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U.S. Department of Labor -- OSHA

Whistleblower Protection
Advisory Committee Meeting

8:33 a.m. to 3:10 p.m.
Thursday, September 4, 2014

U.S. Department of Labor -- OSHA
200 Constitution Avenue
Room C5517
Washington, D.C. 20210

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1 ATTENDEES:

2

3 Whistleblower Protection Advisory Committee:

4 EMILY SPIELER, Northeastern University

5 School of Law, Chair

6 NANCY LESSIN, Steelworkers Charitable and

7 Educational Organization

8 CHRISTINE DOUGHERTY, Principal Discrimination

9 Investigator, State of Minnesota

10 RICHARD MOBERLY, University of Nebraska

11 College of Law

12 AVA BARBOUR, International Unions, UAW

13 MARCIA NARINE, St. Thomas University

14 School of Law (present by phone)

15 ERIC FRUMIN, Change to Win

16 JON BROCK, Emeritus Faculty Member, University

17 Of Washington

18 KENNETH WENGERT, Kraft Foods Group

19 BILLIE GARDE, Clifford & Garde, LLP

20 GREGORY KEATING, Littler Mendelson, PC

21 DAVID EHERTS, Actavis Pharmaceuticals

22

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1 ATTENDEES (continued):

2

3 DR. DAVID MICHAELS, Assistant Secretary of
4 Labor for Occupational Safety and Health

5

6 Directorate of Whistleblower Protection Programs:

7 NANCY SMITH, Acting Director

8 ANTHONY ROSA, Deputy Director

9 MEGHAN SMITH, WPAC Liaison

10 LAURA SEEMAN

11 ROB SWICK

12 KATELYN WENDELL

13 LAURA GIVENS

14 CLEVELAND FAIRCHILD

15 BRIAN BROKER

16 VIET LY

17 PHILIPPE BLANCATO

18

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1 ATTENDEES (continued):

2

3 Also Present:

4 RICHARD RENNER, Kalijarvi, Chuzi, Newman
5 & Fitch

6 MARK LERNER, Solicitor's Office, OSHA

7 MEGAN GUENTHER, Office of the Solicitor,
8 Fair Labor Standards Division

9 KIRK SANDERS, OSHA

10 RICK INCLIMA, Brotherhood of Maintenance of Way
11 Employees Division, Teamsters Rail Conference

12 BRUCE ROLFSEN, Bloomberg BNA, Occupational
13 Safety and Health Reporter

14 JOE SIRBAK, Buchanan, Ingersoll & Rooney

15 DAVE KITRESS, LRP Publications

16 KIM NELSON, OSHA, Toledo Office

17 CONNIE VALKAN, CN Railroad

18 RON JOHNSON, Jones Day

19 ANDREA HYATT, BNSF Railway

20 SUSAN LINDHORST, Union Pacific

21 ROB SWAIN, Department of Labor

22

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1 ATTENDEES (continued):

2

3 Also Present (continued):

4 ROBERT MILLER, U.S. Department of
5 Transportation, Federal Motor Carrier
6 Safety Administration

7 KIMBERLY DARBY, OSHA Office of Communications

8 MARY BRANDENBERGER, OSHA Office of
9 Communications

10 DINKAR MOKADAM, Association of Flight
11 Attendants

12 NICOLE COLEMAN, Nuclear Regulatory Commission

13 LISA JARRIEL, Nuclear Regulatory Commission

14 PHIL STAUB, Washington Metropolitan Area
15 Transit Authority

16 LARRY MANN, Rail Labor

17 RINA TUCKER HARRIS, Consumer Financial
18 Protection Bureau

19 JASON ZUCKERMAN, Zuckerman Law

20 GEORGE CHARTIER, OSHA Public Affairs

21

22

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1 ATTENDEES (continued):

2

3 Also Present (continued):

4 SHANNA DEVINE, Government Accountability
5 Project

6 ADELE ABRAMS, American Society of Safety
7 Engineers

8 DAVID LeGRANDE, Communication Workers of
9 America

10 RICHARD DeANGELES, OSHA Office of
11 Communications

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Exhibit 14. Amended Recommendation From
the Transportation Work Group Regarding
Training

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(Exhibits retained.)

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

2 MS. SPIELER: I'm going to call the
3 second day of the Whistleblower Protection
4 Advisory Committee meeting to order. Is there
5 anyone in the room who was not here yesterday?
6 If so, I'd like to ask you to identify
7 yourselves.

8 MR. BLANCATO: I'm Philippe Blancato.
9 I'm with the Whistleblower Program. I'm going to
10 be taking notes.

11 MR. MANN: Larry Mann, Rail Labor.

12 MS. SPIELER: Thank you. We are going to
13 devote a significant portion of today's meeting
14 to the reports from the subcommittees that have
15 been working between the meetings of the full
16 Advisory Committee, and I've asked each chair of
17 the committee to present in the following order,
18 first to put forward any specific recommendations
19 that the subcommittee has for consideration of
20 the full committee that will require an actual
21 vote of the full committee. At that point, I
22 will chair the part of the meeting in which we

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1 consider and vote on a subcommittee's
2 recommendations.

3 Following that, I've asked the chairs to
4 discuss with us -- and, obviously, this would
5 come first if there are no recommendations --
6 following that, I've asked the chairs to discuss
7 with us the other things that the subcommittee
8 has been discussing, and, finally, to offer any
9 thoughts and to have a conversation with the rest
10 of us about what the subcommittee might do in the
11 future or whether the subcommittee has completed
12 its work. We will use that portion of each of
13 these conversations in the last part of our
14 agenda, when we discuss next steps for the
15 Advisory Committee, which will include a
16 discussion of whether we retain the current
17 subcommittees, create new ones, or move to fewer
18 subcommittees, whatever seems most appropriate.

19 We'll do the subcommittee reports in the
20 following order: Section 11(c), Best Practices,
21 and then the Transportation Work Group. In terms
22 of the day, we'll take a break at ten o'clock,

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1 and we'll break for lunch at 11:45 to 12:45. At
2 12:45, we'll invite public comments, which we may
3 interrupt if Secretary Perez drops by, and then
4 we will complete our discussion of the work group
5 work, with the Transportation Group.

6 Marcia Narine -- we have only two members
7 of the Advisory Committee on the Transportation
8 Work Group, Eric Frumin and Marcia Narine. Eric
9 is the chair of that subcommittee. Marcia is at
10 a funeral this morning and will call in as soon
11 as she is able, for the conversation with regard
12 to the Transportation Work Group recommendations.

13 Following that, we will convene,
14 essentially, as a full committee, to discuss
15 cross-cutting issues and next steps for the
16 committee. So that's the day. I understand at
17 least one member of the committee has a plane at
18 ten to six, 5:50. If, during the break, you
19 could let me know what your travel plans are and
20 whether we need to move up any agenda items in
21 order to accommodate them, I would appreciate it.
22 In any event, moving on, I'm going to turn this

1 over to Dave Eherts, who is the --

2 13. I think Nancy has a point.

3 MS. SPIELER: Nancy.

4 MS. LESSIN: There was some information
5 we got yesterday that I think was incorrect.

6 That was from the Nuclear Regulatory Committee,
7 and I spent some time on the NRC website and, in
8 fact, Section 19.14 gives workers and unions the
9 right to walk around with an NRC inspector.

10 MS. SPIELER: Can you hold that, please,
11 for later in the day?

12 MS. LESSIN: Fine. Fine. Anywhere it
13 wants to come. I just don't want the federal
14 transcript to have the information we were given,
15 that workers don't have that right, because, in
16 fact, I believe they have that right, and
17 wherever and however today we can correct that, I
18 think it should be corrected.

19 MS. SPIELER: Okay. Fine. Thank you.
20 Okay, Dave. If you could first tell us the
21 members of your work group and then move on to
22 the recommendations.

1 MR. EHERTS: And then go around the
2 table. So, myself, of course, Emily, from this
3 side. Ava, you were involved. Rina was involved,
4 Nancy was involved, Christine was involved, and
5 Richard was involved. That's everybody, right?
6 Very good.

7 And then very, very good support from
8 Katelyn and Meghan, too. I want to thank them
9 for that. It really moved us along.

10 I'm happy to report that we've got three
11 proposals that come unanimously recommended by
12 the subcommittee, and what I thought we'd do is
13 go through them one each, vote on each one after
14 I complete the reading, and then we'll go through
15 sentence by sentence, and once everybody is
16 content --

17 MS. SPIELER: I think we'll discuss them
18 before we vote on them.

19 MR. EHERTS: That's what I said. I'll go
20 through them. Then we'll come back through, go
21 sentence by sentence for people with any
22 concerns. Then we'll make a proposal and have a

1 vote. Okay. And, by the way, I thought we had
2 agreement on these a month ago, and we
3 wordsmithed them over the last 3 or 4 months,
4 very carefully, and then yesterday, thinking it
5 would be a half-hour meeting, it went to a 3-hour
6 meeting, and we actually went through and made
7 some substantial changes, in the first one,
8 especially. And I understand you all had copies
9 of these overnight so you had a chance to look at
10 them, and I explained the changes to Greg this
11 morning, very careful.

12 Okay, the first one. Recommendations
13 regarding the statutory provisions of Section
14 11(c). The statutory provisions in the OSH Act
15 that are supposed to protect workers who face
16 retaliation for bringing forward their concerns
17 about injuries or hazards are not adequate. The
18 provisions of Section 11(c) are much weaker than
19 the provisions of the other whistleblower laws
20 that are investigated by OSHA, and they are also
21 weaker than the provisions under state law in
22 some state-plan states. The results are

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1 troubling. Individuals who bring their concerns
2 under Section 11(c) to OSHA are often barred as a
3 result of the short, 30-day statute of
4 limitations, and, therefore, large numbers of
5 potentially meritorious complaints are screened
6 out because they are filed too late under the
7 statute.

8 The ability of the complainant or OSHA
9 investigators to pursue a meaningful settlement
10 process is hampered by the limited resources to
11 litigate claims, by the lack of a provision for
12 preliminary reinstatement, and by the higher
13 standard of proof required in 11(c) cases. Most
14 complainant, even if they have legitimate
15 complaints, never have the opportunity to have
16 their complaints heard in a full adjudicatory
17 hearing because they lack any right to appeal to
18 the administrative law judges with in the
19 Department of Labor, or to take the cases into
20 court. There is no formal appeal to the
21 investigatory decision to find the case to be
22 without merit.

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1 For those cases that are found to be
2 meritorious, very few are ever pursued. The
3 number of cases under Section 11(c) filed by the
4 Solicitor of Labor, although it has increased, is
5 still very small. We believe that the provisions
6 of Section 11(c) are simply too weak to protect
7 the rights of whistleblowers under the
8 Occupational Safety and Health Act. It basic
9 fairness to extend the whistleblowers under the
10 OSH Act, protections that are equivalent to those
11 available under the many other whistleblower
12 laws.

13 In view of these concerns, we urge the
14 Secretary of Labor and Assistant Secretary of
15 Labor for Occupational Safety and Health to
16 advocate for changes in the federal statute that
17 would expand the necessary protections under
18 federal law, and to support efforts in the states
19 to expand health and safety whistleblower
20 protection under state law. The federal
21 statutory changes should include:

22 1. Longer statute of limitations, from

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1 30 to 180 days;

2 MS. BETTS: Revised standards of proof
3 equivalent to those found in 49 USC 42121(b)
4 (AIR21), and Section 806 of the Sarbanes-Oxley
5 Act, 18 USC 1514A;

6 3. Preliminary right to reinstatement;

7 4. Right to de novo review by
8 administrative law judges;

9 5. Right to attorney's fees and full
10 damages, including compensatory and punitive
11 damages in litigated cases;

12 6. A kickout provision that would allow
13 the complainant to take a case into court; and

14 7. A provision guaranteeing procedural
15 rights under the statute, similar to the
16 provision in Section 806 of the Sarbanes-Oxley
17 Act, 18 USC 1514A(e)(1) and (e)(2).

18 MS. SPIELER: I think -- and you can
19 correct me if I'm wrong -- that when a proposal
20 comes from a subcommittee, unanimously endorsed
21 by the members of the subcommittee, it
22 essentially comes as moved and seconded, and

1 therefore we can open the floor for full
2 discussion of the proposal, and that's what I'm
3 going to do now. So, anyone who wants to
4 comment, discuss? Oh, and this initial proposal,
5 Recommendation Regarding Statutory Provisions of
6 11(c), from the Section 11(c) committee, should
7 be marked as number 5 for the committee record.

8 [Exhibit 5 entered into the record.]

9 MS. SPIELER: Discussion? Christine?

10 MS. DOUGHERTY: The issue that I had
11 raised on the subcommittee, while all of these
12 recommendations are, I think, needed revamps, the
13 state-plan states, we've talked a little bit
14 about supporting the efforts, but the concern for
15 the state-plan states is funding. We haven't had
16 any increase in funding. We're still looking at
17 that these will all cost money, not only to
18 implement but to support once they're
19 implemented. And if the recommendation for
20 changes to the whole federal system, because
21 state-plan states are half of what does 11(c)
22 cases, have to be as efficient or as effective

1 the federal law, that without the adequate
2 funding to follow up on that, state-plan states
3 will be put in a position to oppose these issues
4 individually, because of the funding issues. So
5 I just want to make it clear that while the
6 state-plan states support these ideas, that the
7 funding still is a real concern for all the
8 state-plan states.

9 MR. EHERTS: Can I add a comment from the
10 business side, because I've seen this happen
11 quite a few times there. What tends to happen
12 when you shine a light on something like this is
13 that the claims go up, because people understand
14 how they are to be filed, and that they might
15 have some chance of success, so the claims will
16 go up. But I think because of that, companies
17 will do better with their internal provisions and
18 try to handle these internally, understanding
19 that we've got a bigger hammer now, if an
20 employee decides to come outside the company, and
21 I'm hoping that as the internal procedures rake
22 up, we'll actually have fewer whistleblower cases

1 in the long run, because of statutes like this.

2 MS. DOUGHERTY: Well, I still think that
3 with the added protections that you're giving,
4 with the de novo review, which is a huge part of
5 it, and just the increased activity it's going to
6 take at a state level to get state legislatures
7 or rulemaking changed to allow these changes to
8 the state laws, that you're really putting states
9 on a financial burden to implement these
10 recommendations adequately, should they be passed
11 or taken up in the federal level.

12 MR. EHERTS: Understood.

13 MS. DOUGHERTY: I just want that on the
14 record.

15 MS. SPIELER: Yeah. Eric?

16 MR. FRUMIN: Christine, I know that in
17 OSHA's annual review of --

18 ATTENDEE: Could you speak at a
19 microphone, please?

20 MR. FRUMIN: In OSHA's annual review of
21 state plans, they looked at the discrimination,
22 the 11(c) issues a little more carefully a year

1 or two ago, and tried to evaluate each state's
2 performance on that, and I'm wondering whether
3 there's evidence from that which we could cite to
4 support your point that the caseloads are too
5 high, whatever the indicators are, from OSHA's
6 own view, federal OSHA's own review of state
7 plans, which would show the need for the
8 additional resources. So, just a thought. I'm
9 not saying we need to change this at all --

10 MS. SPIELER: Right.

11 MR. FRUMIN: -- in advocating for this.
12 Well, first I want to say I agree with you that
13 state plans need to have enough money to do this,
14 frankly, we all know that federal OSHA hasn't had
15 enough money to do its own job. So it's been a
16 backwater at the federal and state level for
17 decades, and we're glad that it's getting the new
18 attention, so, you know, that's all good. But,
19 speak again, going back specifically to your
20 point. So, just in terms of how we talk about
21 this, as a committee, it's something to consider
22 and maybe the whistleblower program folks can

1 tell us, even though you don't do state plan
2 reviews, whether there's particular evidence,
3 maybe not from every state. I know California
4 was practically a basket case in terms of its own
5 ability to move discrimination cases. So, just
6 something to consider, whether there's already
7 evidence on the record from federal OSHA,
8 demonstrating the need, specifically, to
9 adequately fund the anti-retaliation activities
10 of state plans.

11 MS. DOUGHERTY: Well, I have reviewed all
12 the FAME reports that are published, and the
13 quality of the actual FAME audits vary from
14 region to region as to whether or not they speak
15 to the inadequacies or the strengths of
16 discrimination programs. But I know that we're
17 all under the 90-day Sword of Damocles on all
18 these cases, trying to get them done, and so
19 that's another concern that this committee hasn't
20 even brought to the forefront yet, to talk about
21 changing that.

22 But every state struggles. Even, I'm

1 sure, some of the states, if you look, they've
2 had one discrimination case. Really? One? Even
3 in a smaller state. So, you know, these things
4 may open up the gates further in some of those
5 states where they are not even prepared for what
6 they might get if the filing period is longer or
7 if we change some of these things. But I have
8 taken a look at those.

9 MR. EHERTS: Just one point. As far as I
10 see it, from the business side, the strategy here
11 is to make the statute stronger so that companies
12 are encouraged -- and I know Greg feels strongly
13 about this, too -- companies are encouraged to
14 put in internal processes and procedures to
15 handle these things internally. Companies need
16 this information to be competitive, and if
17 employers aren't bringing them forward to the
18 company and the company is not treating employees
19 fairly, have this environment of openness, then
20 the employee is going to go out to seek outside
21 help, and I think that's what we're trying to
22 prevent with these stronger rules.

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1 So I would try to encourage you that, in
2 the long run, the states are going to have an
3 easier time funding, you know, than they do right
4 now.

5 MS. DOUGHERTY: Well, you know, since the
6 Federal Government oversees us and they're the
7 hand that feeds us, we have to make sure that our
8 programs are operating as required under our
9 agreement with them, and when they come in and
10 audit, I mean, my cases get audited. The things
11 that Anthony was talking about yesterday in our
12 committee meeting about how a case is actually
13 looked at -- the Feds come in and do that to my
14 cases, let alone what happens internally in my
15 organization. So they take and look through my
16 cases. We haven't even talked about complaints
17 against state-plan complaints, where Fed OSHA
18 comes in, and because somebody has complained
19 about how I or one of the other two investigators
20 has done a case -- and we have three
21 investigators for the whole state of Minnesota --
22 that, you know, what have we done?

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1 So we have to please them, and when
2 you're changing how we operate, that is a big
3 change, whether down the road, as Nancy said many
4 times yesterday, that Kumbaya moment comes along,
5 where everybody gets along and management is
6 doing what they should, great. I'd love it. I'd
7 love to be put out of work. I really would. I
8 would love it that nobody has to worry about
9 losing their job in this country because they
10 want to go home safe to their families.

11 MR. EHERTS: Right.

12 MS. DOUGHERTY: So, you know, I've been
13 doing this stuff for a long time. I'm very tied
14 to it, but I want to be able to let people know,
15 that are going to make these complaints, that
16 their complaints are going to be investigated
17 adequately, the way the law intends.

18 MR. EHERTS: Very good. I just don't
19 want to lose sight of that drain-the-swamp goal.
20 All right?

21 MS. SPIELER: And perhaps we can take up
22 some more about state plan issues at a later

1 time. Other specific comments with regard to
2 this proposal from the 11(c) subcommittee? Greg?

3 MR. KEATING: Thank you, Emily. I have a
4 number of comments that I just wanted to put on
5 the record, Emily. First of all, I was also
6 touched by Mr. Mitchell's testimony yesterday. I
7 appreciated his courage in coming forward, and I
8 acknowledge, through hearing that and through
9 listening to Dr. Michaels at the congressional
10 testimony, and you, Emily, at the congressional
11 testimony, and examining this issue, that 11(c)
12 is a statute that needs to have some stronger
13 teeth.

14 And, Dave, I appreciate your -- I agree
15 with you that, I also agree that there needs to
16 be a combination of sticks and carrots. I've
17 said, since the first meeting, that I wish there
18 were more carrots, and I know we're working on
19 that. Jon's doing a great job with the Best
20 Practices committee, and I hope we can continue
21 those efforts.

22 That being said, my first comment is that

1 I question -- and maybe I've got my lawyer hat on
2 -- this sounds to me like what we're doing here
3 is legislating, and I think that the Congress and
4 the Senate have the fundamental right to make
5 these statutory changes, and I don't know whether
6 the Department of Labor, through rulemaking or
7 regulation, has the right to fundamentally change
8 a statute in such substantive ways as we are
9 proposing here. That's number one.

10 Number two is that while I would share
11 the view that a number of these seven proposed
12 revisions to 11(c) would be appropriate, I do
13 have a problem with a couple of them, based on my
14 experience as a practitioner and seeing what I
15 see from the management side. And, by the way, I
16 would also note, for the record -- and, Emily,
17 this is not in any way a blight on the process --
18 but I would just note that we heard from three
19 folks yesterday. Or, we heard from Mr. Mitchell
20 and we heard the sort of worker side of the
21 story.

22 You know, I think that there would be

1 many an employer who would come in here and try
2 and give their voice on what they're trying to
3 do, and what they're seeing, in terms of
4 potentially frivolous complaints or abuse of
5 11(c), and we haven't had that voice.

6 MS. SPIELER: We certainly can add that
7 to an agenda in the future.

8 MR. KEATING: And so what I would note,
9 specifically, with regard to my two comments on
10 these seven proposed fundamental changes is that
11 I have a problem with Number 2 and Number 3.
12 Those are changing the standard of proof and
13 preliminary right to reinstatement. With regard
14 to changing the standard of proof, the issue that
15 I have, I would look to a United States Supreme
16 Court opinion that was issued last summer, the
17 Nassar decision.

18 Justice Kennedy wrote the opinion, and on
19 page 22 of the opinion he went into some detail,
20 and I'd like to just quote briefly, because the
21 exact issue in Nassar was what we're talking
22 about here. Does Title VII, broad remedial

1 statute which prohibits retaliation and
2 discrimination in employment, what is this
3 appropriate standard causation -- which is what
4 we're talking about here. Is it the very lenient
5 standard of a motivating factor? And, in fact,
6 what we're proposing here is even more lenient
7 than that, a contributing factor. Or, in Nassar,
8 should it be the "but for" causation standard.
9 So the Court was faced with the issue of, should
10 we lessen the causation standard or not?

11 Justice Kennedy wrote, and I'm quoting
12 here, "Lessening the causation standard could
13 contribute to the filing of frivolous claims
14 which would siphon resources from efforts by
15 employer, administrative agencies, and courts to
16 combat workplace harassment. Consider, in this
17 regard, the case of an employee who knows that he
18 or she is about to be fired for poor performance,
19 given a lower pay grade, or even just transferred
20 to a different assignment or location.

21 "To forestall that lawful action, he or
22 she might be tempted to make an unfounded charge.

1 Then, when the unrelated employment action comes,
2 the employee could allege that it is retaliation.
3 If respondent were to prevail in his argument
4 here, that claim could be established by a lesson
5 to causation standard, all in order to prevent
6 the undesired change in employment
7 circumstances."

8 And I admit I have my management hat on
9 right now, but I will also note that I have
10 personally seen many examples where individuals
11 who knew that they were on thin ice but had not
12 had a supervisor who had been doing his or her
13 job in documenting the issues, and then senses,
14 because a new supervisor comes in, that the
15 landscape is changing, may decide to engage in
16 protected activity to essentially forestall
17 future employment action, and that is what
18 Justice Kennedy was talking about there.

19 If we change the factor to a contributing
20 factor standard, which is as far on the lenient
21 side as you can get from where we are right now,
22 I have some concerns that that may result in

1 clogging up OSHA, and a flood of claims, and that
2 may also result in at least the prospect, as
3 Justice Kennedy noted, of some frivolous claims.

