin from Schneider also pointed out
22 that presence in our work would also FMCSA pay more

1 attention to whistleblower issues, which generally it
2 doesn't pay much attention to. That would probably
3 help their program quite a bit as well.

4 We look forward to getting their involvement,
5 and hope both with the MOU being wrapped up and other
6 important developments, like getting a person delegated
7 to do this from FMCSA, we can interact with them in a
8 more robust way and do it quickly enough to get some
9 kind of an initial recommendation back to the Advisory
10 Committee within the next six months.

11 Finally, we had three other issues that we
12 took up as being important, which needed to be
13 addressed, that are closely related to whistleblower
14 issues, the hours of service question, the question of
15 over weight and poorly maintained vehicles. It doesn't
16 take much imagination to see where those would become
17 important questions from a whistleblower standpoint.

18 Also, of course, the whole issue of incentive
19 programs regarding the non-reporting of injuries, that
20 arose as well as a concern by the Work Group,
21 particularly in the trucking sector. I'm sure we will
22 hear more about that from the 11(c) Committee today as

1 well. We don't have a handle on it, but we just noted
2 it is of concern. We'd like to keep an eye on that
3 issue and see if there is some way we can contribute to
4 the debate about that.

5 There you have it. I hope that is clear.
6 Thanks again to everybody for their work. I now want
7 to ask Marcia or any of the other Work Group members
8 who are in the room if they have anything briefly they
9 would like to add.

10 MS. NARINE: Thanks, Eric. This is Marcia. I
11 will add that after we met, the Best Practices Group
12 met, and we talked about the Fairfax Memo, which you
13 don't mention by name but you do talk about the
14 employers' incentive programs issue, which is kind of
15 code for the Fairfax Memo, which was distributed later
16 in the day to our group, which was not distributed to
17 the Transportation Committee group.

18 It appears as though all three of the groups
19 are talking about it, the 11(c) group has also been
20 talking about that, so one thing that we will have to
21 talk about is whether there will be a division of
22 labor, no pun intended, among the three groups as to

1 how we will each deal with that issue.

2 Clearly, it is an issue that touches on all
3 the groups, and the question is whether we will all
4 deal with it in a different way without duplicating
5 efforts, and whether there is something specific that
6 each of the groups needs to address.

7 Obviously, to the extent we talked about kind
8 of the CSA regulations yesterday in our group and
9 whether that is something that are drivers going to be
10 trying to either under report any number of issues or
11 people in rail, or anyone else, trying to report any
12 number of issues so that they can avoid having to deal
13 with issues, so they can continue to work, and how does
14 that affect the Fairfax Memo.

15 In the Best Practices Group, we talked about
16 whether people are going to be under reporting issues
17 or whether employers are going to have to change their
18 incentive programs, and obviously the 11(c) Group is
19 going to be dealing with it.

20 One thing we need to think about either today
21 or in some subsequent meeting is what will each work
22 group tackle as it relates to the Fairfax Memo, which

1 is now two years out, to look at this and how we can
2 get back to OSHA about what recommendations we have.

3 That is just one thing I would add because
4 that happened after our group met.

5 MS. SPIELER: Are you there, Eric?

6 MR. FRUMIN: I'm still here. I followed the
7 instructions.

8 MS. NARINE: Did you hear everything I just
9 said?

10 MR. FRUMIN: I heard everything you just said.

11 MR. MANN: Eric, first I want to commend you
12 for chairing the working group. You did an excellent
13 job. By the way, you can send me the money later.

14 (Laughter.)

15 MR. MANN: The one thing that I want to point
16 out is the recommendations you have are consensus
17 recommendations. There are a number of problems which
18 is not coming to your attention.

19 I've been on the front lines of this issue
20 since the law was passed in the rail industry. I can
21 tell you there are many problems involved. I'm not
22 sure how to get that to you.

1 The railroad management would disagree with me
2 on certain issues, of course, and I understand that.
3 There are some major issues that should be addressed,
4 and I'm not sure how we need to get that to your
5 attention.

6 MR. FRUMIN: We will continue to have these
7 opportunities to identify issues and work on them
8 during our sessions and communicate with each other.

9 Larry certainly has a point here. This is a
10 consensus operation. That is going to eliminate the
11 development of recommendations to the Advisory
12 Committee on a whole host of issues. As you can see, I
13 just gave you one example of one that floundered
14 yesterday on this question of linking employer training
15 to the sanctions by OSHA enforcement.

16 There are a whole range of issues. Things
17 were quite contentious in some early discussions. I
18 tried to get us toward the idea of getting consensus
19 recommendations, but these are very contentious issues.
20 There is a lot at stake here.

21 OSHA has been extremely active in the rail
22 sector, maybe more active there in some respects than

1 others. We had quite a bit of interest in our meetings
2 from the rail sector.

3 We know there is a lot at stake here and if we
4 didn't need to be reminded of it, I opened up the paper
5 this morning to learn that an IBW member was killed on
6 a track bed in the Bronx Sunday night.

7 There is a lot of debate that we are not going
8 to get agreement on and we will just do the best we can
9 to air those issues and get consensus where we can.

10 Rick or Constance, do you have anything you
11 want to add?

12 MR. INCLIMA: Eric, thank you very much. I
13 wanted to just echo our appreciation for your chairing
14 of the Subcommittee. I think it has been very well
15 done and very helpful to progress.

16 I also want to thank my colleagues on the
17 Committee for the collegial way we have been able to
18 work and identify issues. There are and will continue
19 to be areas of contention and disagreement. Obviously,
20 we will put our best efforts forward to come to
21 consensus on those items.

22 I wanted to just mention to the full Committee

1 and thank the Chair for allowing us to speak here
2 today, that the training draft on page two of the
3 report is just that. I think we are close. We will
4 continue to work on that proposal and flesh out the
5 issues as we gather more information about current
6 practices, and hopefully we will be able to bring a
7 consensus recommendation to the full Committee in the
8 next go around.

9 Thank you.

10 MS. VALKAN: Eric, I think everyone has
11 addressed the issues and the topics we have covered. I
12 agree, there needs to be discussions on this draft and
13 other things. I like to think of it as lively debates
14 more than contention.

15 I think there is going to be more good
16 discussion on these topics. I look forward to the
17 work.

18 MS. SPIELER: I'd like to thank the Work Group
19 and suggest a way to proceed, and then if the Committee
20 disagrees, I'm willing to take input. I would suggest
21 the two consensus recommendations are very clear and
22 probably I suspect not highly controversial on the full

1 Committee, and perhaps we could take those up
2 immediately. If they are going to be a formal
3 recommendation, I think it is appropriate for us to
4 have a vote on the record.

5 I've never actually discussed this with staff.

6 I assume that is correct.

7 MR. BAIRD: Yes.

8 MS. SPIELER: Our lawyer says yes. I would
9 propose that we do that, and then we have a broader
10 conversation with the Work Group about the areas that
11 the members of the Committee might like to see the Work
12 Group take up in addition to the things you have
13 already mentioned.

14 I'm making a list of things that we are going
15 to have to discuss quickly at the end of the day. I
16 have put two on the list already just from this
17 conversation. One is this overarching question of
18 incentive programs and how we can manage that
19 conversation.

20 Second, I'm sitting here thinking about the
21 issue if a Work Group has a disagreement and therefore
22 can't come forward with a consensus recommendation,

1 would it be appropriate for the Work Group -- and
2 people care deeply about the issue -- would it be
3 appropriate for the Work Group to bring the issue
4 forward for a fuller Committee conversation at a
5 subsequent meeting, and then we can decide how to
6 manage it.

7 Those are two things that I would like to put
8 off until the end of the day, take up the specific
9 recommendations immediately, and then move to a more
10 general discussion about the Work Group before the
11 break.

12 Is that satisfactory to everyone?

13 I have a question for Ed. When a Work Group
14 comes forward with a consensus recommendation, does it
15 come to the Committee as a motion made and seconded, or
16 do we need it formally put before the Committee by
17 Committee members?

18 MR. BAIRD: I think we could do it either way.

19 It is before the Committee as part of the report. I
20 think that's fine for purposes of presentation.

21 MS. SPIELER: I am going to open up discussion
22 on the first --

1 MS. NARINE: Can I just add one thing? I
2 think on the issue that we don't have consensus on, I
3 don't really think it's a knock down/drag out kind of
4 issue. I don't know if I can speak for the Committee.

5 I think it's probably something that probably needs
6 about 20 minutes more.

7 MS. SPIELER: Yes, as someone sat in on the
8 Committee meeting, they ran out of time is why it is
9 not included. I think we should allow you to conclude
10 that conversation and come back with a formal
11 recommendation.

12 My sense was there was room for compromise and
13 consensus on that discussion that was not --

14 MS. NARINE: For the record.

15 MS. SPIELER: Yes, for the record. Let's take
16 up the first one. The first one was labeled "Greater
17 transparency in investigations and information flow
18 from OSHA investigators to the parties is inconsistent
19 across regions.

20 OSHA investigators should share information
21 gathered during the course of their investigations with
22 both parties in accordance with laws, regulations, and

1 OSHA's guidelines."

2 Is there discussion on this? It comes as a
3 motion made and seconded.

4 (No response.)

5 V O T E

6 MS. SPIELER: All those in favor of the
7 recommendation. How do we do this, put hands up?

8 MR. BAIRD: You can do it by voice.

9 MS. SPIELER: All those in favor, say aye.

10 (Chorus of ayes.)

11 MS. SPIELER: Opposed?

12 (No response.)

13 MS. SPIELER: Abstentions?

14 (No response.)

15 MS. SPIELER: Thank you to the Committee.

16 That will go forward from the Advisory Committee to the
17 Assistant Secretary.

18 The second, consistency in application.

19 "Consistent application of the various whistleblower
20 laws and regulations is necessary to give the parties
21 clear guidance as to the requirements of the statutes.

22 To that end, WPAC should recommend" -- it will say

1 WPAC recommends to OSHA "That OSHA take steps such as
2 internal training programs to improve consistency in
3 the application of laws, regulations, and statutes."

4 Any discussion of that recommendation?

5 (No response.)

6 V O T E

7 MS. SPIELER: All those in favor?

8 (Chorus of ayes.)

9 MS. SPIELER: Opposed?

10 (No response.)

11 MS. SPIELER: Abstentions?

12 (No response.)

13 MS. SPIELER: Let's move on to a more general
14 discussion of the work of the Work Group, issues that
15 the other members of the Committee would like to see
16 the Work Group explore more fully, ideas for the Work
17 Group that they can take back for their further work
18 between our Advisory Committee meetings.

19 Dave?

20 MR. EHERTS: I'm interested in training,
21 especially the sentence that says "In addition, the
22 Work Group recognizes that internal training on the

1 topic of whistleblower laws may assist company
2 managers, supervisors, and employees to understand
3 their rights and responsibilities under the
4 whistleblower laws."

5 Can we recommend that be taken up by Best
6 Practices? It seems like that is an area that some
7 companies have already presented on. I think there are
8 good programs in place out there. Maybe we could bring
9 them back to Best Practices.

10 MS. SPIELER: I guess the question would be is
11 there something specific in the transportation
12 industries that the Work Group wants to take up, or
13 would you feel comfortable seeding that to a committee
14 that is looking across all industries and all types of
15 whistleblower matters.

16 MS. NARINE: They worked on this.

17 MR. INCLIMA: We worked on this, on the draft
18 together. There are obviously some challenges. The
19 law is basically new in the rail industry. It has only
20 been in play for about five years.

21 The information flow, both from labor and
22 management, has not been the best, because the railroad

1 industry is so dispersed, it is not like you have a
2 shop in an area where you can gather all your people.

3 That is one of the challenges. We think the
4 more labor and management understand the laws, the
5 responsibilities and the parameters of what constitutes
6 retaliation, we think that will go a long way towards
7 reducing the incidence of retaliatory behavior and
8 therefore, whistleblower filings.

9 That is our goal, at least my goal. I would
10 love to see nothing more than to have whistleblower
11 cases coming out of the rail labor. That might be pie
12 in the sky, but I certainly think we can move forward
13 through education and good faith on both sides.

14 To the question of seeding that to another
15 committee, I'm just not sure. Perhaps there aren't
16 railroad folks on that Committee, and if the Committee
17 was going to take that up, I would suggest that maybe
18 we might have to expand that Committee to bring the
19 railroad industry specific perspectives to the
20 Committee.

21 MS. SPIELER: It might make sense -- I don't
22 think there is a problem if we have parallel

1 recommendations come from Committees, rather than
2 having additional people have to serve on multiple
3 Committees. That might be easier.

4 I actually think we should try not to worry
5 too much about jurisdictional issues of Work Groups at
6 this point. I hope in the end, at least at the end of
7 my tenure as Chair, and I am hoping I am reappointed
8 for a second round, but at the end of my tenure as
9 Chair, I would to sort of have some kind of
10 consolidated report from the Advisory Committee.

11 Right now, as we go through piecemeal
12 recommendations from the Work Groups, I think we should
13 allow the Work Groups to have some leeway in their
14 work.

15 MR. EHERTS: I was looking at duplication.

16 MS. SPIELER: I totally agree with you.

17 MR. EHERTS: If there is energy around it,
18 let's leave it where it is.

19 MS. SPIELER: Yes.

20 MR. MANN: I just wanted to point out that
21 both Rick and I have submitted to the Best Practices
22 Committee proposals that are in effect in the rail

1 industry, two different types of proposals, but they
2 have been very effective.

3 MS. SPIELER: Great. Thank you.

4 MS. LESSIN: A couple of things. One, very
5 quickly. The shorthand that is now being used for
6 employer practices that discourage the reporting of
7 injuries and illnesses has been "incentive programs."
8 I just want to point out that incentive programs, where
9 you get prizes for not reporting, is just one of a
10 broad group, many of which, and I would contend most of
11 which are not incentives at all, they are brutal
12 retaliatory practices where workers get fired or
13 punished in other ways.

14 If we could use the term "employer practices
15 that discourage the reporting of injuries and
16 illnesses" rather than "incentive programs," I think
17 that encompasses what we are dealing with.

18 Second, I have an idea and suggestion that I
19 thought of in terms of transportation, particularly
20 rail and trucking, but I think it's relevant for
21 perhaps the larger group, and I'm not sure it is even
22 possible.

1 OSHA, since 1978 or perhaps before that, I
2 think, has run a grant program. It used to be called
3 the New Directions Program. It is now called Susan
4 Harwood. It provides funds. It's a competitive grant
5 program for employers, unions, academics, worker
6 centers, others, to get funds to develop and conduct
7 training and education.

8 In this case, it's on health and safety and
9 how to prevent injuries and illnesses and how to have
10 good effective programs.

11 It seems to me in this arena of whistleblower
12 protection that there should be training programs. It
13 should be promoted. Employers should be doing it but
14 so too could unions for their members and other
15 organizations.

16 I am wondering if at some point, either the
17 Transportation Group or the full group could talk about
18 a possible recommendation to OSHA to have the kind of
19 program they have now in terms of the competitive grant
20 program on health and safety, but have it specifically
21 to develop whistleblower education materials, training,
22 education.

1 That would give multiple parties the chance to
2 develop really good programs that could go beyond
3 whoever the initial group is and perhaps further the
4 issue of training and education.

5 I would certainly like to think about that in
6 the rail sector for the reasons, Rick, that you talked
7 about, that this a newer statute and some new laws. I
8 think it is probably relevant to all sectors. I was
9 just going to put that out there and I'm not sure when
10 and where it could be discussed.

11 MS. SPIELER: I'll put that not only for the
12 Work Group but I think that is a very interesting
13 suggestion and it probably would be helpful if we could
14 put that on the agenda for our next meeting. You can
15 bring us the information about the history of New
16 Directions and the Harwood Program. That would be
17 great.

18 MS. LESSIN: One last thing was -- I think
19 this is something that you flagged for later
20 discussion. Again, in light of my understanding of
21 kind of long-standing and brutal retaliatory practices
22 that have happened in the transportation sector, I

1 think rail, trucking, elsewhere, but just looking at
2 rail in particular, there was a whole congressional
3 hearing in 2007. There was a report from Congress
4 called "Hidden Tragedy, the Under Reporting of Injuries
5 and Illnesses," that devoted a whole section to the
6 rail sector because of that situation.

7 The idea of just doing a report that has
8 consensus rather than if there are issues where there
9 is the divide that Eric talked about, the
10 labor/management divide, that there be a place for the
11 labor folks to talk about the issues they are most
12 concerned about and their recommendations, and then
13 there would be a section for the management
14 representatives to say whatever it is they are going to
15 say, but that even if there isn't consensus, the idea
16 of advising OSHA on what's happening and what should
17 happen shouldn't be stifled by feeling like a document
18 just has to present the areas where we have agreement.

19 I think advice from the different sectors is
20 important to come out. I'm just wondering if reports
21 could be crafted in a way that if there are burning
22 issues, even though there isn't consensus, if different

1 groups have recommendations about what could make this
2 better, I would sure like a way for that to get on the
3 table, and for those ideas and recommendations to be
4 heard by OSHA.

5 MS. SPIELER: I actually agree with that. I'm
6 kind of sitting here pondering this because it will
7 come up not only in this Work Group but in others and
8 in future ones.

9 I think it is important for the full Committee
10 to be able to take up the issues that are important for
11 advice to OSHA. I'm a little worried about a situation
12 where we allow important issues to die in a Work Group
13 without a full Committee discussion.

14 We can talk about this again towards the end
15 in terms of the Work Group functioning. My feeling is
16 it is much better to air those in a full Committee
17 meeting and see if there are ways the full Committee
18 can help us reach a place where the Committee as a
19 whole can make a recommendation.

20 If it turns out we can't operate by consensus,
21 my hope is we never split along labor/management lines,
22 but even if we do, I think it's appropriate for us to

1 say to the Assistant Secretary we split along these
2 lines, and here is the view of the different sides,
3 because we provide the outside anchor for the
4 conversations about these issues.

5 I do think it is important for us to be a
6 conduit for those ideas as well as a recommender of
7 specific practices.

8 MS. NARINE: Rick, do you have the authority
9 to speak on behalf of the Union or are you here as an
10 expert?

11 MR. INCLIMA: I can speak on behalf of the
12 BMW; yes.

13 MS. NARINE: I agree completely with Nancy's
14 recommendation. I think to the extent that we say this
15 was the consensus but there were some important
16 disagreements and we think it is important that OSHA be
17 aware of them, whether or not we would be speaking on
18 behalf of the Union or his experience.

19 For example, let's say we don't reach a
20 consensus on the last sentence of the training issue.
21 The disagreement is important but it is not going to
22 lead to the destruction of the Committee. It is an

1 important philosophical issue about what management
2 thinks -- companies think is an important incentive and
3 what labor thinks, why would this be an important
4 incentive.

5 That is actually a very important
6 philosophical issue that I think it is important for
7 OSHA to understand. That could dictate how OSHA
8 chooses to -- my favorite word -- "incentivize"
9 corporations in the future. It is important for labor
10 to understand why corporations think that is important,
11 and it is important for corporations to understand why
12 labor doesn't think that is important.

13 We may never reach consensus with 42 hours of
14 discussion, but it is important for those discussions
15 to be public.

16 MR. MANN: I want to point out that I wear a
17 few hats. I can speak on behalf of the Transportation
18 Trades Department of the AFL-CIO on this issue. I am
19 counsel to the Academy of Rail Labor Attorneys, which
20 represent the rail employees in whistleblower cases. I
21 am Rail Safety Coordinator for the United
22 Transportation Union.

1 I can speak on behalf of most of the rail
2 unions on this issue.

3 MS. VALKAN: I think in terms of the working
4 group, I think like any group where you have different
5 perspectives, you are not always going to have parity
6 in opinions or in perspectives.

7 I just want to say I understand there are
8 certain members that have made some characterizations
9 about the Transportation Committee. I'm not going to
10 debate those. It's a good example of where there may
11 not be parity or agreement.

12 I think with respect to the subject matter,
13 I'm here because I'm working in the industry, and while
14 I have some subject matter expertise apparently that I
15 could bring to the group, but I can't speak on behalf
16 of the industry I don't think.

17 That might be a good conversation for you to
18 have if you want industry representation. There can be
19 perhaps some discussion about who would be appropriate.

20 MS. SPIELER: Okay; great. The appointment of
21 the external people for these Work Groups is something
22 that is handled by Dr. Michaels and staff. I actually

1 think that is an important issue and I will take it
2 back and follow up.

3 I'm not necessarily suggesting, by the way,
4 that the members of the Work Group have to speak on
5 behalf of large groups, but that each of you because of
6 the expertise you have from the work you have done and
7 the people you talk to bring particular perspectives on
8 the issues. We value those perspectives. We learn
9 from each other. I think this issue of whether
10 everything has to reach consensus to reach this
11 Committee is something that perhaps we need to re-think
12 a little.

13 I do think we are very much in a learning
14 stage functioning as a full committee and work groups.

15 It was unfortunate there were 14 months where we never
16 saw each other face to face. We were on telephone
17 calls and probably couldn't remember half of the people
18 whose voices we were hearing.

19 The fact that we had these two days and we
20 came together and we are sort of working through some
21 of these process issues, I think it is very important
22 for the future work of the Committee.

1 I do hope that most of you will stay on so we
2 don't have to have a groundhog day experience.

3 MS. NARINE: I didn't mean to put anybody on
4 the spot, but just because I don't want Eric to have to
5 say labor said, you know.

6 MS. SPIELER: No, I think it is by
7 individuals.

8 MS. NARINE: People may want to have
9 attribution or they want to say they can't have
10 attribution.

11 MS. SPIELER: Absolutely.

12 MR. FRUMIN: Emily, I would like to weigh in
13 on a couple of the points here. One is we were acutely
14 aware from the beginning that this was a very small
15 group of people wrestling with complicated subjects in
16 which there were a zillion stakeholders.

17 It was a challenge certainly to make sure that
18 at the outset, the key concerns of the people on the
19 Work Group were aired. In the first couple of calls,
20 there was any number of discussions as Larry said, what
21 are somebody's burning issues.

22 We tried to put them out there but with an eye

1 towards coming to the Advisory Committee with a product
2 that would conform with our charge and give the
3 Committee some ability to speak to OSHA itself.

4 That is compounded by the difficulty of
5 firming up our information base in general, the lack of
6 useful data coming out of the whistleblower protection
7 program, just on the process issues, the whole issue of
8 delays we discussed as a terrible disincentive for
9 workers to file whistleblower complaints, never mind
10 reporting injuries or incidents in the first place.

11 These were complicated questions and we
12 understood in the limited time we had it was quite
13 difficult to structure an information flow that would
14 cast a broad net, filter that information in some way
15 that would be actionable and bring it to the Advisory
16 Committee.

17 That said, if we really want to be serious
18 about tapping into the broad range of information,
19 opinion, whatever else, the stakeholders from labor,
20 management, enforcement, whoever, that they can
21 usefully bring to the table here, that would be an
22 interesting question.

1 Someone proposed to me a while ago well, why
2 don't we host a conference, bring everybody together.
3 The idea didn't appeal to me at the time because I
4 thought that was way out of our ability and we had
5 other things we could more manageably do.

6 I think if we are serious about trying to tap
7 into this very active interest in this issue in the
8 transportation industry, it is an industry which has a
9 tremendous track record for better or worse on these
10 issues, then I think we ought to do that in a
11 structured way. I think that is something the Advisory
12 Committee ought to consider, whether there is a
13 structured way to try to reach out very broadly.

14 This group has its hands full just dealing
15 with the issues that the members are concerned about.
16 Doing something like that would be quite a challenge,
17 but it might be worth it for the reasons people have
18 said.

19 MS. SPIELER: I'm not sure. I hear what you
20 are saying. I think it might be worth following up in
21 some way that expands the input for the Work Group.

22 As you will hear, the Best Practices Work

1 Group has done that by inviting people to address the
2 group. It has been done telephonically. It is time
3 consuming. It is an alternative to trying to organize
4 a single moment, people in the same place kind of
5 conference. It may be something that is more within
6 the resources of the Advisory Committee and the
7 Directorate.

8 I do think we might want to follow up after
9 this meeting on how best to assist the Transportation
10 Group to address what a couple of you have now called
11 "burning issues" that may not have shown up in the
12 specific recommendations, and is there a way to bring
13 those burning issues forward to the Advisory Committee
14 so that perhaps we can discuss them and think about how
15 best to address them.

16 Unfortunately, the Advisory Committee only
17 meets every six months. It may be that the Work Group
18 in addition to the specific recommendations that you
19 are already considering might consider some open
20 telephonic meetings between now and the next meeting in
21 order to sort of focus that discussion and see where we
22 can take it.

1 MR. FRUMIN: Yes. I also want to point out
2 I'm not necessarily saying a "in person conference" is
3 the best way to do that by any means. It was pointed
4 out, for instance, that at DOT, there is an advisory
5 committee structure to FRA, to FMCSA. A number of
6 people on our group are members of those advisory
7 committees.

8 There are a number of information channels
9 that exist or could be tapped into to broaden the
10 information to our group.

11 I think we need to explore that in a
12 structured way to avoid being trapped into the problem
13 which is evident here, if we are only really focusing
14 on consensus recommendations, it is a very narrow
15 discussion.

16 MS. SPIELER: Maybe the best way to do that
17 would be on the next telephone call to have time
18 specifically allocated to the question of should we and
19 how should we expand the conversations we are having.

20 There were a couple of other hands up. Greg,
21 you had your hand up. Dave?

22 MR. EHERTS: To expand upon that, the 11(c)

1 Committee actually has a slide coming up.

2 MR. FRUMIN: Greg, could you speak a little
3 louder, please?

4 MR. SPIELER: It is Dave Eherts who is
5 talking.

6 MR. FRUMIN: I'm sorry.

7 MR. EHERTS: I was just going to kind of
8 expand upon Emily's comment in that the 11(c) Committee
9 has kind of a busy slide we are going to present,
10 talking about sources of information, that in a very
11 transparent way, we are going to reach out to try to
12 get subject matter experts to come speak to us on
13 topics.

14 Richard and Anthony have been very good about
15 giving us access to folks and their opinion about
16 things. I think you don't need a conference, but you
17 can invite folks to come speak to you and answer
18 questions our Committee has, as long as it is done in a
19 very transparent way, I think that will be okay.

20 MR. KEATING: I'm actually going to jump back
21 in. I just had one follow up question. I thought I
22 heard Eric say with regard to this last sentence of the

1 proposed draft, and I may have heard this wrong, but
2 that things sort of fizzled because they wanted to get
3 more information about what OSHA's view was on whether
4 they in fact do consider whether employers do training
5 when they are reaching their findings, and how that
6 might impact the amount that gets sanctioned or
7 whatever.

8 Am I right, that is the kind of stumbling
9 block? If so, is there any chance now or at some point
10 in the future we could hear from OSHA about their view
11 on this particular topic?

12 MS. NARINE: The stumbling block, that was
13 part of the stumbling block. The bigger stumbling
14 block was whether that should even be relevant. This
15 is where the labor/management divide was.

16 Part of the stumbling block was what OSHA did
17 consider and the answer we got back was didn't really
18 know, we got an answer back that there was a punitive
19 damages issue, which really went towards the knowledge
20 of what employers knew.

21 I won't speak for labor. I'll let Rick kind
22 of talk about it. The "management people" said we

1 believe there should be some kind of "credit" or
2 "mitigation" to the extent that there is some
3 recognition that the employer is training people,
4 managers, employees, on what their responsibilities
5 are, keeping a workplace safe, et cetera, similar to
6 how there are affirmative defenses in the harassment
7 area, et cetera.

8 To the extent that you should obviously train
9 people, that is the right thing to do, employers often
10 don't do anything unless there is an incentive or
11 penalty to do so. That is just the way of the world.

12 The position that labor had, and I'll let them
13 speak for themselves, the way I understood it was they
14 should do this anyway, why would you need to add this
15 in. The way I responded was just because sometimes you
16 have to basically beg and force people to do things.

17 The sentence doesn't hurt, it only can help,
18 and to the extent you can have some incentive for
19 employers to do something that they don't already have
20 to do, then the sentence is only going to help,
21 especially for those smaller and mid-sized companies
22 that won't necessarily put in any kind of training if

1 they don't have to, then it is going to be a help.

2 That was basically where the kind of stumbling
3 block went, and then we ran out of time.

4 Rick, do you want to add a little bit more?

5 MR. INCLIMA: Yes, thank you. Very quickly,
6 the position that labor put forward was essentially
7 look, we all have to comply with the law. There
8 shouldn't be an incentive or disincentive to that.

9 Just like we all have to know the safety
10 rules, the safety laws, the regulations, no matter what
11 they are or what they cover, there is a built in
12 incentive for employers to reduce whistleblower
13 complaints, and they do that by reducing retaliation.

14 In that sense, the incentive is already there,
15 and I didn't feel it was necessary to call out training
16 because there is this issue, you have training and you
17 have corporate culture or safety culture, and they
18 don't always align.

19 You could have a really great training program
20 and run your people through a great training program,
21 but then the practice is more or less a reign of terror
22 when you get down to the rank and file, where the boots

1 are on the ground.

2 I'm not saying explicitly that is the case,
3 but that certainly is a possibility. You can't look at
4 a training program on paper and say look at how great
5 this is, therefore, there should be some reward.

6 It is really you have to look at the whole of
7 the case, the whole of the corporate behavior in the
8 bigger picture, and then decide -- I think OSHA already
9 has that discretion to decide -- based on these
10 circumstances and these conditions, we will up the
11 punitive's or reduce the punitive's or come to some
12 finding at the end of the day. I think they already
13 weigh those things.

14 That was really my concern, well, training
15 equates to some favorable consideration, it doesn't
16 necessarily connect the dots.

17 MS. NARINE: We want some more information
18 about what they had, and I think we were going to have
19 more discussion. Obviously, we wouldn't think any kind
20 of paper training program would suffice, kind of
21 similar to the Federal guidelines, where you have to
22 have clearly something more than a paper program to

1 suffice.

2 We have to have obviously a lot more
3 discussion.

4 MR. BAIRD: Can I just jump in one second?
5 Both Eric and now Marcia -- I clearly didn't
6 communicate exactly correctly yesterday, so let me
7 clarify what OSHA does currently think about in this
8 context.

9 In the punitive damages area, there are kind
10 of two theories that the agency can proceed under. One
11 is that the actor or the management official knew the
12 law and broke it anyway, and that would be grounds for
13 punitive damages.

14 The other one is where maybe there wasn't
15 knowledge of that law but the conduct was so reckless
16 or wanton, that it didn't really matter.

17 What OSHA's whistleblower manual says is on
18 that first prong, where a company official retaliates
19 with knowledge that what he's doing is illegal or what
20 she is doing is illegal, the employer has a defense
21 that says if the employer can show they have a training
22 program and they implement it, that is something that

1 is taken in mitigation or punitive damages.

2 To that extent, OSHA's written policies do
3 consider training programs, just so that is clear.

4 MR. FRUMIN: I'd like to just weigh in here
5 for a second. It is an interesting discussion to be
6 had about the use of the incentive to promote
7 compliance in enforcement situations. There is an
8 interesting discussion to be had about the promotion of
9 training within corporate entities, within the employer
10 side, as well as by other people, whether it is unions,
11 OSHA, whoever.

12 We might well have been able to come to grips
13 with both of them, the hang up in this discussion was
14 about linking them. I think it is critical that we get
15 the information we need, Ed touched on a few things,
16 but we need a lot more than that in order to understand
17 better and factually what actually are the policies,
18 not only policies but practices regarding OSHA's use of
19 credits or mitigating factors, et cetera, in
20 enforcement decisions.

21 Training, we are probably able to handle
22 ourselves, but until we figure out a way to look at

1 these separately, I don't think we are going to be able
2 to even come close to grips in terms of linking them.

3 It will be an interesting discussion.
4 Unfortunately, it points to the difficulty again of
5 assessing the practices and the whistleblower
6 protection program based upon the current information
7 base in the program, the kind of record the program
8 keeps.

9 MS. VALKAN: If I may, I just have one
10 question. I recall in yesterday's meeting you did read
11 from the manual. I don't recall anything specifically
12 about training. Something about an employer having an
13 internal policy prohibiting retaliation could be used
14 as a mitigating factor, and there is a separate section
15 for training. I know you were trying to look at that
16 quickly yesterday.

17 MR. BAIRD: My recollection is the words used
18 would encompass "training."

19 MR. FRUMIN: I think it would be better to
20 again defer the detailed discussion of this until we
21 get a comprehensive review of this from OSHA or the
22 Solicitors Office. We are kind of struggling now to

1 deal with scrapes of information.

2 I'm not sure that the mitigating factors and
3 punitive damages' question even is relevant.

4 I'd just like to ask if we could put this one
5 to the side. It's a good example of what it is like to
6 try to work through some of these issues when you get
7 close to the ground and yet trying to understand agency
8 policy.

9 This problem is not unique to whistleblowers.

10 Look at the field operations manual for OSHA on
11 compliance. It has chapter and chapter and chapter
12 with lots of interesting things to discuss along the
13 same lines.

14 MS. SPIELER: I agree, I think since the
15 Committee was in the middle of their conversation about
16 this yesterday, that we should defer this to the Work
17 Group for further discussion, and you should let Ed and
18 members of the Directorate, staff of the Directorate,
19 know what kind of information you need.

20 I'd like to ask you a different question. You
21 noted some of the advisory committees of other agencies
22 are not particularly active and there is sort of

1 interagency information that you would benefit from in
2 terms of your future deliberations.

3 I just would like to make sure that if there
4 needs to be some request through the Directorate to
5 other agencies, that it be clear that request is made
6 not just by the Work Group but also by the full
7 Advisory Committee on behalf of the Work Group, so that
8 to the extent possible, we can really deal actively and
9 effectively with this industry, which has been of
10 particular concern.

11 MR. FRUMIN: First, I want to say perhaps you
12 misheard me. The advisory committees that are run by
13 the DOT agencies are indeed active.

14 MS. SPIELER: Okay, I did mishear you.

15 MR. FRUMIN: Several of our Work Group members
16 serve on those advisory committees. What I was
17 concerned about was again, there was not the
18 interagency contact and collaboration, whether it's on
19 advisory committees or information sharing or even
20 membership on our Advisory Committee.

21 If we can get someone from FMCSA, for
22 instance, to serve on our Advisory Committee, that will

1 help open up an active line of communication with DOT
2 that could be very helpful.

3 I agree with you, it would be good for our
4 full Advisory Committee to second the request that we
5 have already made and that OSHA is already working on
6 to enhance this relationship with DOT. If we don't get
7 a stronger relationship there, both DOT and OSHA's
8 programs are going to suffer or continue to suffer.

9 MS. SPIELER: Okay, thank you. That was
10 clarified for me. Is there anything else?

11 MR. FRUMIN: I have one question which is how
12 long should this Work Group stay in existence? Because
13 we have non-WPAC members on it, I think it is not
14 necessarily fair to assume they should have the same
15 trajectory as the rest of the Advisory Committee.

16 We didn't really talk about it. I tried to
17 project out that we could get some work done in the
18 next six months, but I don't think anyone was ever
19 given a term, so to speak, to sign up for.

20 MS. SPIELER: Good point. It is true, we
21 haven't. It is a different formation than the other
22 Work Groups. The other Work Groups are essentially

1 only members of the Advisory Committee.

2 I actually think it would be helpful to me and
3 therefore I hope to the Interim Director and the
4 Assistant Secretary if you at your next meeting could
5 discuss the issues you would like to address and what
6 kind of time line you feel comfortable with.

7 If the members of the Work Group would like to
8 close down after the next Advisory Committee meeting,
9 then we need to put together a work plan that is doable
10 in that period.

11 If there are issues that you would really as a
12 group think need to be dealt with by the Advisory
13 Committee and need further conversation, then I would
14 appreciate a recommendation to me and to Dr. Michaels
15 regarding what the time line would look like and
16 whether those of you who have agreed to serve as
17 outside members would be willing to continue your work.

18 For example, you might come back and say we
19 think we really need a year and this is what we would
20 do in the first six months and this is what we would do
21 over the 12 month period, and then we think we should
22 disband.

1 The other Work Groups, I think, are coming
2 back for time lines that go as far as 18 months.

3 MR. EHERTS: Twelve months.

4 MS. SPIELER: Twelve months on 11(c). The
5 other Work Groups are coming back with a specific time
6 line proposal. Perhaps on the next Work Group
7 telephone call, I will try to be on it and we will
8 discuss that specific issue on the call so we can get
9 over that, I agree, unfortunate and inappropriate lack
10 of clarity.

11 Does that work for you, Eric?

12 MR. FRUMIN: Yes, that's fine.

13 MS. SPIELER: I apologize. I actually think
14 just before we close this out, we asked Eric to take
15 on, I think, a very difficult task, much more difficult
16 than the other Work Groups because it involved trying
17 to bring in people from outside, trying to figure out
18 how we will address issues coming into it with some
19 discomfort from the outside about the lack of
20 representation on the full Committee.

21 The Committee has worked incredibly well
22 together despite the fact that people had never met.

1 Unlike the other work groups, people were not at the
2 first Advisory Committee. I really want to applaud the
3 work you have done, and in particular, thank Eric for
4 the work he has done in bringing the Committee
5 together.

6 Having sat in on the conversations and
7 listened to how well you all listen to each other, I
8 think there actually is some room for further work that
9 would be meaningful for this Advisory Committee and for
10 the Department of Labor.

11 I do hope you will continue.

12 Is there anything else with regard to this
13 Work Group? If not, it is break time. It is a 15
14 minute break. We will reconvene at 11:00 and talk
15 about Best Practices.

16 (A brief recess was taken.)

17 MS. SPIELER: Before we go forward, many of
18 you arrived after we did introductions this morning. I
19 asked that everybody in the room introduce themselves.

20 I'm going to ask Rob to pass a mike, and if
21 you could say your name and what your affiliation is,
22 if you have not previously introduced yourselves to the

1 group.

2 I also wanted to ask that everyone who is
3 sitting in the public section, because of the
4 transparency, we would appreciate it if you would sign
5 up on the list in the back of the room.

6 MS. GUENTHER: Megan Guenther, Office of the
7 Solicitor.

8 MR. SWAIN: Bob Swain, Office of the
9 Solicitor.

10 MS. DEVINE: Charlotte Devine, Government
11 Accountability Project.

12 MS. HYATT: Andrea Hyatt, BNSF Railway.

13 MR. COCHRAN: Pete Cochran, Morgan Lewis.

14 MR. JOHNSON: Ron Johnson with Jones Day.

15 MS. ZIELINSKI: Sarah Zielinski, F&H Solutions
16 Group.

17 MR. SIRBAK: Joseph Sirbak from Buchanan
18 Ingersoll & Rooney.

19 MR. PENROD: Orlando Penrod, BLET.

20 MR. HEBERT: Tom Hebert, Brotherhood of
21 Locomotive Engineers and Trainmen.

22 MR. HARB: Dave Harb, BLET.

1 MR. BROWN: Dave Brown with the BLET.

2 MR. VERNA: Vince Verna, BLET/Teamsters.

3 MS. BENSON: Hilary Benson, Congressional
4 Office of Compliance.

5 MR. ZUCKERMAN: Jason Zuckerman, of my own law
6 firm, and I represent employees.

7 MS. SPIELER: Thank you very much. Before the
8 break, after the initial presentations from Dr.
9 Michaels and Interim Director Mendelson, we had a
10 report and discussion of the first Work Group, the
11 Transportation Work Group.

12 We are now moving to the second Work Group
13 discussion. It is the Best Practices Work Group
14 chaired by Jon Brock, who will make the initial
15 presentation.

16 We will follow the same process. We will have
17 the Chair of the Work Group do an initial presentation,
18 members of the Work Group add whatever they would like.

19 If there is a specific recommendation, which I don't
20 think there is from this Work Group, but if there is a
21 specific recommendation, we will take up any specific
22 recommendations from Work Groups, and then we will to a

1 more general discussion of issues that the full
2 Advisory Committee would like to discuss with regard to
3 the Work Groups' activities.

4 MR. SWICK: Madam Chairperson, we have one
5 more person.

6 MS. HUGHES: Kathleen Hughes, Union Pacific.

7 MR. SWICK: Thank you.

8 MS. SPIELER: Thank you.

9 BEST PRACTICES AND CORPORATE CULTURE WORK GROUP

10 REPORT AND DISCUSSION

11 MR. BROCK: Thank you very much. I will
12 present a brief summary report on the progress of the
13 Best Practices Work Group, which consists of Greg
14 Keating, Billie Garde, Dave Eherts, Marcia Narine,
15 Nancy Lessin, and Ken Wengert, who is not here at the
16 meeting today and sends his regrets.

17 I want to begin just by referencing the charge
18 the Assistant Secretary gave. He summarized that this
19 morning very nicely with his hopes for our discovering
20 beneficial best practices that could make a difference
21 in reducing incidents of retaliation against
22 whistleblowers and other goals that he discussed.

1 I took some excerpts here that I put up on the
2 slide. I'd like to just for emphasis read a few
3 sentences, so I'll take excerpts from the excerpts.

4 (The agency is at a point where we need to
5 adopt strategies that will better discourage employers
6 from retaliating against employees that engage in
7 protective activities. He goes on to name some of whom
8 are protected."

9 He goes on to say "One potentially fruitful
10 strategy would involve expanding our message." This is
11 part of what he said this morning. "Not only to tell
12 employers that retaliation is against the law, but that
13 there are structures, policies and programs that an
14 employer can adopt that will protect whistleblowers and
15 thereby ensure the employer is following the law.

16 I would like this work group to identify,
17 investigate and evaluate programs, policies and
18 practices currently in use in private and public
19 enterprises that best ensure prevention and cultural
20 discouragement of retaliation against whistleblowers.

21 OSHA would like the WPAC's advice on the
22 effectiveness and impact of these programs, any gaps

1 that are identified in the effectiveness of existing
2 programs, and the best methods for dissemination of
3 information regarding identified best practices."

4 We tried to take that seriously. While I
5 think our specific goal or what we think is possible,
6 I'll just put here as a placeholder a goal that really
7 just refers back to the Assistant Secretary's charge,
8 which I just read excerpts from, that we want to
9 provide a report for consideration by this full
10 Committee to serve as a basis for recommendations to
11 the Assistant Secretary along the lines that he has
12 asked for, articulately and clearly.

13 The Subcommittee report, as he indicated, may
14 have administrative, regulatory or policy
15 recommendations, as well as suggestions regarding
16 dissemination.

17 We began with that. We have learned a
18 tremendous amount since this fairly general goal
19 statement was developed back in December.

20 What have we done so far? We have tried to
21 follow that charge by making sure we reviewed it and
22 understood it, developed a work plan and some protocols

1 to govern our work in terms of working well together,
2 hearing from outside experts and others, people with
3 examples and so on, that we would listen carefully and
4 take in the information.

5 We then began to proceed with the work plan.
6 I think we are doing reasonably well in tracking what
7 we said we would do back at the December meeting. We
8 have met exclusively, as was indicated in some of the
9 earlier comments by our Chair, by phone until
10 yesterday. The phone calls have been remarkably
11 productive. I think it is very difficult as all of us
12 know to be able to talk about difficult issues in that
13 invisible format.

14 Everyone really stepped up and listened to
15 each other well, acknowledged the points that were
16 being made, argued, pushed back, debated. I think the
17 difference, if I may say so, in each of our individual
18 perceptions, and then building to a collective
19 perception now encompasses much more in the way of
20 problems, issues and opportunities that are there for
21 discovering and assembling information on best
22 practices that could be useful.

1 We also learned in more specific terms what
2 some of the challenges were, which I'll talk about in a
3 moment.

4 We decided that we would begin with a set of
5 initial presentations by each of the Work Group
6 members, recognizing that we had individuals who have
7 serious experience from the different perspectives
8 represented on the Committee and represented by their
9 experience, which comes sometimes under different laws
10 that OSHA is responsible for.

11 We had a tremendous amount of resources right
12 there on the Committee. It was a way for us to get
13 introduced to each other and to find out what knowledge
14 people had that they could potentially bring to the
15 table, and also to begin to establish a vocabulary and
16 understanding of issues, and an understanding of the
17 concerns and possibilities that people brought from
18 their experience.

19 We have completed that round. We will move on
20 to beginning to invite other people who have knowledge
21 and expertise that we have identified so far as being
22 important to our continued work, and I'm sure a list of

1 issues and people will evolve as we learn more about
2 what we know and what we need to know.

3 We had some opportunity in the course of the
4 phone calls with the members to look across and compare
5 some of the things that had been said, and it led us to
6 identify what we think are some important challenges.

7 We have identified a pretty substantial list,
8 which I'm sure we will expand and change, of things we
9 think we need to know more about. We project to have
10 some recommendations early in the Fall.

11 I will take you to some examples of the key
12 challenges. This is not everything that will be
13 challenging, you can be sure. This will give you a
14 flavor of the kinds of things we have come up against.

15 It is certainly clear and probably obvious to
16 everyone who works in this arena that not one size fits
17 all, one kind of program will not be appropriate for
18 all companies.

19 We have had some very useful discussions about
20 the possibilities and challenges for coming up with
21 recommendations that would be generically valuable and
22 applicable, recognizing there are different sizes of

1 companies, different laws people are under, different
2 histories, different kinds of problems and issues, and
3 that it would be necessary to have recommendations that
4 made it possible for individual enterprises and perhaps
5 workplaces to be able to adopt policies that made
6 sense.

7 This was not in a way discussed to give anyone
8 a pass on benefits of adopting best practices, but what
9 got adopted, how it got adopted, what could be applied,
10 how it would apply, would depend on some of these other
11 aspects of scale, what laws you were under, what
12 difficulties or problems might have been present or
13 could be predicted.

14 We know clearly that is going to be a
15 challenge to make sure we come up with things that can
16 recognize those differences.

17 We have also identified that even a program
18 that would appear on paper and in manuals to be
19 matching up to what we could call "best practices,"
20 there are numerous issues with implementation,
21 perceptions by those implementing the program, that it
22 is really excellent, and finding out people are not

1 really reporting, that there are aspects of the program
2 that discourage reporting or that are inadequate in one
3 way or another.

4 That led us to some useful discussions that we
5 recognize need to be expanded and delved into on how
6 one goes about auditing these programs, validating that
7 they are doing what they are supposed to do, and being
8 able to get information that allows you to improve and
9 make changes in the programs, and the importance of
10 consistent response, and the difficulties of getting
11 consistent response to the requirements of these
12 programs or to issues that come up, whistleblower
13 issues or retaliation issues that come up, despite the
14 best of programs.

15 We know we need to learn more about how one
16 audits and validates and that will be an important part
17 of best practices and ensuring the best practice
18 someone is trying to implement actually can and does
19 get implemented.

20 We had quite a robust discussion in our last
21 call, and it had come up in earlier calls, but a more
22 focused discussion on what I have listed here as

1 practices, traditions and metrics that encourage under
2 reporting of safety issues, and those kinds of forces
3 that lead to under reporting seems can often lead to
4 more retaliation and difficulties.

5 This is something we flagged and we will learn
6 more about that we identified as an important issue and
7 problem.

8 There are some differences of opinion of
9 exactly where it comes from, how widespread it is, but
10 it clearly is an issue that is recognized that needs
11 attention.

12 We also had some interesting discussions about
13 making a business case for why it is important for
14 companies to be interested in having issues reported.

15 Assistant Secretary Michaels this morning
16 talked about his hope that we would come up with good
17 recommendations that would protect employees from
18 retaliation and increase their capacity to come
19 forward.

20 He described that he had the hope that these
21 practices might also be good for the business.

22 We have had quite a lot of discussion led by

1 contributions from some of the management
2 representatives on the Committee about the benefits
3 they see, and I think it would be fair to say that more
4 businesses could be encouraged to see but maybe they
5 already do, and that by providing useful guidance on
6 program possibilities, program components, and making
7 this -- I'll call it the "business value case" -- that
8 we would be able to make more inroads and there would
9 be more benefits.

10 Perhaps that hope of Secretary Michaels will
11 turn out to be fulfilled more than he might have
12 expected, and I'm sure he would be pleased about it.

13 We also identified the importance of affecting
14 front line supervisory behavior because as we discussed
15 quite a bit, it is really through supervisors and
16 management that people tend to raise most of their
17 issues. Certainly, those are the people in the best
18 position to address the issues and should be addressing
19 the issues.

20 Any kinds of best practice recommendations
21 need to look carefully at how those behaviors, those
22 skills, and the support for appropriate responses can

1 happen. Numerous barriers and difficulties were
2 identified as well as potential tools. The importance
3 of it, I think, is not particularly controversial.

4 Obviously, we want to produce recommendations
5 that actually get adopted. There was a comment from a
6 member of the public yesterday asking us to provide
7 recommendations that could really be used and could
8 make a difference. We certainly had that prominent in
9 our conversations, and it was good to be reminded.

10 Going from those challenges and other aspects
11 of our discussion, this is, I guess, a partial list of
12 areas where we intend for the present to seek
13 additional information. As I said, this list could
14 expand the more we find out about what we think we
15 know, what we think is good, and when we find out there
16 are things we don't know and we need to learn more
17 about.

18 I won't read off the list, but just to give
19 you a sense of what's between the lines here, a desire
20 to really understand the worker experience so that in
21 making recommendations, we are making recommendations
22 that could really affect the capacity, the opportunity,

1 the freedom to raise issues and to have issues handled
2 in a way that reinforces that right, that brings good
3 information forward, and that the information is acted
4 upon.

5 We certainly had in our discussions a very
6 useful perspective provided from the worker
7 perspective, but we think we need to learn more about
8 that experience in these kinds of systems, which will
9 help us learn more about other factors that interfere,
10 some of the metrics and measurements.

11 Some of that was talked about in the
12 Transportation Committee's report. There are a lot of
13 traditional measures that provide monetary rewards, and
14 this is not news to anybody here, for low injury rates.

15 We have had some very useful discussion and we need to
16 look into how that happens and make recommendations
17 about the best ways to provide incentives.

18 We have talked a lot about the common phrase
19 "what is measured is treasured," and part of our
20 further discussions and recommendations I am sure will
21 talk about what people can most usefully measure and
22 what impacts that will have.

1 That is part of understanding the worker
2 experience and the way companies use measurements.
3 There is quite a lot of knowledge around the table
4 about it. Not full agreement but a lot of knowledge
5 and information. I think we will do well with it.

6 I have identified the company size, the
7 auditing, and those kinds of things.

8 We want to tap into the knowledge of vendors,
9 non-profits and others that track trends and tools. We
10 identified we want to know more about what tools were
11 out there being used that could be potentially
12 characterized and recommended as best practices. We
13 are going to try to find out more about what people are
14 using, what people know about.

15 In yesterday's discussion, a point that had
16 not been part of our discussions before but very
17 important, to try to understand more about the
18 experience of immigrant and other vulnerable workforces
19 that might tend to have more difficulty in bringing
20 issues forward and having their rights protected. We
21 will attempt to learn more about that.

22 Yesterday, as Marcia noted, the Fairfax Memo

1 was placed on our agenda as well. We will have to have
2 some discussion to figure out how our Work Group can
3 help with that.

4 We identified because OSHA has the
5 multiplicity of statutes, in order to make our
6 recommendations, to get over the one size fits all, we
7 need to get more knowledgeable about those different
8 programs. Each of us tends to have worked in a few of
9 the areas, but no one has a full picture, especially
10 since some of the laws are new. We want to be sure we
11 are briefed enough so that we can do a good job with
12 that.

13 With some difficulty, I managed to get a time
14 line slide to pop out of my computer. This just gives
15 you a sense of how we will incorporate additional
16 learning and discussion into the calendar.

17 I have put it month and month. The Committee
18 has been very good about putting time aside for these
19 lengthy conference calls to try to substitute for
20 meetings where people can talk substantively and have
21 presentations and questions and discussion.

22 Assuming we can continue to call on people's

1 time in these conference calls, we would be placing
2 these topics into those calls. These are placeholders.

3 Some of it will depend on who is available to come
4 talk to us, things we identified we might want to link
5 together.

6 You will see in here the auditing topic,
7 talking to vendors, other tools, the front line
8 response, other things that I've mentioned, and moving
9 on towards topics that give us the opportunity to
10 perhaps then develop recommendations in the Summer,
11 when everyone really loves to be on conference calls
12 indoors, assuming all the budget discussions that
13 happen in this town will allow us to meet when we
14 intend to, and I'm sure the Chair will convene us
15 appropriately, and we hope to be ready perhaps in the
16 Fall with some very useful recommendations.

17 I again repeat my own sense of encouragement
18 on the progress that we have made, by the candor that
19 has been in the discussions, and by the high degree of
20 substance offered and quality of the questioning, and
21 the willingness around the table/on the phone to
22 acknowledge the importance of issues and possibilities

1 that each of the other Work Group members are raising.

2 That is the progress report that I offer on
3 behalf of the Committee, on behalf of the Work Group.
4 I would like to invite Work Group members to add
5 perspectives and background on anything that I said or
6 on anything I failed to say.