4 Finally, with regard to the right to
5 preliminary reinstatement, it is my belief that -
6 - and this is a hot issue in the SOX domain. I
7 know that OSHA takes the position that it has the
8 right, once their investigation has found merit,
9 to order someone back to work, but I believe that
10 under due process principles, we have a system in
11 place. I referred yesterday to how it has not
12 one, not two, not three, but potentially four
13 levels to it, and I just think it's fundamentally
14 inconsistent with due process that an employer
15 has to accept a remedy when it hasn't exhausted
16 its own appellate process, and gone to the final
17 judgment.

18 So, once again, I do support, generally,
19 the premise that 11(c) needs some strengthening.
20 I question whether we're the body that is
21 authorized to do that, and I personally have a
22 problem with Numbers 2 and 3.

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1 MS. SPIELER: Thank you, Greg. Billie?

2 MS. GARDE: Yeah. Let me respond, Greg,
3 and I will have my employee litigation hat on.
4 I've spent my entire career dealing with this,
5 and those issues that you've raised are commonly,
6 frequently, always raised by management team when
7 we get into the realm of testifying and changing
8 the rules, and I just have to tell you that,
9 first of all, the first of all, the whole mode of
10 a question on whether or not a worker basically
11 tries to create a claim in order to avoid
12 consequences, is frequently thrown out there, but
13 the whistleblower laws work to prevent that from
14 getting very far. It's not that occasionally
15 someone doesn't abuse or try to abuse the
16 process.

17 Every process, every remedial piece of
18 legislation is going to have people that
19 occasionally abuse the process. But if that
20 standard is the standard that is statutorily in
21 the rest of the whistleblower protection
22 statutes, then it's in there for a reason, and it

1 hasn't clogged up. You look at the numbers. It
2 hasn't clogged up the system at all, with either
3 frivolous claims or not meritorious claims. And
4 those other statutes put those burdens of proof
5 in there, by statute, and it has not had that
6 impact.

7 I agree that we're not the legislative
8 body, and the likelihood of something getting
9 through this legislation is very slim, but as the
10 primary agency with responsibility for this law,
11 I think it carries a huge amount of weight, and I
12 think goes a long way in terms of sending a
13 message to the Congress that they recognize the
14 disparity between the law on the books in which
15 people are actually being hurt and killed have
16 the least amount of protection.

17 We heard from Lisa yesterday at the NRC.
18 The NRC has never killed anybody with atomic
19 problems. No one has ever died under those ERA
20 regulations. And yet all these other
21 regulations, people are actually dying, and it
22 has the least burden of proof. I think it

1 behooves us to send a message that, hey, this one
2 got lost just in the passage of time. Had this
3 one come first, I mean, come now, it would
4 automatically be getting the same burdens of
5 proof as all the other whistleblower protections
6 that come up to bat, because those burdens of
7 proof have worked, and the feared abuse has just
8 not materialized.

9 I think it denigrates the importance of
10 the laws by management to keep talking about
11 that. When I'm training, I say, look, motive is
12 not an issue here. You don't get to defend the
13 whistleblower claims by saying somebody has a bad
14 motive. If they had a real concern, they blew
15 the whistle on a real safety issue, even if they
16 had a bad motive, they are entitled to that
17 protection, and the ALJs have done a great job
18 sorting that out, as courts have done, including
19 calling workers on bad motives, but still
20 recognizing a hazard needed to be raised, which
21 you would want. So what if the person has a bad
22 motive? They still, if they're raising a

1 legitimate concern, want that concern addressed.

2 So I completely support the way this is
3 characterized, in terms of recommending
4 legislative action or importance. We can't make
5 it happen. These are legislative authority
6 issues. We can't make it happen, but we can
7 certainly speak to that and say, as a group of
8 experts, we think this needs to be - something
9 needs to be done, and this is one step. And I do
10 think it gives companies a better handle to
11 address it, and that's part of the carrot and
12 sticks that you're talking about. Right now, it
13 becomes much easier to do it as a cost of doing
14 business, as people get hurt.

15 MR. KEATING: Well, I appreciate
16 everything you're saying, Billie. I would just,
17 with regard to one of the comments you made, it
18 is a fact, and the U.S. Supreme Court noted,
19 right the paragraph before the one I quoted in
20 this opinion, Justice Kennedy noted that,
21 basically, the retaliation claims - and we're
22 talking about two sides of the coin,

1 whistleblowing and retaliation. A whistleblower
2 has a remedy because he or she has been
3 retaliated against.

4 MS. GARDE: Right.

5 MR. KEATING: The retaliation claims with
6 the EEOC, in the last 15 years, has doubled. It
7 is now the number one employment claim in
8 America, and it is an unequivocal fact that it is
9 leading race discrimination. It is the number
10 one charge in the employment domain.

11 And we've often heard the quote - in
12 fact, it was the quote that the courts don't like
13 to sort of sit as super-personnel departments -

14 MS. GARDE: Right.

15 MR. KEATING: Trying to sort out each and
16 every human conflict that may happen in the
17 workplace. I do agree with you that there needs
18 to be a stick, and that there needs to be a
19 strong message, and I support that. But I also
20 need to balance what I think, being a
21 practitioner, spending over 90 percent of my time
22 doing this, the reality that we may get bogged

1 down, in many cases, where you're going to go to
2 trial because it's such a low standard for
3 proving causation. It's a thumb on a scale.

4 MS. GARDE: Right. That's why I said,
5 that just hasn't happened in the other statutes,
6 where that burden of proof has been on the books
7 since the beginning. It just hasn't happened.

8 MS. SPIELER: Dave. Go ahead.

9 MR. EHERTS: One recommendation I would
10 make to my company, in reaction to stronger
11 statutes here, is to train the supervisors well.
12 I would document poor performance very carefully,
13 and that benefits not just the company but the
14 employees, because many employees don't
15 understand exactly the peril they're with their
16 poor performance, because it's not discussed
17 openly. And so I think that everybody wins when
18 supervisors document very carefully, have
19 discussions with employees about poor
20 performance, and then there's no surprises when
21 something happens eventually.

22 MS. GARDE: Right. Which is one of the

1 things that Lisa talked about. One of the things
2 that's worked incredibly well under the ERA, is
3 having this additional level of review, of
4 personnel actions, because the unintended
5 consequences of that is that supervisors have
6 gotten a lot better. They're not going to get
7 their proposed personnel or disciplinary action
8 through an executive review board that has the
9 potential to be viewed as retaliatory unless
10 they've done their homework.

11 And in the original legislative history,
12 in the original congressional debates back in the
13 early '70s, this was exactly the argument that
14 management made at that time, strongly in
15 opposition to those original environmental
16 whistleblower bills, and what the legislative
17 history comes and says is, yes, we agree there is
18 potential for abuse, and it's going to make it
19 more difficult to manage without doing all of
20 your homework, but we, Congress, think that
21 ultimately the result of that is we're going to
22 have better-managed companies, and a less

1 opportunity for catastrophes and disasters.

2 Now, those were following the Bhopal
3 disaster, and they were really focused on
4 environmental catastrophes at the time, but
5 basically, that was the congressional answer at
6 that time. Yup, you're right. Potential for
7 abuse, yup, you're right. It's going to make it
8 more difficult. Guess what? The answer to that
9 is you manage better. You expect more of your
10 supervisors, you make sure they do what they're
11 supposed to do, and then legitimate cases will
12 survive, and not-legitimate cases will fall away.
13 And is it a challenge? Yes, but you don't get a
14 free pass under these laws. Managers have to
15 manage better.

16 MS. SPIELER: Other comments?

17 MR. FRUMIN: I think the judgment call
18 about this issue, and, in fact, all seven of
19 them, Greg, and others, is, in fact, the
20 Congress's judgment. They have to live with
21 their recent history, where they've incorporated
22 these kinds of provisions, if not all of them,

1 most of them, in any retaliation provision
2 they've adopted, and been more and more
3 supportive of it, as Richard as pointed out, as
4 has the Supreme Court, in general.

5 So I think we don't really need to
6 negotiate with ourselves about what the final
7 judgment call should be in the Congress. If the
8 Congress, in its wisdom, finally decides to take
9 up a totally antiquated piece of legislation on
10 the merits, we'll have that discussion there in
11 relationship to those details. I think we have
12 enough experience under a variety of laws and
13 enough abysmal experience under this specific law
14 to be able to say this law should benefit from
15 the kinds of judgments that the Congress and
16 agencies and others have made - stakeholders,
17 certainly, have made - in law after law after law
18 after law after law. SOX, finance, certainly,
19 but health and safety, environmental law, as
20 well.

21 So, okay, so I'm, I have my work ahead on
22 here, but I think, from the standpoint of public

1 policy, it makes sense for us to recognize
2 there's a pattern of public policy development
3 that is worth taking advantage of, to remedy a
4 pretty horrific situation. You know, if the
5 agency gets stuck with frivolous claims, if you
6 want to call them that, whatever that means, you
7 know, we'll deal with that, but right now we've
8 got a pattern of public policy judgments and I
9 think it's worth following. It's been
10 instructive.

11 MS. SPIELER: Other comments? Nancy.

12 MS. LESSIN: I think our, not only our
13 right but our duty, as this body, in looking at
14 whistleblower protection and how to make it work
15 better, is to look at all of the places where
16 there are inadequacies, and if there are
17 inadequacies in the statute, it seems to be our
18 right and our duty to identify those and
19 communicate that with the agency responsible for
20 those statutes, and it is totally Congress's role
21 to do what it's going to do. But I think, as a
22 body that has been charged with looking at

1 whistleblower protection and identifying how to
2 make protections real, and reduce retaliation,
3 that it is in our job description to make these
4 kinds of recommendations. So I feel completely
5 comfortable understanding that we're not
6 legislating. We are recommending that there are
7 changes that would make this statute work better
8 for whistleblowers.

9 I think, also, I'm confused about the
10 issue that I think we've heard about, that
11 weakening or lessening a standard was going to
12 clog up the system with frivolous complaints.
13 You know, in medicine they talk about evidenced-
14 based medicine. Here we can look at evidence,
15 and there is tremendous evidence, I think, from
16 the statutes that have this, that the system
17 isn't being clogged up, and so I don't understand
18 why we hear, again and again and again, about
19 this concern, when, in fact, the concern isn't
20 coming in the statutes that, in fact, have this
21 provision.

22 Lastly, the issue of the rights to

1 reinstatement. I think that it is always an
2 important role to balance interests, and I think
3 that there are parties involved that have
4 interests. In 11(c), it's a worker who does not
5 have the resources, who can be starved out, who
6 can be out on the street, not having a home,
7 versus an employer who is moving forward and in
8 some kind of judicial system that can take months
9 and years. And so that balance, I think, is
10 something that needs to be attended to, and the
11 right to reinstatement makes it possible for
12 workers to even think about really challenging
13 some of the health and safety problems that they
14 see, and I think it's absolutely essential.

15 We see it in other places and I think,
16 with 11(c), we're really talking about life and
17 death issue. We're talking about places that
18 could explode, or people that could be
19 tremendously damaged or killed. And if what
20 workers have to do is balance a horrendous health
21 and safety situation resulting with being
22 homeless, not being able to feed a family because

1 they don't have a job for a very long time,
2 that's unconscionable. And so I think this issue
3 of preliminary right to reinstatement is
4 absolutely essential in making 11(c) real for
5 workers and real protection.

6 MS. SPIELER: Other comments? Other
7 discussion with regard to this proposal? Are you
8 ready to vote? All those in favor of the
9 proposal, if you would raise your hands, please,
10 so we can do a count. That's 10 votes in favor.
11 Opposed? It passes unanimously. Thank you very
12 much.

13 MR. EHERTS: The subcommittee discussed
14 at length the Fairfax Memo. This recommendation
15 from Section 11(c) subcommittee regarding
16 practices that discourage reporting. The 11(c)
17 Work Group discussed the Fairfax Memo and
18 proposes the following recommendation to OSHA:

19 The reporting of an injury or illness by
20 an employee is important not just for compliance
21 with the OSHA record-keeping rule, 19 CFR 1904,
22 i.e., it is a protected activity under the act,

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1 but also because it represents critical
2 information for the employer, so that the
3 workplace can be effectively improved, future
4 injuries and associated process disruptions
5 prevented, and lives and costs saved.

6 Building on the Fairfax Memo of March 12,
7 2012, entitled "Employer Safety Incentive and
8 Disincentive Policies and Practices," we
9 recommend that OSHA develop and implement an
10 information and education campaign that educates
11 and engages employers and employees about the
12 problems with practices, policies, and programs,
13 that reward a low number of reporting injuries
14 and illnesses, i.e., a low total recordable
15 incident rate, often referred to as incentive
16 programs, as well as injury and safety
17 disciplinary practices as described in the
18 Fairfax Memo.

19 The goal of the information and education
20 campaign is to have employers eliminate these
21 practices as they discourage workers from
22 reporting injuries and illnesses. Receipt of

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1 occupational injury and illness reports is
2 essential to correct problems before someone
3 becomes seriously hurt.

4 OSHA must have the ability to do more
5 than education employers about the hazardous
6 nature of practices that discourage reporting of
7 injuries and illnesses, and workers should not
8 have to wait until they have been retaliated
9 against as a result of such incentive programs
10 before OSHA can act.

11 OSHA must be able to use a full
12 complement of enforcement tools to address
13 situations where employers to implement or
14 maintain such retaliatory incentive and
15 disincentive programs. One possibility would be
16 such programs, practices, and policies violate
17 OSHA's Recordkeeping Rule 29 CFR 1904, and
18 employers could be cited and fined under the rule
19 for having such programs, policies, and
20 practices.

21 On the other hand, incentive programs
22 that reward the reporting of near-misses, the

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1 reporting of potentially hazardous workplace
2 conditions, sharing ideas on ways to eliminate or
3 reduce hazards and hazardous conditions,
4 participation in workplace safety audits or
5 inspections, et cetera, should be encouraged.

6 MS. SPIELER: And that comes unanimous
7 from the subcommittee. Is that correct?

8 MR. EHERTS: It does.

9 MS. SPIELER: I'd like to mark this as
10 Exhibit 6, for the committee minutes.

11 [Exhibit 6 entered into the record.]

12 MS. SPIELER: And I'd actually, although
13 I didn't warn you, I'd like to ask Nancy or
14 Anthony to just bring us, give us a quick
15 synopsis of where the recordkeeping rule is right
16 now, with regard to these issues.

17 MR. ROSA: I can't.

18 MS. SPIELER: You can't. Okay.

19 MR. ROSA: I think there was an
20 extension.

21 MS. SPIELER: Okay. So I'll do it.
22 There was an extension of comments of the

1 recordkeeping rule review, and in the
2 announcement for this meeting, and my sending out
3 of my last e-mail prior to the meeting, I
4 included the links to the current Federal
5 Register notice regarding how OSHA is taking this
6 up currently, and I believe that's in the packet
7 for the committee. It isn't necessarily relevant
8 to our consideration, but I did want you to know
9 that this is an issue that is currently under
10 consideration at OSHA now.

11 Okay. So now I will open this up for
12 further conversation.

13 MR. EHERTS: One other point. Do we need
14 to include the Fairfax Memo itself in the
15 exhibit? Yes?

16 MS. SPIELER: Sure. Okay. So Exhibit 7
17 would be the Fairfax Memo, in order to make sure
18 that when people are reviewing the committee
19 minutes, it's clear. Great. Thank you, David.

20 [Exhibit 7 entered into the record.]

21 MR. EHERTS: Sure.

22 MS. SPIELER: Ken?

1 MR. WENGER: Just a question to make sure
2 I'm understanding correctly. So the
3 recommendation, the second paragraph, is that
4 even in absence of any evidence of under-
5 reporting, the fact that there were practices
6 that were outlined in the Fairfax Memo, the
7 recommendation would be those would still be a
8 citable issue?

9 MR. EHERTS: That's right.

10 MR. WENGER: Okay.

11 MS. SPIELER: Discussion?

12 MS. GARDE: I have a question and then a
13 comment. I don't understand exactly the first
14 part of the sentence in the paragraph that
15 starts, "OSHA must have the ability to do more
16 than educate employers about the hazardous nature
17 of practices." Are we talking about these
18 programs as hazardous? I mean, that word doesn't
19 seem to match with what they're talking about.
20 So I just wanted to make sure I understand that.

21 MS. SPIELER: Dave, or another member of
22 the subcommittee?

1 MR. EHERTS: Yeah. I think this goes
2 back to what we learned yesterday from Lisa is so
3 effective from the NRC's perspective, which is
4 this culture of open reporting, and we feel that
5 though these practices were very well-intentioned
6 - in fact, I was responsible, in a previous
7 employer, of getting these things in place,
8 because we felt it was important to hold
9 supervisors responsible - I think that the
10 unintended consequences that came out over the
11 next decade or two are very clear, and that these
12 practices, therefore, diminish reporting. And is
13 diminished reporting hazardous, I guess is your
14 question?

15 MS. GARDE: Yeah.

16 MR. EHERTS: You're looking for a
17 synonym, maybe. Okay.

18 MS. SPIELER: Nancy.

19 MS. LESSIN: I'll give an example. There
20 was a workplace in Massachusetts where they had a
21 safety incentive program where there were prizes
22 if no injuries were reported. They had injury

1 discipline. People got disciplined if they did
2 report an injury, and a number of other things.
3 There had been minor injuries, in one area, that
4 never got reported, so they never got
5 investigated. The union never looked at it,
6 management never looked at it, because there was
7 no reporting going on.

8 That company got the Governor's Award for
9 having no injuries one year, and the next year a
10 man was pulled into the machinery and crushed to
11 death. And in the investigation that happened,
12 when it came out that there had been some minor
13 injuries that didn't get reported -- and the
14 primary problem was that in the back of the
15 machine it wasn't properly guarded.

16 There had been a Kaizen event that
17 determined that it would be quicker if they took
18 part of a guard away. While the primary cause
19 was improper guarding, contributing to this death
20 was the fact that the minor injuries weren't
21 being reported, when the situation could have
22 been looked at and could have been corrected

1 before the death happened. And so that's a
2 pretty dramatic example of the importance of
3 early reporting, and encouraging reporting, and
4 looking at reporting of injuries and illnesses to
5 identify the hazards.

6 So having these kinds of programs and
7 practices that discourage reporting, in fact,
8 enhance hazardous conditions.

9 MR. EHERTS: Okay. Maybe the word is
10 detrimental?

11 MS. GARDE: I like detrimental better. I
12 just think hazardous is a little bit confusing in
13 that.

14 MS. SPIELER: Is "detrimental" acceptable
15 to the committee members? I'm looking around the
16 room at the committee members. It comes as yes.
17 Okay.

18 ATTENDEE: Do we need a motion?

19 MS. SPIELER: Not if it's a - okay.
20 Billie, why don't you make a formal motion, just
21 to change the word.

22 MS. GARDE: Okay. I make a motion to

1 change the word "hazardous" to "detrimental" in
2 the paragraph we've been discussing.

3 MS. SPIELER: Second.

4 MR. EHERTS: Second.

5 MS. SPIELER: Is that a friendly
6 amendment, for those who brought forward the --
7 okay. Then it's accepted as a change. Thanks.

8 Other discussion? Comments?

9 MS. GARDE: Well, with that question
10 aside, I do have a comment and hopefully there
11 will be a little discussion about it. It does
12 seem to me that although I generally agree with
13 both the Fairfax Memo and this recommendation, of
14 putting a little bit more teeth into this issue,
15 it does seem like there's a step missing in terms
16 of evidence that a particular policy or practice
17 is, in fact, causing this result. I think that
18 the Fairfax Memo does a good job of laying out,
19 with some caveats, that these things may occur,
20 and that these things may be the consequences of
21 such programs, and I think some of those programs
22 are, on their face, have that impact.

1 But I don't want to be in a position
2 where we take away anybody's thought about what
3 is a good program. How can we develop programs
4 that are both incentives or a disincentive, and
5 I'm a little concerned that is like missing a
6 sentence, in terms of evaluation and
7 thoughtfulness about putting in place programs
8 that do help employers get to where they need to
9 get to.

10 So, I'm not on the subcommittee and this
11 is not my primary area, but I'm used to hearing
12 an allegation that something is causing a
13 chilling effect, and then going out and checking
14 whether that's true. And sometimes it comes back
15 that it's not, or that my assumptions about a
16 particular practice or policy, when you actually
17 get into the workplace and talk to the workers,
18 is either better or worse, or completely
19 different than my own perceptions about what it
20 might have been, or what it might have been
21 causing. And so that, it's like I said, it seems
22 like there's a step missing that requires

1 thoughtfulfulness about things.

2 MS. SPIELER: Greg?

3 MR. KEATING: I think that comment -- I
4 completely agree with that comment, and I think -
5 - correct me if I'm wrong, Ken, but I think that
6 was what Ken was noting, as well. I do have some
7 concerns that being able to go and use
8 recordkeeping rules to come in and cite and fine
9 employers when there is absolutely no evidence
10 that a policy is causing problems is something
11 that I have trouble with.

12 MS. SPIELER: Nancy.

13 MS. LESSIN: So I think that is why we
14 put in the education piece that is, in fact, on
15 OSHA to develop education on this, but the fact
16 is -- and OSHA knows this well -- that there have
17 been two GAOs on this issue, identifying
18 practices and their effects. There has been a
19 congressional hearing in 2008 that produced a
20 report called "Hidden Tragedy: The Underreporting
21 of Workplace Injuries and Illnesses," that
22 details the kinds of activities that have been

1 shown to discourage workers from reporting, and
2 there is an enormous and growing academic studies
3 and literature on this issue. So it is not just
4 -- Rich Fairfax didn't write this based on what
5 was in his mind. It came from evidence from OSHA
6 inspections, and it came from GAO reports, and it
7 came from congressional reports and testimony,
8 and it came from academic literature.

9 So I don't think we have to start from
10 square one saying we really don't know anything
11 about this. We know a tremendous amount out
12 this, and I think that with the education
13 component that we're asking OSHA to develop,
14 about what we know about the policies, practices,
15 and programs that discourage reporting, together
16 with that volume of literature out there, I think
17 that this absolutely covers the field, and to say
18 we need to know more about something in a
19 particular situation, I don't really understand.
20 If the preponderance of evidence in the academic
21 and government and OSHA literature shows that a
22 practice discourages reporting, then that's a

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1 problem that needs to be addressed.

2 You know, it's almost like we know this
3 substance is hazardous, but we're not sure that
4 it's going to cause a disease in this person.

5 No. I think we regulate based on we know that
6 this is hazardous, we have evidence here, and we
7 don't have to wait for this person to get sick to
8 know that this practice or this exposure can
9 cause damage. Not everybody who breathes
10 asbestos is going to get asbestos-related
11 illness, but we regulate asbestos because that's
12 what could happen, and I think there's enough
13 evidence and literature and government studies
14 and OSHA experience on this issue.

15 MS. SPIELER: Christine, you had your
16 hand up.

17 MS. DOUGHERTY: Well, I think we're kind
18 of mixing what 11(c) is about and compliance,
19 because recordkeeping violations are really a
20 compliance issue. And when I get a complaint
21 where a worker says, "I've been disciplined
22 because I reported an injury," I send out a dual

1 referral so that the compliance officer goes out,
2 and they do exactly what Billie is talking about,
3 They interview the workers to ask them, "Are you
4 being discouraged from reporting an injury? Do
5 you feel comfortable reporting an injury?"

6 And if that's true, that they do, and we
7 believe that there's under-reporting, then the
8 compliance side issues a citation, based on that,
9 and the employer has a right to object to that
10 citation and make their arguments in that arena.
11 In 11(c), what you're looking at is the
12 retaliation of that one individual worker, and if
13 there's chilling effect, and, again, I would be
14 doing interviews with the workers.

15 I must say that in most of the cases
16 where I've had this kind of complaint, we settle
17 it out because it's usually a disciplinary action
18 that the person is complaining about, not being
19 fired but disciplined, and we get the employer to
20 understand what we're talking about. I give him
21 a copy of the Fairfax Memo, and we move forward.
22 But I think it's a compliance issue on the

1 recordkeeping, not an 11(c) issue.