7 Marcia, would you like to start?

8 MR. BAIRD: Let me just jump in with a
9 housekeeping thing. The PowerPoint slides that Mr.
10 Brock used to support his presentation has been marked
11 as WPAC Exhibit 3, and will be in the record.

12 (Exhibit No. 3 was marked for
13 identification.)

14 MR. BROCK: Thanks.

15 MS. NARINE: You didn't leave anything out. I
16 am just going to add a comment, which is I think the
17 biggest struggle I am going to have as a participant in
18 this Work Group is trying to help figure out or add to
19 the discussion about the value proposition for
20 employers and trying to figure out the benefit of a
21 safety culture, which I know is a bad word for some
22 members on the Committee.

1 While I think as I said yesterday this is
2 pretty much a selective group of people who think this
3 is an important issue. David and I have talked about
4 it is obvious to us that keeping costs low and
5 retaliating is a stupid thing to do, but it is not
6 obvious to everybody.

7 To the extent that Dr. Michaels talked about
8 large fines for companies that have tremendous
9 reputations, like AT&T and others, clearly companies
10 don't always get it.

11 We could talk about why would anybody want to
12 pay Workers' Compensation costs, the companies are self
13 insured, obviously not everybody gets it. Nancy,
14 Billie and others that represent labor have done a
15 really good job of educating the Advisory Committee of
16 what's going on on the ground.

17 What do we do or how do we really make sure
18 small and mid-sized and large companies understand that
19 value proposition. I think that is going to be a
20 really difficult struggle for us. It is not obvious to
21 everybody. It is not going to make financial sense to
22 everybody. For some people, it is going to make more

1 sense to cut corners, not to the people on this
2 Committee and not to everybody in this room.

3 I think when we are looking at best practices,
4 it is going to have to be financially much more
5 punitive to break the law. It is going to have to be
6 legally more difficult to break the law. It is not
7 going to be a best practice. It is going to be just
8 much harder to break the law.

9 For some people, a best practice is going to
10 be a good thing. For some people, it is going to be a
11 moral thing. For some people, a best practice is not
12 going to be enough.

13 I think we need to think of a range of things
14 and that best practices are going to be good for some
15 people but that is not going to be enough for
16 everybody.

17 MR. BROCK: Thank you, Marcia.

18 MR. EHERTS: I agree completely. I kind of
19 look at the work product from this group as a tool kit.
20 That could be a set of best practices that we could
21 deliver to the outreach program of OSHA we discussed
22 earlier, that they could bring out to industry and say

1 here are some best practices from leading companies
2 that have been very successful, not just in running
3 these programs, but in business, and it might be
4 valuable to you to emulate this culture at your company
5 because you should therefore get the same results.

6 I'd like to point out there is a very good
7 book out right now by Stephen Covey called "Business at
8 the Speed of Trust." I think there are a lot of great
9 lessons in that book about what I call the "macro or
10 strategic business case."

11 I can give you one example. We had a CEO that
12 says very publicly, in fact, only two things matter in
13 our business, and that's every aircraft lands where and
14 when the public wants to land, the time and place, the
15 choosing of the pilot, and every employee goes home the
16 way their families sent them to us in the morning. He
17 said everything else is corporate hoo-haw. In public,
18 he says that. In private, he uses a different word.

19 He said if those two corporate requirements
20 are met, every other corporate requirement will be met
21 in his mind, including EBIT, profit, cash flow, and all
22 those other things.

1 When I read Covey's book, Covey has a lot of
2 very concrete examples, the one he uses is Best Buy.
3 He says for every 0.1 percent increase in employee
4 loyalty, he calls it "engagement," they can measure
5 \$60,000 of increased sales per associate.

6 Basically what Covey is trying to say is if
7 you have the trust and respect of your employees,
8 productivity, quality, sales, everything is going to go
9 up, and the same thing for your customers. If your
10 customers trust your product, it is the best one out
11 there, they are going to buy it, even if it costs a
12 little bit more and delivery takes a little longer.
13 This trust is that important.

14 I would recommend that to the Committee as
15 something we should maybe include in the OSHA materials
16 for outreach. It is a very powerful argument that
17 there is value to safety and there is value to a strong
18 corporate culture around ethics.

19 MR. BROCK: Greg?

20 MR. KEATING: I just wanted to chime in here.
21 First of all, I found this process to be incredibly
22 collaborative and incredibly productive. I think Jon

1 has done a phenomenal job of keeping the ship sailing
2 in a very productive direction.

3 I just wanted to echo something that I had
4 referred to in the initial Advisory meeting, and that
5 ironically one of our audience members, Kathy Hughes,
6 had eloquently stated yesterday, which is on behalf of
7 management, one of my goals, and I think it was echoed
8 by Dr. Michaels this morning in his introductory
9 remarks, is we have had a lot of deterrents, we have
10 had a lot of punishments that have exacerbated and
11 increased in recent years and perhaps for good reason,
12 to try to strengthen the teeth of the whistleblower
13 laws.

14 As Kathy said, she is sort of a little tired
15 of getting whacked in the back and would rather be sort
16 of guided forward.

17 One of my overarching goals that I feel is
18 very attainable, especially in light of the chemistry
19 of this group and the resources that are out there, is
20 to try to identify a series of best practices which if
21 a company adopts and implements in order to create a
22 truly compliant culture, then that should be considered

1 and employers should frankly be given carrots instead
2 of sticks and rewarded for really going above and
3 beyond.

4 In that regard, the last thing I will say is I
5 think we did identify, and Jon, correct me if I'm
6 wrong, there are meaningful differences between the
7 safety area that Nancy has educated a lot of us on,
8 myself included, and the area of general wrongdoing,
9 someone who comes forward and has the courage to
10 identify -- fill in the blank -- fraud, various things
11 that are wrong.

12 I think there are some very practical best
13 practices, especially in that latter area, that we can
14 come up with going forward, which if an employer
15 expends the time and resources to implement, I think
16 should inure to their favor going forward.

17 MR. BROCK: Thank you.

18 MS. NARINE: Let me just add to that. As a
19 former compliance officer, I love incentives. I love
20 to trot out in front of the audit committee here are
21 all the things and if we do this, these are all the
22 credits we will get, all the mitigation, so I think

1 that is important.

2 I think you need to have a lot of carrots, but
3 I think you need to have meaningful sticks as well
4 because to the extent you don't have any meaningful
5 sticks, then no one is going to pay attention to
6 anything.

7 I remember about a year or so ago, there was a
8 multi-page article in the New York Times about OSHA. I
9 can't remember where it was, but it was about how
10 difficult it was for OSHA to enforce a number of
11 penalties. It was a very sad story about how the
12 workers weren't able to get any relief because of a
13 lack of resources that OSHA had.

14 I remember showing it to my class when I was
15 teaching at the time, and they were very sad about the
16 fact that this agency that was meant to protect workers
17 didn't have the resources that it could to be able to
18 do its job.

19 I remember I had students in my classroom that
20 said yeah, my dad works in a factory, they don't think
21 OSHA can do anything. That is the problem. That is
22 what I am worried about.

1 To the extent that his dad's boss didn't have
2 any worry that OSHA could do anything, that's the
3 problem. You need incentives so that employers will go
4 beyond and below. That is the best practices' part.
5 That is the mitigation. That is the stuff we talked
6 about in the last Work Group.

7 You need some meaningful penalties that have
8 some teeth that will say if you don't choose to take
9 advantage of these incentives that we are going to give
10 you, then there is a big stick that will be used, we
11 will punish you often and we will punish you severely.

12 MS. SPIELER: I'm wondering if there are other
13 members of the Work Group that want to chime in at this
14 point.

15 MR. BROCK: We haven't heard from Nancy or
16 Billie yet.

17 MS. GARDE: I would like to comment. We heard
18 from Dr. Michaels this morning, I think a really
19 fundamental piece of our project, which is because of
20 the resource problem at OSHA, it is the workforce that
21 is going to be the eyes and ears to protect the rest of
22 us.

1 I feel like our work is to give as many tools
2 as possible to companies big and small about what that
3 means.

4 Retaliation is often not a common sense. How
5 you deal with retaliation isn't intuitive. Human
6 nature is to retaliate against people who buck the
7 system, who reveal things that embarrass you, who bring
8 shame on your company.

9 We are bucking against human nature and trying
10 to create a reason to act correctly and a framework of
11 how to do that for a lot of companies who if you ask
12 them directly, even small companies, would you
13 retaliate against somebody, no, but when you say this
14 is what retaliation is and this is what you did, it
15 lines up. There is a tremendous amount of education
16 and incentives that go with this.

17 I think one of the things our Committee can do
18 and I talked about this is look for opportunities for
19 the Department of Labor across the board to include in
20 all its programs and processes ways to incentivize, to
21 recognize -- for example, I talked yesterday about the
22 VPP.

1 A VPP program star status is incredibly
2 important to companies. If a company wants to get
3 that, why not put in there they have to have training
4 on anti-retaliation, they have to have a program for
5 employees to raise concerns.

6 All the things OSHA does, we need to look
7 across the board to see where there are opportunities
8 and tools to insert this relatively narrow piece of
9 work that is so critically important.

10 We go from disaster to disaster and as a
11 professional in this area, as soon as I see the
12 disaster, I know there was some worker that was trying
13 to stop that from happening. I know that. Finding who
14 that person was and what the issues were that prevented
15 them from raising the concern or preventing the
16 disaster, it is really all part of the learning. No
17 company wants to be responsible for the next big
18 mistake or bury their workforce.

19 They don't have the tools from the Department
20 of Labor. They don't have the money a lot of times to
21 put together the right kind of program. Frankly, there
22 is not a lot of anti-retaliation training off the

1 shelve out there.

2 This is a relatively narrow scope of
3 activities. I'm hoping our Subcommittee is able to
4 take what is out there and take the tools that are out
5 there and really get in depth about what is it going to
6 take to incentivize companies to make a difference.

7 I think that's a challenge that we have. I
8 think it's going to start a lot from hearing from both
9 workers and small companies about what it will take to
10 do that. I think we need some other eyes on the
11 Committee from the Department of Labor of where are the
12 other opportunities we can piggy back to do some of
13 those things.

14 MR. BROCK: Thank you.

15 MS. LESSIN: I do have something I wanted to
16 say. I think the issue of metrics is going to be a real
17 challenge. Right now, just in the arena of health and
18 safety, the metric that is used is reportable injuries,
19 lost time injuries. Those metrics have not served this
20 arena well, I think. There are way too many ways to
21 game the system to get low reported injuries and low
22 lost time.

1 We have employers that have what we call the
2 "rubber room," where if you break two legs, the
3 supervisor will pick you up, bring you into the
4 workplace, and you play tiddlywinks or do something and
5 then they bring you home, and that is not then a lost
6 time injury because you are in the workplace.

7 All kinds of things happen out there to make
8 the numbers look good. As long as the injury number is
9 the metric used, I think we are going to see continuing
10 pushing the reporting down rather than fixing the
11 workplace so it is healthy and safe and people don't
12 have injuries and illnesses.

13 It is interesting of late looking at this
14 arena. There used to be something in rail called the
15 Harriman Award. That was for carriers, they got the
16 award when there were low injury, work related injury
17 experience. One of the things that was matching up was
18 those carriers who were getting that award and the
19 amount of retaliation claims coming out of that carrier
20 that OSHA was pursuing in terms of trying to deal with
21 the retaliation that was happening and getting people
22 not to report injuries and illnesses.

1 One of the things that happened in the last
2 couple of years is this award that had been going on
3 for 98 years in rail was kind of quietly put away.
4 There is no more Harriman Award, and in my opinion,
5 because of the embarrassment that was coming out.

6 In mines, they had Sentinels of Safety. Some
7 of the big winners of Sentinels of Safety Award was
8 Upper Big Branch, and there are many others. MSHA has
9 recently decided to pull out of that award process.

10 I think it is going to be a lot more than not
11 doing these kind of big recognition programs for low
12 injury rates. I think it is going to really take some
13 thinking about how to set up metrics that support real
14 health and safety, metrics such as how many hazards
15 have you identified, how many hazards have you
16 eliminated, how many hazards have you reduced according
17 to the proper hierarchy, and how many days did it take
18 from when a hazard was identified to when it got
19 corrected.

20 There are many different kinds of metrics but
21 right now, the injury/illness is the most prevalent
22 one, and I think it is problematic for the arena we are

1 talking about in whistleblower.

2 MR. BROCK: Good; thanks.

3 MS. NARINE: I don't know if the EEOC still
4 does this, but they used to have something where the
5 local EEOC District Director would recommend that
6 companies nominate themselves for a national reward. I
7 don't know if they still do that.

8 Maybe it is something that OSHA could
9 consider. Perhaps companies could be awarded maybe
10 based on a committee that's made up of labor and
11 management. Obviously, if management was only on it,
12 it probably would be something labor would not accept.

13 Maybe that is something we could think about
14 for best practices, so if company nominated themselves
15 for their best practices, maybe there is a committee
16 that is made up of Nancy, and maybe a couple of other
17 people, but it's something to think about.

18 If you think you have something that you think
19 you have done to reduce injuries, maybe this Committee
20 considers some metrics that are appropriate, maybe
21 along the lines you thought of, and that is something
22 that gets things out there in the future that other

1 companies could consider.

2 It is something that is not just rubber
3 stamped by other companies. It is not something that
4 OSHA has to sit there and think about what the metrics
5 are. It would be something that is really considered a
6 best practice.

7 Not something we would have to do this year,
8 but something in the future that would be a pretty
9 objective measurement of recognition, this is something
10 that is not used universally but something that is
11 considered really a best practice, something that is
12 judged. It is not a cash prize, but some kind of
13 recognition.

14 I don't know how labor would feel about that.

15 It might be something that is completely out of the
16 industry. Rail wouldn't be judging rail because that
17 could cause a conflict of interest.

18 It is something to think about, to have
19 companies say this is what we are doing, this is what
20 we think is something people should think about, but it
21 is another way to get some recognition out there.

22 MR. BROCK: Call attention to the practice.

1 MS. NARINE: Call attention to the practice.

2 MS. SPIELER: Let me open this up so we are
3 not only the Committee talking to itself.

4 MR. BROCK: We like to.

5 MS. SPIELER: I know. Three hour telephone
6 calls are unusual. We don't have a recommendation from
7 this Committee but we have a recommendation regarding
8 process, and to some extent, although still not fully
9 defined goals -- I'm interested in hearing from the
10 rest of the Advisory Committee about ideas you have,
11 reactions you have, things you think might be missing,
12 concerns you have that you want to make sure the Work
13 Group addresses.

14 MR. EHERTS: I think metrics, and I know Jon
15 has it on his time line for June, but metrics is a big
16 issue. It has come up in almost every group. How do
17 you measure the best performance. I know 11(c) is
18 talking about it.

19 Looking at the state plans, and we want to get
20 best practices from the state plans. We have 24
21 different experiments out there, all different programs
22 running, some have better results than others. What is

1 a good result.

2 I know we have been talking about metrics. I
3 think that is one of the first things, leading
4 indicators and a recommendation back to OSHA. The
5 bottom line is that for all the work we do on leading
6 indicators and how we should measure ourselves, it all
7 goes back to how OSHA measures us, and that is
8 reportable incident rate.

9 In fact, now they are proposing that we
10 publish these rates so that the general public can look
11 across all these different companies and decide who is
12 the better one based on the lower rate.

13 I think it is a bit self defeating here that
14 we talk about these grandiose plans on getting better
15 metrics and leading indicators that really change
16 culture in a company, and we always have to fall back
17 on reportable incident rates.

18 MS. SPIELER: Let me suggest this, this is
19 actually something I am personally interested in.
20 There are broad sets of metrics that I think both Nancy
21 and Dave have now alluded to about rather than using
22 counts of injuries, and I think a number of us have

1 examples like Nancy's that we could share with you
2 about how that didn't seem like that would be the
3 company with the lowest injury rate.

4 Leaving that aside for a moment, I think there
5 is a separate but related question about how you
6 measure effectiveness of practices, best practices
7 intended to encourage reporting and discourage
8 retaliation.

9 I have been sitting in on all three Work Group
10 meetings. I have been very struck by the
11 sophistication of this group in thinking about this.
12 Everybody, I think, understands, for example, that
13 having fewer people coming forward might not be the
14 right measure of a successful program that is
15 encouraging people to come forward.

16 How do you measure on the same track, you get
17 more complaints and less retaliation, and genuinely
18 lower injury rates, how would you figure that out.
19 Those are three separate and different tracks.

20 Kind of what is interesting I think about this
21 Work Group is that the people who have come forward
22 with I think some very interesting programs believe in

1 their programs. The appropriate question back is other
2 than I know it works, whether the ways in which we can
3 advise OSHA that here is what we think are the best
4 practices, and as you go forward and you utilize these
5 and perhaps you encourage NIOSH to do some research on
6 this and they do some research, what would be the
7 questions that need to be asked about effectiveness of
8 best practice programs.

9 I want to ask that question here, and I'd like
10 the staff to participate in this conversation. I think
11 taking it back to the Work Group, any ideas that this
12 full group has on that question would be very useful.

13 Marcia?

14 MS. NARINE: Do we know how other countries
15 and analogous OSHA groups or agencies look at this
16 issue? Do they use reportable injuries? What is the
17 metric they use? Not every country in the world.

18 MS. SPIELER: Rich, do you know if there is
19 comparative information on that?

20 MR. MENDELSON: I don't know that offhand. I
21 know the Work Group with the U.S. and EU.

22 MS. SPIELER: It might be interesting to

1 pursue that as a sort of area of question. I work with
2 the Institute for Work and Health in Toronto. I think
3 they have looked at some of these questions.

4 One of the things they do that I think is
5 instructive, not just for this Committee but for
6 thinking about these kinds of issues is they do
7 research, both qualitative and quantitative research,
8 across a wide range of issues that have to do with the
9 intersection of work and health. They always have a
10 component of that research that has to do with the
11 translation of the research for use outside.

12 They do in fact develop tool kits for
13 physicians or tool kits for unions or tool kits for
14 management on how to address a problem.

15 For example, I know they did that on the issue
16 of return to work, which is a huge issue in the
17 Workers' Comp and work injury world, not before this
18 Committee. Those kinds of products, I think, are
19 something the Committee as a whole in the long run may
20 want to look at.

21 MS. NARINE: I would be particularly
22 interested in countries that have large unionized

1 workforces. That actually might be more helpful.

2 MR. BROCK: OECD might be a source.

3 MR. EHERTS: ILO.

4 MS. LESSIN: In this whole arena of best
5 practices being perhaps in the eye of the beholder,
6 because it is generally the workforce that we are
7 talking about being impacted by whistleblower
8 retaliation, I think it is very important that if we
9 hear something that sounds really good from somewhere,
10 we need to be checking in with representatives of the
11 workforce to see if they experience this the same way.

12 What can look good and have all kinds of very
13 nice elements can in fact not be good from the
14 experience of workers. I think getting those
15 perspectives and really coming forward with programs
16 and practices that have the endorsement of both sides,
17 if we are looking to the best practice being the carrot
18 part or the good thing or whatever, then we need to
19 make sure to do that.

20 MR. EHERTS: I would second that strongly.
21 One fantastic measure I think is employee opinion. We
22 do a survey every year where we ask the workers do you

1 feel hazards are being abated in the workplace. It is
2 an anonymous survey. It is given to Teamsters. They
3 tell you what they think, especially when it's
4 anonymous.

5 We also ask them can you report without fear
6 of retaliation. That is one of the ethics questions we
7 ask. We are looking for higher and higher scores in
8 those areas.

9 We do some internal research showing the
10 departments that do very well on those scores also have
11 the highest productivity and the highest quality. We
12 are kind of validating our own metrics that way.

13 MR. KEATING: I would just echo part of what
14 my presentation when we did it with the group in terms
15 of one of the actual best practices is to go out and do
16 these. This is an example of some of the concrete
17 things we are recommending be done.

18 Your point isn't lost on me, Nancy, and in
19 fact, I don't know if you remember, my presentation
20 started by pointing out that the surveys show that the
21 rank and file don't trust management. Management says
22 we are committed to a culture of compliance, but the

1 surveys, and they are robust, they are based on real
2 data, show that a huge majority of people say one thing
3 but they do the other.

4 Part of the best practices that we are
5 suggesting is to roll out these employee surveys and
6 really understand what are your people thinking, and
7 then take appropriate action.

8 MS. SPIELER: Let me ask another question of
9 the Work Group but also the full Committee. As I think
10 Greg has sometimes pointed out, the safety concerns,
11 which are the primary focus of a number of the
12 statutes, 11(c), and several others, have some
13 different qualities, and I'm going to suggest three
14 buckets.

15 There are financial statutes, which require a
16 level of sophistication of the workforce and a kind of
17 different place within the workforce, and the third
18 bucket is kind of what I think of as the external
19 safety, consumer, environmental, things that require a
20 level of kind of altruistic commitment because it is
21 not about me, it's about others, although I have to say
22 the rest of the world does react with considerably more

1 alarm when there is a consumer safety issue than when
2 there is a worker safety issue.

3 Those are three somewhat different buckets in
4 terms of what I think the nature of what our
5 expectations are of people coming forward, not
6 necessarily in terms of retaliation itself, but in
7 terms of the dynamic of someone coming forward and
8 raising a concern.

9 Does the Committee think -- this is a
10 sub-question of does one size fit all, but a different
11 one from the small and large or industry -- does the
12 Committee think those are different programs or are
13 they all the same thing?

14 Dave, you work primarily in the safety arena.

15 MR. EHERTS: And product safety.

16 MS. SPIELER: Greg, you work primarily in the
17 financial arena. I'm just wondering whether we can
18 think about this as a single question or whether
19 actually we need to think about it as separate
20 questions.

21 MS. GARDE: I think that it is primarily a
22 cultural issue, and then if you encourage employees to

1 raise concerns, they are going to raise all the
2 concerns.

3 As your culture expands to a speak up culture
4 or more transparency, you are going to get more of all
5 those kinds of issues. From my experience, programs
6 that work to change a culture in which workers can
7 raise concerns is going to raise everything from Title
8 70 EEOC issues to being bullied to safety concerns to
9 financial irregularity.

10 I think changing a culture changes the way
11 people think about their willingness to speak up about
12 things. That takes years. It takes a lot of
13 commitment.

14 In answer to your question, I don't think they
15 are different programs. I think it is a program to
16 change the willingness of the workforce to speak and
17 the willingness to management to hear.

18 MR. FRUMIN: One of the analogies that I have
19 often found helpful in looking at the question of
20 worker involvement in a management function is the
21 question of quality assurance.

22 It has some of the same features of safety and

1 health management functions that we are talking about,
2 obviously directly, some of the other buckets, to use
3 Emily's term, external concerns, consumer concerns and
4 so forth.

5 We had to go through a wrenching experience in
6 the American management systems for decades because of
7 the management's unwillingness to give up their command
8 and control philosophy. Jimmy couldn't find an
9 audience here and he had to go to Japan, and the
10 Japanese companies beat the pants off the American ones
11 on quality assurance until we figured out they were on
12 to something.

13 I'm not going to speak for all the pro's and
14 con's of the Japanese version, but my experience with a
15 cooperative approach between workers and managers on
16 quality assurance tells me there are really critical
17 indicators of whether or not managers actually have a
18 stake in whether workers are going to be encouraged to
19 speak up, whether their views are going to be
20 considered seriously and acted upon.

21 To Billie's point, yes. If you create a
22 structured situation, and we didn't go through the

1 quality assurance here in the U.S. haphazardly, when it
2 worked, if it worked, a lot of times, it didn't, a lot
3 of times it was just a lot of hot air. When it worked,
4 it worked because managers had to re-learn their jobs,
5 workers had to be supported. Unions had to change the
6 way they approached this. Then you saw very broad
7 implications.

8 There were good metrics along the way.
9 Speaking of metrics, there was lousy accounting, but
10 good metrics. I mean accounting for the benefits of
11 it.

12 I guess I would just say when you are thinking
13 about a number of these issues on best practices, one
14 of the things that could be helpful to look at, if you
15 could allow yourself to think creatively, is whether in
16 these organizations managers have a structured approach
17 to taking very seriously workers' understanding and
18 views on how things are working out, how they need to
19 change, and for whose benefit.

20 Of course, even who gets paid for that
21 benefit, who actually gets the benefit in monetary
22 terms, which of course is sort of the ultimate test of

1 whether an organization cares about it.

2 Something to add to the mix here. Dave and I
3 talked about this when we were looking at his program
4 in Connecticut. I think it is a fairly well understood
5 concept by people who have been in both health and
6 safety and quality management functions.

7 MR. KEATING: Just a really quick follow on to
8 what Billie said. I think to make your buckets a
9 little simpler, I think you can reduce them down to
10 two.

11 I would agree with Billie that I think we can
12 come up with some suggested best practices that would
13 encompass both the financial and the safety with regard
14 to an individual's identification of wrongdoing or
15 concerns of wrongdoing, and how a company can be better
16 prepared for fielding those responses.

17 How they can be better in responding to those
18 responses and investigating, and how they can be better
19 about remedying the underlying issue and building
20 morale within the organization on the follow through.

21 What I do think is different is the issue that
22 Nancy points to, which is more of a process issue with

1 regard to certain systems that are in place, which I
2 know in her view are inherently retaliatory by their
3 design.

4 It could be something we are going to have to
5 work through, but I think they are definitely separate
6 issues.

7 MS. LESSIN: I agree with that. I want to put
8 a question on the table for OSHA. A lot of these
9 whistleblower claims dealing with workers who get
10 retaliated against when they report an injury, illness,
11 accident, I would love to look at the numbers in
12 particular FRSA and 11(c) of which are the complaints
13 coming in for I raised a safety issue and I got
14 retaliated against or a health issue and I got
15 retaliated against versus I reported an injury.

16 I think some of them are going to come
17 together but I think some of them are going to be
18 distinct. I would like to see that experience broken
19 out to see where we are getting the claims filed in
20 those two arenas in particular and maybe STAA as well.

21 I do think and I said it in the Work Group
22 yesterday, I used a statute that we don't have, sexual

1 harassment. We generally don't have a program from the
2 top that is supporting a harassing environment and
3 trying to get everybody to harass. You don't have
4 that.

5 In the arena of retaliation against workers
6 who report injuries and illnesses, there are a massive
7 number of programs from the top that are instituted,
8 that are reward programs or punishment programs or
9 both. That is very different, and I talked about it,
10 by design. When something is by design from the top,
11 it's very different from we just need better training
12 to make sure that our supervisors encourage people to
13 raise issues that we think can be environmentally
14 damaging.