2 MR. EHERTS: Okay.

3 MS. SPIELER: Eric?

4 MR. FRUMIN: Yeah. I just wanted to
5 second Christine's point. If I understand the
6 discussion in the Fairfax Memo, and that's
7 basically what this recommendation is sort of
8 referencing, right?

9 MR. EHERTS: That's right.

10 MR. FRUMIN: This recommendation isn't
11 trying to tease out all the ideas in the Fairfax
12 Memo. This is sort of your authority, if that's
13 what you're referring to, right?

14 MR. EHERTS: That's right.

15 MR. FRUMIN: So, if I understand this
16 correctly, there's not an absolute presumption
17 that any program, so-called incentive program, is
18 absolutely based upon a low recording, based upon
19 the reporting imageries, absolutely, in every
20 single case, violates 1904. I don't think that's
21 the presumption in the Fairfax Memo. It's an
22 interpretive guidance, which says that they may

1 violate 1904.

2 MS. GARDE: Right.

3 MR. FRUMIN: So, my hunch is that, with
4 this kind of guidance, compliance officers are
5 going to take a much stricter look at those
6 practices in a way that was different than before
7 they issued this, which is one of the reasons why
8 employers have had such a strong reaction to
9 this, because it was a wake-up call. Wow, no one
10 ever looked at this before, from a compliance
11 standpoint. Could an employer put together a
12 program, an incentive program, based upon the
13 non-reporting of injuries or illnesses, which
14 could comply with 1904 because it was doing 62
15 other things to promote an open workplace?

16 Could Sikorsky, under Dave's leadership,
17 have gotten past the compliance inspection under
18 1904, because you had five other ways of making
19 sure workers reported things, even though Eric's
20 salary was based, in part, on the total
21 recordable rate? Yeah, it's possible, but we
22 know a lot of companies aren't doing that, and so

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1 does OSHA, and so do the companies.

2 So I think if we just take the Fairfax
3 Memo as the authority, I think that answers
4 Billie's question --

5 MS. GARDE: It's not going to completely
6 preclude --

7 MR. FRUMIN: Right. Is there a need for
8 evidence for a compliance situation? If we had
9 to tease out what all that evidence was, we'd be
10 here forever. I don't think we're in a position
11 to do that.

12 MR. EHERTS: Yeah. If I can just make a
13 few comments on this. Number one, Ken and Billie
14 and Greg made me some self-reflection, like why
15 do I feel this is so intuitive? I'd go back to
16 one short anecdote. Back in 1992, I was being
17 interviewed, and moving from Merck to what became
18 Sanofi-Aventis, and the VP of HR said, "You need
19 to help me lower the recordable incident rate,"
20 because the company was headquartered in Paris,
21 and they were "beating them up" over TRIR. And I
22 said, "You don't need me." This is back in 1992.

1 I said, "What you do is put everybody in
2 a group of 10, give them all a Sony Walkman" --
3 this is back in 1992 -- "Give them all a Sony
4 Walkman if nobody reports an injury. If one
5 person reports an injury, his nine buddies lose
6 their Sony Walkman. Your rate will go to zero.
7 You don't need me." I stood up. He said, "I
8 want a safety program." I said, "That's
9 different. I thought you just wanted a zero
10 TRIR."

11 And so back in 1992, I understood,
12 intuitively, that taking away rewards from fellow
13 workers was discriminatory. It's hurting the
14 employee that reports the accident, and human
15 nature is then you don't report, especially if
16 it's minor. And so I'm not talking about lost
17 workday cases or fatals. I'm talking about minor
18 injuries, and those minor injuries are critical
19 to an EHS manager, so that he or she knows where
20 the issues are, so they can be corrected. And,
21 again, everybody gains and the company gets
22 stronger, and it goes back to Lisa's chilling

1 effect, and I think that's everything that this
2 is about.

3 Now, the nexus to 11(c), I think, is the
4 second to the last paragraph of the Fairfax Memo,
5 where he says, "Incentive programs that
6 discourage employees from reporting their
7 injuries are problematic because, under Section
8 11(c) an employer may not, in any manner,
9 discriminate" -- and this is exactly what Lisa
10 was telling us yesterday -- "against an employee
11 because the employee exercises the protected
12 right, such as the right to report an injury."

13 And so I think, back to what Christine
14 asked, I think that's a nexus to 11(c) right
15 there, is that on its face, when you take away a
16 reward from fellow workers, because somebody
17 exercised a right, you're discriminating against
18 that employee, and I think that's why this is
19 important to this committee.

20 MS. SPIELER: Additional comments?
21 Discussion? Are you ready to vote? Questions?
22 This is the vote on the amended motion, where we

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1 changed the word "hazardous" in the first line of
2 the second paragraph to "detrimental." All those
3 in favor? Ten. Opposed? It's a unanimous vote
4 in favor of recommendation. Thank you.

5 MR. EHERTS: Yeah. Great discussions.

6 MS. SPIELER: And we have a third
7 recommendation?

8 MR. EHERTS: We do. A recommendation
9 from the 11(c) subcommittee regarding punitive
10 damages.

11 MS. SPIELER: And this will be marked as
12 Exhibit 8 for the committee minutes.

13 [Exhibit 8 entered into the record.]

14 MR. EHERTS: The Section 11(c)
15 subcommittee has explored the use of punitive
16 damages in settlement and litigation of OSH Act
17 Section 11(c) retaliation cases. The
18 subcommittee has found that OSHA may not be
19 applying consistent standards regarding punitive
20 damages, and, as a result, may not seek punitive
21 damages in appropriate cases.

22 The Whistleblower Investigations Manual

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1 at 6-2(2011) identifies cases appropriate for
2 punitive damages as those "where the respondent's
3 conduct is motivated by evil motive or intent or
4 when it involves reckless or callous indifference
5 to the rights of the employee" under Section
6 11(c).

7 The subcommittee agrees that punitive
8 damages are a necessary tool in combating and
9 deterring these types of egregious cases.
10 Accordingly, based on our research and
11 discussion, we make the following recommendation:

12 We recommend that OSHA work with the
13 Department of Labor's Office of the Solicitor to
14 develop consistent, articulable standards
15 regarding the circumstances when punitive damages
16 would be appropriate in an OSH Act Section 11(c)
17 retaliation case, whether based on the standards
18 set forth in the Whistleblower Investigations
19 Manual 2011, or some other standards.

20 We further recommend that OSHA work with
21 the Office of the Solicitor to achieve better
22 coordination between OSHA investigators and the

1 Office of the Solicitor regarding the
2 appropriateness of punitive damages in particular
3 cases.

4 And, finally, we recommend that OSHA
5 apply these consistent, articulable standards and
6 seek punitive damages in appropriate cases in
7 order to more fully remedy and deter egregious
8 conduct.

9 MS. SPIELER: And that comes unanimously
10 recommended from the subcommittee?

11 MR. EHERTS: It does.

12 MS. SPIELER: Discussion? Then we can
13 move immediately to a vote. All those in favor?
14 Ten. Opposed? None. It's unanimously endorsed
15 by the full committee.

16 So, Dave, that takes us to the next
17 portion of this conversation. I am aware, since
18 I've been attending the subcommittee meetings,
19 that this has been what the subcommittee has
20 spent its time on, and you are to be applauded.

21 MR. EHERTS: Almost in its entirety.

22 MS. SPIELER: Yes. So we can start this

1 conversation now and conclude it later in the
2 day, but I'm wondering what the subcommittee's
3 thoughts are and what the full committee's
4 thoughts are about the additional work that the
5 11(c) committee might take up, or, whether the
6 11(c) committee has completed its work and would
7 like to go into either, close down or go into
8 suspension.

9 So I'm opening that up, not just for the
10 subcommittee members but also for the full
11 committee, for discussion. Ava?

12 MS. BARBOUR: So, as a member of the
13 subcommittee, I don't think that our work is
14 done, and a couple of area that I think have been
15 brought up, both in our subcommittee meetings and
16 both today and yesterday, with the full
17 committee, that we might take up. I'm looking at
18 doing more investigation of the state-plan
19 states. We had talked about that early on in the
20 subcommittee, and just for purposes of time and
21 the work that we did on these three proposals, we
22 haven't really done much. I know Christine has

1 done some work on it, that we could certainly
2 continue on, and I think that would be useful.

3 And then the other area that I continue
4 to be interested in is training and consistency
5 in investigations in the regions, and I think
6 that, certainly I asked for some data yesterday
7 and I think that there's more. And I applaud. I
8 know that the Directorate is doing work on that
9 now, but I think it would be something useful for
10 either the 11(c) subcommittee or perhaps that's
11 an issue for the full committee, as it does
12 affect all of the whistleblower statutes that
13 OSHA is responsible for.

14 MS. SPIELER: Yeah, Richard.

15 MR. MOBERLY: I just want to second the
16 training, looking at the training, and also say
17 that I think it is a broader issue than just
18 11(c), so I would encourage us either to set up a
19 separate subcommittee or figure out some way to
20 handle that.

21 MS. SPIELER: That's interesting, because
22 that actually is an issue that came up at our

1 very first committee meeting, and there was a
2 quite animated conversation about it at that
3 time, and I remember Marcia also had a lot of
4 interest in the question of training, and we put
5 it aside. So it is definitely something I think
6 we should take up when we talk about next steps
7 for the committee.

8 Let's see. Nancy?

9 MS. LESSIN: So I agree with what's been
10 said and second that. I think two additional
11 things. One is our recommendations were on
12 changes that we wanted to see to make 11(c) work
13 better, but I think Steve Mitchell's presentation
14 yesterday really highlighted that even with what
15 we have, there are things that could and should
16 happen, we need to look into, to make the statute
17 work better as it is, and I think really getting
18 some more data, looking at where there are
19 problems, identifying if there are system
20 problems.

21 Was Steve's presentation something that's
22 an outlier that has some fixes within a small

1 pond, or would we find these kinds of things
2 throughout? If so, that's very troubling. I
3 think in either case it's troubling, in trying to
4 identify system problems to make 11(c) work
5 better is really essential.

6 If there's supposed to be oversight in
7 place, and we end up with the experience here,
8 then I think there are questions about that, so
9 looking at training and oversight and supervision
10 and those kinds of things, I think, is really
11 brought forward.

12 MS. SPIELER: Do you think that's
13 specific for 11(c), or is that a general issue
14 for the whistleblower investigations.

15 MR. EHERTS: It could be a new
16 subcommittee.

17 [Laughter.]

18 MS. LESSIN: I know we were looking at
19 11(c). I know 11(c) has the, when you look at
20 the number of cases coming in, it has the
21 greatest number of cases. But, in fact, as we
22 look at the other statutes, this may, in fact --

1 we may be looking at all of the statutes, or we
2 may be honing in on several of them that look at
3 this. I would just like to say that 11(c),
4 whether it's standalone or this issue has to be
5 looked at broader, 11(c) should be in the mix for
6 a continuing look at those issues and what might
7 need to be done.

8 The other thing -- and, again, I'm not
9 sure that this is just 11(c), but one of the most
10 important rights, but, I think, least used and
11 perhaps least protected, is the right of a worker
12 to refuse unsafe work, and I do want to look at
13 is 11(c) really protecting that? I know that
14 there have been some court decisions in the past
15 that have interfered with that, and I wouldn't
16 mind looking at some of the other statutes --
17 FRSA, STAA, to see what they look like.

18 But that's another arena, that if workers
19 don't feel that they have the right to refuse
20 unsafe work, then we can just look at Upper Big
21 Branch Mine and other places where it's been
22 documented that people have had problems. So I

1 would love to look at that piece, in particular,
2 whether it's just 11(c) or broader than that, I
3 think, as a conversation.

4 MR. EHERTS: Yeah. If I could just
5 comment. Coming into this meeting, I was
6 thinking we would sunset the subcommittee on this
7 issue, but, likewise, I'm kind of inspired by
8 what Steve said, and Christine's plea, also, for
9 resources. And I think the data shows there are
10 some inconsistent ways the statute is being
11 applied in different state plans, and differing
12 results, that's for sure.

13 So I think would propose moving forward
14 with the data analysis, looking at differences in
15 state plans and the resources therefore required
16 by state plans to implement it correctly.

17 MS. SPIELER: Okay. Additional thoughts?
18 Christine.

19 MS. DOUGHERTY: You know, one of the
20 considerations that I've looked at over the 12
21 years that I've been doing this work is kind of
22 going along with some of the things that David

1 has brought up, is the education component, is
2 that I don't think we do a very good job of
3 educating, particularly employers, about the
4 responsibilities under the OSHA Act for workers'
5 rights to report everything, from the safety
6 complaints to what discrimination really means.

7 You know, I go to these employment law
8 seminars in Minnesota, and the Department of
9 Labor always has a wage-and-hour person speaking,
10 talking about all the changes in the Wage and
11 Hour law. I've never seen somebody come from the
12 federal level and speak about OSHA,
13 discrimination under OSHA, what all that means to
14 all the attorneys and the HR people that attend
15 these programs, and that's just in Minnesota.

16 So if you're looking at 50 states where
17 lawyers gather, HR people gather -- when I did
18 wage-and-hour work, I used to just go and speak
19 to HR people all the time about what their
20 responsibilities were under overtime and all of
21 the reporting requirements, but I don't think we,
22 at the federal level or the state level, have

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1 done as good of a job as we could to educate, and
2 I think education and how maybe to implement some
3 of that stuff, whether it's on websites or
4 attending these kinds of seminars are important,
5 because when I started with OSHA 12 years ago, I
6 had no idea there was a discrimination part.

7 I had done human rights work. I had done
8 labor work. But when I got there it was like, or
9 applied for the job, it was like, "Really?
10 There's a discrimination? You actually are
11 protected if you bring up a safety complaint at
12 work?" I'd always done office work so it wasn't
13 as important to me, but I have brothers that are
14 woodworkers, guards, saws, drills, all kinds of
15 things that could go wrong, and I never thought
16 about their rights to have a safe work
17 environment.

18 So I think the education is a big
19 component that maybe this committee could talk
20 about some ways to get the word out.

21 MS. SPIELER: Great. Eric.

22 MR. FRUMIN: So, just as an FYI, the

1 Transport Work Group is coming forward with a
2 recommendation that mirrors the last one, about
3 OSHA promoting, through its own educational
4 activities, employer understanding of any
5 retaliation laws, so it's sort of along those
6 lines.

7 And then the other thing that I think
8 will also create more of a need for more
9 aggressive outreach by the agency on awareness
10 are the forthcoming rule changes that OSHA is
11 moving forward on the recordkeeping rules,
12 including the public dissemination of employer,
13 site-specific, injury-illness information, and
14 there's a whole story to that.

15 MR. EHERTS: The chilling effect that
16 might have on reporting.

17 MR. FRUMIN: Well, yeah. So, all I'm
18 saying is there are a number of factors that are
19 combining to justify a much greater affirmative
20 effort by the Labor Department, and OSHA in
21 particular, to get the word out about protecting
22 workers' rights to report injuries, hazards, and

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1 so forth, in addition to the issues you've
2 raised.

3 MS. SPIELER: Terrific. It sounds like
4 the 11(c) committee will --

5 MR. EHERTS: Carry on.

6 MS. SPIELER: -- carry on. I was looking
7 for the right word. Obviously, and as we sort
8 this out toward the end of the day, and if we do
9 sunset any committees or create others, then
10 we'll also want to sort who is on what committee
11 and what people want to be doing, but I think
12 that will happen post-meeting, not here, because
13 if there's going to be any change in the
14 subcommittee structure, it would have to be
15 discussed with Dr. Michaels and others at the
16 agency.

17 So this is just a formative conversation,
18 although any subcommittee that currently exists
19 that has ongoing work to do can certainly
20 continue on with its current membership and its
21 current chair. And so it sounds as if the 11(c)
22 committee will, in fact, do just that, and I want

1 to express my considerable thanks to Dave, who
2 has been terrific as a chair, and to Katelyn, who
3 has been fabulous as a staff person for the
4 committee. And I just want to note that I think
5 today or tomorrow --

6 MS. WENDELL: Tomorrow.

7 MS. SPIELER: -- tomorrow is Katelyn's
8 last day at OSHA, and so she agreed to stay on
9 through, I gather, through this committee
10 meeting, and I want to thank you, on behalf of
11 the subcommittee and the full committee for the
12 work that you've done, and wish you well in your
13 next steps.

14 MS. WENDELL: Thank you.

15 MR. EHERTS: I, likewise, would like to
16 thank the members, the fantastic job. We had
17 some big disagreements at times, but we always
18 came back together, and I think the final product
19 is a very, very good compromise.

20 MS. SPIELER: So, thank you. So it's now
21 ten to ten, and I think we've completed the 11(c)
22 committee report, and we were due, I think, to

1 take a break at ten o'clock. I would suggest we
2 take the break now, and then when we reconvene,
3 we move on to the Best Practices subcommittee.
4 So, 15 minutes and let's reconvene.

5 [Break taken from 9:51 to 10:12 a.m.]

6 MS. SPIELER: If there are people who
7 have arrived who are observers, please make sure
8 you sign up on the list, and could you also
9 identify yourselves?

10 MR. JOHNSON: Ron Johnson, back from
11 Jones Day.

12 MR. ZUCKERMAN: My name is Jason
13 Zuckerman, and I represent plaintiffs in actions
14 for the whistleblower laws.

15 MR. CHARTIER: George Chartier of OSHA
16 Public Affairs.

17 MS. DEVINE: Hi. Shanna Devine with the
18 Government Accountability Project.

19 MS. SPIELER: Thank you.

20 MS. ABRAMS: Hi. Adele Abrams. I'm
21 representing the American Society of Safety
22 Engineers.

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1 MS. SPIELER: For those people in the
2 audience who weren't here before the break, the
3 committee unanimously adopted the recommendations
4 from the Section 11(c) subcommittee of the
5 committee, and we're now moving on to the report
6 from the Best Practices subcommittee. Jon?

7 MR. BROCK: The Best Practices and
8 Corporate Culture subcommittee has met by phone,
9 largely, since the end of last year, and has
10 reviewed, from the expertise of its members and a
11 number of other people that we were able to
12 invite onto our phone calls, in particular topic
13 areas that we had identified. In the course of
14 that review, we went over a very, very
15 substantial number of areas related to potential
16 best practices, and in our meeting yesterday, we
17 talked about what all of that had produced,
18 myself having combed through the notes and
19 produced some summary information.

20 We were -- I think it would be fair to
21 say, for everyone -- gratified to see how much we
22 had covered, but also challenged by the necessity

1 of then putting that into a workable, practical
2 package of best practices that could be
3 meaningful. And relevant to the discussion this
4 morning, comments this morning, about the
5 importance of making policies known to employers,
6 making workers aware of rights that they had,
7 there certainly appears to be a need to make a
8 useful collection of best practices available, so
9 that employers will know what's expected and can
10 adopt those policies if they wish to do so, and
11 so the workers are in a position to say this is
12 what's expected, this is what we should expect in
13 our workplace, and so that OSHA has something
14 that is universally recognized, or widely
15 recognized as an appropriate set of practices
16 that they can also make use of, or publicize,
17 advise, or educate about.

18 What I think we discovered was that there
19 is an awful lot known about best practices.
20 There are companies that are looking ahead,
21 working on doing the right things, adopting
22 practices, changing practices. We had a number

1 of, many examples talked about. We also know
2 that even though a lot is known, it does not
3 appear to be universally applied. There doesn't
4 appear to be a comprehensive and accepted
5 compilation that's easily accessible. So the
6 potential that we would produce such a
7 collection, such a compilation, seems like it
8 would be extremely useful to the worker audience,
9 to the manager audience, and to OSHA.

10 So we now have what we think is a very
11 substantial proportion of what at least
12 represents the key elements of best practice,
13 although we had actually had some debate about
14 whether that's exactly the right term, but
15 certainly a compendium of valuable practices that
16 could be put into a system. If you did all these
17 things, you would have good system.

18 But it would be challenging to take all
19 of that and put it into the appropriate format,
20 and that will be our next task, which we hope to
21 bring to you, to this committee, at the next
22 meeting, in a form that you can review, comment

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1 on, add your own experience and substance to it,
2 and that we could then turn that into what would
3 be a final recommendation for committee
4 consideration.

5 What our work suggests, to this point, is
6 that there are universal principles that are not
7 industry specific, but that apply, generally, to
8 anti-retaliation policies and programs that are
9 in place in some places and could be put in
10 place, we hope, in a lot more. It's equally
11 important, as has been discussed in the
12 committee, to adapt those principles, those
13 functional areas, those elements, to the
14 specifics of an industry, of a firm, of a
15 facility, of history, of size, and the individual
16 characteristics of an enterprise of a workplace.
17 But we will focus, at least initially, on putting
18 out the universal principles.

19 I'll give you a flavor, the rest of the
20 committee, for some of the things that seemed to
21 have that kind of universality, and this is not
22 in any particular order, or some of these may not

1 end up on the list, but just to give you an idea
2 of what kinds of things that have the
3 characteristic of universality.

4 A need to define what retaliation is. We
5 had a good bit of discussion about how often
6 behaviors that are retaliatory, policies that
7 have retaliatory elements and impact, are carried
8 out and either justified or rationalized, or
9 simply people just simply don't know. We
10 identified a lot of human reactions in the
11 workplace that could result in retaliatory
12 behavior, even if policies were contrary to that.

13 So having a clear definition is certainly
14 an example of a universal principle or
15 characteristics of a successful program.
16 Leadership commitment. That includes leadership
17 commitment at the top. I mean, this is something
18 that gets talked about in many places and ways,
19 and sometimes not all that meaningfully, but
20 leadership commitment from that top, but that
21 also means leadership commitment at the mid
22 levels and front line levels, so that retaliatory

1 behavior is watched for, not tolerated, and the
2 proper kinds of evaluation take place.

3 Training the universal element, in order
4 for people to understand what their obligations
5 are, what those definitions are, how the programs
6 work, their responsibilities in this regard.
7 Training is going to be a universal element of
8 the successful program.

9 Somewhat of a different characteristics -
10 - and you heard some discussion about it earlier
11 today, in connection with the Fairfax Memo
12 recommendation, and Dave talked about it in terms
13 of programs that he has been candid enough to say
14 he promoted some of these programs earlier but
15 has changed his view, and, as a result, his
16 company's policies, and Ken also talked about it
17 in the committee as something that's changed in
18 his company, and we heard, in some of our
19 meetings from outside people about this
20 recognition throughout leading companies, at
21 least -- that punishment for reporting issues or
22 incidents is retaliatory, and implied

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1 punishments, threats of punishments are
2 retaliatory.

3 Some of this is driven by incentives, so
4 we identified that incentives need to be aligned
5 properly so that people are not encouraged not to
6 report, and many common incentive schemes -- Dave
7 an example or two this morning -- do promote,
8 seem to promote that. So some kinds of
9 recommendations related to the proper kinds of
10 incentives, proper balance of incentives is
11 probably a universal principle, and one that
12 might surprise some people, but not others.

13 Another one, potentially, is to have a
14 process such as the NRC guest talked about,
15 within a company that reviews potential
16 disciplinary actions, to see if there is
17 retaliation or perception thereof, something to
18 help prevent retaliatory actions and the
19 potential chilling effects.