15 It is just a very different thing. I don't
16 agree with Billie that once you have some kind of
17 situation where everybody reports everything. I think
18 there is this arena where there is designed policies,
19 programs and practices that needs to be looked at
20 differently.

21 MS. DOUGHERTY: I don't think with the whole
22 concept of best practices that if somebody reports a

1 violation, there is generally no incentive in an
2 employment situation to say if we don't have any sexual
3 harassment cases filed this year, you all get a bonus.

4 If their Workers' Comp rates are down, you get a
5 bonus.

6 I think there is a real different type of
7 incentive between those kinds of practices.

8 MS. NARINE: I agree with the three buckets.
9 In my past job and in the consulting work I do now, I
10 see all three of them. I do agree with Billie to the
11 extent that the issues are generally the same, but I
12 think there are some nuances. I also agree with Billie
13 that there is some benefit to defining "retaliation."

14 Your average person is going to understand if
15 you're fired, that is retaliation. If you're in the
16 finance world, if you don't get the overseas stretch
17 assignment, that is retaliation to you. If you are the
18 hourly worker and you don't get your Christmas break
19 off so you can't stay home with your kids, if you take
20 those two weeks off and you do that without pay where
21 you lose your job, that is retaliation to you.

22 When you are doing that training, there is no

1 one size fits all training. You have to define for
2 that supervisor this is retaliation, this is what it
3 looks like for your workforce.

4 If you don't get to go to that certain meeting
5 where the really important stuff is being discussed,
6 then you miss out on critical information that is going
7 to get you to know what is happening, that critical
8 knowledge that is not written down any place.

9 There are very specific issues. There is the
10 tone at the top but there is also the tone at the
11 middle and there are also people who take their cues
12 from what their supervisor does. It doesn't really
13 matter what is in the manual. It doesn't matter what
14 the CEO says. All that matters is what the supervisor
15 does.

16 Those are all very important issues. That is
17 the culture that happens in that plant and there is the
18 culture that happens in the plant that is ten miles
19 away.

20 Those are all very important issues where when
21 we are talking about best practices, it is company
22 culture and also location culture.

1 I think while the issues are similar across
2 industries, we have to kind of be thinking about when
3 we are talking about training programs, we have to get
4 clearly at the macro level but at some point we have to
5 recognize some kind of micro issues as well.

6 There are some that are going to go across
7 worker safety, financial, and consumer safety, but
8 there are also some that we have to recognize to be
9 able to get the companies to buy in, we are going to
10 have to speak to things at their level as well because
11 if we're talking to the financial industry, they are
12 not going to get some of these issues. They are going
13 to say this doesn't relate to me at all.

14 MR. EHERTS: Just along those lines, Jon,
15 maybe adding to our agenda, there is a concept called
16 "just culture," and it stands for fair. I think it
17 comes from aviation and I think it is an U.K.
18 initiative. I would recommend it.

19 I know we talked about the carrot and the
20 stick, and often times you do have to punish behavior
21 you don't want in the workplace.

22 What just culture says have you punished

1 people for breaking that rule who didn't get hurt, so
2 they weren't wearing safety glasses and had an eye
3 injury, you can punish them for not wearing safety
4 glasses, but did you punish other people that were not
5 wearing safety glasses that did not get an eye injury.

6 If you did it across the board, it's better.

7 If somebody stands on the top of a ladder and
8 falls off and gets injured because they were trying to
9 complete something just in time for the end of the
10 quarter and get a delivery done. They do something
11 called a "substitution test," where they take ten
12 Teamsters and say confidentially, would you have done
13 the same thing.

14 If they say yes, it's the end of the quarter
15 and our management wants us to get this aircraft
16 delivered, and therefore we would have broken that
17 rule, then you can't punish the individual that was
18 injured breaking the rule.

19 I think it is a best practice, and maybe the
20 FAA folks will know about it. We should bring that in,
21 too.

22 MS. DOUGHERTY: We see that on the compliance

1 side now a lot with employee misconduct. One of the
2 standards is how you discipline the other employees for
3 doing the same thing, you say this person didn't have
4 fall protection, we trained on fall protection, they
5 didn't have it that day, but if no one has ever worn
6 fall protection, their misconduct defense falls apart.

7 That is the way we see it.

8 MS. SPIELER: To continue the conversation on
9 Jon's presentation, are there other suggestions about
10 groups or individuals that the Work Group should be
11 talking to or are there specific recommendations within
12 those categories, particularly from people who aren't
13 in the Work Groups, so that they can take that back
14 with them.

15 (No response.)

16 MS. SPIELER: Nancy made a specific request
17 about data. Is that doable?

18 MR. ROSA: It is probably something we can
19 look at.

20 MR. FRUMIN: Can you speak up a little bit?

21 MR. ROSA: I'm sorry. It is probably
22 something we can look at. Our database is very

1 limited, but we can try to pull out FRSA, 11(c) and
2 STAA cases, and then look in the system for each of
3 those cases whether it was a safety report or an injury
4 report. We can try to see if we can get that
5 information for you.

6 MR. FRUMIN: Could I comment on this?

7 MS. SPIELER: Go ahead, Eric.

8 MR. FRUMIN: This limitation in the database
9 regarding the genesis of complaints is an extremely
10 serious problem for our Committee, for the agency, and
11 other people.

12 It came up as a repeated question in our
13 discussions, what was the reason rail workers, workers
14 covered by FRSA, were filing complaints. Was it about
15 an injury. Was it about a safety hazard.

16 Apparently, according to rail employers and
17 others, that had a major impact or that ignorance on
18 our inability to answer had a major impact on our
19 ability to then try to address what the underlying
20 problems were in the industry that discouraged workers
21 from reporting problems in the first place.

22 I don't want to take up more time about it

1 now. I'll be a broken record on the subject over the
2 course of my time on the Committee. If OSHA doesn't
3 fix this problem and fix it soon, we're just going to
4 be digging ourselves deeper into a hole of ignorance,
5 and I suggest we pay attention to that in a future
6 meeting in the not too distant future.

7 MS. SPIELER: I actually had that on my list
8 of things for us to think about for the future. I
9 think with the new Directorate, not as new as it was 14
10 months ago, but with the new Directorate and much more
11 attention to the whistleblower questions, that it might
12 be useful for this Committee to have a conversation
13 about what might be useful, with the understanding some
14 of it may be achievable and some of it might not be
15 achievable.

16 I think it might be useful internally for you
17 to hear some of the concerns about the available data,
18 and this is one subset of a number of things I've heard
19 along the way.

20 At a minimum, I would like us to think about
21 putting that as an agenda item in six months at the
22 next Committee meeting. I do agree, and I have many

1 questions, but unfortunately mine often have to do with
2 what happens next. That is even more difficult for
3 OSHA to put together.

4 Yes, I think the data issue has to be
5 addressed.

6 MS. LESSIN: I just wanted to comment on the
7 issue of just culture very quickly. The spirit of
8 Brent Churchill just came down upon me. Brent
9 Churchill was an utility lineman in New England. He
10 went up to fix power lines and did not put on his
11 insulated gloves, grabbed onto the 7,600 volt line and
12 was electrocuted.

13 In this case, the glove was right there and he
14 was well trained, he just didn't put it on. The
15 employer said what a terrible tragedy but what a
16 careless worker.

17 In fact, Brent Churchill had worked 55 of the
18 last 60 hours because it was an ice storm in New
19 England, and this utility company had laid off 37
20 linemen a couple of years ago, so when there was an ice
21 storm, the only way they could get the power back on
22 was to have people work those kinds of hours.

1 The issue of whether or not this utility
2 company would or would not have disciplined anybody
3 that they saw not wearing a glove is irrelevant to the
4 fact that they had a work process which was inhumane.
5 Human beings are not made to work 55 over the last 60
6 hours. We think the last time he went up, he was
7 probably asleep. He had wanted to go home and was
8 basically told if you go home, don't bother punching
9 back in. He tried to soldier through.

10 There are many, many issues, have people been
11 properly trained, did they break a rule because they
12 just didn't have good training on it, or were they
13 fatigued, any number of issues.

14 If we are ever going to think about just
15 culture, it is much more than does everybody get
16 disciplined if they do a certain thing.

17 MR. EHERTS: Just to sum this up a little bit,
18 I agree with all that. In fact, we look at fatigue
19 management, especially in aviation where I come from.
20 It is a big deal for us. We look at proper training.

21 I think the bottom line is the way just
22 culture works is you exhaust every other thing before

1 you blame the individual. There are cases where the
2 individual is to blame. You have to exhaust every
3 other avenue and make sure management has given them
4 all the tools they need to work safely first.

5 MR. SPIELER: Anything else with regard to the
6 Best Practices Committee?

7 (No response.)

8 MS. SPIELER: I would suggest that we break
9 for lunch now and reconvene at 1:30. Thank you very
10 much.

11 (A luncheon recess was taken.)

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1 A F T E R N O O N S E S S I O N

2 (1:31 p.m.)

3 MS. SPIELER: We are now back from lunch.

4 MR. MURRAY: Vince Murray with the Federal
5 Aviation Administration.

6 MS. VINO: Good afternoon, Barbara Vino with
7 the Federal Aviation Administration.

8 MR. BAXTER: Derek Baxter, Office of the
9 Solicitor, Mine Safety and Health Division.

10 MR. LORD: Charlie Lord, also with the
11 Solicitors Office, Mine Safety and Health Division.

12 MR. SWICK: Thank you.

13 MS. SPIELER: This afternoon we are going to
14 hear a report and have a discussion of the third Work
15 Group that has been working under the auspices of this
16 Committee by working telephonically since our last
17 meeting in January, over a year ago, the Work Group
18 that is looking at 11(c).

19 After that, we are going to take a break and
20 hear from some of these people who are in the room
21 right now from the FAA, Mine Safety and Health
22 Administration, and the report on the National Labor

1 Relations Board processes.

2 At 4:00, we will be open for public comments.

3 If you haven't already given your name to a member of
4 the staff but would like to make a public comment,
5 please make sure that you talk with Rob, so we make
6 sure we allocate the time. Appropriately, we
7 will close with a discussion of next steps for the
8 Committee, a number of which have already come up this
9 morning.

10 What we have been doing for those of you who
11 were not in the room before, the Work Group Chair gives
12 a report, supplemented by comments from the Work Group
13 members, and then we open it up for discussion.

14 If there is a specific recommendation, which
15 there was from the Transportation Work Group, and there
16 will be, I believe, from the 11(c) Work Group, we will
17 take that recommendation up first, and have a
18 discussion, and if possible, a vote on it, and then
19 move on to the more general and longer term plans.

20 Dave Eherts is the Chair of that Work Group.
21 I'm turning the Chair over to him for the report.

22 //

1 REPORT OF THE 11(c) WORK GROUP AND DISCUSSION

2 MR. EHERTS: I would like to thank the Chair
3 for this right after lunch slot.

4 (Laughter.)

5 (Exhibit No. 4 was marked for
6 identification.)

7 MR. EHERTS: Ed, I think this is Exhibit 4.

8 MR. BAIRD: I have a copy of the PowerPoint
9 slides that Dave Eherts is going to base his
10 presentation on, and they will be marked as WPAC
11 Exhibit 4 and entered into the record.

12 MR. EHERTS: I want to welcome the FAA. I'
13 Chief of Safety at Sikorsky Aircraft. We make the
14 Black Hawk and VIP aircraft.

15 As communicated to us by Dr. Michaels, it is
16 clear what the work products are and where we should be
17 looking for information, data and benchmarking.

18 I will just reads points one and two. The
19 work products are (1) to provide strategic advice
20 regarding enforcement policies and practices, and (2)
21 provide analysis of any shortcomings in the current
22 statute that need to be addressed in order to provide

1 effective protection to employees.

2 We met and after some long discussions we
3 coalesced that charge into a series of questions and
4 follow up questions. Let me quickly read down the
5 list.

6 Number one, how does the 11(c) provision
7 differ from provisions of other whistleblower statutes.

8 Which statutes are most effective in providing strong
9 and effective protection of whistleblowers. We list
10 some areas for comparison.

11 Number two, how does OSHA currently
12 investigate 11(c) complaints, approach settlement of
13 cases, including punitive damages, train investigators,
14 and refer them to the Solicitor, and similar issues.

15 Item three, how does this investigation
16 process compare to the processes used under other
17 statutes, both within OSHA and for other similar laws.

18 Four, how does OSHA's approach compare with
19 the approach to whistleblowers under OSHA state plans.

20 We think there is a wealth of information there
21 vis-a-vis best practices and results. I think we are
22 going to spend quite a bit of time looking at state

1 plans.

2 Finally, number five, what are OSHA's current
3 staffing levels and needs with regard to 11(c)
4 enforcement.

5 I was very interested to hear in the
6 President's budget, there are proposals for increases,
7 which we think are very necessary.

8 We also recognized there may be some
9 relatively quick win's, understanding the usual
10 Government complexity, and coming from the private
11 sector, we have something called "public sector speed."

12 We know that doesn't always apply to the Government.
13 These are recommendations that we believe lead to some
14 immediate improvements in whistleblower protection.

15 Two of these we refer to phase one, urgent
16 issues, and our plan is to communicate these to the
17 full Committee immediately when we have consensus, and
18 we will do that today.

19 As part of that process, we will pass these to
20 OSHA in an iterative way to make sure we avoid any
21 unintended consequences or propose something that is
22 clearly infeasible.

1 Phase two issues are those we feel are
2 relatively easier to implement and they don't require
3 statutory changes. Finally, phase three,
4 recommendations we have for statutory change. We know
5 that will take a lot more study and a lot more time.

6 We did reach consensus in fact by unanimous
7 vote yesterday, and we have one recommendation for the
8 full Committee. If the full Committee agrees, we will
9 make a recommendation to OSHA.

10 That is the reporting of an injury or illness
11 by an employee is a protected activity under the Act.
12 That is true.

13 Building on the Fairfax Memo, we recommended
14 OSHA adopt mechanisms that prohibit directly the use of
15 employer practices, policies and programs that may
16 discourage workers from reporting illnesses and
17 injuries, so OSHA can use its full complement of
18 enforcement options in addressing this issue.

19 As I said, I don't think it's a motion but we
20 will talk about this when we complete the presentation.

21 Phase two. In the phase two bucket, we
22 anticipate we will have recommendations for the full

1 Committee within about six months dealing with adoption
2 of some best practices, do our analysis of all the
3 state plans. What works and what doesn't work,
4 including metrics, the correct metrics, to drive the
5 right priorities.

6 We may also have some recommendations in the
7 medium term dealing with improving the process for
8 referral to the Solicitors Office and use of remedies
9 including punitive damages and preliminary
10 reinstatements.

11 We may have a recommendation for
12 reestablishing the link with the NLRB and for more
13 appropriate staffing levels in the Whistleblower
14 Directorate.

15 Finally, we plan to investigate the referral
16 process between the whistleblower investigators and the
17 compliance officers. From speaking with OSHA, it
18 appears that it works right now, but we think it is an
19 informal way, and maybe we ought to make it more
20 formal.

21 Again, these recommendations will be given in
22 about six months.

1 Finally, we have some recommendations for
2 statutory changes based upon potentially further
3 analysis and comparison of the other statutes dealing
4 with anti-retaliation, EEOC and SOX. Our goal would be
5 to have all this complete within 12 months.

6 We had lengthy discussions concerning where we
7 might find the data and information we need to make
8 these recommendations. We have listed them all here.

9 The very capable staff at OSHA has already
10 begun identifying and cumulating the resources for us
11 on the left-hand side, the written resources. On the
12 right-hand side, Richard and Anthony have offered to
13 assist us with subject matter experts from the OSHA
14 Office and Lafe can certainly help us identify SMEs
15 within the NLRB process. Nancy is here from the labor
16 perspective. We have Richard and Jason being
17 particularly helpful in proposing some plaintiff side
18 and employer attorneys that can help us understand
19 their issues.

20 If anyone has any further suggestions for data
21 sources, I'd like to open that up when the full
22 Committee starts a discussion.

1 We are all ears to everybody else's opinions
2 and we are good with e-mail, too. If you would like
3 anything else considered, please send us a note and we
4 will make sure it gets in the record and gets reviewed.

5 MS. SPIELER: Before you turn it back to me,
6 why don't you find out whether other members of the
7 Work Group have anything they would like to contribute.

8 MR. EHERTS: Very good. They are not shy, I
9 know that.

10 MR. MOBERLY: We have talked a lot this
11 morning about effectiveness and when we look at
12 employer programs and effectiveness in that realm, one
13 of the things we struggled with yesterday is thinking
14 about statutory effectiveness and what type of metrics
15 we could use to evaluate not only 11(c) but other
16 whistleblower protections and whether they were
17 effective and what that might mean beyond whether
18 employees win or how much they get in settlement.

19 I would be interested in anyone's thoughts on
20 that as we go forward, how can we evaluate these
21 statutes to figure out whether they are doing the job
22 we want them to do.

1 MS. LESSIN: For the record, the labor
2 experience is going to be a lot more than Nancy.
3 There's a rich experience out there with different
4 industries and different practices and different ideas
5 and suggestions.

6 MR. EHERTS: Nancy is here to advise us on who
7 we should speak to, who may be the subject matter
8 expert in different areas.

9 MS. SPIELER: There may be other ideas about
10 people we should be talking to. We will come back to
11 that. First, the Work Group came forward with a
12 recommendation that we consider endorsing and sending
13 on to the Assistant Secretary with regard to the issue
14 of workplace policies, practices, and programs that
15 discourage workers from reporting illnesses and
16 injuries.

17 Let me just take a moment to sort of give a
18 little background here. What we have come to be kind
19 of lumping under the Fairfax Memo is a memorandum that
20 came out of the Enforcement Directorate, that
21 specifically endorsed using Section 11(c) of OSHA to
22 consider it to be a violation if someone was being

1 disciplined as a result of an employer practice,
2 program or policy that would discourage reporting.

3 That is the sort of context of the Fairfax
4 Memo. That only addressed OSHA's jurisdiction over
5 this with regard to specifically when there was an
6 11(c) complaint filed.

7 The question that came up in the Subcommittee
8 was well, is there any way for OSHA to think about when
9 that should be a violation outside of 11(c)
10 proceedings. As I read this, it is a kind of generic
11 why don't you think about that and come up with
12 strategies for addressing it that would be sent to the
13 Assistant Secretary.

14 What we did before, despite the fact that Dave
15 said this is not a motion, I'm going to take it in
16 order to have an appropriate conversation about it as
17 we did the other Work Group recommendation, as a motion
18 that is on the table, made and seconded, since it comes
19 from a consensus recommendation from a work group, open
20 it up for discussion for the full Committee.

21 If there is agreement on the Committee and we
22 move to a vote, then we will do that. If there are

1 questions or concerns that need to be addressed, we can
2 have a discussion about it and see if it needs to be
3 amended. I'm going to, to the extent I remember them,
4 I'm pretty good at it, to adhere to Robert's Rules.
5 Whatever kinds of motions you want to make.

6 MS. NARINE: I have a question. I'm assuming,
7 and maybe I shouldn't assume, you read it as programs
8 that discourage but it says programs that may
9 discourage workers. My question is about the word
10 "may." Did you use the word "may" to track the intent
11 of the Fairfax Memo?

12 The Fairfax Memo quotes the Burlington
13 Northern decision. Is that the reason for the word
14 "may," or you thought "may" was the appropriate
15 language?

16 MR. EHERTS: We're not that good. This memo
17 has gotten a lot of attention in my field. The
18 paragraph which starts with "There are several types of
19 workplace policies and practices that could discourage
20 reporting and could constitute unlawful discrimination
21 and a violation of Section 11(c) and other
22 whistleblower protection statutes," we just wanted to

1 bring that back to OSHA and say on their face, we think
2 they would.

3 MS. NARINE: "May" and "would" are different.

4 Did you want "may," "could" or "would?"

5 MR. EHERTS: I would argue the gist of it is
6 he has identified poor practices, and we think those
7 poor practices, would they be place constitute a
8 violation.

9 MS. SPIELER: Let me intervene here because it
10 is actually a little bit more confusing even than that.

11 There is the issue of may, could, would, but there is
12 also a question about exactly what the scope of OSHA's
13 powers are in this arena, what they are without
14 regulatory change, what they would be with regulatory
15 change.

16 I took the conversation to mean that we are
17 asking OSHA to think about how to move the process
18 outside the 11(c) process and consider having it be in
19 their more interventive mode, where they actually can
20 take action without having a retaliation complaint.

21 I'm not sure having sat in on the Committee
22 and actually done some of the writing it was crafted

1 with the level of attentiveness, Marcia, that you are
2 inquiring about. I don't know whether the Work Group
3 feels capable of sort of parsing that piece. I don't
4 know exactly how the Work Group would like to proceed.

5 MR. EHERTS: I think we meant for OSHA to
6 figure that out.

7 MS. NARINE: You also have the words "prohibit
8 directly," which is really strong. It almost doesn't
9 matter to me -- it matters, but because the words
10 "prohibit directly" are so strong, "may" might be
11 right, but I think it would have to be precise. It is
12 a very strong directive from OSHA to managers or to the
13 workforce.

14 Whatever the intent is of the Committee,
15 whatever we are going to vote on, I think it has to be
16 clear. Whatever the 11(c) Committee wants us to vote
17 on, I plan to vote on, I just want to know what the
18 intent was.

19 MS. SPIELER: That's fair.

20 MR. MOBERLY: I think we used "may" on purpose
21 because I think we respected the ability of employers
22 to come up with practices, policies and programs that

1 maybe we hadn't thought of. "May," I think, was
2 open-ended on purpose, at least from my perspective.
3 It was for me.

4 MS. SPIELER: I think "prohibit directly"
5 meant not through the 11 (c) process. I think if you
6 have alternative language that says the equivalent of
7 that, my guess is that the members of the Subcommittee
8 would be open to it.

9 MR. EHERTS: Nancy has a litany of practices
10 that she has delineated for us that would fall in this
11 group.

12 MS. LESSIN: Indeed.

13 MS. NARINE: I wouldn't necessarily think
14 "prohibit directly" means without the use of the 11(c)
15 process.

16 MS. SPIELER: Does anyone else on the Work
17 Group want to discuss the language?

18 MR. MOBERLY: I would take that as an offer of
19 a friendly amendment to clarify. Beyond the 11(c) for
20 me is the full complement of enforcement options. I
21 think that is the language we wrote yesterday to
22 perhaps obliquely hint that it was more than 11(c).

1 Maybe we should just make that clear and say
2 use this full complement of enforcement options in
3 addressing this issue, including but not limited to the
4 11(c) process, or beyond its 11(c) powers, something to
5 that effect.

6 MS. SPIELER: Katelyn, are you capable of
7 typing that up on the screen?

8 MS. WENDELL: Yes.

9 MS. SPIELER: I don't think it was just at the
10 end is the problem, that's why I was having trouble.
11 Why can't it say we recommend that OSHA use its full
12 complement of enforcement options in addressing the
13 issue of employer practices, policies and programs that
14 may discourage?

15 MS. LESSIN: Here's my question at this point.
16 Right now, an employer can have a practice. For
17 example, at one of our workplaces in Iowa where
18 everybody's name was in a hat and periodically names
19 would get drawn out of the hat, and that person would
20 go home with a big screen t.v.

21 If you had an OSHA recordable injury, your
22 name was taken out of the hat and you were not

1 eligible.

2 That is one set of things. There is the
3 accident repeater program, if you have had two
4 injuries, you are in the program. The next injury, you
5 get counseling on how to be a safer worker. For
6 subsequent injuries, it is a verbal warning, written
7 warning, suspension, termination.

8 Right now under OSHA, they have no ability to
9 deal with those practices. The only way they can deal
10 with them is having the person whose name was taken out
11 of the hat and not eligible for the prize to file an
12 11(c) complaint.

13 There is no tool where OSHA can say this
14 practice is not legal. I want to make sure that what
15 this says means exactly that OSHA is able to look at
16 practices whether or not somebody has been retaliated
17 against by not getting a prize or by getting
18 disciplined, and say the practice on its face
19 discourages injury and illness reporting, and
20 therefore, violates wherever this is put. It will be
21 something that is enforceable through citation for
22 having that practice and there can be fines.

1 I want to make sure that the language in this
2 allows for that, and that is what is being recommended.

3 I am going to see what this is turning into to make
4 sure that is what is communicated.

5 MR. FRUMIN: Emily, can I add something here?

6 MS. SPIELER: Yes, go ahead.

7 MR. FRUMIN: One of the key aspects of this is
8 a little broader, outside, I think, what I understand
9 to mean an "enforcement option." An enforcement option
10 depends on what the authority is. Right now, the only
11 authority OSHA has immediately that is applicable in
12 the real world is Section 11(c). There is nothing
13 right now to enforce.

14 There is guidance. There is urging. There is
15 whatever. There is no actionable authority.

16 In order to achieve that Nancy, I and others
17 are so urgently concerned about, OSHA needs to be able
18 to enforce under a different authority. We believe
19 under the statute, under the law, it has the ability to
20 exert that authority probably through a regulatory
21 stage to establish it as a matter of regulatory policy
22 that these practices are in violation of the OSHA Act,

1 rather than simply stating it as an interpretation of
2 11(c) and leaving it up to the 11(c) enforcement
3 process to serve as the basis for that action.

4 I think we also have to be careful about the
5 use of the term "enforcement option" and consider
6 actually expanding it to regulatory and enforcement
7 options.

8 If the authority doesn't change, the
9 enforcement itself is going to be restricted to the
10 existing authority, and that is not sufficient.

11 In a nutshell, OSHA needs the regulatory
12 authority, and I think it has the statutory authority
13 under the Act, but what is lacking is the regulatory
14 authority which prohibits these actions and which can
15 be enforced in the way that OSHA enforces its other
16 regulations.

17 That would conform with what I understand from
18 the discussion to be the intent here, which is for OSHA
19 to go beyond its authority under 11(c) and use other
20 kinds of authorities that sounds like the full
21 complement of enforcement options.

22 MS. SPIELER: Let me just say I have taken

1 over the secretarial role here. I have an alternative.

2 I'm not endorsing it. It's a reflection of what I
3 think this conversation was, and I am putting it up
4 here for discussion. You can't see it, Eric, but you
5 didn't see that I had already put "regulatory" in.

6 It says "The reporting of an injury or illness
7 by employees is a protected activity, although under
8 the Fairfax Memo, we recommend that OSHA utilize its
9 full complement of enforcement and regulatory options
10 in addition to 11(c) retaliation cases to address the
11 use of employer practices, policies and programs that
12 may discourage workers from reporting illnesses and
13 injuries."

14 MR. EHERTS: I've read this memo a million
15 times now. He actually points out that such a policy
16 is inconsistent with the employer's obligation to
17 establish a way for employees to report injuries, and
18 it cites a regulation, 29 C.F.R. 1904.35(c). He is
19 citing the recordkeeping regulations.

20 I think he is suggesting that is where OSHA
21 would enforce it. We may have a mechanism already in
22 the recordkeeping regulation to do that.

1 MS. SPIELER: I would ask the Committee -- I
2 was personally reluctant to get into the business of
3 telling OSHA where to do its regulatory work. I think
4 there are lots of legal questions we could then get
5 into about where the authority lies and how it should
6 be utilized.

7 I was imagining as Chair that our
8 recommendation, when I was listening to this
9 conversation, was more at the policy level. We think
10 you ought to think about this, and you should write a
11 section into that part of the regulations that would do
12 this versus that.

13 That is my own feeling about it. There are
14 too many lawyers on this Committee. We all have an
15 opinion about where and whether it could be done. I'm
16 going to leave that up there and go back to my chair.

17 MR. EHERTS: One other point, I agree with
18 Eric, this does intend to cover all the statutes, but I
19 think it is a very good first step. I would propose it
20 that way.

21 MS. NARINE: I have a broader question for the
22 Committee. Was there any discussion of whether there

1 are any employer practices, policies or programs that
2 would be acceptable under the Fairfax Memo as rewards
3 or incentives or anything like that that would pass
4 muster?

5 MR. EHERTS: I think rewarding the submission
6 of a near miss report, rewarding information on hazards
7 they found in the workplace, behavior based safety type
8 places where they rewarded people who took the right
9 actions. Right? I said it that way, not the opposite.

10 MS. LESSIN: You had me with the first two and
11 you lost me with the last one.

12 MR. EHERTS: If you reward the good actions,
13 not the bad.

14 MS. NARINE: I think it is important with the
15 Best Practices Committee. My concern is with this
16 policy, as we look at how do we give guidance to
17 employers as to what you can do, let's say we endorse
18 this. There are going to be some employers who say
19 what in the world are we allowed to do.

20 MR. EHERTS: Encourage.

21 MS. NARINE: Right. I just think we need to
22 be able to give guidance as to what are you going to be

1 able to do now. That's all.

2 MS. DOUGHERTY: When the Memo first came out,
3 I had a lot of calls from Union rep's and business
4 agents about what does this mean and does this apply to
5 our workplace. We had a lot of conversations around
6 that.

7 One of the suggestions that came up was
8 instead of the employer always at the end rewarding,
9 let's have a big safety kick off, let's talk about it
10 is to have safe practices, all those things at the
11 beginning of a year and go forward, without any thought
12 of a reward later, just let's make everybody safe.

13 That idea was kicked around from some of the
14 Union rep's that I talked with.

15 MR. KEATING: I want to echo what Marcia said
16 and also something you said, Emily, which is on the one
17 hand, what I think I heard you saying, what I see when
18 I look at this, to me this represents a seismic change
19 in sort of OSHA's ability to bring actions against
20 employers, instead of just when prompted by 11(c), if
21 we go the full route of what Eric suggests, they have
22 the regulatory and enforcement options to come after

1 any employer they want for any policy they suspect is
2 or may be problematic.

3 At the same time, we are giving employers no
4 guidance as to sort of what is okay. To emphasize
5 something Dave said, at least the Fairfax Memo was
6 helpful because it came out and gave employers four
7 concrete examples of things OSHA felt were problematic.

8 I have a grave concern about giving this broad
9 an edict that OSHA can just go out now and whatever
10 reason there "may," another word, be a problem, they
11 are going to bring in enforcement or some sort of
12 citation action against an employer.

13 I don't think this is wholly consistent with
14 what I thought was sort of the task of this Committee,
15 to both look at ways we can improve whistleblower
16 protections but in the same spirit, figure out ways we
17 can let employers know what is okay and reward them if
18 they do it right.

19 I just view this as a little bit one
20 dimensional in that regard.

21 MS. LESSIN: Can we get a copy of this for
22 everybody? The data that I asked for just shows one of

1 the biggest if not the biggest category of complaints
2 that are coming in, where workers are getting
3 retaliated against for reporting injuries. This is
4 huge.

5 What Dr. Michaels talked about earlier was the
6 kind of link between whistleblower and health and
7 safety. If workers are not feeling free to report
8 their injuries, then the hazards don't get identified
9 and then you are absolutely degrading workplace health
10 and safety.

11 It is so important, it is essential for
12 workers to feel they can not only say there is a hazard
13 here but I got injured, so they can be looking at how
14 did that happen and what needs to be fixed.

15 The pervasive chilling atmosphere out there
16 where workers are not reporting injuries is making for
17 extremely dangerous workplaces right now. Those that
18 do report that get retaliated against is setting up the
19 chilling effect because co-workers sees what happens to
20 them.

21 The issue of what can employers do, there is a
22 whole part of OSHA right now within the agency, and we

1 are just talking about 11(c) here, that is compliance
2 assistance. It helps employers figure out how to
3 identify what problems they have and how to correct it.

4 OSHA is looking at how to move forward with a
5 comprehensive injury and illness prevention program
6 that enables employers to identify and correct hazards.

7 In terms of what employers can't do, right now
8 under the Fairfax Memo, it is really clarifying some
9 arenas where OSHA has said we're going to look at this
10 as retaliation. They have identified the practices.

11 With something like this that says okay,
12 workers, you don't have to wait to be injured, we can
13 take care of this hazard, meaning this practice that is
14 retaliating against you, I think that is very
15 consistent with OSHA practice.

16 If what is needed was something like this, to
17 have OSHA talk not just about what we can't do, which
18 is have a practice that discourages injury reporting,
19 but what you can do, I think what you can do is have a
20 safe workplace. That is what the law requires. There
21 are enormous kinds of tools that OSHA has to assist
22 employers in having a safer workplace.

1 I'm not sure. I guess I'm not sure when you
2 talk about what can employers do, employers can do what
3 they were supposed to be able to do since the Act came
4 into being, which is provide a workplace that is free
5 of recognized hazards that are causing or likely to
6 cause death or serious physical harm. That is what
7 they can do. There are a lot of tools to help
8 employers do that.

9 MS. SPIELER: I just want to draw a box around
10 this conversation because it's complex. This only has
11 to do when we are talking about retaliation. This
12 grows out of the 11(c) program because it has to do
13 with OSHA's enforcement powers that are coextensive
14 with the 11(c) program and have nothing to do with the
15 other retaliation statutes.

16 MR. EHERTS: It says from reporting illnesses
17 and injuries.

18 MS. SPIELER: That is the first thing. The
19 second thing is I'm fairly certain this would require
20 some kind of regulatory process. As I think we all
21 know, the regulatory process, the development of
22 regulations, is a very open process.

1 That is not to say necessarily that this
2 recommendation should come from this Committee. I just
3 want to make sure we understand what its implications
4 are, that the Committee would be endorsing a process
5 where OSHA would try to figure out how they might be
6 able to do this. It is not OSHA taking our
7 recommendation could go out and cite employers.

8 I'm pretty sure they couldn't get away with
9 doing that under the general duty clause and other than
10 that, you would need a regulation that would have to go
11 through the full administrative process.

12 It isn't go out and do citations. It's more a
13 policy level recommendation that because 11(c) waits
14 for, as it were, the cow to leave the barn, is there
15 some way for OSHA to address this problem before
16 waiting for the retaliation complaint.

17 That's just to provide context. Again, I
18 leave to the Committee how you want to handle it.

19 MR. KEATING: In response to that, I
20 understand the dilemma that exists, the problem that
21 exists, in that right now, it's only when an employee
22 makes a report that OSHA technically can get involved.

1 I think I could even be comfortable with a
2 recommendation that OSHA explore ways in which it
3 could, with the use of its regulatory power, strengthen
4 its initiatives in this regard.

5 I just read this language as utilize its full
6 complement, this is almost a directive that we are
7 giving to OSHA that it should mobilize and marshal
8 behind this and do whatever it can. I think it reads a
9 little bit too strong.

10 Bathed in the absence of any employer guidance
11 --

12 MS. SPIELER: I don't even know if this is a
13 friendly amendment, if it was and since it is the
14 Committee as a whole, this is a complex process, Dave,
15 if you felt this was a friendly amendment, perhaps
16 Greg, you could offer an amendment to it that would be
17 acceptable to the Committee that would lead us closer
18 to consensus.

19 MR. KEATING: I would suggest the word
20 "explore" instead of "utilize its full complement of."

21 MS. WENDELL: How about "Explore how best to
22 utilize" or "Explore how to address enforcement and

1 regulatory options?"

2 MR. EHERTS: I take Greg very seriously. I
3 know from my own analysis, if you do a sensitivity
4 analysis of accident rates, the real variation comes in
5 reporting, not recordkeeping. OSHA has page after page
6 telling you precisely what is recordable and what is
7 not. I think we have become very, very good at that.

8 If I compare rates across companies, the real
9 difference is whether they are reporting them or not.
10 I think these practices do lead to under reporting, and
11 therefore, the numbers don't mean anything. That's why
12 it is so important to me.

13 MS. NARINE: Just based on the words you just
14 used, they do lead to under reporting, I still have an
15 issue with the word "may." I probably have less of an
16 issue with the word "could," although "may" and "could"
17 are very close together. There is a difference to me.

18 You keep using the word "do," and that is more
19 definite. I guess I could vote for it if you kept the
20 word "may" in, but that is the word that struck out to
21 me the first time you used it and it is always going to
22 rankle me because of the strength, it's not as strong

1 as before.

2 MS. SPIELER: We have a moving target up on
3 the screen.

4 MS. LESSIN: I wanted to talk to the issue of
5 "may." This is a huge problem. Again, I'll cite
6 steelworkers' statistics. These practices are present,
7 the last survey we did, in over 90 percent of
8 steelworker represented facilities, and in talking to
9 other Unions, talking to worker centers, talking to
10 workers, talking to my brothers and sisters in rail, it
11 is the way things are done these days, and it is very
12 problematic.

13 I wouldn't want a situation, and this is
14 something that happened just a couple of years ago, we
15 had an employer that had an incentive program. Every
16 month there was no OSHA reportable injury, everybody
17 got \$10. The next month, they got \$11. The next
18 month, they got \$12. It went up and up.

19 If there was an OSHA reportable injury, nobody
20 got any money that money and the next month it would
21 start with \$10 again, and then this employer decided to
22 add a new element, which was that should there be an

1 OSHA recordable, everything I just said was true, but
2 that person would be required to come to work for one
3 week in a florescent orange vest, the person who had an
4 OSHA recordable.

5 This is real. I would not want a situation
6 where when this played out through whatever mechanism,
7 somebody said well, we haven't had an OSHA reportable
8 yet, so we don't know if this would discourage anybody
9 from reporting their injuries, so we have to wait until
10 we see that happen to be able to say it will suppress
11 reporting.

12 I want reasonable people to look at these
13 kinds of practices where you get prizes if you don't
14 report or are threatened or punished if you do report
15 on their face, and not have to wait for the case that
16 says oh, look, this is what happened.

17 However we craft this --

18 MS. NARINE: I would see as what you just said
19 as the "did" discourage it. The policy is so blatant,
20 I think that is the issue. Maybe it is the
21 combination. If OSHA comes out with something, really
22 practical guidance of here are the do's and here are

1 the do not's, where it is really easy for employers to
2 understand, this is what we find a problem with, here
3 are 20 examples of really clearly problematic things,
4 here are things we really think are acceptable, good
5 practices that are going to make it a safer workplace
6 and a better place for your employees.

7 I would probably have less of a problem with
8 the language with "may." "May" is so vague and so
9 subject to misinterpretation. I think on the flip
10 side, will discourage employers from trying to put in
11 practices that can help.

12 While you are worried, legitimately so, about
13 discouraging reporting of injuries, I'm worried there
14 might be employers that might be trying to think of
15 innovative ways to make the workplace safer, even
16 getting input from employees saying let's try to do
17 this, and that might be getting stifled because they
18 are saying well, we can't do this because OSHA now has
19 all these new powers, and because this "may"
20 discourage, we can't do it.

21 MS. SPIELER: Let me intervene here because
22 somehow we have to sort out next steps. We are not

1 writing a regulation here. We are asking OSHA to
2 consider writing a regulation. I think we are having a
3 tendency -- whether "may" is in there or not, OSHA is
4 going to have to write something that will then go
5 through a public hearing process, and then will be
6 refined, and refined again.

7 I think the question really before this body
8 is do we want to make a recommendation of this sort to
9 OSHA and if so, is the language we have currently on
10 the board acceptable or are there amendments you would
11 like to make. We have to make a decision about this
12 "may" discourage versus "discourage."

13 We have three options really. I don't have
14 motions really for any of them since we have entirely
15 new language up on the board. We can move and second
16 the current language and vote it up or down with the
17 "may." We can move and second the current language
18 without the "may." We can table the issue and send it
19 back to the Committee for further crafting and bring
20 back to the full Committee.

21 This is the prerogative of the Chair having
22 failed entirely to adhere to Robert's Rules, I think we

1 don't have currently an actual motion that has been
2 made and seconded. The Committee's recommendation was
3 actually sufficiently different from what we are now
4 looking at on the board.

5 I would ask if somebody would make a motion
6 and somebody second it, and we then vote up or down.
7 If people want to change the language, we will make a
8 decision as to whether the language suggested is a
9 friendly amendment or not.

10 MR. BAIRD: Just for the record, why don't we
11 read what is up on the Board? I'll just read that.

12 What is currently up on the screen reads as
13 follows: "The reporting of an injury or illness by an
14 employee is a protected activity under the Act.
15 Building on the Fairfax Memo, we recommend that OSHA
16 explore how best to address the use of employer
17 practices, policies, and programs that" -- the word
18 "may" appears in parentheses -- "discourage workers
19 from reporting illnesses and injuries through its
20 enforcement and regulatory options "in addition to
21 Section 11(c) retaliation cases."

22 MS. NARINE: Emily, I could live with the

1 "may" based on your extensive explanation. Take the
2 parentheses out.

3 MR. BAIRD: There are no parentheses around
4 "may."

5 MS. SPIELER: It's not the most artfully
6 drafted thing. Is there a motion?

7 M O T I O N

8 MEMBER: So moved.

9 MS. SPIELER: Is there a second?

10 MS. DOUGHERTY: Second.

11 MS. SPIELER: Is there further discussion
12 about this now moved and seconded language as a
13 recommendation from this Advisory Committee to OSHA?
14 Jon?

15 MR. BROCK: I think this is really an
16 important issue and a good one for this Committee to
17 try to move forward on and to say some wise things
18 about.

19 As I'm hearing the discussion about the
20 language and what does this mean and what does that
21 mean if we change this word, it could mean this, the
22 issues around what could or would OSHA actually do,

1 whether this is parallel or not to other things that
2 already get done, doesn't have to be, but without
3 experience it could raise issues about what to expect
4 or how it would get done.

5 I also have a concern about having something
6 on such an important issue come out early, with even
7 the people around this table who are fairly like
8 minded, at least in my view, about the importance of
9 the issue and the benefit of doing something about it.

10 If we can't easily answer the question about
11 exactly what this means or what we think OSHA should do
12 about it or acknowledging some of the complexities, as
13 we turn it over to OSHA, even for rulemaking or
14 consideration, I think we don't start off all that well
15 with people that will be watching other things that we
16 do.

17 My own sense is like the earlier Committee
18 that you have talked about this a lot, and with this
19 kind of input, a little more working on the words and
20 what do we mean, what is it we really want OSHA to do,
21 and what kind of responses and criticisms might we get
22 so we can try to anticipate that, I think it would

1 really strengthen what you are trying to do here if you
2 just went back.

3 I think this is terribly important and I think
4 you are on a good track. It doesn't seem like it is
5 quite ready just based on the questions and discussions
6 here, at least that is my sense of it.

7 M O T I O N

8 MS. SPIELER: Is that a motion to table?

9 MR. BROCK: I would support a motion to table.

10 MS. SPIELER: Technically, it is not supposed
11 to be a debatable motion, is my recollection. Is there
12 a second on the motion to table?

13 MR. EHERTS: Second.

14 MS. SPIELER: It is an up and down vote. The
15 motion to table, as I understand it, is a suggestion to
16 go back to the Committee for further exploration.

17 MR. BROCK: I hope it emerges really well.

18 V O T E

19 MS. SPIELER: All those in favor of the motion
20 to table?

21 (Chorus of ayes.)

22 MS. SPIELER: We are going to have to do

1 hands.

2 (Show of hands.)

3 MS. SPIELER: Opposed?

4 (Show of hands.)

5 MS. SPIELER: The motion to table carries.

6 MEMBER: Did Eric vote?

7 MS. SPIELER: Eric? Eric is not on the phone
8 and there was a 5-4 vote in favor of tabling it and
9 sending it back to the Committee. I did not vote. The
10 motion carries and it goes back to the Committee for
11 further work. I'm assuming the Work Group will bring
12 it back to the full Committee next time.

13 I doubt I'm going to be able to continue to go
14 to every Work Group.

15 MR. FRUMIN: Sorry, I hate to bust up the
16 party. I just realized my phone was on mute and you
17 didn't hear my answer. It is a tie vote, guys.

18 MS. SPIELER: Your vote is against table?

19 MR. FRUMIN: Afraid so; yes.

20 MS. SPIELER: I actually do not know what to
21 do in a tie vote. Frankly, and maybe this is the
22 prerogative of the Chair at this point, unless somebody

1 else knows Robert's Rules on a tie vote on tabling --
2 do you know?

3 MR. BAIRD: No.

4 MS. SPIELER: I don't know either. I'm
5 actually going to, with all due respect to the urgency
6 that I think the labor people feel -- given the
7 discomfort that I feel coming from a number of people
8 in the room right now, that I would like the Committee
9 to take it under advisement and bring it back next
10 time.

11 I would suggest that -- I do worry. I think
12 the Work Group needs to be able to explain to the full
13 Committee exactly, with the assistance of OSHA staff,
14 what the OSHA options are if we make this
15 recommendation, and perhaps to explore what the
16 concerns on the other side are going to be so we can be
17 prepared to discuss them.

18 I would ask that we do that. I apologize if
19 you all go out and research Robert's Rules and I got it
20 wrong. Next time, I will bring my copy.

21 MR. BAIRD: I will, too.

22 MS. SPIELER: It actually never occurred to me

1 we would have a split vote down the middle on anything.

2 Although not our total commitment to operate by
3 consensus but our hope to operate by consensus, I would
4 hate to have a split vote on this important issue at
5 this meeting.

6 One of the reasons I would like to see it go
7 back to Committee is to avoid that and see if we can
8 hammer something out that would be supported across the
9 board by the Advisory Committee.

10 MR. EHERTS: I'm in favor of the initial
11 recommendation in general, but I want to get the
12 wording exactly right, because I do think it is that
13 important.

14 MS. SPIELER: I'm not going to continue the
15 discussion about this issue at this point. It is
16 already 2:30. I want to make sure we have at least a
17 few minutes of discussion about the rest of the 11(c)
18 report, and in particular, whether there is any
19 guidance that the members of this Committee would like
20 to give to the Work Group on how they proceed on the
21 rest of their work.

22 Are there particular groups or people that the

1 Work Group has not thought about talking with, are
2 there resources the Work Group should be looking to,
3 are there other agencies that the Work Group should be
4 studying that would have a sufficient parallelism with
5 the 11(c) process that would be useful and so on.

6 I want to move on and open it up to that
7 conversation. We are a bit behind schedule now. We
8 will see if we can wrap this up in 15 minutes.

9 MS. NARINE: What states are you looking at
10 when you are looking at state plans? How have you
11 decided which ones to look at?

12 MR. EHERTS: We have not even started yet.

13 MS. DOUGHERTY: Basically, you would have to
14 look at all of them because they are going to be
15 different.

16 MR. FRUMIN: Can I ask a question about the
17 state plan issue?

18 MS. SPIELER: Yes, go ahead, Eric.

19 MR. FRUMIN: Did you discuss how you would
20 approach learning the lessons that were obtained by
21 OSHA's review of all the state plan 11(c) programs in
22 their state plan reviews last year? That is a matter

1 of record. I don't think they have ever compiled it in
2 any kind of systematic comparison. Maybe they could.

3 MR. EHERTS: We will definitely ask some
4 questions.

5 MR. FRUMIN: I was just wondering if you
6 talked about those reports and the evaluation they did
7 last year on 11(c) in details.

8 MS. SPIELER: That is a great suggestion.

9 MS. NARINE: The SEC's is relatively new, but
10 are you going to look to see how they have done?

11 MR. EHERTS: Yes.

12 MS. NARINE: I didn't see it on the list.

13 MS. BARBOUR: The state plans and some of
14 these other issues on effectiveness, which we have
15 talked a little bit about, as a working group we had
16 some discussion, I think on two sort of issues with
17 effectiveness.

18 One is just comparing what do the different
19 statutes say, what are the statute of limitations, is
20 there a kick out provision. All those things versus
21 how effective are they actually in practice.

22 I think that is the part we struggled with,

1 what metrics do you use and how do you measure that.
2 That is going to be an issue for us that we are
3 continuing to look at it, and if anybody has
4 suggestions. That is an issue for the state plans as
5 well as these other programs.

6 MS. NARINE: We were talking yesterday about
7 the ones like the SEC aren't going to be totally
8 analogous, but some of the initial issues might be
9 similar.

10 MR. BROCK: Just a question. Is it on your
11 list to look at some of the case processing procedures?
12 These guys talked earlier today about the value and
13 efforts to reduce the backlog, and that has a lot to do
14 with perceptions of whether OSHA is doing what it is
15 supposed to do. Are you looking at some of those
16 issues?

17 MR. EHERTS: Specifically, the settlement
18 process and mitigation. I think we will put that in.

19 MR. BROCK: Thank you.

20 MS. SPIELER: Anything else? Dave?

21 MR. EHERTS: I'm good.

22 MS. NARINE: When you look at the 22

1 whistleblower statutes, are you going to prioritize
2 them, I assume, based on the number of claims?

3 MR. FRUMIN: Emily, one other quick comment.
4 I know that on one of your slides at the end, you
5 listed the anticipated sources of information, and you
6 highlighted additional data from OSHA.

7 I know it's on the agenda. I'm just noting
8 this is another example of the urgency of changing the
9 way OSHA keeps its information on the 11(c) process so
10 there is actually much more meaningful data collection
11 and analysis than we are now able to get. Just bear
12 that in mind when we start talking about the ever
13 popular data issue next.

14 MS. SPIELER: Anything else?

15 (No response.)

16 MS. SPIELER: We actually were scheduled for a
17 break at the end of the 11(c) Committee report. Why
18 don't we take it now. We will reconvene in 15 minutes.

19 MR. BAIRD: Before we do, so we are altogether
20 on the record, I just want to indicate the Committee
21 has been handed out a form called "Investigative Data,
22 10/1/12 and 9/30/13." I am going to mark that as WPAC

1 Exhibit 5.

2 (Exhibit No. 5 was marked for
3 identification.)

4 I am going to virtually mark that slide that
5 Katelyn did that had the text of the revised
6 recommendation that was tabled as WPAC Exhibit 6.

7 (A brief recess was taken.)

8 (Exhibit No. 6 was marked for
9 identification.)

10 MS. SPIELER: Before we get started, it has
11 been suggested -- two things. The data that was handed
12 out and made part of the record hasn't been fully
13 cleaned, and in particular, some of the terms on it may
14 not be actually correct. As an example, the one
15 includes all settlements, both what usually is called
16 "settlements" and what is usually called "settlements,
17 other."

18 It is a first coloring of some data. It
19 should be taken as that. It's not clear that we can
20 draw conclusions from it, but it is an example of the
21 kind of work they are doing to try to respond to
22 requests for data. We look forward to having a data

1 discussion.

2 Second, in the next session, we are going to
3 be hearing from representatives of three different
4 agencies. It has been suggested to me that we hear
5 three relatively brief consecutive presentations and
6 then you will take questions together.

7 I could go either way on this, but I see our
8 MSHA representatives sitting up here alone, or I will
9 just time keep.

10 Do any of you who are presenting have any
11 strong feelings about this one way or the other?

12 (No response.)

13 MR. SPIELER: Why don't we do ten minute
14 presentations from each of you and then have all three
15 of you sit at the table so you can answer questions.
16 Is that okay with you?

17 I'm going to turn it over to you, would you
18 please introduce yourself and tell us about the Mine
19 Safety and Health Act process.

20 //

21 //

22 //

1 LESSONS LEARNED FROM WHISTLEBLOWER PROCESSES -
2 MINE SAFETY AND HEALTH ADMINISTRATION

3 MR. BAXTER: I'm Derek Baxter from the Mine
4 Safety and Health Division of the Office of the
5 Solicitor here at DOL. I will be speaking from my
6 perspective from a practicing lawyer who works on some
7 of these cases.

8 My colleague, Charlie Lord, is here in the
9 audience, too. He may participate in some of the
10 questioning. He is a prosecutor in a number of these
11 cases.

12 We call it Section 105(c) of the Mine Act that
13 we deal with. It is a very important provision that
14 MSHA administers. When the Mine Act was passed in
15 1977, the Senate went out of its way to flag this
16 provision and to say that for our mine safety and
17 health program to work, miners really have to play an
18 active role.

19 MSHA, as you might know, is a safety agency
20 that is at every mine in the country, at least twice,
21 maybe four times a year, depending on the type of mine.
22 The inspectors are there a lot.

1 Still, mining conditions are very volatile.
2 Once the inspector is gone, conditions can change. We
3 have to give every incentive to miners to come forward
4 and to speak out about conditions they see.

5 When that doesn't happen, we can see the
6 consequences. I am sure we all remember Upper Big
7 Branch, the mine in West Virginia, where there was a
8 tremendous explosion. Twenty-nine miners lost their
9 lives, back in 2010.

10 In MSHA's report, they flagged incidences of
11 miners who had noticed these conditions. They weren't
12 hidden. MSHA didn't get a single complaint before
13 then. In this particular mine, miners didn't feel
14 comfortable about coming forward.

15 The report has quotes from miners saying they
16 knew not to say anything because they would probably
17 get fired. They have a very poignant interchange from
18 a purchasing agent at the mine whose job it was to
19 report conditions and explain why the mine was down and
20 not running coal and not getting production. When he
21 would actually make those phone calls, his hands would
22 literally be trembling. The mentality was not to

1 listen to the safety problems and what was going on
2 underground. That was a very preventable accident
3 there.