20 Immediate and proper responses to
21 retaliation complaints, responses that are
22 timely, serious, and effective, using clear

1 standards for investigation that are parallel to
2 the standards in the relevant laws, and to have
3 very specific audits and assessments be part of
4 your program, to see if it's working, because the
5 fact that you've got a really terrific policy
6 written down, or have copied out the policies
7 from someplace else that's recognized, doesn't
8 necessarily mean it will happen on the ground.
9 There are many slips between cup and lip on this,
10 everyone who works in this area knows, and so
11 there are some fairly specific audit and
12 assessment procedures that are important to see
13 if employees, once all is said and done with the
14 policies and the training and accountabilities
15 and incentives, that, in fact, there is a
16 willingness to report issues, not a chilled
17 atmosphere, and so on. And we had some
18 discussion in this and other areas about what
19 would be the specific elements of an audit, what
20 are the specific elements of training, and so on.
21 And one other universal, I would add
22 here, as you heard about in some of the comments

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1 this morning and in other meetings, is that there
2 is potential for business benefit, for strategic
3 benefit, for quality benefit, as well as
4 benefits, certainly, to a safe workplace or
5 outside of industrial safety, for an honorable
6 workplace free of financial risks, and the
7 environmental risks, or whatever the industry
8 might encounter. So the idea of making clear
9 that there are potential benefits seems also to
10 be an important universal principle.

11 I could give you a very long list but I
12 won't do that. And so we then, we devoted most
13 of our time yesterday, saying, well, how are we
14 going to put all of this together in a format
15 that would be accessible to those who need it --
16 and, as I mentioned, the three audiences:
17 employers, labor, and OSHA, among others, I
18 suppose. We thought it would be very important
19 to try to do something that was very concise and
20 accessible.

21 You have to forgive my artistic non-
22 skills, but I just put up here an idea of how we

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1 Here's why this is important, and then here are
2 the major components of that. If you're going to
3 have a training program, it has to do the
4 following things in order to have a chance of
5 being effective. Here are what its pieces are.
6 Here are some key things it has to train on.
7 There are issues of validation, quality of the
8 training, how it's delivered, whether you can
9 identify as validation, whether people really got
10 it.

11 And you can imagine doing this for
12 audits. You can imagine defining what the
13 leadership commitment looks like. It's all fine
14 to say there needs to be leadership commitment,
15 but that doesn't mean very much unless you say
16 this is what needs to be done. Receiving
17 reports, acting on reports, walking the talk,
18 what happens at the mid levels, what are
19 supervisors accountable for, what about
20 performance evaluation, including things related
21 to contributing and helping to create a safe
22 workplace, and other components.

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1 And then we had some discussion about the
2 benefit of trying to be really specific and
3 saying, well, what are some dos and what are some
4 don'ts? There are some things that are getting
5 done, that are going on, that shouldn't be done,
6 pointing those out specifically seemed like a
7 very valuable thing to do, and here are some
8 things to do. This may overlap with some of the
9 items back here, so we'll have to really decide
10 the format.

11 And then, I didn't put it up here, but we
12 also talked about the benefit of examples, having
13 specific examples that come from different
14 industries and different sizes of firms, so that
15 if a company is looking at it, seeing those
16 general principles, they can so, oh, I see how it
17 got done in my industry, or I see how this got
18 handled in a firm that's my size, instead of this
19 size of these big corporations, from which much
20 of this comes.

21 And so having examples seems like
22 something else we will try to do. I'm not sure

1 we'll be, at that point, when we come back to the
2 committee next time, but hopefully, certainly we
3 would be optimistic, based on the material we've
4 developed so far, and the vigor of the debates,
5 like the 11(c) committee. We've had some
6 vigorous debates.

7 But I want to say that those debates have
8 really enriched it, and I think the whole is much
9 greater than the sum of the parts. My
10 observation is that there is an incredibly
11 knowledgeable group of people on this committee
12 relative to the mission of this committee, and I
13 want to thank the chair and anyone else who was
14 responsible for putting this quality and mixture
15 of people on the group. I'm certainly the least
16 knowledgeable about these kinds of specifics, so
17 I probably learned the most.

18 But you could see how the combination of
19 experiences and skills and perspectives has
20 really moved the debate to a much more practical
21 focused and balanced position, and it also
22 underscores that it's unlikely that there is

1 really the necessary, useful compendium of best
2 practices out there, because even people that
3 know a lot, that are experienced, were able to
4 learn from each other, and if we can use that
5 kind of a combination, assembled in a group like
6 this, and in a committee like this, which
7 obviously has additional skills and expertise
8 that haven't weighed in yet, I suspect that we
9 can, indeed, produce something that does
10 represent a product of real value for any company
11 that wants to adopt a program that really has a
12 chance of eliminating retaliation, or certainly
13 dealing with it, in the most appropriate ways,
14 when it comes up.

15 And so we hope to come to you at the next
16 meeting with a format that is accessible to you.

17 MS. SPIELER: Jon, how can the committee
18 be helpful to the subcommittee at this point?

19 MR. BROCK: I certainly would open that
20 question to others, but my initial thought would
21 be if you're aware of exemplary programs, or
22 parts of programs, that would help us find things

1 that we may not have found, that would be
2 extremely, extremely helpful. We've really
3 benefitted from looking at good examples. Other
4 members of the committee?

5 MS. SPIELER: Greg.

6 MR. KEATING: Yeah. I just wanted to
7 start by saying that real hats have to go off to
8 Jon, who has done an unbelievable amount of work.
9 We've had six or so 3-hour telephone meetings,
10 and he took a lot of notes and reduced it down to
11 some very good product, and we really have made a
12 lot of headway, thanks to his leadership.

13 The one overall comment I would have is -
14 - and this has been a really valuable exercise
15 for me. It's a topic I'm very committed to, and
16 I've learned through Nancy and some robust
17 debate, and that's opened my eyes. What I've
18 learned is that the challenge we have with this
19 Best Practices committee is that every industry
20 is slightly different, and that even within the
21 industries -- and we have a speaker who I think
22 we may have coming to our next meeting.

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1 In talking with her, she's spent her
2 whole life in this area of compliance and best
3 practices, and the familiar refrain that I often
4 hear is that it's not a one-size-fits-all. It is
5 going to depend, significantly, on whether you're
6 talking about a safety area or a financial area,
7 or whether you're talking about a huge company or
8 a small company.

9 And so I think one of our challenges, in
10 getting an ultimate product before the committee
11 next time, is going to be to reduce it down to
12 either a format that would apply, no matter how
13 big or small, or what industry you're in, or
14 whether we're going to kind of maybe even, I
15 don't know, slice and dice it a bit, to have a
16 few different examples. But that's been a little
17 bit of the challenge, but we've learned a lot,
18 and I think we've got some exciting new
19 presenters lined up for upcoming meetings.

20 MS. SPIELER: Richard.

21 MR. MOBERLY: So, I just had a couple of
22 questions about some of the work that you had

1 done. I'm really impressed with all this and I'm
2 excited to see the final product.

3 MR. BROCK: Yeah. Me, too.

4 MR. MOBERLY: this isn't along the lines
5 of what you said would be helpful, so this may be
6 entirely unhelpful.

7 MR. BROCK: You wouldn't be the first
8 one.

9 MR. MOBERLY: So the first one, I was
10 wondering if you all had discussed any incentive
11 programs such as affirmative defenses for
12 employers who might adopt these best practices,
13 along the lines of Farragher/Ellerth or within
14 the sexual harassment realm, and whether you've
15 discussed that or whether you will in the future.

16 MR. BROCK: I think others could identify
17 it better than I. We have certainly touched on
18 it. We haven't explored it or delved into it.
19 There has been discussion about should there be
20 incentives, what should they look like, or is
21 that inappropriate -- you know, debates you would
22 expect -- and I imagine that would come up

1 further.

2 MR. KEATING: I would also note, Richard,
3 we did touch on that. I remember we had kind of
4 a spirited discussion between and Emily at one
5 point, about what would the kind of reward or the
6 benefit, the carrot, the true carrot be to an
7 employer if they did it all right, and yet
8 something slipped through the cracks?

9 Earlier today, we voted on a
10 recommendation by 11(c) that standards be
11 promulgated for punitive damages, and I think we
12 may well want to revisit, ultimately, when we
13 make our recommendations, that if an employer
14 does all these things, then that might be a
15 factor that should be included in that standard
16 of weighing punitive damages, and should be taken
17 heavily into consideration, that there is
18 evidence that all these thing we recommended be
19 done, were done, in terms of assessing whether to
20 issue punitive damages.

21 MR. MOBERLY: I think that's great to
22 have that further discussion. We could probably

1 have a spirited debate right now, and perhaps
2 it's best to let that debate happen in the
3 subcommittee for a while. I just wanted to make
4 sure that was there.

5 And the other thing. So I mentioned
6 yesterday, one of my kind of focus areas is also
7 on the underlying misconduct that's being
8 reported, and so I didn't know if a lot of these
9 best practices areas that you outlined were
10 dealing with preventing retaliation, and I didn't
11 know if the committee was also, as part of its
12 charge or its focus, thinking about best
13 practices for what to do with that underlying
14 misconduct that is identified? That may be
15 outside your role, but I didn't know.

16 MR. BROCK: No, we've actually -- and
17 others should comment on this, too -- we've
18 actually had a lot of discussion about positive
19 programs, to try to get issues to come forward.
20 One of the common elements I didn't mention, that
21 came up -- there's a long list of them -- are the
22 need to have multiple channels available to

1 employees, to have opportunities for raising
2 things early, to have investigations. We talked
3 about this yesterday a bit. Not everybody was in
4 the meeting the whole time, because of the other
5 groups having impending recommendations and other
6 things, we it didn't go as far. But we have
7 talked about those aspects that would bring
8 issues forth, and the investigations of the
9 underlying issue being important.

10 And when you talk about the incentives,
11 for example, if you have those incentives to
12 suppress reporting, you're going to be more
13 likely to get temptation to retaliate or
14 reactions that are retaliatory. But if you're
15 doing more positive things that take care of
16 those issues in quick time, and fully, then the
17 environment is open.

18 We talked a lot about that. We have a
19 long list of things that have been discussed
20 quite a bit, and sometimes repeatedly. One of
21 the questions is related to the scope, so if it's
22 an anti-retaliation program, what other elements

1 of dealing with safety issues, or financial risk
2 issues, or health or environment, what other
3 aspects of that are important, or seem central to
4 the anti-retaliation dimension, and what gets us
5 into other areas that really take us out of
6 scope? So we actually, in trying to think about
7 putting together something this concise, you
8 might imagine that that came up. So it's in
9 there, exactly how we'll deal with it. How far
10 we'll go with it, we don't know, but it's clearly
11 connected and important.

12 MR. MOBERLY: Right. Thank you.

13 MS. SPIELER: Other suggestions?
14 Comments? Concerns? Eric.

15 MR. FRUMIN: I had a thought which was on
16 my mind before you said your last point about
17 best practices that might or might not be within
18 the scope of retaliation issues, and it gets to
19 the question of best practices on other important
20 management functions which sort of walk and talk
21 like hazard reporting, or things of that nature.

22 MR. BROCK: The Fairfax type stuff?

1 MR. FRUMIN: Well, no. We have
2 management functions on HR issues. We have
3 management functions on design of the process.
4 We have management functions on supervision of
5 the process, and in supervision of employee. Any
6 number of management functions to keep the
7 railroad running, literally and figuratively, and
8 some of those have little to do with health and
9 safety issues, hazard reporting, injury
10 reporting, but some of them have quite a bit to
11 do with it.

12 So, to me, the one that I often think
13 about is quality management, and the importance
14 of an approach to quality management which can
15 elicit the involvement of workers who actually
16 know a lot about this subject, in a very
17 constructive and productive way. And what I have
18 found, in a number of settings related to safety,
19 but, at least in the industries that I've worked
20 in, it's often in regard to ergonomics, where if
21 one was trying to achieve a high-quality
22 production process -- and it wasn't just in

1 manufacturing; it was in other settings, as well
2 -- and you did it in a way which provided workers
3 with an opportunity to be adequately involved, so
4 that they could talk about the interferences in
5 the quality, in achieving a high-quality process.

6 Invariably, that involvement would elicit
7 from those same workers observations, complaints,
8 suggestions, whatever you want to call it, about
9 bad design, from the standpoint of the effect on
10 their bodies, not just how the parts didn't fit
11 together, et cetera. The best example I know of
12 was from Ford Motor, where an epidemiologist who
13 worked in corporate medical, Gordon Reeve, was
14 able to look at their incidence data, at
15 different assembly plants. I don't think he's
16 ever published this, and it's a shame.

17 But he linked it to actually comparing
18 the incidence rates for workplace injuries, many
19 of which were musculoskeletal disorders, and also
20 warranty claims, literally by shift and
21 supervisor, for the installation of the right
22 front passenger door on Ford Pintos, or whatever.

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1 I mean, Ford, they had it down. They really kept
2 good records. And he was able to actually come
3 up with a correlation that a 10 percent drop in
4 injury rates could save them money, like \$1
5 billion in warranty costs.

6 And it always bugged me that the quality
7 people would get the credit, at the end-of-year
8 accounting, for basically doing the same work
9 that the health and safety ergonomics people were
10 doing, because the solution to that problem was a
11 better ergonomic design of the process, which
12 saved them a ton of money, because the doors
13 would fit and they wouldn't have to do a recall.
14 And then, along the way, they saved a lot of arms
15 and backs and other things.

16 So is there a process in the company
17 which elicits worker involvement, i.e., reports
18 of problems, which has something to do with
19 health and safety, which might have actually, on
20 their own steam, been a hazard report, or, God
21 forbid, an injury report, but was central to
22 another process within the management function,

1 whether it's bad supervision, bad design, bad HR
2 practices, et cetera.

3 So, as long as you're looking at these
4 questions of what are the management functions
5 for which one is trying to identify best
6 practices, keep in mind that there may be a
7 substantial overlap in that little silo of
8 management function, with a health and safety
9 issue, but it's called something else. It could
10 be called quality. It could be called something
11 else, and if you're only asking for health and
12 safety programs, you may not even be asking for
13 the right thing.

14 Certainly, in the manufacturing world --
15 and I would assume this is true in other
16 settings, in other sectors, as well -- quality
17 management certainly could be part of it.
18 Nancy's example today about the company in
19 Massachusetts which had a Kaizen event and
20 identified a serious health and safety problem,
21 in that case machine-guarding, is a perfect
22 anecdote, but this was a very widespread issue.

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1 As I said, it loomed very large. So I would
2 encourage you to certainly look at quality
3 management as a way to do that.

4 MS. SPIELER: Ken.

5 MR. WENGER: Just a comment to that. So
6 we've been very conscious of, this is not a
7 safety management team. This is a retaliation
8 best practices and we're trying to keep it broad
9 to that point. Safety is an important component
10 to this, but it could be financial, it could be
11 quality, it could be a lot of different things
12 that are the underlying causes that's driving
13 that retaliation perspective, so we're trying to
14 come up with those best practices that are kind
15 of holistic, all-inclusive, and not make this a
16 safety management process or a quality management
17 process, or, or, or. It's all about and.

18 We've also had a lot of debate around,
19 we're not looking at the whole company culture
20 issue. We've had to draw some boundaries around
21 this a little bit, so we keep coming back to,
22 this is about retaliation, this is around best

1 practices, around how do you deal with
2 retaliation or the potential retaliation
3 behaviors, practices, systems, processes and
4 organization would have, and how you design that
5 stuff out from your practices and processes.

6 So I think we'll get at what your point
7 is, and I think your point is well taken, but I
8 guess, just for the rest of the committee, you
9 know, it's not just a safety management
10 retaliation thing. This is retaliation, bigger,
11 whistleblowers, not just safety whistleblowers.

12 MS. SPIELER: So I'm going to take my
13 chair hat off for just a second. It seems to me,
14 partly what I'm hearing is that there's a scoping
15 question for the subcommittee, and I think it
16 would be hard to de-link the anti-retaliation
17 from the chilling effect questions, although
18 there are other pieces of corporate culture that
19 would clearly be outside the boundary, and I
20 assume that the subcommittee will continue to
21 explore where that boundary is between what I'm
22 calling chilling effect, what we've been talking

1 about in a number of our conversations, and a
2 more general corporate culture.

3 But I do think that the point Eric makes
4 is one that I haven't really heard, in listening
5 in on the subcommittee conversations, which is
6 the effective siloing within management, in terms
7 of how to create best practices, and that might
8 not be safety management, but there are many ways
9 in which the way corporate structure functions
10 that can impede the sort of communication of
11 information and the communication of anti-
12 retaliation, as well as principles, as well as
13 take care of the chilling effect questions, and
14 that particularly might come up, for example, in
15 the investigation of the original complaint,
16 which was the issue that Richard was raising, and
17 what the responses to initial complaints, in
18 terms of whether people feel that it's worth
19 coming forward.

20 And so I would hope the subcommittee
21 would explore all of those issues, and I must
22 say, having been on some of those phone calls, it

1 is an extraordinary commitment of time that
2 subcommittee members have made to hear from
3 people who have made presentations, and to debate
4 some of the issues, and I'm quite certain that as
5 the subcommittee moves forward that the product
6 will be very valuable for OSHA and for employers
7 and others outside the agency.

8 MR. BROCK: Emily, could I make a quick
9 comment on this issue?

10 MS. SPIELER: Yes.

11 MR. BROCK: Eric, I think it's a very
12 useful point, and, as Emily said, we haven't
13 thought about it in that way, so this is like an
14 out-of-the-box thing for us, although we've been
15 pretty out-of-the-box most of the way, depending
16 on how you want to think about it.

17 MR. FRUMIN: [Inaudible.]

18 MR. BROCK: Yeah. The spring, you know,
19 pops out. But we have talked a lot about it, and
20 I think that the business side of people on the
21 committee have been particularly candid about
22 this, and, I think, to a person, and not just

1 them, talking about the benefits that you get by
2 hearing from employees. We didn't talk about it
3 in quality management ways. That's the kind of
4 new piece. But we've talked an awful lot about -
5 - and Dave mentioned it this morning -- you want
6 that reporting to come in. That's why you
7 shouldn't be afraid of your numbers going up if
8 you're doing everything else right. That's not
9 something I think all of us came in thinking
10 about, or recognizing.

11 So the idea of free flow of information,
12 hearing from workers being a potentially really
13 important data source, has been talked about in
14 quality terms, quality of product terms, separate
15 from the quality of safety environment terms. So
16 we certainly have a lot of things on the table
17 related to making sure you're getting information
18 from employees, and you're really looking into
19 it, and you're really listening to them, and
20 giving them the feedback on it, but we haven't
21 thought about it in that kind of a connection,
22 and I think that's a helpful thing, and I think

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1 subject to the qualifications you've heard about,
2 how far do we go with other parts of corporate
3 systems.

4 But there is that tie-in. I mean, even
5 performance evaluation, right, has a big tie-in,
6 because if you're not accountable for how you
7 respond to the underlying issue, much less
8 retaliation, then how come you got a bonus? And
9 this is what the corporate members are saying.
10 It's not even what Nancy or Billie or I might be
11 saying.

12 So I think we were in good condition to
13 look at that type of thing.

14 MS. SPIELER: Greg.

15 MR. KEATING: Just in response to
16 something that Ken said, I think we have to keep
17 in mind, also, that, as Dr. Michaels said
18 yesterday, when he kicked off this meeting, that
19 with regard to our work group, he was very
20 hopeful -- and I was writing down what he was
21 saying. I believe he said that we could come up
22 with recommendations to help to create a culture

1 of ethics and compliance where employees are
2 "welcomed and encouraged to share their
3 concerns."

4 So I think, Ken, that I would disagree
5 slightly. I think our group is designed not to
6 just focus on anti-retaliation. I think, in an
7 ideal world, I would be extremely proud of our
8 mission if we were able to arm the employers with
9 some concrete measures that might help to create
10 and foster this culture, and also create a
11 situation and environment of transparency, where
12 workers not only are free from retaliation, but
13 feel entirely welcome and encouraged to walk in
14 any number of doors to voice their concerns
15 without fear of reprisal.

16 MS. SPIELER: Other comments or
17 suggestions for the subcommittee? Jon, thank
18 you. As Greg has already said, you've done an
19 amazing job of trying to move this committee
20 forward. It's a large subcommittee with varied
21 views on these subjects, and I do think people
22 have done a remarkable job of listening to each

1 other and moving the conversation forward, so
2 thank you, and we'll look forward to your report
3 at our next full committee meeting.

4 MR. BROCK: Well, you're welcome, and
5 credit to the knowledge that everybody brought to
6 the table.

7 MS. SPIELER: Okay. So it's ten to
8 eleven and we really need Marcia on the phone for
9 the Transport--. Marcia Narine needs to be part
10 of the conversation for the Transportation Work
11 Group report out.

12 Although it was set for later on the
13 agenda, I'm wondering if we could open the public
14 comment period now. I know at least a couple of
15 members of the public area here, and if you're
16 prepared, we could move into that section of the
17 meeting, even though it was set for after lunch.

18 I just want to say, before I see who's in
19 the room, that we had two members of the public
20 who contacted staff to raise some issues but did
21 not want to come forward and have not identified
22 themselves for the public record. One of them, a

1 whistleblower with an open case, has expressed
2 concern that OSHA does not have the resource to
3 pursue cases in a timely fashion, and I think
4 that's been something that we have been
5 discussion and will continue to discuss as we go
6 forward.

7 The second, with two open cases, is
8 concerned about the effects of electronic
9 stalking as a form of blacklisting and
10 retaliation, and that issue, and how you define
11 retaliation maybe part of our conversations going
12 forward, as well.

13 I'd like to note, as we always do, for
14 the record, that in public comments we're not
15 prepared to hear about individual pending cases,
16 and that all public comments should be directed
17 at policy and systems level concerns, and not at
18 the adjudication of individual cases. If
19 individual cases are your concern, I'd ask that
20 you discuss that with the OSHA staff directly and
21 not address your public comments to your
22 individual case.

1 That said, I know that there were two
2 people who had asked to speak to the committee in
3 advance of this meeting. Shanna Devine from the
4 Government Accountability Project. Ms. Devine,
5 do you just want to come forward and offer your
6 remarks?

7 MS. DEVINE: Thank you for having me here
8 today. I'm just going to go ahead and read a
9 prepared written statement, though I'd be remiss
10 not to acknowledge the overlap between the Best
11 Practices Work Group's list of recommendations
12 and the list of recommendations that I'm going to
13 share for the DWPP.

14 MS. SPIELER: Do you want to put your
15 written statement into the record, as an Exhibit?

16 MS. DEVINE: Certainly. Thank you.

17 MS. SPIELER: So why don't we mark that
18 as Exhibit -- so, before I do that, we're
19 clarifying here. We're going to put a copy, some
20 form of a copy of the flipchart into the record
21 from the Best Practices committee as Exhibit 9,
22 and Ms. Devine's written testimony will be in the

1 record as Exhibit 10. Go ahead.

2 [Exhibits 9 and 10 are entered into the
3 record.]

4 MS. DEVINE: Thank you. Oversight of
5 OSHA's Directorate of the Whistleblower
6 Protection Program, DWPP, is a top priority for
7 the Government Accountability Project, the
8 nation's leading whistleblower protection and
9 advocacy organization. GAP legal director, Tom
10 Devine, could not be here today so I'm going to
11 share the following remarks on behalf of our
12 organization.

13 DWPP faces many structural and financial
14 handicaps, making it difficult to reach the
15 potential of whistleblower laws. As an
16 overextended agency specializing in worker
17 safety, the enforcement of whistleblower rights
18 has taken a back seat. This breakdown in
19 enforcement, not weak statutory rights, is the
20 primary reason that the track record for
21 whistleblowers has been so weak.

22 Based on reviews ranging from the GAO to

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1 the Department of Labor's Office of Inspector
2 General to GAP's own survey from whistleblowers
3 and practitioners, the primary difficulties
4 include inadequate staff resources and
5 investigator training, with staffing levels that
6 sustain unrealistic work loads; unusual regional
7 authority and a lack of independent oversight,
8 which has led to widely varying interpretations
9 of law and success rates between regions;
10 excessive, often multi-year delays in processing
11 complaints; a failure to interview or
12 functionally communicate with complainants;
13 failure to use alternative disputes resolution
14 mediations in order to resolve cases; a vacuum of
15 credible data to support adverse decisions
16 against complainants; a previous lack of
17 authority, and now lack of action by the DWPP to
18 reverse regional decisions.

19 To that end, GAP would like to propose
20 three recommendations for the DWPP to realize its
21 full potential. First, an independent national
22 audit of regional compliance with consistent

1 MS. SPIELER: Thank you. Would you be
2 willing to take questions.

3 MS. DEVINE: Certainly.

4 MS. SPIELER: Richard.

5 MR. MOBERLY: Thank you for that, Ms.
6 Devine. I had a quick question on your third
7 proposal, which was the authority to close the
8 investigation. So just to make sure I understand
9 it, rather than -- what you're saying is, the way
10 I understand it now, for many of those laws,
11 after the time period has passed, the
12 whistleblower could withdraw their complaint and
13 go to federal district court, let's say under
14 Sarbanes-Oxley, and what your proposal would be
15 is that the investigation would end and it could
16 go to an administrative law judge. Is that
17 accurate?

18 MS. DEVINE: Our concern -- thank you for
19 requesting clarification. It's needed. Our
20 concern, at this time, is that even beyond the
21 stated time frame that an investigation is
22 supposed to be completed, it continues to remain

1 open, in some cases for years, and the
2 whistleblower is required to then wait for it to
3 be closed or completed before they can begin the
4 next process of their hearing. So we'd like to
5 allow -- we'd like to request that the DWPP is
6 able to, when requested by the complainant, the
7 whistleblower, request that the, request that
8 the, in this case, the investigation be closed,
9 so that they can continue to proceed with a
10 hearing.

11 MR. MOBERLY: With an administrative
12 hearing?

13 MS. DEVINE: With an administrative
14 hearing, or whatever, in this case, is designated
15 under the statute.

16 MR. MOBERLY: Okay. Thank you.

17 MS. SPIELER: So I assume that doesn't
18 apply to 11(c) cases, that recommendation.

19 MS. DEVINE: In this case, it would apply
20 to any statute where there was an allocated time
21 line for an investigation to take place --

22 MS. SPIELER: And somewhere to go

1 thereafter?

2 MS. DEVINE: And then, if there is
3 somewhere indicated, for them to go there after,
4 within that statute, it would be applicable.

5 MS. SPIELER: Okay.

6 MS. DEVINE: And, of course, each statute
7 is, depends on the language within that statute.

8 MS. SPIELER: Of course. I actually
9 would like to ask a question. The DWPP is a
10 relatively new organization within OSHA and
11 within the Department of Labor, and was formed, I
12 think, and as was this Advisory Committee, in
13 part, because the department and the Assistant
14 Secretary shared the concerns that you've raised
15 about the historical treatment of whistleblower
16 cases.

17 So I'm wondering the extent to which you
18 have studied very recent changes that have been
19 put into effect, say, in the last year, and
20 whether that has had any effect on what you're
21 seeing out there, in terms of the ability of
22 OSHA, in the regions, to respond to complaints?

1 MS. DEVINE: We have been tracking
2 developments and initiatives by the DWPP, and a
3 lot of our recommendations are merely to
4 reinforce the efforts by the DWPP and not to
5 supersede them, by any means, or to imply that
6 efforts are not being made at the top. But
7 certain structural reforms, we feel, are needed,
8 and concrete, tangible changes as recommended in
9 our statement would only facilitate, we believe,
10 the efforts from the DWPP throughout the last
11 year.

12 MS. SPIELER: Thank you. I might say
13 that if you, as you continued to monitor, and if
14 you see trends that either represent improvements
15 or don't, I think this committee and the staff of
16 the DWPP would be very interested in seeing your
17 results. Are there other questions or comments
18 for Ms. Devine? Thank you very much for coming.

19 MS. DEVINE: Thank you.

20 MS. SPIELER: Is John Pajak in the room?
21 I'm not sure how to pronounce it. No. Is there
22 anyone else here who would like to offer public

1 comments to the committee.

2 MR. ZUCKERMAN: Yeah. Very quick.

3 MS. SPIELER: Okay. Why don't you come
4 forward and identify yourself.

5 MR. ZUCKERMAN: I'll keep to about 1
6 minutes and we'll see if I succeed. My name is
7 Jason Zuckerman and I represent a lot of
8 whistleblowers, and that's what I have done,
9 since basically I got out of law school, and I
10 just want to highlight just how big of a problem
11 there is of lack of resources. I worked on a lot
12 of cases under prior political leadership of the
13 Department of Labor, and I would argue there were
14 people there who went out of their way to
15 undermine these laws.

16 I think we had an ARB there that went out
17 of their way to rewrite these laws to create new
18 obstacles that were really not part of these
19 laws, that were completely contrary to the plain
20 meaning. We have a great ARB now that is
21 applying the plain meaning of these laws, and is
22 willing to look at the history of these laws, and

1 where we have them, and we have great people at
2 the highest levels of OSHA, and I've seen a huge,
3 huge improvement of how the claims are handled.
4 But I hate having to tell clients that you could
5 be at OSHA for years. That's just absolutely
6 absurd.

7 And I think it would be a very good idea
8 to have that option, where the employee would be
9 able to ask for the work to end at OSHA, to have
10 opportunity to go to the OALJ, but I hear from
11 all the ALJs that I interact with that they have
12 more work than they've ever had. I think it
13 would be very helpful for this committee to make
14 a clear public statement that there is a huge,
15 huge problem here.

16 There was a GAO report a few years ago
17 about the lack of resources, and it's only gotten
18 worse. There is just a real need to have a lot
19 more resources at the OALJ level and at the OSHA
20 level, and hopefully that will happen very soon.
21 I mean, my point only is under the prior
22 political leadership of the Department of Labor,

1 this area, I think, was a very low priority, and
2 I would argue that there were people who really
3 went out of their way to undermine these laws.
4 Now it's the opposite.

5 There is a will here, and I think people
6 at all levels of OSHA very, very much want to do
7 their job, but they just do not have the
8 resources, and that's a big problem, and I would
9 argue it's a problem not only for employees but
10 also for employers, because I don't think any
11 employer would want to have a claim open for
12 years and years and years. It's just not helpful
13 to anyone.

14 So I would urge that it be a higher
15 priority for this group to really highlight the
16 utter lack of resources in these programs.

17 MS. SPIELER: Thank you, Mr. Zuckerman.
18 Just before you go, are there any questions or
19 comments for Mr. Zuckerman? Thank you. Are
20 there any additional people in the room?

21 MR. KEATING: I'm sorry. Could I just
22 make one observation, or actually it's a question

1 for Anthony. I litigate, like Jason does, these
2 cases around the country, and I have found, in my
3 experience, that there is somewhat marked
4 difference in the efficiency and alacrity with
5 which cases are investigated, based on where
6 geographically you are, and I'm not going to go
7 say this region is better than the other, but do
8 you find that there just happens to be a bigger
9 backlog in certain regions, that there are an
10 inadequate amount of investigators in certain
11 regions, or is there anything that might explain
12 why a case might take 4 months in one region but
13 a year and a half in another?

14 MR. ROSA: Well, the issue with the
15 backlog has been an experience in all ten
16 regions. Some of the regions have, in the past
17 couple of years, worked on, I guess what we call
18 initiatives to reduce the inventory, and focusing
19 on the backlog, and I just wanted to clarify the
20 difference between what's in inventory in
21 backlog. Backlog, for purposes of what we track
22 in OSHA, as you know we've been looking at the

1 completed, and we're moving along with trying to
2 create that consistent level of approach with all
3 the regions, and with lessons learned, best
4 practices that we've learned, on what worked in
5 one area that we can probably implement
6 nationwide. We're working quite heavily and
7 diligently in that area.

8 MS. SPIELER: Richard?

9 MR. MOBERLY: Just to follow up on that,
10 so what I hear you saying is that there's some
11 analysis at the quantitative level of cases by
12 region, and I was wondering, we just heard
13 anecdotally, and I think in Ms. Devine's
14 testimony, that there might be some qualitative
15 difference in the standards being applied by
16 various regions, and I didn't know if OSHA had
17 ever taken a look or tried to examine whether
18 different regions reach different outcomes in
19 similar type cases?

20 MR. ROSA: Well, what we're trying to do
21 now is working on our regional audit program.
22 We're trying to create the consistencies. I

1 think that -- I mean, I, personally, am coming
2 from one particular region. I'm new to the
3 Directorate at a national level, so to give you
4 some experience at a national level is a bit
5 premature at the time for me to address that.
6 But I know, in my particular area, we were trying
7 to work on creating some consistency within my
8 own group that I was at.

9 So to have that information, to give it
10 to you right now, on a national scale, it's
11 premature. I'll be looking into that data.

12 MS. SPIELER: Jon.

13 MR. BROCK: Just a quick comment on that.
14 This issue of backlogs and the kickout kind of
15 activity, which I think this is part of the
16 earlier recommendation, those kinds of things
17 seem to come up a lot when we hear from people
18 outside, and I wonder if there isn't some, just
19 as you briefed us yesterday on the progress and
20 so on, if we shouldn't do that regularly, or look
21 at some of these issues and try to give you
22 useful information and feedback, as well as get

1 some, because those seem to just come up all the
2 time. And I certainly know that there's a large
3 effort in the agency to address that, but it
4 seems particularly challenging, and the answer
5 doesn't seem obvious. But there's a lot of good
6 brains here, and out there, who deal with these
7 issues from different roles, that might have some
8 valuable perspective.

9 MS. SPIELER: I was actually going to
10 suggest that, in our sort of next steps, thinking
11 that we think a little bit about the kind of
12 information and issues that have come up that
13 might be particularly -- it might be particularly
14 useful for Anthony, you and the rest of the
15 staff, to think about bringing information to us
16 at our next meeting or the next couple of
17 meetings, in which we could then decide whether
18 there are ways that the committee can be helpful
19 to the department in moving ahead on these kinds
20 of questions.

21 GAP has just suggested an external audit,
22 and I'm thinking that, that my personal view of

1 that is that may be a little premature, given
2 that OSHA hasn't had a chance to do its own audit
3 of these questions yet, partly because of the
4 many issues that DWPP has had to deal with since
5 its inception. But I do think it's something
6 that needs to really be looked at, with great
7 seriousness, and thinking about Mr. Mitchell's
8 talk yesterday about the problems he perceived
9 and what was happening in the Caterpillar
10 complaints certainly highlights a concern.

11 In thinking about that, it seems to me we
12 really have to be careful to think about the
13 11(c) complaints separately from the other
14 complaints, a small number, even in their
15 aggregate, than the 11(c) complaints, because
16 11(c) complaints have nowhere else to go, and the
17 complainants in these other matters, particularly
18 if they are represented, may be looking for
19 efficiency over thoroughness.

20 In the 11(c) complaints, thoroughness is
21 incredibly important, in view of the fact that
22 there is nowhere else to go, and I would urge, as

1 you think about it and we talk about future
2 presentations, but also your work on a day-to-day
3 basis, that you keep in mind that time limits in
4 one situation have a very different impact than
5 time limits in the other situations. Nancy?

6 MS. LESSIN: Two things. Did we ask
7 yesterday for a breakout of the statistics by
8 region?

9 MS. SPIELER: We're going to get to that.

10 MS. LESSIN: And secondly, there may be
11 some people coming at 12:45, thinking that that
12 was the time for --

13 MS. SPIELER: No. We'll definitely ask
14 for additional public comment. But we are in a
15 kind of interesting situation, because -- well,
16 Marcia couldn't be here this morning, and that
17 was certainly deeply unexpected and sad, since
18 she's at a family member's funeral this morning,
19 and we really can't move ahead with the
20 Transportation Work Group report without her
21 being part of the presentation of the
22 recommendation.

1 That said, I'm wondering -- and I look to
2 the committee for guidance here -- rather than
3 just breaking until 12:45, at this point, for an
4 hour and a half, I actually thought maybe we
5 should move to the --

6 MR. ROSA: I just wanted to make one
7 comment to also address to what Greg Keating was
8 saying about the backlog or the lapse time. For
9 many years, or for the past recent years, as OSHA
10 has been getting additional staff for the
11 whistleblower program, partly, in great part, in
12 response to the reports from the GAP and OIG,
13 what's happened also is that we have various
14 structure that were out there in the regions.

15 We had a structure where we had our size.
16 We had a structure that some investigators
17 reported to area directors or assistant area
18 directors, and we're trying now to get into a
19 structure where we have the ARA and one or two or
20 possibly three teams with supervisors. But even
21 in those structures that we had just one RSI, we
22 were hiring additional investigators but we were

1 not hiring another supervisor, and the ratio that
2 was existing between the employee and supervisor
3 was so high that the supervisor did not have
4 enough time to review the files, so a lot of the
5 files were backlogged at the supervisor's desk.

6 We're realizing that investigations in
7 whistleblowers are very complex cases that
8 require a lot of extensive review by the
9 supervisor, so we're trying to have a ratio that
10 is more reasonable, and that's why, the process
11 we're working on now, with the new ARA structure
12 in all the regions, is to have, in general, two
13 teams that would have a lower ratio than a 10-to-
14 1 or a 12-to-1, or at least something like a 6-
15 or a 7-to-1. It will be much more manageable and
16 it will definitely help on the lapse time,
17 overall, in getting these responses and getting
18 the cases completed. So I just wanted to clarify
19 that.

20 MR. FRUMIN: Yeah. I just wanted to
21 react. We've seen a move, which, fortunately,
22 hasn't been carried out, to merge regional

1 offices at OSHA, and to eliminate some of the
2 levels of supervision, in general, not just on
3 whistleblower cases, which is of great concern to
4 me, because it would be happening at the same
5 time that the agency is trying to move a number
6 of enforcement initiatives, and perhaps
7 initiatives in other areas outside of
8 enforcement, where we, as outside stakeholders,
9 over and over again, say we want to see
10 consistency in application.

11 And it seems like lunacy to me that at a
12 time when the agency is going through a very
13 dynamic period, and implementing new policies,
14 and doing things that are long overdue, and so
15 forth, you would eliminate the very people and
16 stretch out the workloads of the very people who
17 are supposed to provide that kind of consistency.

18 So I want to sort of register that
19 concern, support the idea that, as you just said,
20 making sure that there's adequate levels of
21 supervision, and reiterate the recommendation
22 from our work group, some months ago, calling for

1 what Greg and others have mentioned, which is to
2 make sure that the whistleblower enforcement
3 effort does enhance the consistency of its work
4 across regions, including, obviously, adequate
5 supervision, if needed, to get that done.

6 MS. SPIELER: I, of course, would add
7 validity to consistency in the goal.

8 MR. ROSA: Absolutely.

9 MR. FRUMIN: Well, me too.

10 MS. SPIELER: Yeah. Go ahead.

11 MR. KEATING: I would just make one other
12 follow-up point to something I talked about
13 earlier, and Billie responded to, which is if the
14 changes that we recommended unanimously be
15 strongly considered to 11(c) go forward, and
16 there is a change in the standard, and there is
17 now a change whereby they can pursue the track to
18 an administrative law judge, I mean, I think what
19 Jason testified to and what I've seen in my
20 practice does reflect that with a lightened
21 standard, and with multiple avenues of redress
22 comes a need for either more resources or more

1 streamlined and uniform practices.

2 And I would basically take a little
3 exception to what Billie said earlier, that there
4 are all these other statutes and they have a
5 lower standard and nothing has gotten clogged up.
6 Well, I think they have gotten clogged up, and I
7 think we have to be a little careful about
8 recommending that there be -- and we all know the
9 statistics are there, that 11(c) is, by far, the
10 most complaints, by far. So if we're going to
11 adopt a new standard, and we're going to create
12 new remedies, and there aren't adequate resources
13 to begin with, we're buying a problem.

14 MS. SPIELER: Yeah. I think there's no
15 question about that, and that should the 11(c)
16 statute be amended to be more consistent with the
17 other modern statutes, that there will have to be
18 a lot of thinking that goes on, in terms of the
19 way the department functions and what the
20 resources are that the department needs in order
21 to function appropriately, not only at the OSHA
22 level but also at the Office of the ALJs and at

1 the ARB level. But I personally doubt that
2 that's going to happen any time soon. Yes,
3 absolutely.

4 Let me make a -- I'm going to share some
5 thoughts with you about what I've been thinking
6 about, about next steps, which I was going to do
7 at four o'clock this afternoon but we have this
8 little gap here. There are some cross-cutting
9 issues that have come up, and one of them,
10 obviously, this morning, was this question of
11 training, which we had both training internal to
12 OSHA and external education and training.

13 On the other hand, we currently have
14 three working subcommittees, and despite some
15 expectation that at least one of them would
16 sunset, and although we haven't heard from one of
17 them yet, it is my understanding that all three
18 will continue beyond this meeting. I personally
19 don't think that we have the resources to add a
20 fourth subcommittee. There would be more
21 duplication of people on multiple subcommittees.
22 People are already putting in quite a lot of

1 time.

2 So I'm going to suggest, in terms of
3 subcommittee work -- but I'd like to hear your
4 thoughts about this -- that at least for the next
5 6 months, until our next full committee meeting,
6 we continue with the subcommittees that we
7 currently have, and then assess, at our next
8 committee meeting, at which the full committee
9 will have gone through a reappointment process
10 and we will sort of be able to plan a 2-year time
11 period, assuming I'm still chair -- we'll work on
12 that. And so that would be my suggestion with
13 regard to subcommittees.

14 That said, I think there are a few issues
15 that have come up in the course of our
16 conversations that we might be assisted by having
17 full conversations about in our next committee
18 meeting, as springboards for thinking about
19 future work. Among those, I think, that I've
20 heard, would be training -- what is, in fact
21 currently going on in terms of training of people
22 working within the apparatus of OSHA to do the

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1 investigations on complaints, but also eternal
2 education efforts that OSHA undertakes to educate
3 employers, unions, and employees, and other
4 potential stakeholders about the issues that this
5 committee addresses.

6 The second would be to take more of a
7 look at the data, and I think that there may be
8 requests, in particular, that come from the 11(c)
9 committee, about the data, and I know that you've
10 been working with Eric in the Transportation Work
11 Group on data, but I do think there are a number
12 of issues that have come up this time that are
13 worthy of full committee discussion, and I would
14 invite the committee members to chime in, but,
15 clearly, one of them would be a region-by-region
16 analysis of the data that you're keeping on IMIS,
17 with regard to retaliation, and I would want to
18 look at it over time, to see whether there have
19 been changes in trends, both nationally and
20 within the regions.

21 But my guess is that there could be a
22 number of other areas that committee members will

1 think of today, or over the next couple of
2 months, that we could discuss whether the
3 department has the capacity to put together some
4 reports on that issue.

5 So those are two areas that I think have
6 been very clear in the meeting today, that could
7 be the subject of significant conversation at our
8 next meeting.

9 An area that we haven't discussed as a
10 full committee, but certainly Mr. Mitchell's
11 testimony yesterday served as an alarm for, is
12 that the 19 people who did not have union
13 protection at the Caterpillar plant, who filed
14 11(c) complaints, and all of whom had their 11(c)
15 complaints dismissed, were essentially non-
16 permanent employees.

17 I know that OSHA has recently issued a
18 specific directive with regard to what I think
19 OSHA is calling temporary workers, although I
20 think that it's a little bit of a misnomer, since
21 often these people are in permanent jobs through
22 staffing agencies. And I believe you've set up

1 some kind of advisory committee, or OSHA has,
2 with regard to temporary workers? Is that true?

3 MR. ROSA: I don't know.

4 MS. SPIELER: Okay. I'm wondering
5 whether, for our next meeting, we couldn't
6 explore a little bit, and I would urge the Best
7 Practices committee to give some thought to this
8 question, and I don't think it's been part of the
9 thinking, that in these triangulated work
10 relationships, that there are particular problems
11 that come up with regard to retaliatory
12 practices, and if those issues aren't being
13 addressed elsewhere in OSHA, through a separate
14 advisory committee or task force, or through the
15 current directive, it may be something that we,
16 as a committee, would like to discuss at some
17 point, in terms of what are the special issues
18 that are addressed by people in these situations,
19 because it not only has a huge effect on
20 reporting, which is incredibly confusing in that
21 domain, but also, I think, in terms of thinking
22 through how anti-retaliation provisions and work

1 is a separate kind of issue that is pretty
2 complex.

3 The fourth area, but it kind of relates
4 to both training and to data, I think, are the
5 questions of the thoroughness of the
6 investigations that are being done. That issue
7 was also raised by Mr. Mitchell yesterday. It's
8 kind of the other side of the coin of the concern
9 that Jason and Greg are raising, about the
10 efficiency of the investigation, but what is
11 being done at OSHA to make sure that adequate
12 investigations are being done in the field.

13 Is Mr. Mitchell's experience unusual or
14 is it something that is of concern, and what is
15 the oversight of the investigatory process to
16 focus not only on efficiency but also on the
17 validity of the investigations for both side, so
18 that the validity of the investigation that would
19 show up frivolous complaints and the validity of
20 the investigation that would show up legitimate
21 complaints, where an explanation has been offered
22 by the employer that's worthy of further review.

1 So those are the issues that I've heard
2 coming out of these discussions so far. There
3 may be others, but I'd like to open it up for
4 committee discussion, and after the break, when
5 we come back, we can reoffer to open the floor
6 for public comments, since that's what was on the
7 agenda. I understand the Secretary will not be
8 stopping by, but we will reopen for public
9 comment if there are additional people who have
10 come, and we will have a report from the
11 Transportation Work Group, and then we will
12 return to this conversation before we adjourn.
13 But we do have some time right now. Dave?

14 MR. EHERTS: Okay. I've got two other
15 fast areas. One is collaboration. I've heard
16 some great stories about where collaboration has
17 really increased the efficiency and the
18 thoroughness of the process. For example, I
19 understand that the 11(c) investigators aren't
20 necessarily trained in safety and health, and,
21 therefore, whenever an implication comes up of a
22 safety or health violation, I think it would be

1 standard work that they always went to a field
2 office and asked for support in that area. So
3 collaboration is one area that I think is
4 important.

5 And I'd like to reintroduce a topic that
6 I think was tamped down at the beginning, and
7 that's looking at the process within OSHA, to
8 make sure it's as efficient and effective as
9 possible. In business, we use something called
10 value stream mapping to look at processes, and I
11 think before we ask -- which I think we certainly
12 will -- for increased resources, we ought to make
13 sure the resources we have are being used
14 efficiently.

15 MS. SPIELER: Nancy?

16 MS. LESSIN: I just wanted to -- to your
17 fourth piece that was about the thoroughness of
18 investigation and oversight of that, I want to
19 make sure that the appeals process, to the degree
20 that there is an appeals process --

21 MS. SPIELER: Are you talking about 11(c)
22 now?

1 MS. LESSIN: Yeah. So, it's called
2 something else and not appeals --

3 MS. SPIELER: Administrative Review.

4 MS. LESSIN: Thank you, administrative
5 review, that that be on our radar to look at
6 everything from the beginning through that, and
7 what's working and what isn't, and what ideas we
8 might have. So I just want that to be clear, and
9 I also want to flag that there is this issue with
10 the NRC, at some point before 4:30, that I want
11 to address.

12 MS. SPIELER: Richard.

13 MR. MOBERLY: So, I was intrigued
14 yesterday by the NRC's policy statement about
15 environments for raising concerns, and since I'm
16 not on the Best Practices committee, I think they
17 ought to address that, and take a look at whether
18 --

19 MR. BROCK: Would you like to be a
20 member?

21 MS. SPIELER: Billie knows the NRC
22 process and is on that subcommittee.

1 MR. MOBERLY: But to the extent OSHA can
2 do issue similar policy statements and use
3 similar means to get them considered carefully
4 and seriously by employers, once those best
5 practices are out there, that might be a good
6 indicator of, or least might be some indication
7 for employers to look at, on whether they have
8 the right environment for raising concerns, and
9 whether OSHA can do anything beyond just asking
10 them.