4 That's why MSHA takes this provision very
5 seriously. Section 105(c), it is on the screen. This
6 is 30 U.S.C. 815(c). I won't read the full language
7 there. It does say that no person shall discharge or
8 in any other manner discriminate against, and it goes
9 on to say in a different clause, that is very
10 interesting, or otherwise interfere with the exercise
11 of statutory rights of any miner.

12 It goes on to list some of the examples of the
13 protected activity that is covered.

14 In terms of discrimination under the Mine Act,
15 this is similar to a lot of other discrimination
16 statutes in terms of the elements, we look for
17 protected activity. MSHA has published guidance in
18 terms of what constitutes protected activity or
19 examples of it.

20 That includes making complaints to MSHA,
21 talking to an inspector at the mine, making internal
22 health and safety complaints to the company. Even if

1 they never talk to MSHA, it is important obviously to
2 make sure that miners talk about conditions they see.
3 Even under certain circumstances, refusing to work
4 under unsafe conditions.

5 We also have to show employer knowledge of the
6 protected activity, adverse action, and a nexus between
7 the protected activity and the adverse action.

8 Aside from the discrimination prong, as I
9 mentioned a minute ago, we also have this interference
10 prong. There have been some cases over the years which
11 MSHA has found that employer policies or employer
12 actions have interfered with the exercise of statutory
13 rights.

14 For example, threatening a miner, telling a
15 miner don't talk to the inspector when the inspector
16 arrives on the property. Telling miners they can't
17 leave the section without explicit permission even if
18 they see a very rigid safety problem that they feel
19 they need to report.

20 MSHA recently filed an Amicus Brief in a
21 Commission case that sets out our view of the test,
22 which is drawn from these Commission cases in the past,

1 and which also both the Commission and MSHA over the
2 years have looked to the NRA, which has a very
3 developed case law, of course, on interference.

4 We argue interference includes an action by
5 someone that under the totality of the circumstances
6 tends to interfere with the exercise of protected
7 rights. If it does that, then the person fails to
8 justify the action with a legitimate and substantial
9 reason that outweighs the harm caused to those
10 protected rights.

11 An important difference between our cases and
12 OSHA cases is they are before Administrative Law
13 Judges, not in District Court. That is right there in
14 the statute itself.

15 There are currently 18 Administrative Law
16 Judges in the Federal Safety and Health Review
17 Commission. They are experienced, specialized judges
18 that are used to these cases. That probably helps the
19 cases move along.

20 It may be a little hard to read on the screen,
21 but it should be in your materials, about the deadlines
22 for pushing these cases forward. The deadlines on the

1 screen there are from the statute. MSHA also has a
2 whole series of internal deadlines that they put in a
3 handbook, which is on their website, if you are
4 interested. I think that is very important.

5 We have different deadlines. I will start at
6 the top. The complainant has to file their complaint
7 with MSHA within 60 days of the adverse action,
8 although there is also language in the legislative
9 history and elsewhere that says that is not
10 jurisdictional. Certainly, we want them to do, but
11 that is not always fatal to the case if for some reason
12 they miss the 60 day deadline.

13 After that, MSHA investigates. MSHA has 18
14 different district offices and a number of field
15 offices throughout the country. Each district office
16 will have typically several what we call "special
17 investigators."

18 These are investigators that have gone through
19 specialized training, they investigate these
20 whistleblower 105(c) cases. They also investigate
21 other particularly sensitive cases.

22 They report their findings to their district

1 manager and the case is eventually reviewed by MSHA
2 Headquarters and by the Office of the Solicitor if it
3 is going to be filed.

4 The statute says this investigation must begin
5 within 15 days of receiving the complaint. In reality,
6 it begins almost instantaneously when MSHA gets the
7 complaint. That is in part because they have cascading
8 internal deadlines, within 20 days, they are actually
9 supposed to complete the investigation and give it to
10 the solicitors to review.

11 One thing that I think is very important is
12 communication. We have that. Special investigators
13 will talk to the solicitors and flag problems or talk
14 through how the case looks as it goes.

15 If you see that second box on the left, the
16 Secretary of Labor has to decide whether to file for
17 temporary reinstatement, and I'll talk more about what
18 that means later. That is basically preliminarily
19 putting the miner back to work.

20 The internal deadline MSHA has targeted for
21 that is within 30 days of the complaint being filed or
22 the Secretary will either file it or decline it if in

1 fact finding it to be frivolously brought.

2 If we do file for particular reinstatement,
3 the Mine Commission has certain procedural rules also
4 that kick in in terms of moving the case forward. We
5 don't automatically get reinstatement.

6 We have to get an Order from an Administrative
7 Law Judge, and the operator may request a hearing. The
8 operator has to do that within ten days. The Judge
9 then has ten days to schedule a hearing, and then has
10 to issue his or her decision within seven days of the
11 hearing. It is a pretty quick, fast moving process.

12 If you see the box below that, while this
13 whole temporary reinstatement issue is going on or not,
14 if the miner didn't request temporary reinstatement,
15 MSHA is investigating the case on its merits, trying to
16 decide if we want to file, ultimately if we think there
17 is discrimination, interference or not. MSHA has an
18 internal deadline of 60 days to do that.

19 Below that, there is a statutory deadline of
20 90 days for the Secretary of Labor to file a complaint
21 on the merits if we think it is meritorious or decline
22 it. If we decline the case, we tell the complainant

1 that, and they have 30 days, they have a private right
2 of action, so they can independently go before the
3 Administrative Law Judge with their own case. That
4 does happen.

5 I think because of these deadlines and because
6 MSHA has stated in recent years they have put more
7 resources into looking at these cases, and they have
8 also put more outreach materials up on the web, and
9 they have tried to really take this very seriously.

10 The number of discrimination cases has gone
11 way up. From 1993 to 2008, there was an average of six
12 temporary reinstatement cases filed per year. In the
13 last three years, it went up to an average of 25 per
14 year. In 2012, we filed 47 temporary reinstatements,
15 which was a record for MSHA. Last year we filed 45
16 cases on the merits, which is also a record for MSHA.

17 The cases, I think, are moving faster and
18 there are a lot more of them. They are really trying
19 to make that work.

20 Typically, reinstatement, that is a very
21 important provision, I think, and part of the statute.

22 The Senate said in their report when Congress passed

1 the law that temporary reinstatement was essential, it
2 was an essential protection. These miners, they
3 can lose their job and be out of work. That is a
4 disincentive obviously to come forward with safety
5 complaints.

6 Also in the Senate report they talked about
7 how mining can occur in some remote areas, and there
8 are just not a lot of other jobs out there.

9 They put that provision in. If a miner has a
10 non-frivolous case, they don't even have to have a
11 prima facie case, but for a temporary reinstatement
12 hearing, they have to have evidence to show that they
13 could put on a prima facie case on the merits later.
14 It is a very limited in scope hearing.

15 The Commission rules say it is just limited to
16 the issue of whether this complaint appears frivolous
17 or not, and it is not intended to test all the
18 affirmative defenses that an employer would have or to
19 test the credibility of the witnesses. Again, it is
20 just seeing whether there is reasonable cause to
21 believe that this miner could prevail later.

22 On the merits, as I mentioned, the Secretary

1 can file or eventually the miner has a private right of
2 action under 105(c)(3).

3 Finally, if the miner and the Secretary win
4 the case, there is good statutory language that says
5 they must take affirmative action to abate the
6 violation, and in another place in the statute it talks
7 about granting all appropriate relief.

8 That relief can take a number of forms. We
9 always have a civil monetary penalty as part of the
10 case, and also make whole remedies, back pay, other
11 compensatory damages, so we have had different cases
12 over the years just kind of exploring just what
13 remedies are available. That is part of it.

14 That is an overview. I look forward to your
15 questions.

16 MS. SPIELER: Great. Thank you.

17 MR. BAIRD: Let me just jump in and say I have
18 a copy of this PowerPoint that Mr. Baxter presented,
19 and I will mark that as WPAC Exhibit 7.

20 (Exhibit No. 7 was marked for
21 identification.)

22 //

1 LESSONS LEARNED FROM WHISTLEBLOWER PROCESSES

2 NATIONAL LABOR RELATIONS BOARD

3 MR. SOLOMON: Good afternoon. I'm Lafe
4 Solomon. I've spent my professional career at the
5 National Labor Relations Board, and from June of 2010
6 until October of 2013, I served as Acting General
7 Counsel.

8 In 1935, Congress passed the National Labor
9 Relations Act, and for our purposes here today, they
10 made unlawful discharge or other forms of retaliation
11 against workers for engaging in Union activities or
12 other protected concerted activities.

13 The Act has always applied to non-Union
14 workplaces as well as unionized workplaces' protected
15 concerted activities, and in its most simplest form, it
16 protects two or more workers for talking to each other
17 about terms and conditions of employment.

18 Obviously, health and safety concerns are
19 covered under the National Labor Relations Act as are
20 many other types of terms and conditions of employment.

21 I just thought I would give you an overview of
22 our investigative process. In fiscal year 2013, we had

1 21,000 complaints. We have 26 field offices around the
2 country. We don't really keep track of how many of
3 those cases are retaliation cases as opposed to other
4 types of unfair labor practices. My guesstimate would
5 be 40 to 50 percent of those do involve retaliation.

6 As an agency, we have set very simple or
7 straightforward strategic goals. One has to do with
8 the holding of elections, which is part of what we do,
9 and the other is our goal to investigate, prosecute and
10 remedy unfair labor practice cases impartially and
11 promptly.

12 Under that strategic goal are two overarching
13 goals having to do with unfair labor practice charges.

14 One is to resolve all unfair labor practice charges
15 within 120 days of the filing of the charge. We set a
16 percentage goal each year. For fiscal year 2013, it
17 was 72 percent.

18 The other goal in this area is that we would
19 close meritorious cases within 365 days of the filing
20 of the charge. For that goal, it was 80 percent.

21 I'm happy to say that we did meet our goals in
22 fiscal year 2013, sometimes we came a little bit short.

1 The way we are able to implement these,
2 because we really do believe in the prompt resolution
3 of workplace disputes -- it doesn't help the worker, it
4 doesn't help the employer. It helps no one if these
5 disputes fester.

6 Our entire metrics and evaluation system from
7 the very top of the agency to the very beginning of the
8 agency are evaluated obviously on quality and
9 thoroughness of investigations, but also on timeliness.
10 These measures are closely monitored. We have a whole
11 Division in Washington, the Division of Operations,
12 that oversees the field offices.

13 When a case is docketed, and we are a little
14 unlike OSHA, every one is docketed. The moment it is
15 docketed, we have three buckets. We call it "impact
16 analysis," and we have Category 1, Category 2, and
17 Category 3. Category 3 are the most serious unfair
18 labor practice charges.

19 All discharges are automatically in Category
20 3, other forms of reprisal could be in Category 2 or 3,
21 depending on what is alleged in the case.

22 Category 3 cases are given a time line of

1 seven weeks to investigate. Obviously, the
2 investigator starts with the charging party and the
3 charging party's witnesses, but in that seven week
4 period, we also expect to take evidence from the
5 charged party as well.

6 Category 2 cases are nine weeks and Category 1
7 cases are 11 weeks.

8 What happens after the investigation is
9 finished and there is a supervisor that is deeply
10 involved with the investigator, they present the case
11 with the Regional Director, and the Regional attorney
12 will be there, and other personnel.

13 The Regional Director makes a decision as to
14 whether the case has merit or not. Generally speaking,
15 one-third of the cases filed with us are bound to be
16 meritorious. The two-thirds, the Regional Director
17 says I don't think there's merit, so the charging party
18 is asked to withdraw it or else it is dismissed.

19 If the charge is found to be meritorious, the
20 Regional Director will issue a complaint. The
21 complaint then goes to an Administrative Law Judge.
22 Just like the Department of Labor, we have

1 Administrative Law Judges that hear our cases. The
2 General Counsel has an attorney that represents the
3 charging party. There is no private right of action.
4 We bring the charge and we prosecute the case as the
5 General Counsel.

6 The Administrative Law Judge issues a
7 decision. That decision is appealable to the five
8 member Board in Washington, who at some point will
9 issue their decision, and the important part there is
10 that Board decisions are not self enforcing, so we have
11 to go into a Court of Appeals around the country to get
12 the case enforced.

13 The respondent always has the option of filing
14 in the D.C. Circuit. The Board files wherever the
15 unfair labor practice charge occurred.

16 At all stages, from the very beginning through
17 even when it's before the Board, we have a very active
18 settlement program. We settle over 90 percent of the
19 cases, and they can settle at any one of the stages.
20 Obviously, we would prefer early settlement. We will
21 never shut that door.

22 I also wanted to say that because we don't

1 have preliminary reinstatement as Mine and Safety does
2 -- when we issue a complaint, the Regional Director
3 will decide whether we should seek injunctive relief.
4 We do have the power under 10(j) of the Act to bring an
5 injunctive action in a District Court.

6 However, the way the case law has developed
7 under the National Labor Relations Act, we cannot go in
8 just because there has been a discharge or discharges.
9 There has to be more for us. The discharges have to
10 have thwarted the Union campaign, the election
11 campaign, or it has stifled the first contract
12 negotiations. Unfortunately, it isn't enough or isn't
13 sufficient for us to seek injunctions for all
14 discharges.

15 I think I'm going to stop there and I'll wait
16 for questions.

17 MS. SPIELER: Thank you, Lafe. We will hear
18 about the FAA, and then we will ask all three of you to
19 come back up.

20 //

21 //

22 //

1 LESSONS LEARNED FROM WHISTLEBLOWER PROCESSES

2 FEDERAL AVIATION ADMINISTRATION

3 MR. MURRAY: Good afternoon. My name is
4 Vincent Murray. I'm currently the Acting Manager and
5 Chief Investigator for the FAA's Office of Audit and
6 Evaluation, Audit and Analysis Branch, which handles
7 the primary coordination for all of the FAA's
8 whistleblower efforts.

9 Thank you for the opportunity today to come
10 and discuss some of the unique aspects of the
11 whistleblower law that we deal with, and more
12 importantly, the coordination efforts that we have
13 developed with OSHA to ensure that both the safety
14 aspects of a complaint and the retaliation aspects of a
15 complaint are properly investigated.

16 The notes that were passed out is just a quick
17 high level data overview. As was mentioned before,
18 this has not been thoroughly validated. Most of the
19 data is secondhand to us from OSHA.

20 Take it with a grain of salt if we happen to
21 be off a few numbers here or there. It does give you a
22 sense of the activity that occurs in the whistleblower

1 program in the aviation industry.

2 On January 21, 2000, Alaska Airlines Flight
3 261 lost control and crashed into the Pacific Ocean off
4 the coast of California, killing all souls on board.
5 The NTSB determined the probable cause of the accident
6 to be related to the lack of lubrication of one of the
7 primary flight control surfaces causing the aircraft to
8 lose pitch control.

9 Contributing to that was some of the
10 maintenance practices at Alaska Airlines. A former
11 employee of Alaska Airlines subsequently filed suit
12 claiming they had raised these very safety issues with
13 the company years prior to the accident.

14 That same year, Congress passed the Wendell H.
15 Ford Aviation and Investment and Reform Act for the
16 21st Century, known as AIR21, establishing the first
17 whistleblower protection laws for the aviation
18 industry. It was codified in Title 49, United States
19 Code, Section 42121.

20 The FAA has general regulatory authority over
21 aviation under Title 49 anyway. This particular
22 whistleblower law generally empowers OSHA to enforce

1 any retaliation, correct any retaliation that may have
2 occurred, related to safety complaints that were raised
3 by an employee of a contractor, subcontractor, or
4 employee of an air carrier.

5 One of the important things to understand,
6 while the aviation industry is very large, the
7 whistleblower protection laws only apply to air carrier
8 operations. That would apply to your general 121 type
9 air carriers such as the Delta's/United's of the world.

10 It would also apply to your commuter and on demand
11 type air carriers, which are certificated under Part
12 135 of our regulations. It would not apply to say an
13 air tour operator or a pilot school or other types of
14 aviation activities. Just keep that in mind.

15 As you see from some of the statistics, we
16 certainly didn't have the 21,000 complaints that you
17 would see from the National Labor Relations Board.
18 However, the FAA does investigate thousands of safety
19 complaints annually. We get those through a number of
20 different avenues, and the vast majority of them are
21 never related to any sort of claimed retaliation.

22 You will see there was a spike in 2013 where

1 we investigated almost 100 whistleblower type
2 complaints. We actually in took about 165 complaints
3 but many of those either did not meet AIR21 criteria or
4 had already been investigated by some other complaint
5 method.

6 When we intake a complaint -- let me talk
7 about notification first. When an employee believes
8 they may have been retaliated against for raising a
9 safety complaint, they may bring it to the FAA first.
10 We have local offices they can go to. We have
11 oversight offices. There are internal reporting
12 mechanisms.

13 Often we may get the first complaint of a
14 whistleblower type case. When we do, we immediately
15 notify OSHA of that complaint because they may be
16 getting one shortly thereafter, and we want to make
17 sure they are tied together.

18 However, there are certainly occasions where
19 OSHA is the first to know of a whistleblower complaint,
20 most likely because someone has taken it to an
21 employment attorney and the attorney is then filing a
22 complaint with OSHA on their behalf, and it is

1 something that the FAA has not known about before.

2 It is very important that OSHA notify us so we
3 can investigate the relevant safety aspects of that
4 complaint.

5 Initially, some of the hurdles that we had up
6 to a year ago in our coordination efforts with OSHA,
7 the FAA has a centralized whistleblower oversight
8 process at headquarters, and then we will refer those
9 investigations out to the field.

10 OSHA is more regional centric, I believe it is
11 eight regions. All eight of them would be sending us
12 complaints. Some were better at sending those
13 complaints to us than others. Another thing that we
14 found was those complaints were often being transmitted
15 back and forth by U.S. mail.

16 I don't know if you realize this or not, but
17 U.S. mail is not 100 accurate, and there was no
18 feedback loop between us and OSHA. Consequently, when
19 we started to increase our coordination efforts, we
20 realized there were safety complaints that OSHA had
21 transmitted to us that never got to us and had never
22 been addressed by the FAA. That was one aspect that we

1 definitely had to take care of.

2 One of the things we have done since then is
3 we have created an organizational e-mail box, and we
4 now communicate with Rob Swick, a single point of
5 contact within OSHA. One hundred percent of the
6 complaints we get go to OSHA if they didn't come from
7 OSHA to begin with and vice versa.

8 Secondly, in order to make sure that the ball
9 doesn't get dropped anywhere, we also do a monthly
10 reconciliation between their AIR21 cases and our AIR21
11 cases, to make sure there is not some sort of safety
12 complaint out there that has not been properly
13 investigated.

14 Our intake processes are a little bit
15 different. We coordinate activities, but what OSHA is
16 investigating related to the retaliation is very
17 different from what we are investigating related to
18 compliance with the Federal aviation regulations.

19 Consequently, even at the intake level, OSHA
20 may find that something does not meet timely filing
21 requirements, 91 days or greater. That doesn't matter
22 to the FAA. We don't care if it was a year ago. If it

1 has to do with a safety complaint, we want it, we want
2 to be able to investigate it.

3 If it was related to a claim of retaliation,
4 we will investigate it under our whistleblower process.

5 Conversely, just because the FAA doesn't find
6 that a Federal regulation related air carrier safety
7 was violated does not necessarily mean there is not
8 merit for OSHA's purposes.

9 For example, if a pilot feels she was
10 pressured to fly while ill or fatigued, contrary to
11 Federal regulations, and refuses to fly, then no
12 Federal aviation regulation has been violated because
13 no operation occurred. However, the OSHA ALJs and the
14 Administrative Review Board have held that by failing
15 to do that, if they are retaliated against, then that
16 is in fact a violation of AIR21.

17 Although the investigations are similar, there
18 is not a 100 percent overlap.

19 One of the unique aspects of AIR21 at the end
20 of the investigation is there is an opportunity in the
21 law that the employer, if they are found to have
22 violated AIR21, the Secretary's findings can come back

1 to the FAA and we can then initiate a civil penalty
2 against that organization, just for having violated
3 AIR21, even if there was no prior violation of any
4 other regulatory requirements.

5 That gets a little bit complicated because at
6 what point in the appeal process do you determine the
7 violation of AIR21 has occurred. Is it just when the
8 Secretary issues the findings or is it after the appeal
9 to the ALJ or the ALJ decision, or the appeal to the
10 ARB or potential appeal even to a court?

11 Those are issues that we have to work out, but
12 it is simple communication back and forth to ensure
13 that gets covered.

14 That is generally the coverage of AIR21 and
15 the coordination process with OSHA. I think at this
16 time it is appropriate to open it up for questions.

17 MR. BAIRD: Let me just say for the record
18 that Mr. Murray handed out a sheet called "FAA/OSHA
19 Fact Sheet," which I will mark as WPAC Exhibit 8 for
20 the record.

21 (Exhibit No. 8 was marked for
22 identification.)

1 DISCUSSION

2 MS. SPIELER: It is open for the full
3 Committee questions. Marcia?

4 MS. NARINE: I have questions for MSHA. How
5 many mines are under your jurisdiction? Second
6 question is how many inspectors do you have? A third
7 question is how did funding change if any after the
8 Upper Big Branch disaster?

9 MR. BAXTER: I would have to get the precise
10 data from MSHA on that, which we can, following this.
11 I think roughly there are 2,000 coal mines and 14,000
12 other types of mines in the country. In terms of
13 funding, I don't really have the budget data. I know
14 there were increases for certain things for MSHA
15 following Big Branch for certain programs. What was
16 the other?

17 MS. NARINE: How many inspectors.

18 MR. BAXTER: Again, we can find the exact
19 data. It's less 1,000, somewhere in the range of
20 600-700, something like that. We can clarify that.

21 MS. SPIELER: I don't know if everyone knows
22 this. Under the Mine Safety and Health Act, the mines

1 have to be inspected on a regular basis, which makes it
2 very different from OSHA. Underground mines need to be
3 inspected four times a year. Above ground mines need
4 to be inspected at least twice a year. They actually
5 see inspectors in the mining industry as opposed to in
6 general industry where you might or might not.

7 MS. GARDE: For FAA, do you take enforcement
8 action or do you investigate the retaliation itself?

9 MR. MURRAY: FAA does not investigate any
10 aspect of the retaliation whatsoever.

11 MS. GARDE: You rely on the Department of
12 Labor?

13 MR. MURRAY: That is entirely assigned to the
14 Department of Labor.

15 MS. GARDE: If you are aware of a safety
16 concern, which has a retaliation piece of it that
17 didn't go to the Department of Labor or didn't meet the
18 Department of Labor statute of limitations, is that
19 just a freebie?

20 MR. MURRAY: I'm not exactly sure I know what
21 you mean by "freebie."

22 MS. GARDE: Any enforcement action or any

1 disciplinary action or anything that you do with the
2 airlines about retaliation itself, not the safety
3 issue.

4 MR. MURRAY: Not about the retaliation, no.

5 MS. GARDE: What about Mine and Safety, do you
6 investigate retaliation?

7 MR. BAXTER: Yes.

8 MS. GARDE: Internally? You have your own
9 retaliation investigators?

10 MR. BAXTER: Yes.

11 MS. GARDE: If you find retaliation, what
12 enforcement action can you take?

13 MR. BAXTER: In terms of retaliation of a
14 miner?

15 MS. GARDE: Yes.

16 MR. BAXTER: You can remedy the conduct,
17 reinstatement of the miner. There is language about
18 cease and desist orders as referred to in the
19 legislative history. A penalty that would deter the
20 conduct from happening in the future.

21 MS. GARDE: How many retaliation complaints do
22 you receive directly that your agency investigates?

1 MR. BAXTER: Again, I will have to get precise
2 data for you. I would say it's under 200 a year.

3 MS. GARDE: How many investigators -- do all
4 your investigators -- are they qualified to investigate
5 retaliation claims?

6 MR. BAXTER: Yes, there's training that
7 special investigators go through. At the Mine Academy
8 in West Virginia, there is a course of training. They
9 have a number of classes. It is a graduated program.
10 It takes a while, while they are working in the field
11 at the same time, to finally get their credentials.
12 Lawyers play a role in the training as well.

13 MS. GARDE: When you find retaliation has
14 occurred with a miner, are those publicly published
15 decisions? If it is against a worker, can he appeal in
16 front of an ALJ?

17 MR. BAXTER: For us to bring the case, if we
18 bring the case before an Administrative Law Judge, yes,
19 that is going to be a published decision.

20 MS. GARDE: You said you bring the case. Does
21 a worker have a private right of action?

22 MR. BAXTER: They ultimately do if we decline

1 to bring the case. They have private right of action.

2 That also would be a published decision.

3 MS. SPIELER: Can they intervene individually
4 in the cases that MSHA brings?

5 MR. BAXTER: Under the Commission rules, they
6 are parties to the case themselves. We are working in
7 effect in a joint representation setting with them.
8 They are parties to the case. Quite often they will
9 have private counsel participating.

10 MS. GARDE: Do you know off the top of your
11 head what section of the statute refers to this
12 remedial relief?

13 MR. BAXTER: Sure. Section 105(c)(2).

14 MS. GARDE: Those are my questions. Thank
15 you.

16 MR. FRUMIN: Emily?

17 MS. SPIELER: Go for it, Eric.

18 MR. FRUMIN: Lafe, could you tell us something
19 about how OSHA and the NLRB sort out who moves if a
20 complaint is filed with OSHA and a charge is filed with
21 the Board, similar sets of facts that are relevant?
22 From your standpoint, how do you look at the question

1 of parallel action?

2 MR. SOLOMON: Back in the 1970s, there was a
3 Memo of Understanding that was published in the Federal
4 Register between OSHA and the NLRB. That Memo of
5 Understanding was that basically the NLRB would stay
6 its hand and OSHA would take over.

7 That Memo of Understanding is little known at
8 this point, I think, either at OSHA or at the NLRB. In
9 practice, I think both agencies just do their own
10 thing, unless someone calls it to the other's
11 attention. One reason I'm on this detail is to change
12 that practice. I believe there does need to be
13 coordination and communication between the two
14 agencies. That is something that is a work in
15 progress.

16 MR. FRUMIN: Thank you.

17 MS. BARBOUR: I just wanted to add to that. I
18 brought that issue up yesterday at the 11(c) Work Group
19 meeting. It is something that is on that working
20 group's agenda to explore more and perhaps hopefully
21 come up with some recommendations on it.

22 MR. KEATING: For the FAA, you mentioned there

1 is no jurisdiction over retaliation claims; right?