11 MS. SPIELER: Christine.

12 MS. DOUGHERTY: Kind of following up on
13 what Ava had said about looking at, for the 11(c)
14 committee, the states, and we're talking about
15 federal and the federal program, but half of the
16 11(c) cases in this country are done by the
17 individual states, and that I've not been able to
18 get really good statistics on what the state
19 numbers are.

20 As I said earlier, the FAME reports are
21 really sketchy from region to region, as to
22 what's looked at in individual states. I think

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1 there needs to be maybe even some guidance given
2 to OSHA, in terms of if they're going to do these
3 audits of the states, your audit teams need to be
4 consistent, they need to be looking at the same
5 types of things, from state to state, have the
6 same kind of standards, the same kind of review.

7 From what I'm reading in these reports,
8 there might be a half a paragraph -- well, they
9 opened five cases and they closed five cases.
10 What is that? I mean, I can't get any read for
11 that program, or what they're doing. And I don't
12 even know the numbers. How many OSHA cases are
13 states doing, compared to what federal OSHA is
14 doing?

15 So I think we need to really look at that
16 and give some guidance to states on what an
17 investigation should look like, and where are we
18 going with those investigations on a state-by-
19 state basis.

20 MS. SPIELER: Nancy.

21 MS. LESSIN: I just wanted to follow up
22 with what Richard talked about with the NRC, and

1 just raise an issue that my understand -- and
2 please correct me if I'm wrong -- I think the NRC
3 carries an incredible sledgehammer. Behind all
4 of the nice letters that it can issue, it can
5 shut a facility down.

6 OSHA does not have that sledgehammer, and
7 so the issue of what NRC does with the nice
8 letters, there's something backing that up that
9 may have facilities listen to it in a different
10 way than if you have rules that give no rights to
11 shut anything down, and if you order abatement
12 and a facility challenges that, that you can go
13 through appeal after appeal and there's nothing
14 that can compel anything to happen.

15 So I think, while listening to the NRC
16 about how they do things is interesting, I think
17 it's also important to understand why they may
18 get action with their nice letters whereas
19 another agency in a different situation may not.

20 MS. SPIELER: I'm not sure they would
21 characterize them as nice letters, but mean
22 letters.

1 MS. LESSIN: I think we heard that.
2 Didn't they say nice letters?

3 MS. SPIELER: Mean. Mean letters.

4 MS. LESSIN: Mean letters. Okay.

5 MS. SPIELER: Christine, did you have
6 your hand up again.

7 MS. DOUGHERTY: No.

8 MS. SPIELER: Okay. Yeah, Eric.

9 MR. FRUMIN: So, we are, the
10 Transportation Work Group is invested pretty
11 heavily in looking at the whistleblower case
12 enforcement data, and we're on the verge of
13 getting it. Thank you very much to the staff who
14 are preparing it. Initially, it not only covers
15 the transportation statutes but, obviously,
16 similar data exists for other cases, including
17 11(c).

18 So I definitely think we need some very
19 serious consideration to how we, ourselves, as a
20 committee, evaluate this new source of
21 information, and also what sorts of analyses we
22 want to recommend to OSHA itself. I know that's

1 going to take some work, because I know how much
2 work the OSHA people are putting into it, just
3 preparing it. So I don't want to minimize the
4 burden that I'm advocating we take on here, but
5 just noting that it's important cross-cutting and
6 substantial.

7 MS. SPIELER: Eric, how would you suggest
8 we go forward on the issue of the data?

9 MR. FRUMIN: Well, first we do some pilot
10 analyses with the first round of data that we're
11 going to be getting on the transport cases. I
12 mean, the really new piece here is two-fold. One
13 is the allegation information, which Anthony
14 talked about yesterday, when we presented the
15 IMIS formatting to us. That is, it tells us
16 whatever is in the file about the circumstances
17 that the complainant says gave rise to the
18 retaliation in the first place. "I refuse to
19 drive this truck, it was broken, and they fired
20 me," or "I reported an injury when I was getting
21 on the locomotive, and they fired me," or
22 whatever. You know. There's coded information

1 in there. I think there's like six different
2 codes, but we can learn a lot more from that.

3 But these are thousands of cases, just in
4 3 years, thousands of them, and that's not even
5 11(c). You can look at the crude numbers they
6 gave us, just for 1 or 2 years, the number of
7 cases, and 11(c) is much more.

8 So I think we need to do a little
9 piloting, some pilot analyses, just so we can
10 sort of get our feet wet, and on a couple of key
11 issues that are of interest to whoever cares
12 enough to want to do this work, and take it from
13 there and see. Once we have a format for both
14 receiving the data from the Labor Department and
15 also for doing the analysis, who ever is good at
16 Excel and Access, or some other data for
17 searching text fields in spreadsheets, maybe
18 we'll have a format down and we can go beyond
19 that.

20 One interesting case, of course, the
21 question is how does any or all of this relate to
22 the compliance information that OSHA has for

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1 enforcement of standards, and also in the
2 transportation world, how does it relate to the
3 information that the transportation safety
4 agencies, FMCSA is a good example, has on these
5 same employers, regarding the oversight of their
6 operations, or FRA? I'm not really competent on
7 that question, and we definitely need some help
8 with that.

9 I'm hoping that we can get some help from
10 MSHA, also in how they have evaluated their own
11 retaliation data, since they do a lot of both
12 retaliation enforcement and analysis, but that's
13 a little more speculative, at this point.

14 MS. SPIELER: So it sounds to me as if the
15 Transportation Work Group is going to be
16 receiving data soon, and is in the best position
17 to probably take the first cut at this. My
18 suspicion is that this will be a conversation in
19 the 11(c) work group, as well, and since Dave is
20 a trained epidemiologist and he knows how to look
21 at data, it will be a productive conversation in
22 that committee, as well.

1 So I'm going to suggest, with regard to
2 the data, Anthony, you and I can be in touch, but
3 that we work this through the subcommittees
4 initially, to see what the best way to do this
5 is, and there may emerge some overarching
6 questions about the data that would be worth
7 discussing, just as a general conversation in the
8 next committee meeting, but I don't think we know
9 that yet. That would be my suggestion on how to
10 proceed on the data issues.

11 There are several issues that Nancy and
12 Christine have brought up that are specifically
13 focused on 11(c). Obviously, certainly, any
14 state plan issues may be relevant, in the end, to
15 some of the best practices, but they're
16 essentially only within the 11(c) structure, and
17 so I would suggest that those concerns be taken
18 up by the subcommittee and prioritized however
19 the subcommittee chooses to do that, and first I
20 get a transcript and then minutes of the meeting,
21 but we'll try to pull those out in time for the
22 subcommittee to be able to consider them in a

1 timely manner, because it takes quite a while to
2 get a full transcript, and then minutes from the
3 department. So it seems to me that would be the
4 best way to proceed on that. Nancy?

5 MS. LESSIN: I also wanted the statutory
6 information from the various statutes that gave
7 workers the right to refuse to do a job, because
8 when I look at the data that I think has that
9 broken out as a category, a work refusal, I also
10 want to understand the statute and what it really
11 means.

12 MS. SPIELER: So the other safety
13 statutes?

14 MS. LESSIN: And if there's any other
15 statute that has somebody -- you know, if it's
16 food safety --

17 MS. SPIELER: Well, the Mine Act
18 definitely has provisions on that.

19 MR. ROSA: Well, what we did yesterday is
20 we actually have copies of about three or four
21 samples of the statutes for the Transportation
22 Work Group. We did make copies of those, but

1 they're all available on our website. They're
2 all there. All the statutes are there, on our
3 website, so you can pull up all the rest. But we
4 just printed about three or four.

5 MS. SPIELER: Yes. But, for example, the
6 Mine Act is not on the OSHA website.

7 MR. ROSA: It's not on OSHA website.

8 MS. SPIELER: Because, I mean, so there
9 are statutes that aren't under the OSHA umbrella
10 that be applicable to the provisions, but that's
11 helpful.

12 MS. GARDE: And a lot of that, under the
13 statutes that I work for, it isn't in the statute
14 but it is in the interpretation of the statute.

15 MS. SPIELER: So it's not in the OSHA Act
16 either.

17 MS. GARDE: So it's in the ALJ decisions
18 that are interpreting something as including a
19 refusal to work.

20 MS. SPIELER: So I could put my winter
21 quarter RA on this project, because it doesn't
22 seem as if it should be the project of the DWPP,

1 given their other priorities. And so I would
2 suggest that I try to do that.

3 MS. LESSIN: Excellent.

4 MS. SPIELER: She is interested in
5 whistleblower issues, so why not this one?

6 MR. KEATING: Just one follow-up to
7 something I said this morning. As I noted this
8 morning, I did find Mr. Mitchell's testimony very
9 compelling. I do think, though, that the
10 employer or maybe even a nonprofit that
11 represents employers, like National Association
12 of Manufacturing, or Mercer, or someone who also
13 tries to follow and gather data that relates to
14 safety reporting, should either be able to
15 present, at the next full committee, or, at a
16 minimum, in a work group subcommittee, so that we
17 get voice.

18 And related to that, I do have a little
19 bit of concern with sort of digesting, slicing,
20 and dicing data, because maybe it's just the
21 trial lawyer in me, but you could put up an
22 expert to take all the data and present it for

1 the plaintiff, and then you hear the same expert,
2 with the same data, for the defendant, and you
3 hear night and day. And it all sounds great,
4 because -- there's a reason I went into the law.
5 I'm not good with math and numbers.

6 So I just we need to at least make sure
7 we have a balanced approach.

8 MS. SPIELER: Yeah, no. I actually
9 totally agree with that and would be happy to
10 work with you and Ken and Dave and staff on
11 putting together one or more people to come, I
12 think, to the full committee to talk about some
13 of these issues. Perhaps someone from ORC, and
14 then -- but, in any event, I think that's a great
15 idea.

16 I'm cautious about data, but I also think
17 it can just, sort of looking at it can be
18 instructive without turning people loose on it
19 who are being paid to come up with one side of
20 the story or the other. Because I don't think
21 our goal, in looking at the data, is to prove
22 something but rather to see whether there are

1 instructive things in it that would help us
2 advise the department, and particularly DWPP, on
3 things that we see that may merit further
4 investigation within OSHA, or, ultimately, should
5 that decision be made, by some kind of external
6 audit. But that we would certainly not be
7 drawing ultimate conclusions from these data,
8 which I think have problems within them anyway.

9 And so, I think caution is entirely
10 appropriate, and we should be mindful of that
11 caution as we go forward.

12 MR. EHERTS: If I can just -- just two
13 points about raised concerns, I think. First we
14 start with the limitations of the data, so I'd
15 ask Anthony to go through, and I know I picked
16 some of them up yesterday when we were looking at
17 IMIS, about what we know and what we don't.
18 There's some sealed information. When things get
19 kicked out, we don't know the facts, so let's be
20 clear what we know and what we don't know.

21 Second, I think that computers are very
22 good at demonstrating correlations but almost

1 never cause and effect. Cause and effect takes a
2 person, and I think that's where Greg's concerns
3 come in. A correlation can be there, but whether
4 there's cause and effect between the two things
5 really takes interpretation by a person's mind,
6 and we'll have to be very careful about that.

7 MS. SPIELER: Yes, Absolutely always, I
8 think. It's now, according to my watch, anyway,
9 11:45. I would suggest we break for an hour now,
10 that you continue to think about this
11 conversation that we're having. When we come
12 back, we'll take additional public comments, move
13 to the Transportation Work Group report, and then
14 close out the meeting with any final thoughts
15 about next steps for the committee. Enjoy lunch.

16 [Lunch break taken from 11:45 a.m. to
17 12:58 p.m.]

18 MS. SPIELER: Why don't we come to order?
19 We jumped the gun on the public comment period
20 before lunch, but I understand that some people
21 who appropriately thought that 12:45 was the time
22 for public comments may have come, and so I'm

1 going to reopen the public comment period, so
2 that anyone else who has come can come forward
3 and offer comments or a statement to the
4 committee.

5 I want to reiterate what I said this
6 morning, which is that the committee really is
7 not in a position to listen to any concerns about
8 individual cases, particularly pending cases, and
9 if there's any issue related to a pending case,
10 it should be discussed private with the staff.
11 We are interested in hearing about policy level
12 of systems-wide issues that the committee should
13 be interested in.

14 If you could identify yourself and tell
15 us what organization you're with, if you're with
16 one, and then give us your statement.

17 MR. LEGRANDE: Thank you. My name is
18 David LeGrande. I'm Director of Occupational
19 Safety and Health, with the Communications
20 Workers of America. Our interest, in particular,
21 is specific to many hundreds of thousands of
22 workers we represent, in two particular

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1 -- I'm not afraid to mention employers' names --
2 in the collective bargaining relationship,
3 Verizon actually had a more onerous policy than
4 did AT&T. They also initiated their policy a
5 year earlier, in 2010, as opposed to AT&T's in
6 2011. And the work of the union and the support
7 of the Federal Government in these cases has led
8 Verizon to wisely set aside, in many areas of the
9 country, what we think is their illegal and
10 onerous policy.

11 I want to thank, without getting into
12 details regarding the Cleveland case, thank the
13 Department of Labor for allowing the union to
14 provide intervener status in that case. I
15 understand it's the first time this has taken
16 place, according to the Cleveland folks, in the
17 Solicitor's Office there in Cleveland, that is.

18 This is an extremely important issue, and
19 the work that you do is, again, appreciated.
20 Illegal activity on the part of the employer
21 really needs to be stopped. Without going into a
22 speech, they bend their opportunities beyond the

1 law whenever they can, and in support of the
2 Federal Government in that regard is important.

3 I should mention, in the cases that we
4 were involved in, there has been a significant
5 coordination within the Solicitor's Office,
6 within the Department of Labor, although nothing
7 is perfect. So we would advocate that you pass
8 the message on to the solicitors and the
9 Secretary of Labor, as well, that coordination
10 among the various regional offices and area
11 offices really needs to be improved.

12 In the case -- again, not mentioning
13 details -- the Cleveland case, which is comprised
14 of 13 individual claimants, had to move forward
15 before the other regional offices were willing to
16 move forward, kind of a mystery to us, and other
17 offices meaning Chicago, Kansas City, and, most
18 recently, Atlanta, as well. We're trying to get
19 as many cases filed in as many parts of the
20 country as we possibly can, and not just for the
21 purpose of improving working conditions for our
22 members, but making the Department of Labor's job

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1 a little bit easier, and also ending these
2 practices on the part of involved employers.

3 I do want to mention another issue that I
4 would ask you to step into, that we've identified
5 as a major issue, particularly in one state.
6 It's kind of ironic. I grew up in Cleveland, so
7 I'm really proud of the Cleveland case, but I
8 lived in California for several years, and I'm
9 really unhappy with what's going on in
10 California.

11 We have several cases, violations of
12 11(c), that have been filed against the two major
13 telecommunications companies in California, AT&T
14 and Verizon. Under California law, CAL OSHA does
15 not handle 11(c) cases. They refer them to the
16 Division of Labor Standards Enforcement, and if
17 there is an injury involved, Workers'
18 Compensation. That sounds like it makes total
19 sense, I guess.

20 The problem is when workers go into DLSE,
21 the Division of Labor Standards Enforcement, to
22 file a case, they're told to go to Workers' Comp,

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1 appreciate your attention, again, to these
2 issues, and would appreciate your attention, to
3 the degree that you can, focus on an individual
4 case, looking at the case that's moving through
5 the Solicitor's Office in Cleveland, Ohio. It
6 appears, knock on wood, that there may be a very
7 positive outcome to that case. If that is
8 actually what happens, that can have a
9 significant positive effect on how 11(c) cases
10 are handled in the private sector in the U.S.,
11 and with that I appreciate your time.

12 MS. SPIELER: Would you be willing to
13 take questions, if there are any?

14 MR. LEGRANDE: Oh, certainly.

15 MS. SPIELER: Thank you.

16 MR. EHERTS: I've got a quick one. Can
17 you give us a few more details on the offending
18 policy at AT&T and Verizon?

19 MR. LEGRANDE: Well, let me focus on
20 AT&T, because that's where the active cases are.
21 Verizon, again, withdrew the implementation of
22 their policy when the union requested, on the

1 East Coast, in this part of the country,
2 requested information through the collective
3 bargaining agreement, and identified that Verizon
4 was in violation of other OSHA standards, so we
5 sort of cut a deal, you might say, and that is
6 you correct those other standards but you also do
7 not implement this policy. It's not always easy
8 with a company like Verizon.

9 With AT&T, the policy very specifically
10 says that if an employee suffers a work-related
11 injury, by definition it is preventable, and
12 because it's preventable, by definition it's the
13 employee's fault, and the employee should be
14 issued discipline. Now, as in the collective
15 bargaining agreement, it's a step process. You
16 don't get fired immediately, just as you wouldn't
17 get fired through the grievance process
18 immediately, unless it was an egregious act, of
19 course. You are initially warned. Then you are
20 suspended for a day. If it's an issue where they
21 see some problems with that particular employee's
22 employment record, they will increase the

1 suspension to 5 days.

2 MR. EHERTS: Okay. Just to be specific,
3 it is because they broke a rule and were injured,
4 or is because they were just injured?

5 MR. LEGRANDE: It's because they were
6 injured. I'll give you a specific example, if I
7 may. In a case in Michigan, we had a member who
8 was climbing a ladder, performing his work above
9 ground, and the work rule the company has is you
10 first investigate the general work area to
11 identify any potential hazards that might be out
12 there.

13 In this particular case, the ladder was
14 not far, and really, there was no choice where
15 the worker could place the ladder, but it wasn't
16 far from a bush, and the bush was up about three
17 rungs high on the ladder. The worker looked at
18 the bush, saw nothing unusual with the bush.
19 When he came down the ladder he was stung by a
20 bee, and that created an allergic reaction. He
21 went to see company medical. He was suspended
22 for 3 days because this was an egregious act. He

1 did not identify the fact that there was a bee's
2 nest in the bush, and, thus, this was a
3 preventable injury, and because it was a
4 preventable injury, he was subject to discipline.
5 The union grieved the case.

6 Interesting in this particular case,
7 Michigan, which is a state plan, MIOSHA, Michigan
8 OSHA, ruled in favor of the claimant and the
9 union, our Grand Rapids local, and the company,
10 of course, contested the citation because that's
11 what companies do, because they can. The
12 administrative law judge ruled in favor of the
13 claimant and the union, and then subsequently
14 ruled, in three additional cases, against the
15 company -- totally different circumstances, not
16 bee sting cases, outside injuries, or injuries
17 that occurred outside.

18 And then, of significance in the Michigan
19 case, we had 18 recorded cases where grievances
20 have been filed and complaints with Michigan OSHA
21 had been filed. All of those cases were then
22 settled to the union's satisfaction and the

1 workers' satisfaction. But, again, it's 2014
2 now. It took almost 3 years, 2-1/2 years for
3 those cases to be settled, and the duress that
4 the employees are put under is significant during
5 that period of time.

6 So, again, we appreciate your support in
7 eliminating this illegal behavior on the part of
8 employers, or at least working with various
9 parties to do that.

10 MS. SPIELER: It has definitely been a
11 focus of many of our conversations, those kinds
12 of practices. Other questions or comments for
13 Mr. LeGrande? Thank you very much.

14 MR. LEGRANDE: Thank you. I appreciate
15 it.

16 MS. SPIELER: Is there anyone else here
17 who would like to offer public comments? And
18 before we move forward, is there anyone here who
19 is observing and hasn't previously identified him
20 or herself, and, in particular, you need to make
21 sure that you sign up on the observer list.

22 MR. INCLIMA: Hi. Rick Inclima, Director

1 of Safety, Brotherhood of Maintenance of Way
2 Employees Division, Teamsters Rail Conference.

3 MR. DEANGELES: Richard De Angeles,
4 OSHA's Office of Communications.

5 MR. MOKADAM: Dinkar Mokadam, Association
6 of Flight Attendants, TWA.

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

9 MR. SIRBAK: Joe Sirbak, Buchanan,
10 Ingersoll & Rooney.

11 MS. SPIELER: Thank you. Okay. So we
12 are still waiting for Marcia Narine to call in,
13 but Eric has indicated that he can go ahead with
14 the report from the Transportation Work Group.
15 I'd like to invite the members of the work group
16 who aren't members of the committee to come up
17 and sit at this table. I know that Larry and
18 Rick are here. Is there anyone else? So, Rob,
19 if could just help them get comfortable.

20 Just as a little background, while people
21 are settling in, the Transportation Work Group
22 has external experts who have been appointed to

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1 be members of the work group, although they are
2 not members of the full Advisory Committee, in
3 part, or maybe in total, because the full
4 committee did not have representation from the
5 transportation industry, and that was felt to be
6 a significant gap in the initial appointment of
7 the committee.

8 The work group has been working with Eric
9 Frumin, a labor representative, as chair, and
10 Marcia Narine as the second representative from
11 this committee -- Marcia represents management --
12 with representatives from both management and
13 labor in the rail industry, and as I think Eric
14 will tell us, will move from the rail industry to
15 other components of the transportation industries
16 in the future.

17 But I'm going to turn this over to Eric,
18 with the same request that I made this morning,
19 to start with any recommendations, and after the
20 committee has considered the recommendations, to
21 discuss any other issues that have come up in the
22 work group, and then future plans.

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1 And Marcia will be calling in, in
2 probably -- would it be better to do it in a
3 different order?

4 ATTENDEE: It's going to be sooner. I
5 just checked my notes.

6 MS. SPIELER: Do you want to start with
7 the recommendation?

8 MR. FRUMIN: I'd like to do the report.

9 MS. SPIELER: Okay. We're actually going
10 to wait on the recommendation until Marcia can
11 phone in, and so Eric is going to start with the
12 report from the committee, the issues that have
13 been considered, and then once Marcia calls in,
14 we'll be able to move to the recommendations.

15 So, there is a written report from the
16 committee that was revised yesterday, and it will
17 be Exhibit 11 to the committee minutes.

18 [Exhibit 11 is entered into the record.]

19 MR. FRUMIN: And there are two other
20 documents, as well, that the report references,
21 the recommendations and also the minutes of the
22 August 20th meeting.

1 MS. SPIELER: Okay. So why don't we make
2 those now components of the record. The
3 recommendation would be Exhibit 12 and the report
4 from the -- what's the third one?

5 MR. FRUMIN: The minutes.

6 MS. SPIELER: The minutes would be
7 Exhibit 13.

8 [Exhibits 12 and 13 entered into the
9 record.]

10 MR. FRUMIN: Okay. So the work group
11 includes myself as a labor rep and chair; Marcia
12 Narine as a management rep, who actually did come
13 from the trucking sector, so she is familiar with
14 one part of the transportation industry and that
15 aspect of it. And then we had three labor reps,
16 two of whom are here, from rail. We've got Rick
17 Inclima and Larry Mann, and then we had a third
18 labor rep from trucking, Mike Manley, from the
19 Teamsters. On the management side we had two
20 reps from rail, who may join us. I don't know.
21 Is Connie here?

22 MS. SMITH: She left.

1 MR. FRUMIN: Oh. She had to leave.
2 Connie Valkan from Canadian National, or Illinois
3 Central, and Charles Shewmake from BNSF,
4 Burlington Northern, with a shout-out to
5 Charles's colleague, Andrea Hyatt, who is here,
6 who was often helpful in some of the minutes, as
7 well. And, on a couple of occasions, the lawyer
8 who works with Rick Inclima, Harry Zanville,
9 stepped in for Rick, in a couple of discussions,
10 as well, when Rick couldn't participate. But, in
11 general, that was it from rail.

12 And then from trucking we had, on the
13 management side, Todd Jadin, a senior official at
14 Schneider National, which is one of the largest
15 trucking companies in the country. We also had
16 two people from the air transport world, Rob
17 DeLucia from the Airline for America, and Ed
18 Watt, formerly with the Transportation Workers
19 Union, now with the ATU, Amalgamated Transit
20 Union. And I'll say a bit about the air
21 transport issue, as well.

22 So it's a little unusual group, compared

1 to the other work groups, but I think it's fair
2 to say the group very much had its feet on the
3 ground, in terms of the issues we were
4 discussing, and I want to thank the members of
5 it, again, as I've done repeatedly, for their
6 hard work and willingness to cooperate with each
7 other in getting to agreement.

8 So, there's a written report. I'm going
9 to summarize some of it, not try to read it
10 verbatim, and add a few comments about it, and
11 then, in the course of that, discuss the
12 recommendation that we're presenting at this
13 meeting, for your consideration, which we'll vote
14 on, but also discuss another recommendation on
15 which there was no agreement, and some other
16 issues.

17 So, as I've said, we have more people on
18 the work group from the rail sector, so no big
19 surprise, the rail issues got a lot of attention.
20 Also, the rail sector has been one of the most
21 active areas of focus for OSHA in enforcement on
22 whistleblower issues. So, that's perhaps why

1 there was more participation, you know, more
2 people on it. In any event, we spent a lot of
3 time talking about rail industry issues.

4 Another reason why the rail sector
5 dominated was -- and I'll get to this more later,
6 but -- one of the critical linkages that we
7 needed to make, as a group, was to have active
8 involvement from the FMCSA in order to
9 knowledgeable discuss the trucking issues and the
10 Surface Transportation Act enforcement. And
11 originally we had, as a member of this committee,
12 Jack Van Steenburg, the Chief Safety Officer for
13 FMCSA, but he wasn't able to continue in that
14 role, so we lost a critical part of that
15 discussion, and only recently do we now have
16 someone from FMCSA, so we're sort of back in the
17 saddle on the trucking issues. I'll say more
18 about that later. But it wasn't only because of
19 the vibrancy of their work in rail. It was also
20 because of the need to fill this gap in FMCSA's
21 involvement.

22 Anyway, so, just as a reminder, we early

1 on discussed two issues and brought forth
2 recommendations, I think, for the March meeting,
3 on consistency in application and transparency,
4 and was glad that we could contribute to the
5 committee's work on that, and so that's a matter
6 of record. We figured, with that kind of
7 success, we would easily achieve agreement on
8 some other issues.

9 And, at the time, back in March, we were
10 already working on two questions -- training,
11 particularly employer-initiated internal
12 voluntary training, and also incentives, and the
13 incentives that I'm talking about here are
14 incentives for employers to do training, based
15 upon consideration that such training programs
16 would receive in enforcement efforts. So if you
17 do training, you get a break in enforcement
18 effort, and Greg already mentioned this morning
19 an example of how that might work.

20 Well, when those proposals were provided
21 initially, they were kind of joined at the hip.
22 You could see why, right? But it became clear

1 that there was not going to be a consensus -- oh,
2 sorry.

3 [Incoming call.]

4 MR. SWICK: Whistleblower Protection
5 Advisory Committee.

6 MS. NARINE: Hi. This Marcia Narine.

7 MR. SWICK: Hi, Marcia. We're on the
8 record and live. Can you hear everything okay?

9 MS. NARINE: I can, but I'm going to put
10 the phone on mute because I'm in a loud place.

11 MR. SWICK: Okay.

12 MR. FRUMIN: Hi, Marcia. Eric here. So
13 I'm just starting our report. Thank you for
14 making the effort to join us, and, again, our
15 sympathies to you and your family.

16 And, for your information, I've given
17 some of the background and I'm now going into the
18 discussion that the work group had on the
19 training and incentives issue. Incidentally,
20 Marcia, we're joined here by Rick Inclima and
21 Larry Mann. It may be that some of the other
22 members of the work group will show up before we

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1 are done with our report, but Rick and Larry are
2 here, as well.

3 In any case, so we had a lot of
4 difficulty getting to this question of how we
5 could decouple the training and incentives
6 issues, and one of the tricky things -- and, for
7 a while, it looked like we simply couldn't. It
8 even became difficult to accept the use of the
9 word "effective." We had spent a lot of time on
10 the word "effective" to discuss training.

11 And it came down to the same basic
12 questions -- well, what do you mean by effective,
13 and how will that play out in enforcement? It
14 was as with training, in general, particularly on
15 the management side, there was consistent
16 concern, what are the implications of this for
17 enforcement -- which is a very natural concern,
18 understandable, but it became an obstacle to
19 reaching agreement on a recommendation regarding
20 training, period. And when I'm talking about
21 training, I'm referring here largely to the
22 internal voluntary training.

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1 This started off as a discussion in the
2 rail sector. It's important to note here that
3 FRA does not require employers to provide
4 training on retaliation issues. That's like a
5 serious gap. It may have something to do with
6 the nature of the problems in the rail sector,
7 but, in any case, the importance of voluntary
8 training cannot be overemphasized, given the lack
9 of any requirement on employers in that sector,
10 under FRA rules, to do training on this issue.

11 So, that became a real stumbling block,
12 and in August, we actually got to the point of
13 taking votes on several different versions of the
14 training proposal. It's reflected in the minutes
15 that you have, and we ended up with a sharp party
16 line vote, labor on one side, management on the
17 other, and we could not proceed with a
18 recommendation. So the draft report that I
19 prepared last week, that you might have had a
20 chance to read, said, basically, sorry, we don't
21 have a recommendation. We have a party line
22 dispute. Can't help you out.

1 And I think it's fair to say that the
2 difficulty of wrestling with this definition of
3 "effective" was, in part, related to the
4 enforcement implications, but it also arises
5 from, I think, a genuine concern about what
6 constitutes effective training, and that concern
7 was shared by everybody in the group. The
8 stumbling block was, do we need a definition in
9 order to say something about the need for
10 effective training and the value of effective
11 training?

12 And for quite a while, I think it's fair
13 to say -- others, correct me if I'm wrong -- that
14 the management folks were not willing to accept a
15 recommendation from this group calling for
16 effective training without knowing, essentially,
17 what they were getting themselves into.
18 Understandably, could this turn up in some
19 enforcement setting?

20 So, we couldn't get to agreement. Well,
21 finally, yesterday, with a little bit of
22 additional text about the value of training, and

1 noting the importance of it, that disagreement
2 melted away, and so we're able to present this
3 recommendation today, and, again, the
4 recommendation supports the idea of voluntary
5 internal training by employers. We realize, of
6 course, it's not limited to rail. It's not
7 limited to transportation. This group's
8 expertise is in the world of transportation, for
9 most of them, and we're not in a position to
10 really understand, I think, how this would play
11 out in a lot of other sectors, because our feet
12 are on the ground in the transportation world,
13 but it's clear to everybody that the
14 recommendation has merit outside the world of
15 transportation and rail and trucking and Safe
16 Container Act, or AIR21, or whatever.

17 So, as a result, we came with a
18 recommendation which calls not only for OSHA
19 itself to promote internal training by preparing
20 materials itself, which would be made available
21 to employers, but also, for this group, for this
22 Advisory Committee, to assist OSHA in doing that

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1 by, yes, Emily, convening yet another work group
2 to help develop parameters and content for OSHA's
3 so-called sample or model training materials. So
4 we envision this group, the WPAC, offering its
5 assistance in a more concrete form to OSHA, with
6 the design of materials that OSHA would
7 eventually distribute on its own letterhead, so
8 to speak.

9 MS. NARINE: It's hard to hear you. Can
10 you talk a little bit louder?

11 MR. FRUMIN: Sorry. Is that any better?

12 MS. NARINE: That's much better.

13 MR. FRUMIN: Okay. Sorry. So we,
14 ourselves, want to help OSHA develop the
15 materials that OSHA would use to promote
16 voluntary employer training in the rail sector,
17 and we said statute-specific training. What kind
18 of training materials would be helpful to
19 employers in rail? In trucking? In general
20 industry construction, et cetera, covered by
21 OSHA, et cetera, recognizing that some employers
22 really need that. So I'll present that

1 recommendation in a minute.

2 On the incentives issue, it was clear
3 that there was a lot of support from management
4 for the use of training programs, and so there
5 was no question that they wanted to support the
6 use of those programs, in part, in relationship
7 to enforcement.

8 But it was -- how do I characterize it
9 here? -- it was based upon a pretty generalized
10 description of what kind of training would
11 qualify for more lenient treatment, whereas, on
12 the labor side, they wanted a lot more details
13 about what kinds of training programs would
14 qualify, and I mentioned a few of them in the
15 report.

16 The effectiveness of the training --
17 whoops, there's the E word again. What's the
18 employer's prior history in retaliation? Not
19 just was there a training program, but what was
20 the history at that employer, on these
21 enforcement cases? And, finally, even
22 identifying the need to identify the managers or

1 the supervisors who were involved in the
2 enforcement case, so that you would need a much
3 more robust evaluation of the training activity
4 in order for that training activity to qualify as
5 grounds for some kind of leniency.

6 So you could see there was a really sharp
7 difference of view between the labor and
8 management folks on what kinds of training would
9 be suitable for use by OSHA in enforcement, and,
10 therefore, serve as an effective incentive. So
11 that gap we couldn't cross, and so there's no
12 recommendation on incentives, but I wanted to let
13 you know about that, in the spirit of presenting
14 the different versions of it, so you're aware of
15 it. A different kind of incentive issue has been
16 discussed here at length on reporting issues, but
17 we also talk about enforcement issues here.

18 So, I'd like to briefly report on -- just
19 provide the rest. Well, I could -- let's see.
20 Maybe we should just deal with the training
21 recommendation now and then I'll come back to the
22 rest of the report, because Marcia is on the

1 line. Okay.

2 So, first I want to ask Marcia or the
3 other members of the work group, Larry or Rick,
4 if there's anything else you would like to add to
5 what I've said here. No. Rick and Larry don't.
6 Marcia? Anything else you'd like to add?

7 MS. NARINE: I think you're -- I don't
8 have anything to add. I'll just be there to
9 answer questions if there's anything.

10 MR. FRUMIN: Okay. I just wanted to take
11 this opportunity to also thank Marcia publicly
12 for her involvement in the group. She's been
13 very clear as a management rep what her vantage
14 point was, but I think she also brought a very
15 fresh and honest look at the issues repeatedly,
16 and always demanding a very high standard of
17 management performance in her expectations for
18 what constitutes adequate management performance
19 -- and I don't say that often. So I just want to
20 express that appreciation, Marcia --

21 MS. NARINE: Thank you very much.

22 MR. FRUMIN: -- for your contribution to

1 the group, and willingness to work hard, and,
2 again, even to the point of calling in today.

3 Okay. So that's the report, and now
4 let's get on to the recommendation, if I could
5 find my copy of it here. Here we go. Got it.
6 So, it's very short. I'll just read it over.

7 The Transportation Working Group
8 recommends that the Advisory Committee consider
9 the usefulness of recommending to OSHA that it,
10 meaning OSHA, develop and offer statute-specific
11 periodic training to transportation and other
12 industries subject to whistleblower laws. The
13 working group recognizes that effective internal
14 training on the topic of whistleblower laws may
15 assist company managers, supervisor, and
16 employees in understanding their rights and
17 responsibilities under the whistleblower laws,
18 and prevent retaliation.

19 The working group recognizes that some
20 employers, especially small to mid-sized
21 employers, may lack the resources to design their
22 own training programs. And, finally, the working

1 group recommends that WPAC assign a working group
2 the task of recommending threshold parameters and
3 content for such training.

4 So, I'll move that. Does anyone want to
5 second it?

6 MS. SPIELER: It doesn't need to be.

7 MR. FRUMIN: Oh, it doesn't need a
8 second.

9 MS. SPIELER: It comes from a --

10 MR. FRUMIN: It comes from the group.
11 Okay. Yeah, Marcia and I. So this report that
12 I'm summarizing is one that Marcia and I, you
13 know, developed together.

14 MS. SPIELER: Okay. So we have before us
15 a recommendation that comes, and, as we decided
16 before, since it comes with the subcommittee's
17 recommendation, it essentially comes moved and
18 seconded, and the floor is open for discussion of
19 the recommendation. Nancy.

20 MS. LESSIN: So, I have a couple of
21 question, but just a couple of things going into
22 this that are troubling, and this is just very

1 specific to rail right now. In 2008, when the
2 congressional hearing was held on the
3 underreporting of injuries and illnesses, there
4 was only one industry that was called out in that
5 report for its terrible record in retaliating
6 against workers for reporting injuries and
7 illnesses, and that was rail. So that was 2008.

8 In 2014, I went through the National
9 Press Releases that came out on whistleblower,
10 that dealt with actions against employers for
11 retaliation. There were 17 of them, and a third
12 were from rail. So we have this, you know, many
13 years and rail keeps showing up as very, very
14 problematic.

15 So, in light of that, the larger question
16 is, what's going on? How does training fit into
17 this? And I think that training is a component.
18 As I read this, this talked about the working
19 group recognizes that some employers, especially
20 small and mid-sized, may lack resources, but, you
21 know, some of those that keep showing up as being
22 called out for the retaliation are Metro North,

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1 BNSF, Union Pacific, Union Pacific again. These
2 aren't folks that are lacking resources.

3 So, some of the questions that I have --
4 is anyone in rail doing training, and it is
5 making any difference at all, or is there no
6 training anywhere? I think I'd like to know a
7 little bit more about, you know, has training
8 been tried and is it working somewhere? Is
9 training the problem?

10 I'd also like to know -- this is asking
11 for OSHA to develop statute-specific training --
12 are there other things in the, you know,
13 anywhere. Does OSHA develop training that goes
14 to employers, and who does it, and what do we
15 know about it? And I know there's a whole
16 section of training coming out of OSHA. That's
17 the Susan Harwood grant, so it's not OSHA that
18 develops it. They sent it out. So unions, and
19 employers, and academic institutions can, with
20 OSHA-funded money, develop training, and it has
21 to be approved by OSHA. So is that something to
22 look at?

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1 And then, what about if employers -- this
2 seems to say the working group would look at
3 encouraging OSHA to develop this training for
4 employers. Is, then, the hope that the employers
5 will train employees? What's the link between
6 those things? So that's just some of my initial
7 thoughts.

8 MR. FRUMIN: Okay. So, on the first
9 question -- so let me just repeat the three
10 questions. What's happening in the rail
11 industry? Does OSHA provide training materials,
12 broadly, and in different versions, training or
13 training materials? And, third, is the training
14 of employees envisioned in this recommendation?
15 Did I more or less get that right?

16 MS. LESSIN: Close enough.

17 MR. FRUMIN: Okay. So on the first
18 issue, I'm going to defer to the people from the
19 rail industry who are here, to answer that
20 question in a second, because I could repeat what
21 I've heard from them or the management
22 counterparts, but I'll leave it to Rick and Larry

1 to respond to that. And there was certainly
2 robust discussion about the training practices in
3 the rail industry, so no shortage of information
4 on that score. Opinions, as well, but
5 information, no less.

6 On the second issue, does OSHA provide
7 training and training materials, OSHA does a lot
8 of training, not the least of which is to its own
9 staff or to the staff of state-plan inspectors,
10 and the OSHA Training Institute is a big
11 operation. They've got years of experience. I
12 think the OSHA website is one of the most heavily
13 visited websites in the entire Federal
14 Government, and there's a huge amount of training
15 material on their website, so everything from
16 brick-and-mortar, warm-blooded people teaching
17 classes to a fact sheet about how to operate a
18 forklift, and everything in between, it's out
19 there.

20 Some of it is done internally. The E-
21 tools, I know that some people at OSHA have
22 worked on, very hard, for many years. Some of it

1 is fabulous stuff. You know, it just is very
2 sophisticated work. So I don't think there's any
3 lack of space within OSHA to expect that OSHA
4 could prepare these materials.

5 Do they need the benefit of people like
6 ourselves, from the outside, to help them with
7 it? Yes. Do they often use private sector
8 materials in their training, with a stamp of
9 approval, that they vet? Absolutely, whether
10 it's grant-funded or from the Institute for
11 Forklift Safety, or whatever. Yeah, so they do.

12 So I think we're operating in a realm
13 that OSHA feels comfortable with by asking them
14 to do this, and we should encourage them to do
15 it, but we should give them the benefit of our
16 experience. What the hell. We're an advisory
17 committee of people outside the agency.

18 On the third one, yes, we definitely
19 envisioned these materials being used by
20 employers to train not only managers and
21 supervisors but also employees, and it references
22 employee awareness, as well, and that was the

1 spirit of the discussion.

2 So those would be my immediate answers.
3 Before I ask Larry or Rick to comment on the
4 first question, Marcia, did you have anything you
5 wanted to add?

6 So, Marcia, if you're talking, you're on
7 mute still.

8 MS. NARINE: No. I wasn't talking. I
9 could partially hear what you were saying,
10 although I heard the questions clearly, so I
11 didn't want to repeat anything. I know that you
12 mentioned the fact that we had talked in the
13 report about [inaudible, bad phone connection].

14 MR. FRUMIN: Hang on a second. Marcia,
15 the volume was down a little low. Could you just
16 repeat what you said? You didn't know if we
17 mentioned what?

18 MS. NARINE: I didn't know if you had
19 mentioned the issue of the Department of Labor
20 working with industry and labor to develop the
21 training.

22 MR. FRUMIN: Yes, I did, and I --

1 MS. NARINE: [Inaudible, bad phone
2 connection] because it was a little hard to hear
3 you. I heard her questions very clearly, but I
4 couldn't hear your responses clearly.

5 MR. FRUMIN: I apologize. Yes. I did
6 say that that was our intent, which was for
7 stakeholders like ourselves to be involved in
8 that training, in developing the training, so
9 that's the intent of the recommendation. That's
10 what our report says, but that's what we
11 intended.

12 MS. NARINE: And I don't know if Charles
13 is there --

14 MR. FRUMIN: He's not, no.

15 MS. NARINE: -- and he could talk about
16 the training that BNSF does, but he talked about
17 the fact that they do extensive training, but we
18 are aware that other smaller companies may not be
19 able to do it, or don't have the money, or don't
20 have the people to do it.

21 MR. FRUMIN: Right. He's not here, but
22 I'm asking Rick and Larry to say something about

1 the practices in the rail industry that they're
2 familiar with. Was that it, Marcia? Did you
3 have anything else you wanted to add?

4 MS. NARINE: No. I don't have anything
5 else to add.

6 MR. FRUMIN: Okay. Thanks. Okay, Rick
7 or Larry, could one of you comment on the
8 practices in the industry?

9 MR. INCLIMA: Thank you, Eric. You know,
10 I mean, Nancy's absolutely right. The railroad
11 industry has a lot to grow into, to come,
12 frankly, into the 21st century on this stuff.
13 Some of the underlying problems, if you talk to
14 management, they'll say, well, it's the Federal
15 Employers Liability Act, which is, essentially,
16 our Workman's' Comp, and they hold that up as a
17 shield, whether it's a safety regulation,
18 whistleblower, or anything else, that that's the
19 big problem.

20 It really isn't. A railroad and an
21 injured employee can sit down in a room and
22 settle that case. If it was 10 lost work days,

1 they can make them whole, or split the baby,
2 whatever, but it takes two sides to make the
3 deal. Under FELA, if you can't make the
4 settlement, you know, you go to court, and Larry
5 can talk more about that.

6 So that's one aspect that seems to be an
7 impediment, I think somewhat of a false
8 impediment, none the less. Then you have these
9 programs and policies in place where managers --
10 promotional opportunities, bonuses, their stature
11 within the company -- is tied to injury rates.
12 And so if a supervisor, a front-line supervisor
13 has X amount of injuries, he basically gets
14 called on the carpet. He can be demoted. He can
15 be fired.

16 So that supervisor has, frankly, a lot of
17 personal incentives to make sure that accidents
18 don't occur, but when they do occur, they don't
19 get reported, because he's going to be kind of on
20 a -- you know, they're keeping a tally sheet, and
21 if Bob's got more injuries on his territory than
22 Jim, well, guess what? Bob falls out of favor

1 and Bob may be out of a job. So there are some
2 built-in incentives there that more or less lead
3 to harassment and retaliation for injuries.

4 So that's kind of what's going on with
5 question number one, and, Larry, I don't know if
6 you wanted to elaborate on that a little bit.

7 MR. MANN: A couple of points. There is
8 also peer pressure. If I'm going to make a few
9 bucks in my group, I'm going to put a little
10 pressure on my coworker who may be injured, not
11 to report. So it's not only the manager putting
12 pressure on. It's peer pressure, as well. I'm
13 talking about the incentive policies, and many
14 railroads have formal policies. It's written
15 policies on this issue.

16 And we also have to look at the rail
17 industry culture for 100 years. In almost every
18 case, up until the whistleblower law, every time
19 an employee was injured there would be sanctions
20 imposed against that employee. Virtually 100
21 percent of the time there would be a counter-
22 claim by the industry that there was a violation

1 of some rule, whether it was valid or invalid.
2 But that was the culture they've been dealing
3 with, up until present time.

4 The issue of the incentive program is one
5 that I'm particularly concerned about, and I'm
6 going to move forward in the subcommittee to
7 bring specific examples to the working group, for
8 us to address, and maybe bring to the full
9 committee for one of two actions -- individual
10 complaint, or, I'm interested in a declaratory
11 judgment to get this issue resolved for once --
12 is an incentive program of violation of
13 whistleblower, and I think it particularly is so
14 when you have a financial interest in not
15 reporting.

16 I also want to address one other point.
17 The reason that the issue of those small to mid-
18 sized employers was inserted here is that we have
19 approximately 560 small railroads. We're talking
20 about mom-and-pop railroads in the country, and
21 some of them are ten employees. So it's going to
22 be difficult for even those managers on these

1 small railroads to even know about whistleblower.
2 It's not clear to us how we can handle that. Of
3 course, they have an association. There's a
4 Short Line Association, nationally. Whether or
5 not we could encourage them to do some training
6 would be helpful, of course.

7 So those are my comments on that issue.

8 MR. FRUMIN: Okay. I would ask Rick or
9 Larry, if you could, just to characterize,
10 briefly, how you see the training efforts within
11 the railroads now on the issue of retaliation or
12 preventing retaliation.

13 MR. INCLIMA: Yeah. That's a great
14 question. The big railroads say they're doing
15 training, and I'm sure they are, but they're not
16 training our members. They're training managers,
17 and, quite frankly, I think they're training
18 managers to learn how to fire a person, or
19 discipline a person, or put him in an adverse
20 position without getting hooked under the FRSA.
21 That's why this recommendation is broad.

22 It says managers, supervisors, and

1 employees, because, quite frankly, if you trained
2 everybody in the same room -- I don't expect, in
3 my lifetime, that would happen, but if you did
4 that, then everything is on the table, and
5 everybody hears what's being said. So that's
6 what's going on.

7 We think that training is lacking. Maybe
8 they're doing training, but perhaps not for the
9 right reasons, and that needs to be fixed. Part
10 of that effort, or part of the solution is for us
11 to provide training to the workers, and the
12 Brotherhood of Maintenance of Way Employees
13 Division has formal, 20109 FRSA whistleblower
14 training programs, and pretty much we do them
15 around the country, and we educate our members.
16 I'll be in upstate New York next week, doing a
17 program.

18 And the idea here is to let them
19 understand their rights and responsibilities.
20 Know what the law provides and know what the law
21 doesn't provide, which is equally important,
22 because we don't want to burden OSHA, the labor

1 reps, or, frankly, anybody else with frivolous
2 cases, frivolous claims. So we try to be very
3 focused on, this is what it is and this is what
4 it's not. Frankly, I think if management did the
5 same thing, we'd be in a much better place.