2 MR. MURRAY: Correct. The section of the law,
3 42121, that created the whistleblower protections
4 assigns sole responsibility to the Department of Labor
5 through OSHA for investigating and correcting or
6 ordering any relief based on the retaliation.

7 MR. KEATING: I think you also said just
8 because OSHA does not have jurisdiction, for example,
9 because 90 days has passed, you will take on the
10 investigation of safety. My question is is there any
11 statute of limitations for how long you have to do that
12 or is it open-ended?

13 MR. MURRAY: No, there is absolutely no
14 statute of limitations. When we started increasing the
15 coordination efforts between OSHA and the FAA about a
16 year ago, we actually found some cases up to three or
17 four years prior that OSHA knew about but we never knew
18 about.

19 We conducted a full intake analysis on those,
20 and if those were issues of an alleged violation of a
21 regulation, order or standard, we went ahead and
22 investigated them.

1 MR. KEATING: What are the remedies against
2 carriers to the extent there are deemed to be safety
3 violations? Are there fines?

4 MR. MURRAY: Generally speaking, for a
5 certificated operator like an air carrier, it would be
6 a civil penalty. There is the option if it is very
7 egregious of actually suspending or revoking their
8 operating certificate, but that would be a very
9 egregious last ditch kind of situation.

10 MR. EHERTS: It has to be a safety complaint?

11 MR. MURRAY: It has to be related to a safety
12 violation; that's correct.

13 MS. SPIELER: I am actually interested in
14 these relationships between the agencies, leaving the
15 Board aside for a moment. At MSHA, the relationship
16 between the retaliation and the safety issues, I don't
17 know if you know this because this is on the agency
18 side, if somebody files a retaliation complaint with
19 MSHA that has an underlying safety issue, how is that
20 handled in terms of going out to the mines to inspect
21 for the potential safety violation?

22 MR. BAXTER: It would be referred from the

1 special investigator to an inspector in the field
2 office.

3 MS. SPIELER: Is that in the field manual, is
4 it just practiced? Is it in the regulations anywhere?

5 MR. BAXTER: I don't know if it's in a manual.
6 I know it is certainly the practice, if a safety issue
7 is raised, they are going to look into it.

8 MS. SPIELER: At the FAA, you said something
9 and I'm not sure I heard it right. You said if OSHA
10 finds merit in the AIR21 retaliation case, you can
11 issue a civil penalty against the carrier because of
12 the retaliation finding?

13 MR. MURRAY: That's correct. For example,
14 let's take the case I used where the pilot refused to
15 fly because it would have violated duty time
16 regulations. Because they refused to fly, no operation
17 occurred. Because no operation occurred, there was no
18 violation of an FAA regulation at that point.

19 OSHA can do their retaliation piece and say if
20 this person was retaliated against because they refused
21 to fly, because they refused to violate a regulation,
22 that company has therefore violated AIR21. That

1 Secretary's findings letter comes back to us and then
2 we can initiate a civil penalty just based on the
3 violation of AIR21.

4 MS. SPIELER: Okay. That is very interesting.

5 MR. KEATING: In effect, there would be a
6 double penalty against the employer?

7 MR. MURRAY: There could be a penalty for the
8 safety violation if one occurred, and then there could
9 separately be a penalty for violating AIR21 if the
10 Secretary found that.

11 MS. SPIELER: At MSHA and the Board, when
12 someone brings a complaint, are they always docketed?
13 If I phone the agency and say I think I've been
14 retaliated against, whatever language someone would
15 use, does it somehow get docketed?

16 MR. BAXTER: Yes, it's tracked internally.

17 MS. SPIELER: Even if it is ultimately deemed
18 frivolous?

19 MR. BAXTER: Yes, it is tracked internally and
20 investigated.

21 MS. SPIELER: What about at the Board?

22 MR. SOLOMON: We have information officers in

1 every office that handle phone calls and visits. Every
2 one of those contacts is recorded. If the person files
3 a charge, and that requires a signature from a person,
4 then all of those charges are docketed.

5 MR. MOBERLY: Mr. Baxter, you were asked about
6 relationships between special investigators when they
7 found out about underlying safety violations, that
8 would report that to an inspector who could then deal
9 with the safety part of it.

10 There are a group of inspectors that deal with
11 the safety part and special investigators that deal
12 with the retaliation part; is that accurate?

13 MR. BAXTER: Yes. The special investigators
14 typically had been inspectors prior, they deal with the
15 discrimination issues. They also do other kinds of
16 investigations, for example, should there be civil
17 liability of a high level supervisor for violations.
18 That is another big portfolio they have. They are
19 separate from the inspectors in the field who deal with
20 health and safety issues.

21 MR. MOBERLY: My question is does it go the
22 other way, does it go from safety inspectors who might

1 find out about retaliation issues talking to the
2 special investigators about those?

3 MR. BAXTER: We need the complainant to
4 actually instigate the case and bring it forward to us.
5 That is the trigger for us. They have materials that
6 can be provided, they can explain how the process
7 works. The complainant needs to start the process for
8 us.

9 MS. SPIELER: There is also an inspection
10 process in MSHA, right? There are workers involved in
11 the inspection process.

12 MR. BAXTER: Exactly. There is a provision,
13 103(f) of the statute, that provides for miner
14 representatives. They can be designated at the mine.
15 They can accompany the inspector on the mine visit.
16 They can have some participation in the inspection as
17 well.

18 MR. FRUMIN: I wanted to ask all three
19 agencies, is there a difference between someone who
20 complains about a violation of a safety rule and
21 someone who complains and then suffers retaliation as a
22 result, or someone who files a complaint about

1 retaliation but they have never been a complainant to
2 the agency. I'm wondering whether in your
3 investigation and enforcement protocols there is any
4 consideration given to heightened sanctions in the
5 event the employer retaliates against someone who has
6 begun his involvement by filing a safety complaint of
7 some kind with the agency?

8 In other words, we are now dealing with
9 someone who is an informant with the agency and part of
10 the agency's enforcement process, and now is being
11 retaliated against as an informant to the agency, not
12 retaliated against for other reasons within the
13 workplace, does that kind of retaliation against agency
14 informants trigger any particular special treatment or
15 action by the agency?

16 MR. BAXTER: From MSHA's standpoint, all of
17 the incidences you mentioned are covered. They are all
18 going to be treated -- I don't know if any would have a
19 particular priority that the agency would give. They
20 are all covered by the statute.

21 Those scenario's could play into the civil
22 penalty that the agency assesses. It could be more

1 egregious conduct if someone was fired for
2 participating in a Mine Act proceeding, for example.

3 MR. FRUMIN: That is what I am wondering. Do
4 you have a policy, for instance, on increasing the
5 penalty calculation under those kinds of conditions?
6 Is that somewhere in policy already?

7 MR. BAXTER: Our penalties are especially
8 assessed. They look at each penalty individually in
9 this context, and that is a factor that goes into it,
10 what type of protected activity occurred.

11 A type of protected activity like
12 participating in a proceeding, all things equal, might
13 result in a higher civil penalty.

14 MR. FRUMIN: Could you provide us at some
15 point with that policy?

16 MR. BAXTER: I will get with the agency on
17 that.

18 MR. FRUMIN: Not today, but thank you. How
19 about the other agencies?

20 MR. MURRAY: From the FAA, it's not required
21 that we have an enforcement policy that affords a
22 higher penalty if they were a whistleblower because we

1 would have a separate civil penalty if they were found
2 to have violated AIR21, so it's already covered.

3 MR. FRUMIN: The Board?

4 MR. SOLOMON: The remedies under the National
5 Labor Relations Act are quite limited. We can't fine,
6 we can't issue penalties. All we can do is make whole.

7 I don't think the predicate for your question is going
8 to apply for us.

9 MR. FRUMIN: Thank you.

10 MS. NARINE: Since Eric has asked you for
11 something very specific, Mr. Baxter, I did ask you for
12 information. I don't actually need you to get it for
13 me. I know you were being polite saying you would get
14 something, but now that Eric has asked you for a
15 specific deliverable, I want to be clear that I don't
16 need you to get me statistics about your funding or
17 anything like that.

18 MR. FRUMIN: Marcia, you're making me look
19 bad.

20 MS. NARINE: No, not at all.

21 MR. BROCK: I just have a brief question for
22 the gentleman from the FAA. Looking at the sheet you

1 passed out, could you say a little bit more about the
2 findings of merit? You have the category that says
3 "OSHA Findings of Merit." Could you talk about sort of
4 the equivalent for the complaints that you investigate
5 at the FAA?

6 MR. MURRAY: In the FAA, we don't use the term
7 "merit" or "no merit." We either find a violation of a
8 regulatory requirement or we don't. It is a simple
9 preponderance of the evidence, and based on that and
10 based on our sanction guidance table, we determine what
11 enforcement posture we would take based upon that
12 violation.

13 For example, we could find a violation but if
14 it was a very low risk kind of violation, it can
15 actually be handled with a verbal reprimand and simply
16 recorded in a database.

17 If it was a little bit higher risk, it could
18 be handled with a written warning or perhaps some sort
19 of designated corrective action which would be
20 documented.

21 If it is a higher risk kind of thing or if it
22 was an intentional act, then it would warrant either a

1 civil penalty or some sort of certificate action if
2 that was called for.

3 MR. BROCK: This 41 percent, is that relative
4 to the AIR21 complaints on your first line?

5 MR. MURRAY: The 41 percent is of the
6 allegations that a regulatory requirement -- I should
7 say a regulation, order or standard related to air
8 carrier safety, in 41 percent of the cases we
9 substantiated that a violation of some sort occurred.

10 One of the unique aspects, we obviously can
11 only take enforcement action if a specific regulatory
12 requirement has been violated. When we conduct our
13 safety investigations, we also look for, under the law,
14 whether there was a violation of a safety standard that
15 may not be a specific regulatory requirement.

16 An example might be our engineers get it
17 because they deal with all sorts of National Institutes
18 of Standards and Technologies, and there is all sorts
19 of standards that go into metallurgy and things like
20 that.

21 In the operational world, it might be
22 something like an advisory circular. In an advisory

1 circular, we teach our inspectors it is advisory, it is
2 one way but not necessarily the only way to meet an
3 outcome, whether it is to comply with the regulations
4 or meet a specific safety standard.

5 An air carrier would have the option to either
6 do it exactly the way the advisory circular says or do
7 it in some other way that meets an equivalent intent.

8 If we do an investigation, if there is an
9 allegation and we do an investigation and determine
10 they are not doing it in accordance with the advisory
11 circular nor are they doing it in any other way that
12 meets the same safety standard, we will substantiate
13 that allegation.

14 The corrective action that follows may be
15 different than a regulatory enforcement. It may be a
16 simple notification to the air carrier that we found
17 they did not meet the standard. It may be some sort of
18 follow up action required by the oversight office.
19 They might have to change their policy, change their
20 manuals, something of that nature, which would not
21 necessarily be regulatory in nature.

22 In 41 percent of the cases, we found that some

1 sort of standard, regulation or order was not followed.

2 MR. BROCK: Thank you.

3 MR. MOBERLY: This is actually for Mr. Baxter
4 and Mr. Solomon, MSHA and NLRB. If you heard some of
5 our other presentations, we are looking at 11(c), a
6 very old statute, and ways we might improve that to
7 protect whistleblowers and make their complaints more
8 effective.

9 I'm curious as you look at your statutes, what
10 do you think in your statute is essential for
11 whistleblower protection that you would keep and what
12 would you like to see if you ruled the world to improve
13 your statute to better protect whistleblowers?

14 MR. SOLOMON: I have to be a little cautious
15 because this is an open meeting.

16 (Laughter.)

17 MR. SOLOMON: I certainly think the statute of
18 limitations for 11(c) being 30 days has to be a
19 deterrent.

20 MR. MOBERLY: You can talk about 11(c). I'm
21 interested in your thoughts on your statute.

22 MR. SOLOMON: In our statute, we have 180

1 days. I think the biggest weakness in the National
2 Labor Relations Act and certainly a lot of people have
3 commented on this, is the lack of remedies. We can
4 only do make whole. That is reinstatement with back
5 pay. We are limited in the use of injunctive relief.

6 Obviously, there is a long delay that is
7 possible, and the other part of this being the Board
8 decisions are not self enforcing, so to go through the
9 whole process of the Administrative Law Judge, the
10 Board decision, Court of Appeals, and then you can go
11 to the Supreme Court, it can be a quite lengthy drawn
12 out process.

13 MR. MOBERLY: Thank you.

14 MR. BAXTER: I won't go so far as to say what
15 we need or don't need, but I will say as I mentioned
16 earlier MSHA has been having a lot of success with the
17 temporary reinstatement provision of the statute.
18 Often the number of cases that we filed under that has
19 gone up. I think that encourages miners to pursue
20 their claim on the merits at the same time.

21 I mentioned earlier the time frames that MSHA
22 has to focus on moving their cases, and yet they are

1 not necessarily fatal to the case if they miss them.

2 That is also lenient for us.

3 In terms of the remedies, we do have a
4 penalty. We do have a good range of make whole
5 compensatory remedies as well.

6 MR. MOBERLY: I think you gave us the number
7 of cases for temporary reinstatement that you brought,
8 a huge increase recently. Do you have numbers on how
9 many you win of those when you bring those cases?

10 MR. BAXTER: A temporary reinstatement, it's a
11 very high number. There has only been a handful of
12 temporary reinstatement cases that we have actually
13 taken to hearing and lost in recent years. There have
14 been more cases that we found, many more cases we found
15 to be frivolous and haven't gone ahead and filed.

16 Given the low bar, and there was a 2009 case
17 or January 2010 case, I think, from the Commission that
18 clarified that it is a very low bar to meet. Given
19 that, we win the vast majority of those cases.

20 MR. MOBERLY: Thank you very much.

21 MR. MILES: I'm just going to jump in here and
22 give you the OSC perspective. In the Federal

1 Government context, just on those three issues, statute
2 of limitations, available remedies and injunctive
3 relief, OSC has no statute of limitations.

4 A Federal employee can file a complaint with
5 us whenever they want. It's not a huge issue, to be
6 honest. We are still very good at weeding out
7 frivolous complaints, 90 percent of them don't get an
8 investigation of the 3,000 we get, and the bulk are
9 alleged prohibited activity that occurred within the
10 last year or so. It is not a huge problem to have
11 that.

12 The Federal Government is a little bit
13 different because the presumption is there should be
14 absolutely no retaliation, the taxpayer shouldn't be
15 paying for that. That's one difference.

16 On available remedies, until recently, it was
17 just make whole remedies, where consequential damages,
18 which wasn't very well defined in the case law, but now
19 there is compensatory damages, and I really see it as
20 an obstacle to us being able to settle cases.

21 Now complainants are looking for paydays
22 rather than just trying to get back on their feet. In

1 the bad cases, in the very blatant retaliation cases,
2 we were able to settle them very creatively when the
3 agency wanted to, so the availability of compensatory
4 damages doesn't necessarily make a huge difference.

5 I'm at a public forum. I'm sure I'm going to
6 get in trouble for that one.

7 Injunctive relief has been critical to OSC's
8 enforcement efforts, especially in the last two and a
9 half years since there has been a new Special Counsel.

10 We have made much greater use of our ability to seek
11 stays, to allow us to investigate cases.

12 Formally, through the Merit Systems Protection
13 Board, and that is really where we have tried to
14 advance the law on retaliation, just because the burden
15 is very easy to get a stay and we can at least get some
16 Board non-precedential decisions on kind of interesting
17 questions, but also just the fact that we can seek that
18 stay formally has convinced agencies to play ball with
19 us when we ask them to hold off on a suspension or hold
20 off on a termination so we can complete our
21 investigation.

22 I would say that piece is really critical in

1 our enforcement efforts.

2 MR. FRUMIN: To the MSHA representative, the
3 lack of worker complaints at the Upper Big Branch mine
4 was quite a startling finding to a lot of observers.

5 I wonder whether there were any particular top
6 line take home lessons to MSHA and the mining industry
7 about the significance of the fact that notwithstanding
8 the extensive rights miners have, the presence of MSHA
9 at the mines, that you didn't get any complaints about
10 those horrific conditions literally for years.

11 MR. BAXTER: I suppose it's really up to
12 Joseph Main, the Assistant Secretary, to address that.

13 He has addressed that and he testified before Congress
14 following Upper Big Branch, and he made that point,
15 that at this particular Massey mine, there was a
16 culture of intimidation and miners were not comfortable
17 in terms of coming forward with safety complaints.

18 The kind of complaints at Upper Big Branch,
19 the conditions and problems there were very obvious.
20 There was a lack of rock dust which would prevent or
21 mitigate a coal explosion from going through the mine.

22 That would have been very easy to remedy and certainly

1 was apparent.

2 This is not at all to fault the miners. Mr.
3 Main's testimony showed it wasn't a place where people
4 would speak out. MSHA actually held a public hearing
5 in West Virginia to hear from friends and family of the
6 affected miners, and the accident investigator of Upper
7 Big Branch interviewed about 260 people who had been
8 involved at the mine.

9 This theme came through that there wasn't the
10 comfort level of raising those issues.

11 That is a take away that we need to focus and
12 we do focus on this statute very seriously and try to
13 prosecute it very vigorously.

14 MR. MURRAY: If I might go back for just a
15 second. When the discussion took place with my
16 colleagues about their statutes and what changes might
17 be beneficial, I initially thought I was off the hook
18 because our statute basically speaks to the Department
19 of Labor, not FAA.

20 MR. MOBERLY: That is why I didn't ask you the
21 specific question.

22 MR. MURRAY: Yes. Unfortunately, I recalled a

1 recent ALJ decision which may in fact have bearing on
2 that. Obviously, it was Congress' intent that air
3 carrier employees, contractors and subcontractors be
4 able to freely report safety concerns without fear of
5 retaliation.

6 There was a recent case -- it's a matter of
7 record but I'll use some generic's -- large air
8 carrier, international air carrier, in which a worker
9 who lived and worked in a foreign country reported some
10 pretty serious safety violations, falsification of
11 maintenance documents and things like that.

12 We substantiated virtually everything that he
13 reported. When it went to the ALJ, the ALJ determined
14 that under extraterritoriality law, because Congress
15 did not specifically extend coverage of AIR21
16 internationally, that worker was not covered.

17 I don't know where it will go in the appeal
18 process from here. That was definitely one that caught
19 me as a safety investigator by surprise, wow.

20 As large as our air carriers are, particularly
21 with the consolidation that has occurred within the
22 industry, as many places as they fly and as much of

1 their traffic that is in fact international, that could
2 have a very large impact on safety reporting outside
3 the United States.

4 MR. EHERTS: I have a question to kind of
5 follow up on Eric's with Mr. Baxter. This culture of
6 intimidation at the Branch mine, would it raised to the
7 level of interference with the exercise of statutory
8 rights? Would that be a violation of 105(c)(1)? Do
9 you have to have something else happen?

10 MR. BAXTER: Certainly, threats, telling
11 workers don't report this, don't talk to MSHA, that
12 could be seen as interference with their statutory
13 rights; sure.

14 MS. SPIELER: Would the individual have to
15 bring a complaint then?

16 MR. BAXTER: Yes.

17 MS. SPIELER: This is actually interesting in
18 terms of the conversation we were having earlier. If
19 there is a situation of intimidation so that no one is
20 willing to come forward, but the mine inspector is
21 there and does a walk around and thinks there is
22 significant intimidation, is there any way the mine can

1 be cited outside of 105(c) for intimidation around
2 safety issues?

3 MR. BAXTER: No, for interference cases, any
4 discrimination case, you do need a complaint to be
5 filed. There are other avenues for getting at health
6 and safety complaints. Our statute provides under
7 Section 103(g) what are called "hazard complaints."

8 MS. SPIELER: We are specifically interested
9 in the question of intimidation, and if there is a way
10 for the agency to get -- I know the Board can under
11 8(a)(1), but can MSHA get intimidation around safety
12 without it being a specific safety complaint and
13 without an individual alleging retaliation under
14 105(c)?

15 MR. BAXTER: If there is a miner complaint --
16 we do need that.

17 MS. GARDE: I have a question and an answer,
18 although I don't speak for the NRC. The NRC does have
19 that authority and they have shut down plants when they
20 lost confidence that workers would raise concerns.

21 It wasn't a specific complaint. It really was
22 just the conclusion that they no longer had reasonable

1 assurance that workers would raise safety concerns, and
2 then they had temporary loss of their license until
3 they could demonstrate they had that confidence.

4 MS. SPIELER: Interesting.

5 MS. GARDE: They have exercised that
6 authority.

7 My question to FAA, you started your
8 discussion today about the Alaska Air accident. I
9 actually knew a family that was on that flight and have
10 followed that pretty closely.

11 When you receive a safety complaint about a
12 valve or some piece of equipment, does the FAA ever
13 look to see whether or not that concern was raised
14 internally before it came to your attention in some
15 form of an incident? Do you do that type of kind of
16 cultural or human factors assessment?

17 MR. MURRAY: It's not written in any policy
18 requirement in the inspector's handbook. It would be
19 part of a thorough investigation of whatever incident
20 occurred. We have a database that includes complaints
21 and regular surveillance items that we have found on
22 our own surveillance.

1 If those types of things had come up in prior
2 complaints, then they should be available to whoever is
3 conducting the investigation of a particular incident.

4 MS. GARDE: I've seen it in your FAA reports
5 after an accident. My question is before an accident
6 happens. Are you in any way tracking whether or not a
7 safety concern that goes back to a company's culture
8 and somebody attempted to raise it, it resulted in an
9 accident, but you are looking for those to prevent
10 that?

11 MR. MURRAY: That is in essence where FAA's
12 safety model is today. Because the actual accident
13 rate itself has gotten so low for so long, we don't
14 have == we have had to change our business model from
15 investigating accidents and trying to prevent those
16 accidents from happening again to looking for the
17 precursors to accidents.

18 MS. GARDE: Is that one of the things you are
19 looking for?

20 MR. MURRAY: Absolutely. We have an entire
21 integrated safety analysis system that is intended to
22 do exactly that, to look for pieces of information that

1 at first glance may be completely unrelated but when
2 combined in aggregate, actually point to at least a
3 risk if not a defined problem, it is at least something
4 we can look at to quantify the likelihood and severity
5 to determine whether mitigation is required or not.

6 MS. GARDE: Is that something I could find on
7 your website or is it in an inspection manual?

8 MR. MURRAY: Yes, if you look under ASIAs,
9 that is the overarching program designed to kind of
10 collate at a high level individual pieces of data that
11 may be unrelated.

12 MS. GARDE: Thank you.

13 MR. EHERTS: As a manufacturer, we keep that
14 information also when it comes to critical parts and
15 any issues we have internally.

16 MS. SPIELER: I would just like to ask one
17 question because it's an issue that comes up around the
18 statutes under OSHA's jurisdiction, particularly of
19 MSHA and the Board.

20 How do you approach mixed motive cases? There
21 are various ways in which the statutes at OSHA
22 investigates written motivating factors, substantial

1 factors.

2 I'm curious as to how under your statutes you
3 approach that and to what extent you think it matters.

4 That is my first question.

5 My second question is for Lafe, which is there
6 is no private right of action under the Board, and
7 there is an informal appeal of failure to issue a
8 complaint, similar to the 11(c) process. If there is
9 any time left after the first answer, I'm interested in
10 knowing whether you have thought about the issues of
11 lack of private right of action under the Board
12 process.

13 MR. BAXTER: Under our statute at MSHA for
14 mixed motive cases, it tends to come up more on the
15 merits than the temporary reinstatement cases where we
16 are just looking at whether it is not frivolously
17 brought.

18 We do have a burden shifting provision.
19 Ultimately, the complainant is going to have to show --
20 meet about four tests under some early case law that we
21 have had, under Commission case from 1981 and 1982.

22 MR. SOLOMON: We also have a lot of case law,

1 and there is a burden shifting. If it is a he said/she
2 said type of case, we will issue a complaint and allow
3 the Judge to sort out the factors.

4 On the appeal process, I now feel very
5 strongly. After three years, I now have an agenda once
6 a week for appeals from cases that were dismissed by
7 the Regional Directors. I feel it is a very worthwhile
8 process. There were cases that I disagreed with the
9 Regional Director.

10 MS. SPIELER: Let me intervene because I'm not
11 sure everyone understands what you are saying. Lafa is
12 now talking about the cases in which there is
13 essentially, as in 11(c), no finding of merit, so it
14 goes up to the Central Office for review. I have a
15 hard time thinking of it as an "appeal." For review,
16 to see whether it was appropriately dismissed.

17 I wasn't really asking whether the review
18 should happen, absolutely a review should happen. I
19 was curious about what you thought about the fact that
20 at the Board, unlike at the EEOC and under most of the
21 statutes that OSHA is dealing with, there is no way out
22 for the individual.

1 After the informal appeal, if there is an
2 upholding of the dismissal, then that is it for the
3 complainant.

4 I was curious how much you had thought about
5 what the impact would be on Board process if there were
6 a private right of action.

7 MR. SOLOMON: It would be a huge impact. If
8 as under some of these statutes you have an automatic
9 right to an ALJ hearing, that would be a huge change.
10 All those people that filed an appeal would probably
11 then want to go to an ALJ hearing. There would
12 certainly be resource issues that would have to be
13 addressed.

14 I haven't spent a lot of time thinking about
15 whether if I were rewriting the National Labor
16 Relations Act, would I put in a private right of
17 action. It's only since I've been here I have even
18 contemplated such a thing.

19 I think one reason the Act has been
20 successful, if you are willing to call it that, is in
21 the prompt resolution of disputes, and part of that
22 promptness is if the General Counsel says it's not

1 meritorious, that's the end of the game, then I think
2 all of that would be changed under a private right of
3 action.

4 MS. SPIELER: Anything else?

5 (No response.)

6 MS. SPIELER: Thank you very much. I think it
7 is incredibly helpful for this Committee to get a sense
8 of the world out there, how retaliation is being dealt
9 with, and the three models, they are all different,
10 they are different from 11(c), and from some of the
11 other statutes OSHA investigates.

12 I think it is very useful for us and we really
13 appreciate you having taken the time to do this. Thank
14 you very much.

15 The next item on our agenda is time for public
16 comment. Mr. Renner, were you planning to speak? If
17 you could identify yourself fully, that would be great.

18 PUBLIC COMMENTS

19 MR. RENNER: My name is Richard Renner. I'm
20 an attorney at Kalijarvi, Chuzi, Newman and Fitch here
21 in Washington, D.C.

22 I really just have a few remarks I wanted to

1 make, things that I thought might be helpful to the
2 Committee from what I have heard.

3 This morning, there was some issue about
4 training and the availability of training in the
5 whistleblower area. I wanted to let you know that as
6 part of the National Employment Lawyers Association, I
7 participated in a seminar here in Washington, D.C. last
8 October. This is the brochure that we had for our
9 program called "Shining the Light on Whistleblower and
10 Retaliation Claims."

11 The materials from this two day seminar are
12 available for purchase from NELA at NELA.org.

13 We had 150 whistleblower advocates from around
14 the country and expert panels on a wide variety of
15 whistleblower topics, including many that addressed the
16 Department of Labor process, and our thoughts as
17 advocates about how we work around some of the
18 weaknesses in the law, such as those in 11(c), and the
19 alternatives available to whistleblowers.

20 I would recommend those materials to people
21 looking at this area.

22 At a previous NELA event, Kim Bobo of

1 Interfaith Worker Justice, asked me if I could take all
2 of whistleblower law and summarize it on one page for
3 their low income worker clinics around the country. It
4 turns out I could not.

5 I could do it on two pages, and I brought
6 those two pages here. They are also available on my
7 web page. There was a flyer designed to help those
8 people doing intake, typically law students helping at
9 the low income worker clinics, to help them identify
10 the applicable laws and get the initial complaint filed
11 on time.

12 Particularly for the 11(c) and environmental
13 complaints, which have to be filed within 30 days --
14 this is a huge issue, in catching those issues in the
15 field quickly and getting the complaint filed on time
16 -- this is my flyer that intends to do that, on two
17 pages.

18 MR. MOBERLY: What size font do you have on
19 there?

20 (Laughter.)

21 MR. RENNER: 12 point. It is available on my
22 personal web page,

1 www.taterenner.com/whistleblowerflyerforclinics.pdf.

2 One thing that this slide tries to do is it
3 encompasses not only the Directorate of Whistleblower
4 Protection Programs Acts, but also the Fair Labor
5 Standards Act and the Family Medical Leave Act, which
6 are enforced through the Wage and Hour Division, and
7 the NLRB process, which I think is really under
8 utilized, particularly among low income workers who are
9 non-unionized but still engaged in concerted
10 activities. How to file and initiate those complaints
11 is addressed here.

12 In preparing this, I noticed that one thing
13 that Wage and Hour Division does that I do not see the
14 Directorate of Whistleblower Protection Programs doing
15 is providing for immigration certification for those
16 undocumented employees who report violations of the law
17 and would meet the requirements for an U Visa in
18 immigration law.

19 Since Wage and Hour Division is part of the
20 Department of Labor, it seems to me a fairly
21 straightforward stroke of the pen type of policy change
22 to make sure that undocumented immigrants who file

1 whistleblower complaints get those same services that
2 are available through the Wage and Hour Division.

3 Particularly with the enactment of the Food
4 Safety Modernization Act, which covers 20 million
5 American workers, many of whom are undocumented
6 immigrants, I think this would be an important policy
7 step to take.

8 I understand yesterday the 11(c) Work Group
9 asked about getting a list of laws that protect
10 whistleblowers but are not enforced through the
11 Department of Labor. I have prepared such a chart. It
12 is on my personal web page,
13 www.taterenner.com/fedchart.php. There are about 90
14 Federal laws that I have collected so far.

15 My colleague, Ann Lugbill, of Cincinnati,
16 started this list, through the National Employment
17 Lawyers Association, I've helped maintain it. We keep
18 a collection of those laws that protect whistleblowers.

19 There are a wide variety of enforcement schemes that
20 Congress has used among those various laws.

21 Finally, I have been working the last week on
22 a Brief for the Fifth Circuit that compared the charge

1 filing requirements of SOX with that of Title VII,
2 enforced through the EEOC.

3 It gave me a renewed appreciation for the way
4 in which the Department of Labor has structured in its
5 whistleblower rules a very open-ended opportunity to
6 initiate complaints and have cases decided on the
7 merits. Really, keeping an eye to minimizing and
8 reducing the impact of administrative hurdles that
9 might prevent cases from being decided on the merits.

10 I just wanted to express my appreciation for
11 that foresighted way in which the Department of Labor
12 regulations are written.

13 MS. SPIELER: Can you be a little more
14 specific about the differences between the EEOC process
15 and the DOL process that you are referring to?

16 MR. RENNER: Absolutely. In the Department of
17 Labor process, no particular form is required for the
18 initial complaint. Indeed, they will accept oral
19 complaints. Typically, I will fax in a letter to
20 commence the proceedings. The adjudication of the case
21 very specifically is based on an assessment of the
22 original complaint and consideration of the additional

1 information obtained from the complainant through the
2 interview.

3 By making clear that the Department does not
4 expect the initial complaint to provide all the
5 required information for adjudication, that should be a
6 very clear signal to the Federal Courts that in
7 determining whether or not a complainant has met the
8 traditional requirements of exhaustion, they should not
9 be looking at the four corners of the complaint,
10 because that is not what the Department of Labor does.

11 In a case called FedEx vs. Holowecki, the
12 Supreme Court made clear that we do not impose the
13 Federal Court pleading standards on administrative
14 complaints, but we have to look at the rules of a
15 particular agency. That gives added importance to the
16 way in which the Department of Labor has framed its
17 rules.

18 In the Title VII arena, EEOC, particularly for
19 Federal employees, has required that a complaint set
20 out the basis of the charge, and there has been a split
21 of authorities on whether or not an employee who
22 checked off race, sex, national origin, or religious

1 discrimination, and later discovers they really had a
2 retaliation claim because the true motivation turned
3 out to be a reprisal for their protected activities.

4 There is a split of authorities about whether
5 or not that claim will even be adjudicated if the right
6 language wasn't used in the original charge.

7 In the Department of Labor, if a charge had a
8 mistake in it or new information adds insight into the
9 way in which it should be pled, the Department of Labor
10 has something very similar to the Federal Rules, Civil
11 Procedure 15, in 29 C.F.R. 18.5(e), which says that a
12 complaint can be amended, and the complainant can do
13 that once as a matter of right before an Answer is
14 filed, and typically when we don't have Answers filed,
15 that means at any time.

16 You get one free amendment. After that, you
17 need to ask for permission, but that permission is
18 usually allowed, when it assists adjudication on the
19 merits.

20 In EEOC, claims are allowed to be amended or
21 supplemented to add like or related claims. It doesn't
22 sound like much, but it has been enough so that there

1 is a divergence in the case law between the way cases
2 are decided at the Department of Labor on amendment and
3 pleading issues, and on the way they are decided under
4 Title VII.

5 We had a number of very good decisions in the
6 early 1970s under Title VII about the remedial purpose
7 of the law. Since then, I've seen increasingly Federal
8 Courts that take advantage of whatever requirements are
9 set up in the rules and regulations to trip up a
10 complainant from getting to a decision on the merits,
11 to do precisely that.

12 MS. SPIELER: Thank you. Anything else?

13 MR. RENNER: Thank you very much.

14 MS. SPIELER: Thank you. I know others have
15 not signed up, but if there is anyone else here from
16 the public who would like to say anything, we are open
17 to that.

18 (No response.)

19 MR. SWICK: No response.

20 DISCUSSION OF NEXT STEPS

21 MS. SPIELER: We are moving to the final
22 discussion of next steps. I have some barely

1 comprehensible notes here.

2 I think in the context of each of the work
3 groups, that there was a conversation both about work
4 plans and about issues that the Work Groups would like
5 to continue to discuss.

6 I'm going to assume that we don't have to
7 revisit and re-summarize that at this point, and the
8 Work Group Chairs will take that and continue that
9 work.

10 There are, however, a number of issues that
11 came up in the course of our meeting that I thought
12 were in one way or another cross cutting issues that
13 perhaps it would be useful for us to touch on, and
14 maybe just agree that we should have them on the next
15 Advisory Committee agenda as separate items, apart from
16 the Work Group reports.

17 Over and over again, we have discussed data
18 issues and metric issues. I'm talking about data that
19 would be useful to the Work Groups, data that would be
20 useful in thinking about programmatically, and the
21 question of what data is being collected by the
22 Directorate going forward as the Directorate develops

1 its data gathering mechanisms.

2 We had a brief conversation over lunch about
3 this, and I suggested that we at least have -- I
4 actually suggested two things. If each Work Group has
5 specific data that you think would be useful to the
6 Work Group activities, I would suggest you put that on
7 a Work Group agenda and we communicate that to the
8 Directorate.

9 I want to say on behalf of the Directorate and
10 the Department of Labor, I am aware the data gathering
11 capacity isn't necessarily what we think it should be.

12 I would urge as we make these suggestions or requests,
13 we understand that it may not be possible for them to
14 provide those data in the short term, and I can't say
15 about the long term.

16 Nevertheless, I think it might be useful for
17 the Directorate to know what we would like to have so
18 that it could be part of your thinking.

19 My inclination right now is to put the data
20 question on the agenda as a separate agenda item at our
21 next meeting, largely because I don't necessarily think
22 that a fully thought out recommendation to OSHA about

1 data would necessarily yield what we want given the
2 limitations of the systems.

3 On the other hand, I do think it would be
4 useful for OSHA to hear from us in a brainstorming
5 session about the kind of data we would hope you would
6 move toward collecting in the whistleblower arena, and
7 for me, I have to warn you, that includes being able to
8 track cases beyond what you think of as your
9 jurisdiction.

10 It would be what happens when it goes to SOL
11 and what happens when it goes to the ALJs. That
12 creates a different issue, I think, for OSHA. I do
13 think it would be worth having a conversation about
14 that.

15 I am just going to run through these and then
16 we can revisit them. The second cross cutting issue,
17 and I don't have a solution for this one, maybe I have
18 a suggestion, what I had under the rubric, not
19 incentive programs, but under reporting challenges.

20 That is a theme that has clearly come up in
21 all three of the Work Groups. I'm not sure it can be
22 pulled out of any of the Work Groups. I think it has a

1 different character in each of them. At some point I
2 think it is important for us as a full Committee to
3 have a full conversation on it from different vantage
4 parts.

5 I think we got stuck in part on the
6 recommendation that came from the 11(c) Committee
7 because we don't have a shared understanding of some of
8 the information.

9 Again, I would suggest -- I know there is an
10 issue in Best Practices, there is an issue, for
11 example, that the Best Practices Subcommittee may take
12 up on the question of whether it should be part of VPP.

13 There is the issue of what I think of as
14 non-whistleblower enforcement, is there some way for
15 OSHA to address this issue of pressure to under report
16 independently of the retaliation process.

17 I thought it was interesting that MSHA can't
18 and apparently didn't include that in their post-Upper
19 Big Branch analysis.

20 That is an issue that I know 11(c) will
21 continue to discuss. In any event, I think that issue
22 we should bring back as a cross cutting issue for

1 Committee conversation later. It may simply grow out
2 of the Work Group reports, but it may require something
3 more integrative.

4 Third, we haven't really grappled with the
5 issue of training and we didn't set up a work group on
6 training, although we had talked about that 14 months
7 ago. It keeps coming up. It came up again also in
8 Nancy's, I thought, very good suggestion about thinking
9 about a grant program on training for this and that
10 would expand the availability of training monies.

11 Again, I think maybe we want to put that on a
12 future agenda and then decide how we would like to
13 proceed with it. I don't think it necessarily fits
14 under Best Practices, which would be external to the
15 agency, and I don't think it fits under the other Work
16 Groups.

17 There were two essentially what I think of as
18 process issues that I'm pondering. One is this
19 question of how to bring to the full Committee issues
20 that don't really fit within the Work Groups but which
21 the Committee as a whole is clearly interested in.

22 I'm suggesting that we start those

1 conversations by having those issues on the agenda as
2 separate issues, maybe just as brainstorming, where we
3 can ask questions of OSHA, and we can then decide how
4 we would like to proceed.

5 The second is this question that I think was
6 interesting that came out of the Transportation
7 Committee about the issue of how much consensus at the
8 Committee level before something is surfaced -- at the
9 Work Group level before something is surfaced to the
10 full Committee.

11 I came away from that with the sense and I
12 thought it reflected what I felt in the room, but that
13 may be presumptuous, that there are times when there
14 may be disputes within the Work Groups that should be
15 surfaced to the full Committee for a fuller
16 conversation.

17 That might result in referral back to the Work
18 Group or it might result in some other outcome. We
19 shouldn't having set up the Work Groups use them to
20 keep important issues from the full Committee's
21 education and deliberations as we go forward.

22 That, I would say is something that the Work

1 Group Chairs need to think about.

2 Finally, I think there is this lurking
3 question of interagency functioning, which comes up in
4 different ways. We need some representation on the
5 Transportation Committee in order for them to go
6 forward on some important issues, as one example.

7 We need to understand better and perhaps you
8 can help us with that, what MOUs are in place, which
9 ones are currently undergoing revision. If you don't
10 feel you can tell us what the revision is, okay, but we
11 should at least know you are addressing these issues.
12 Where can we be helpful in thinking about that.

13 I think we need to think with more clarity
14 about this question, interagency intersections.

15 One last thing, it is clear to me in the
16 course of this, I thought this was valuable use of
17 however long, an hour. There are a number of agencies
18 that have come up, again, from outside OSHA or outside
19 DOL, that we have not talked to. I would include the
20 SEC, the NRC.

21 I could be persuaded, although I'm not sure,
22 to include EEOC and Wage and Hour, all of which handle

1 different statutes in different ways, but I think it
2 would be illuminating, particularly for those members
3 of the Committee who have the tendency to work in one
4 arena but not across arenas to hear the variability and
5 sort of strengths and weaknesses of different programs.

6 I would suggest at our next meeting we again
7 have some time to do a similar kind of session.

8 MR. EHERTS: In fact, a number of the
9 questions asked by 11(c) were answered.

10 MS. SPIELER: They will be answered
11 differently by each of the agencies.

12 MR. EHERTS: Exactly.

13 MS. SPIELER: I'm sure we will all rush to see
14 the 90 statutes that Mr. Renner has cataloged.

15 MR. EHERTS: That was on our list in 11(c).

16 MS. SPIELER: Those are the issues I saw
17 coming out of this meeting that need further thinking.

18 I obviously will be talking to the Work Group Chairs.

19 I would like the Committee's input in thinking about
20 this.

21 We are going to come up with every six months,
22 I hope -- Rob and I have discussed the fact that we are

1 going to try to set up a future schedule, so we can
2 actually have this on our calendars.

3 I assume we will be discussing whether we
4 should do it in conjunction with Work Group meetings in
5 the same way we did this time.

6 What would you like to expand on that I have
7 not mentioned? Nancy?

8 MS. LESSIN: I'm in favor of everything you
9 said. I wanted to take a little longer look at the
10 issue of under reporting challenges. It is interesting
11 to me that most of those who weren't prepared to move
12 on were the same people as those who aren't on the Work
13 Group. I think on our Work Group, we had a fuller,
14 deeper conversation that others weren't privy to.

15 I'm wondering how to really address that. I
16 think sort of in the thinking here, it's like let's get
17 agencies in front of us, and what I'm thinking is let's
18 get some of the victims in front of us.

19 I would like time for those who have
20 experienced this kind of retaliation for reporting an
21 injury to not be a statistic for this group. I think
22 it is very important that we have some examples of

1 people whose lives have been wrecked by this branch of
2 retaliatory employer behavior.

3 I think at times this issue of retaliation for
4 reporting an injury or illness has been characterized
5 as narrow when we look at the 22 statutes, but I think
6 when we look at the data that comes in in terms of the
7 cases that are coming into the agencies under FRSA and
8 OSHA 11(c), I think that says this is not a narrow
9 issue, it is a huge issue.

10 It is what OSHA is spending a whole lot of
11 time and energy on. It is what whistleblower
12 investigators are spending a lot of time and energy on.

13 I would like to consider bringing some of
14 those who have experienced this kind of retaliation to
15 talk about what it looks like, what it feels like, what
16 it is doing. I do think there isn't an universal
17 experience with this kind of whistleblowing. I want to
18 make that as a suggestion.

19 MR. EHERTS: With the caveat no open cases?

20 MS. LESSIN: No open cases.

21 MS. SPIELER: Other ideas, suggestions? We
22 clearly have too long an agenda for our next Committee

1 meeting.

2 MR. MENDELSON: Given that you have such an
3 aggressive agenda and you don't even have a meeting
4 schedule, my staff wanted to proffer that there seems
5 to be some recommendations that the Work Groups are
6 very close on and maybe just need a little more time,
7 instead of waiting six months, if you wanted to have a
8 telephonic meeting, giving whatever notice requirements
9 were needed for that, in the interim, that might be
10 something you might consider so you don't have to wait
11 six months on things you are close on.

12 MS. SPIELER: I frankly have resisted the
13 notion of trying to chair a full Committee meeting by
14 phone. I think the Work Group meetings are
15 sufficiently challenging, with a caveat.

16 If there is a very discrete and clear
17 recommendation from a Work Group, and I think this is
18 maybe the 11(c) recommendation didn't come with enough
19 sort of explanation and background -- I think if we
20 were going to do this telephonically, it would have to
21 be on discrete recommendations, and there would have to
22 be a background piece written, not 50 pages, that

1 provided people with an understanding of what it meant,
2 what it didn't mean, why the Work Group had gotten
3 there, so it would be a feasible thing on the
4 telephone. I appreciate the suggestion.

5 MR. BAIRD: Let me just say we should think
6 about that. I'm not saying we can't do it. There are
7 some things we need to think through.

8 MR. MENDELSON: Subject to the requirements,
9 of course.

10 MS. SPIELER: Yes, I understand that. The
11 reason I'm responding this way is when sequestration
12 happened, it was suggested to me that we just do our
13 meetings that way. I just said no. I did not consult
14 the rest of you.

15 I just thought it was impossible, and we don't
16 know each other well enough really. I just thought it
17 would be untenable to have a complex conversation with
18 30 people on the phone, which sort of what it ends up
19 being with staff.

20 MS. NARINE: As a recommendation, I really
21 appreciate the level of discussion we had on the
22 recommendation that we couldn't get through today.

1 I think that would need a lot of discussion
2 because it is so important and could be so significant
3 in the lives of workers and for employers.

4 I don't know if it would matter if I heard
5 from 100 workers and 100 employers because the level of
6 significance would be such that I would need to think
7 about it, digest it, et cetera.

8 Perhaps if I had been in the room and heard
9 all the discussion back and forth, I probably would
10 have asked all the same questions.

11 Because I want to be able to have a
12 deliberative informed vote -- the reason I said I could
13 live with the "may" is because I know 100 other people
14 would have asked the same question about the word
15 "may," whether it is me or not. It's going to go
16 through public comment. That is why I said I could
17 live with it.

18 I do think it's important that something that
19 I know you all put a lot of thought into gets the level
20 of respect and debate that it deserves.

21 MS. SPIELER: Let me just say, I'm not sure
22 it's a good practice to have something show up for

1 consideration and vote without it being distributed in
2 advance of a meeting.

3 Because we haven't been meeting and the Work
4 Groups met yesterday, there really were no
5 alternatives. I think as we go forward and we have a
6 regular meeting schedule, and the Work Groups are not
7 formed at least on these issues, the Work Groups need
8 to think about that.

9 I don't think the report can arrive the day of
10 the Committee meeting. I don't think the
11 recommendations should arrive the day of the Committee
12 meeting. I think I certainly would find it difficult
13 when I show up at meetings and somebody gives me
14 something to vote on without having a chance to think
15 about it.

16 MR. EHERTS: How do we get around the FACA
17 rules about sending stuff back and forth so freely
18 between the Committee members? I can see where the
19 Subcommittee is meeting and we are deliberating on all
20 those things, we have those discussions.

21 How do we get the full Committee ready before
22 a meeting with FACA?

1 MR. BAIRD: You can certainly send out
2 background material before the meeting. That is no
3 problem at all. We would enter that into the record at
4 the meeting.

5 MR. EHERTS: Answering questions we had from
6 Committee members before the meeting, that would be
7 difficult one on one, wouldn't it?

8 MR. BAIRD: Yes, that would be difficult.

9 MS. SPIELER: Some of that can happen in Work
10 Groups, and they are publicly noticed, and people are
11 on the phone.

12 MS. NARINE: Maybe saying we have a pretty
13 important proposal that we are going to be working on,
14 you are welcome to join in the Work Group discussion,
15 et cetera.

16 MR. FRUMIN: To Emily's point, to the extent
17 there is a background document which is intended to be
18 self explanatory and stand on its own, that could
19 certainly help give people a greater sense of comfort
20 with the proposal in advance so they are not just
21 looking at the text, they are looking at the rationale
22 and all that.

1 MS. SPIELER: Yes, exactly.

2 MR. FRUMIN: I wanted to suggest one other way
3 of improving our process here. I think every time we
4 have interacted with agency staff, whether it is OSHA
5 staff or related agencies today, we have benefitted
6 greatly from it.

7 While I appreciate the administrative help we
8 have gotten from the Whistleblower staff, I think we
9 have been losing some of that benefit by virtue of
10 whatever limits there have been about their
11 participation.

12 I would like to just suggest that going
13 forward, where there is an opportunity either on paper
14 or by inviting agency staff to actually participate in
15 speaking roles, understanding they are under limits
16 about what they can say and so forth, we should attempt
17 to do that.

18 I have generally found it to be very helpful.
19 I don't know how other people feel. I just wanted to
20 offer that additional idea.

21 MS. SPIELER: Good. Richard?

22 MR. MOBERLY: I just have a question for Ed.

1 Can you remind us what rules if any there are about
2 circulating drafts of reports? If there is an open
3 conference call of a Work Group and after that call,
4 there are drafts circulated that will be presented to
5 the entire Committee, what rules are there about that?

6 MR. BAIRD: That's fine. There is a provision
7 that talks about preparatory work in the regulations,
8 and that would fall within that, preparatory work.

9 MR. MOBERLY: Thanks.

10 MS. NARINE: What work?

11 MR. BAIRD: Preparatory.

12 MS. GARDE: I just have one other topic, on
13 what Eric said, in terms of involving the Directorate
14 staff. One of the things I don't think we have on any
15 of our growing lists of things to consider and talk
16 about are some of the real pragmatic suggestions that
17 came out of the IG report and other reports, things
18 like ideas on backlogs, ideas on timeliness, more
19 efficiency.

20 I think that is part of our charter. I don't
21 really want to suggest another subcommittee, I think it
22 may very well be that the staff already has a lot of

1 that under control or has some ideas or is doing things
2 that I don't know about. It might be helpful for us to
3 understand what those things are.

4 As I sit here, I had like six or seven which
5 seemed to me fairly simple straightforward
6 administrative fixes and things like that, but there
7 really hasn't been time to talk about those. I don't
8 want to talk about them if somebody is working on them.

9 It would be really helpful from my perspective
10 to know what they are doing and what issues are on
11 their plate to do, and then is there something we could
12 do to be helpful.

13 MS. SPIELER: I think that is a terrific idea.

14 When we met 14 months ago and the Directorate was
15 really brand new, there was a feeling we should hold
16 off and let them get on their feet and figure out
17 responses to those reports.

18 I know a lot of thought has gone into that.
19 We heard about successes of pilots we were told about.

20 I think it might make sense -- I don't know how we are
21 going to do all this in one day -- to have a report
22 where you tell us where you are on some of these

1 issues, answer some questions, and then we can figure
2 out if within the Committee there is expertise that
3 would be useful to you in addressing some of the
4 administrative and operational issues.

5 We took that on a little bit with 11(c). We
6 haven't really talked about it across the board.

7 MS. GARDE: Thank you.

8 MS. SPIELER: Are we allowed to have two day
9 meetings?

10 MR. BAIRD: There is nothing in FACA that says
11 you can't.

12 MR. KEATING: There is no reason why we
13 couldn't potentially have a half day working group.
14 Yesterday, we had the whole day.

15 MR. MENDELSON: There are obviously budget and
16 policy issues the front office would need to clear on
17 that.

18 MS. SPIELER: Right. I think in part what I
19 am hearing and I feel it as well is there was such a
20 long period of time since our last meeting that we
21 didn't really have a chance to really kind of develop
22 any rhythm at all.

1 We now have a very long list that we are going
2 to have to sort out at the next meeting. I will talk
3 to staff about some of the issues and how to prioritize
4 them and stay on top of the Work Groups to figure it
5 out. It may be now that everyone knows the direction
6 of the Work Groups, that we should take up only
7 recommendations and reports as opposed to progress
8 reports.

9 Why don't we see how it goes over the next
10 three months. I will be working with staff on
11 scheduling issues, then we can figure it out.

12 Is there any other business?

13 MS. NARINE: It will be in six months or three
14 months?

15 MS. SPIELER: The next in person full
16 Committee meeting will be in approximately six months.
17 We are going to try to figure out a schedule. If it
18 turns out March threw us off in a way that we don't
19 like, we may tweak it in some way. It would be
20 September.

21 Before we adjourn, I again want to thank the
22 staff. I was the transition team person on the

1 Presidential Transition Team for the Department of
2 Labor that looked at OSHA, and discovered that -- I
3 knew some of the whistleblower laws that had been
4 assigned to OSHA, but I had no idea, and then to
5 discover there really was no attention being paid.

6 The amount of attention that has been paid in
7 this Administration is a whole different order of
8 magnitude. I think there are also congressional
9 expectations about as increasingly we look to a
10 whistleblower model to assist in regulatory
11 enforcement.

12 I think the commitment the Administration has
13 made on this issue is tremendous, but that kind of
14 commitment never follows through unless you have people
15 who are dedicated to making it work, and that includes
16 the staff of the Central Directorate and the three
17 members of that staff who worked with us directly on
18 the Work Groups, Meghan Smith, Rob Swick and Katelyn
19 Wendell.

20 Also the fact that there is a whistleblower
21 sort of set committee that is working across OSHA,
22 there is really an intent to deal with the regional

1 variations, with the creation of new positions within
2 the regions.

3 I think sometimes change takes a long time,
4 but all of this really matters. I personally am
5 delighted to be a part of it, but I really want to
6 applaud the staff for wanting to make it right. Thank
7 you.

8 MR. FRUMIN: Emily, can I also thank you for
9 the amount of time and effort and creativity you have
10 brought to your role here. I don't know if you knew
11 what you were signing up for. In any event, I'm sure
12 it has taken a lot of time, probably a few more
13 frustrations than you banked on. I appreciate the help
14 you have given all of us.

15 MS. SPIELER: Thank you. I hope you can be
16 with us next time.

17 MR. FRUMIN: I certainly expect to be. Thank
18 you.

19 MS. SPIELER: Thank you all. I think we can
20 adjourn.

21 (Whereupon, at 4:45 p.m., the Committee
22 meeting was concluded.)