6 MR. FRUMIN: Larry?

7 MR. MANN: I will comment about the
8 operating crews. I conducted seminars for the
9 operating crews at their regional meetings, their
10 conventions, but we're talking about maybe 500
11 employees coming to a regional meeting or a
12 convention. There are 40,000 operating
13 employees. It doesn't get down to the rank and
14 file, and, frankly, labor doesn't know how to get
15 that accomplished.

16 If you have local meetings, because of
17 the work schedules of railroad workers, 24 hours
18 a day, they are 12-hour shifts, you rarely get
19 more than -- I'm talking about operating crews
20 now -- you rarely get more than 10 or 12
21 employees at a local meeting. That's just the
22 nature of the beast, because of their work

1 schedules, and they need their rest.

2 So we, in the operating part of the rail
3 industry, have not been able to adequately train.

4 MR. FRUMIN: All right. Other questions?

5 MS. SPIELER: So are there other questions
6 or discussions about the recommendation. Nancy?

7 MS. LESSIN: So, one of the things that
8 it occurs to me, when we look at problems,
9 training is definitely an important piece, but
10 it's not where you start. You try to eliminate
11 the problem or the hazard. In our 11(c) work
12 group, we came up with a recommendation going
13 further than the Fairfax Memo, saying that the
14 practices, policies, and programs that are
15 retaliatory should be taken on by OSHA as part of
16 what they do to eliminate retaliation. It occurs
17 to me that the Fairfax Memo doesn't just cover
18 11(c). It covers FRSA.

19 So one of my questions -- and I may
20 already know the answer to this, but I hope I
21 don't -- is, could you take that recommendation
22 that we have, about the Fairfax Memo --

1 MS. SPIELER: I'm going to interrupt you.
2 I'm sorry, but right now we have a motion on the
3 floor that's specific, that we're discussing,
4 which is a recommendation with regard to
5 training, and we haven't opened up the
6 conversation yet on the Transportation Work Group
7 for the other matters that they might consider,
8 and I think we owe it to the group, which worked
9 very hard yesterday on this specific
10 recommendation, for the Advisory Committee to
11 consider it, and decide what we want to do with
12 it, and we may very well have additional thoughts
13 about what the work group should do, but we can
14 move on to those next, as a matter of procedure.

15 MS. LESSIN: I was just going to link
16 that we had a lot about education in that, and I
17 was making the link with this training and
18 education piece, if it could be expanded to
19 include that education.

20 MS. SPIELER: Did you want to offer an
21 amendment to this recommendation that's been
22 made?

1 MS. LESSIN: I think I just wanted to
2 raise the query for the Transportation group, and
3 I think they may know that this isn't going to go
4 anywhere.

5 MS. NARINE: Can you talk a little bit
6 louder, please, or closer to the microphone?
7 Thank you.

8 MR. FRUMIN: So Nancy has raised a
9 question about the scope of this recommendation,
10 particularly in comparison to the earlier
11 recommendation from the 11(c) group. With the
12 11(c) recommendation now having been adopted, our
13 group can certainly look at that. Larry has also
14 focused very much on a future plan of work for
15 the group on the incentive issue, not the
16 incentives as I've described it in my report but
17 the incentives as we've discussed more broadly
18 within the committee.

19 So I think it's safe to say that the
20 question of company policies linking injury
21 reporting to financial incentives and so forth,
22 that's going to get plenty of discussion. I'm

1 trusting Larry to be good to his word on that
2 subject, and we're interested in that, so I'm
3 sure that will happen, but at some future
4 discussion. Richard?

5 MR. MOBERLY: I had a question for the
6 group on the scope of this, because I'm unclear
7 on whether you are suggesting or asking for
8 training to just the transportation group,
9 because you say transportation and other
10 industries, and then you are asking to assign to
11 a working group, so I can imagine if you wanted
12 training for the transportation industry, then
13 your working group ought to do it, or it would be
14 a natural home for it. If you're asking for
15 training writ large, then perhaps it would be a
16 different working group. So I'm just wondering -
17 - I'm not clear which one you mean.

18 MR. FRUMIN: I think -- well, I know we
19 discussed this and we expected that this
20 recommendation would apply broadly and that the
21 involvement of labor, management, and other
22 stakeholders in supporting OSHA's development

1 would be broad, as well. So we were very clear
2 that we believed that this recommendation would
3 not be limited to transportation. It would make
4 sense for it to be cast more broadly, and that
5 the stakeholder involvement would be broader, as
6 a result.

7 MR. MOBERLY: Thanks.

8 MR. FRUMIN: And, therefore, we would
9 need some other group besides ours to be involved
10 in that.

11 MS. SPIELER: I'd like to just point out
12 something about the format of this
13 recommendation, as we think about it. It comes
14 to us as a recommendation to the Advisory
15 Committee to consider the usefulness of a
16 recommendation to OSHA, as opposed to in the form
17 of the Advisory Committee recommends to OSHA. It
18 may be that the consideration of this and the
19 consideration of the creation of a training
20 committee is something that the Advisory
21 Committee can continue to take up, based upon
22 this recommendation, that's different from a

1 recommendation that says to OSHA, do this. I'm
2 not sure whether that's what the work group
3 actually intended, but it does mean that unless
4 we amend the language of the recommendation, it
5 is a recommendation to us as to further action
6 for the Advisory Committee.

7 MR. FRUMIN: Yeah, no. I think you've
8 caught a problem with the formatting. I feel
9 comfortable saying we intended this
10 recommendation to be adopted by the full Advisory
11 Committee as a recommendation to OSHA to take
12 action, i.e., draft training materials for
13 employers to use. So if it doesn't read the way
14 we intended, I apologize. We should have caught
15 it. There were enough drafters in the room to
16 shake a stick at, but, in any case, yes, our
17 intent was that the action by the full WPAC in
18 adopting this would mean that the full committee
19 is speaking to OSHA, saying, yes, OSHA, please
20 develop these materials and we're going to help
21 you by supporting you with drafting them on
22 threshold parameters and content.

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1 MR. MOBERLY: Can we clean up that
2 language, then?

3 MR. FRUMIN: Yeah. Let's clean it up.

4 MS. SPIELER: Yeah, well, so I -- I'm
5 going to read this, but I'm puzzling over the
6 last paragraph. So, it would read, if it is
7 adopted, "The Advisory Committee recommends to
8 OSHA that it develop and offer statute-specific
9 periodic training to transportation and other
10 industries subject to whistleblower laws. The
11 Advisory Committee recognizes that effective
12 internal training on the topic of whistleblower
13 laws may assist company managers, supervisors,
14 and employees in understanding their rights and
15 responsibilities under the whistleblower laws and
16 prevent retaliation."

17 So wherever it says working group, it
18 should say Advisory Committee. So, in the next
19 sentence it would be the, "The Advisory
20 Committee, or WPAC, recognizes that some
21 employers, especially small to mid-sized
22 employers, may lack the resources to design their

1 own training programs."

2 And then I think the last sentence will
3 have to be, "The WPAC will consider the formation
4 of a working group that will be assigned the task
5 of recommending threshold parameters and content
6 for such training."

7 MR. FRUMIN: Yeah. Well, that comports
8 with our intent. It's always good to have
9 another set of eyes, or, in this case, a dozen
10 set of eyes.

11 MR. KEATING: Emily. Could I say
12 something?

13 MS. SPIELER: Yeah, go ahead, Greg, while
14 I'm puzzling over this.

15 MR. KEATING: That's fine. I would just
16 volunteer that rather than, in the last paragraph
17 --

18 MS. SPIELER: Yes. Please rewrite the
19 last paragraph. I'm having trouble with it.

20 MR. KEATING: Well, my only point was,
21 would this not logically fit in the Best
22 Practices Working Group, to try to -- since, as

1 John has noted, we've identified a number of
2 hallmark components of a set of best practices,
3 one of which is training, and we've already spent
4 considerable time talking about what that type of
5 a program would entail? I just think that it
6 might be logical, since we're going to continue
7 to meet over the next 6 months, to focus on a
8 subset of that, which would be the key components
9 of training that OSHA might want to roll out,
10 further into this mission, or this
11 recommendation.

12 MR. FRUMIN: Well, I haven't been part of
13 the Best Practices Working Group so I can't
14 really say how this task compares to the other
15 tasks that you've taken on for yourself. What I
16 can say is that this was narrowly focused on,
17 sort of minimum level training materials for OSHA
18 itself to produce, reflecting the input of labor
19 and management stakeholders, that would then be
20 made available to employers who are not
21 developing their own training. That sounds to me
22 like something less than a "best practice." It

1 sounds to me like kind of a floor. That's why we
2 use the term threshold parameters in content.
3 What are the minimum aspects of training that
4 definitely need to be in there, and how would
5 that be described and conveyed?

6 So, again, I can't really say whether
7 that is at odds or markedly different than what
8 you've discussed in best practices, but I
9 wouldn't describe what we were asking for as
10 "best practice for employers." It was something
11 less than that, sort of like employers who comply
12 with OSHA standards instead of having a full-
13 fledged health and safety program, if I can use a
14 crude analogy.

15 MR. KEATING: Point well taken, Eric, but
16 it goes directly to what I was trying to say
17 earlier this morning, which was that what we've
18 learned in the Best Practices Group is that it's
19 going to depend a lot on your industry, your
20 size. And so I'm just suggesting that I think it
21 might be a logical place, the Best Practices
22 Group, to consider some recommendations for a

1 minimum set of standards designed for small
2 companies that don't have the resources, so OSHA
3 could say, look, this is the kind of floor.

4 MR. FRUMIN: I'm not necessarily
5 objecting. I'm only trying to clarify what I
6 think was the intent of this, compared to my
7 imagination of what you've discussed. But this
8 is really a discussion for us, as a whole, about
9 how to handle this recommendation, should you be
10 so nice as to adopt it. But we're not really
11 describing what working group it should go to.
12 If you want to assign it to that group, fine,
13 another group, if we can handle another group.

14 We didn't want to get into that. We just
15 wanted to say we thought -- our main point about
16 using the term "working group" was, we wanted the
17 idea that labor and management, and potentially
18 other stakeholders, would be involved in drafting
19 this material, because we recognize the value of
20 people with real-world experience providing that
21 assistance to OSHA.

22 MS. LESSIN: So, I think one of the

1 issues about the Best Practices Group is that if
2 this is looking at statute-specific training,
3 there is nobody from rail, in particular, on that
4 group. So however this is done, I think the idea
5 of having members with experience with that
6 statute should be integrated into this. So,
7 again, I don't know that we have to say here
8 where exactly it's going to go, but I would like
9 the concept that those familiar with the statute
10 be part of the process of developing this.

11 MS. SPIELER: Can we leave this a little
12 bit unstated at this point, in terms of where it
13 goes? For example, we could say, "The Advisory
14 Committee will take up the task of recommending
15 threshold parameters and content for such
16 training," period, because it still seems to me
17 that in order for us to really figure out where
18 this belongs and what the best way to go about it
19 is, all of us have to have a better understanding
20 -- which Eric may already have, but I don't think
21 everyone has -- with regard to the kinds of
22 training OSHA currently develops, how it works,

1 who it's directed at, what you think is
2 effective, and what you think isn't.

3 And so, my inclination -- and this
4 reiterates something I said before lunch -- would
5 be to have a presentation next time, from the
6 OSHA staff, with regard to the way you approach
7 training, and maybe not just the DWPP, your
8 department, but OSHA, more generally, how you
9 approach training, how you approach
10 communications to employers, employees, unions,
11 and from that build a strategy for the Advisory
12 Committee to assist in this area of training.

13 I think that's an incredibly important
14 conversation to have. I agree that we need to
15 have stakeholders who are affected by the
16 different statutes in the specific training
17 discussions, or we need to instruct OSHA to do
18 that. I'm not really sure what the right answer
19 is, but I don't think we have enough shared
20 understanding about this at this point, and, as
21 I've already said, I don't think we have the
22 person power to staff a fourth committee, and I

1 think we can see, then, in the next 6 months,
2 what Best Practices is going to do with the
3 training piece, and that would inform that
4 discussion at our next meeting.

5 Would that be acceptable? So if it read,
6 "The Advisory Committee will take up the task of
7 recommending threshold parameters and content for
8 such training," with a period, would that be
9 acceptable, or would the committee want it to say
10 more?

11 MR. FRUMIN: Well, speaking for myself,
12 and I hope Marcia could hear Emily's proposal,
13 that sounds fine to me. It addresses the intent,
14 which is that this Advisory Committee wants to
15 make it its business to be part of what OSHA is
16 going to eventually emerge with, and our goal is
17 to have OSHA develop these draft materials for
18 employers to use. So we want in on the process.
19 That's a good way to do it. That's the intent.

20 Marcia, were you able to hear Emily's
21 proposal, and do you have any comment?

22 MS. NARINE: I heard it, and I don't have

1 any comments or issues with it.

2 MR. FRUMIN: Great. So, amendment
3 accepted, if that's --

4 MS. SPIELER: So further discussion? Do
5 we need to have -- I was going to sort of reread
6 the full proposal, but I'm not sure,
7 procedurally, how to proceed at this point.
8 Should I read it and have someone move and second
9 it, as a substitute proposal?

10 MS. BETTS: It can be an amendment.

11 MS. SPIELER: Okay, but --

12 MS. BETTS: A motion and second to amend
13 the proposal.

14 MS. SPIELER: Okay. I'm not sure I should
15 make it, however.

16 MS. BETTS: No. I don't think you
17 should, but also just before we do that, do you
18 want to change the headings at all. Right now it
19 still says it's a work group, or --

20 MS. SPIELER: Why don't we just say
21 recommendations for -- amended recommendations --
22 Transportation Work Group Amended Recommendations

1 for WPAC. Okay?

2 MS. BETTS: Yes.

3 MS. SPIELER: Okay, and I'm going to read
4 it, and then I'm going to ask for someone to move
5 and second this amended proposal, and then it
6 will be for further discussion and for vote,
7 assuming the amendment is -- oh, wait. The
8 amendment has to be accepted. Oh, God. This is
9 the moment I feared of this meeting.

10 MS. BETTS: I'm most irritating. Sorry,
11 everyone. I actually meant, do you want to
12 change this so that it reflects that this is a
13 work group recommendation to the agency, I mean,
14 a WPAC recommendation to the agency, not a work
15 group recommendation?

16 MS. SPIELER: Yes, yes, yes. It should.

17 MS. BETTS: Okay. So that's --

18 MS. SPIELER: Okay.

19 MS. BETTS: And then you can read it, and
20 once everyone has heard the correct wording, we
21 get a motion and second from other people, not
22 from you.

1 MS. SPIELER: Yeah. Okay.

2 MS. BETTS: And we'll mark that as
3 Exhibit 14.

4 MS. SPIELER: You're never going to be
5 able to read my writing on this.

6 MR. FRUMIN: Hang in there, Marcia.
7 We're almost ready for a --

8 MS. SPIELER: Okay. So the title of this
9 is the "WPAC Recommendation to OSHA Regarding
10 Training." Okay?

11 "The Advisory Committee recommends to
12 OSHA that it develop and offer statute-specific
13 periodic training to transportation and other
14 industries subject to whistleblower laws. The
15 Advisory Committee recognizes that effective
16 internal training on the topic of whistleblower
17 laws may assist company managers, supervisors,
18 and employees in understanding their rights and
19 responsibilities under the whistleblower laws and
20 prevent retaliation.

21 "The Advisory Committee recognizes that
22 some employers, especially small to mid-sized

1 employers, may lack the resources to design their
2 own training programs. The Advisory Committee
3 will take up the task of recommending threshold
4 parameters and content for such training."

5 MR. EHERTS: So moved.

6 MR. KEATING: I second.

7 MS. SPIELER: Moved by Dave Eherts,
8 seconded by Greg Keating. Further discussion?
9 Ready to vote? All those in favor.

10 MS. NARINE: Aye.

11 ATTENDEE: Raise your hand.

12 MS. SPIELER: Eleven. Opposed?

13 MS. NARINE: I am.

14 MS. SPIELER: It passes unanimously, 11
15 ayes, 0 nos, no abstention.

16 MR. FRUMIN: Okay. So, thank you very
17 much for the support. We appreciate it. I now
18 want to report on the other aspects of our
19 group's work.

20 MS. SPIELER: Oh, wait. This has to be
21 entered into the record as Exhibit 14, the
22 amended recommendation from the Transportation

1 Work Group regarding training.

2 [Exhibit 14 entered into the record.]

3 MR. FRUMIN: So now I want to talk very
4 briefly about the trucking industry issues. As I
5 mentioned earlier, one obstacle to a meaningful
6 discussion about trucking industry issues was the
7 absence of an active participation by someone
8 from DOT. Now that OSHA and the FMCSA have their
9 memorandum of understanding in place, we have a
10 senior FMCSA office, Bob Miller, who spoke to us
11 yesterday, with whom we can engage, and that now
12 offers multiple opportunities for the trucking
13 industry reps on the committee, and others on the
14 committee who are familiar with transportation
15 and DOT, as well, to discuss trucking industry
16 issues and enforcement under STAA.

17 So we look forward to doing that, and
18 that had implications for the discussion that
19 I'll mention in a minute, about the future of the
20 working group, because we considered that as a
21 general question.

22 It's worth pointing out, coincidentally,

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1 that, at the same time that we have this new
2 opportunity to engage with FMCSA, we, meaning
3 industry and labor stakeholders as well as OSHA
4 itself, at the same time as that's happening,
5 coincidentally, FMCSA itself is under a directive
6 from the Congress in the MAP-21 law, to address a
7 new area of retaliation prevention by including
8 prohibitions against coercion in all of its new
9 regulations. So, coercion is a form of adverse
10 action that does not yet translate into a person
11 losing something -- losing their job status,
12 losing money, and so forth -- but is,
13 nonetheless, supposed to force an employee to do
14 the wrong thing.

15 And, if you think for a minute about the
16 nature of work in the trucking sector, it's easy
17 to imagine what that coercion sounds like.
18 "Either you get that load to Oshkosh by six
19 o'clock tonight or you're never going to work for
20 us again." You know, they're not firing him,
21 they're not docking him his pay, but he knows
22 he's never going to work again, and given the

1 growth of that kind of contingent employment in
2 the economy, in general, having nothing to do
3 with trucking, whether it's staffing agencies or
4 people with no other recourse, I think the issue
5 of coercion is an important one.

6 Nonetheless, FMCSA has a coercion rule
7 that they publish for public comment to define
8 coercion, so when they prohibited it in their
9 future regulations they have something that
10 everybody knew what they were talking about. The
11 record close for public on that on August 18th,
12 so we expect to see more FMCSA involvement in
13 that. That, of course, is something FMCSA
14 themselves will enforce. It's not an OSHA issue.
15 That's for them to look at.

16 So, we look forward to a rosy future of
17 discussion within the work group on the trucking
18 industry issues, and that was an affirmative
19 commitment from the two trucking industry reps
20 yesterday.

21 The last issue I want to mention that we
22 discussed was -- and I've referred to it several

1 times already -- is the evaluation of OSHA's own
2 enforcement data on whistleblower enforcement,
3 and suffice it to say that with the new
4 allegation information available, it will address
5 a gap in our knowledge that was sorely felt in
6 all of our discussions, really from day one,
7 about the circumstances leading to retaliation
8 cases and the lessons that one could draw from
9 them about, for lack of a better word,
10 predictors, as well as the information about what
11 are appropriate responses.

12 And this cut across a number of industry
13 sectors. For instance, in rail, as Rick already
14 mentioned, there is a concern about the frequency
15 of injury reporting cases and worker compensation
16 cases, Federal Employer Liability Act cases
17 overlapping with whistleblower cases, which,
18 given the practices regarding retaliation for
19 injuries shouldn't surprise anybody, but there
20 are a substantial number of cases that have
21 nothing to do with injuries but are still
22 retaliation for people either refusing hazardous

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1 duty or whatever else, reporting some other
2 problem.

3 And with trucking, again, there's a whole
4 range of reasons why the allegation information
5 is important. For instance, one of the concerns
6 the trucking industry folks felt was that the
7 retaliation issues -- that when truck drivers
8 think about safety, they are thinking primarily -
9 - when they're thinking about truck safety and
10 the safety of the vehicle, the moving vehicle,
11 they're not thinking about OSHA. They're
12 thinking about FMCSA. Is the vehicle defective?
13 Are they working too many hours, and a host of
14 other things. Are they overweight? So those are
15 FMCSA enforcement issues.

16 On the other hand, when you think about
17 the injuries to drivers, those are happening much
18 more frequently in areas outside of FMCSA's
19 jurisdiction, when the truck isn't moving at all
20 but drivers are getting hurt, and musculoskeletal
21 disorders, for instance, is a good example of
22 that.

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1 So you could see where the allegations,
2 that is, the information in the allegation
3 sections of the website, of the whistleblower
4 data, in this allegation information, it would be
5 very important for us to understand what are the
6 actual patterns of the circumstances, and how
7 should OSHA, as an agency, be responding to it,
8 what sorts of outreach, training, and so forth
9 needs to happen within the industry. So, we're
10 looking forward to that, and, finally, we'll be
11 glad to get it.

12 Lastly, we discussed, as a group, our ad
13 hoc formation. Do we have good reason to stay in
14 business? With trucking, it's plainly obvious.
15 We have a new opportunity and there's a fair
16 amount of enthusiasm about that. In rail, it's
17 clear that we have important issues to work
18 through. It's not clear, given the somewhat
19 tortuous nature of the last discussion, how
20 productive that's going to be in getting to
21 actual recommendations.

22 On the other hand, I think the

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1 discussions, even without consensus
2 recommendations, are very informative. I had
3 really very few reservations about preparing a
4 report to this full committee saying we couldn't
5 get to agreement, and here are the reasons why,
6 and that's the way it looked until yesterday
7 around noon. But I thought that was really
8 interesting anyway, and I could say more about
9 why if you're interested.

10 So, in any event, the rail folks seem to
11 be pretty clear. There was on consensus they
12 had, which was, this work group serves as an
13 important forum for them to talk about shared
14 concerns and try to find ways to move forward
15 together, and, if not, to get those different
16 views of concerns out in a public forum. So, I'm
17 certainly not going to second-guess that view.
18 I'm perfectly happy to stay on the committee.
19 Others can join it. But we certainly seem to
20 have an opportunity that seems to be productive,
21 and that was the feeling of the group.

22 So, respectfully submitted, that's the

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1 end of the report. Marcia, did you -- I hope you
2 heard what I had to say, and I wanted to ask if
3 there was anything else you wanted to add. And,
4 again, thanks for your support.

5 MS. NARINE: No, I don't have anything to
6 add, and I did hear everything.

7 MR. FRUMIN: Okay. Thanks a lot. So,
8 any other questions or discussion about those
9 issues? Yes, Nancy.

10 MS. LESSIN: I'll just reiterate that if
11 the group could look at what we did in the 11(c)
12 work group on the Fairfax Memo, and take a look
13 at it, and I think, Larry, you were talking about
14 the concerns about the incentive that can coerce
15 -- I'll use that word -- people not to report or
16 bring things forward, I think, from my experience
17 in rail, it's both the incentive and the
18 disincentive programs, the promise of money or
19 whatever it is, as well as the threat of losing
20 your position, losing your job, getting
21 disciplined, those kinds of things.

22 So I would really encourage the group to

1 take a look at what we put together and see if
2 that is something that transportation might think
3 about moving forward with, as well.

4 MR. FRUMIN: Okay. Sounds like a useful
5 suggestion. I mean, it's a consensus view of the
6 Advisory Committee, and we certainly ought to pay
7 attention to it.

8 I forgot that there was one other thing
9 that wasn't in the written report I meant to add,
10 which was, with regard to air transport, again,
11 we've had very limited involvement by the two
12 members who had expertise in that area. I hope
13 to remedy that problem going forward, and make
14 sure that we've adequately addressed retaliation
15 or potential retaliation issues in air transport.
16 I can't say for sure how that's going to go, but
17 I did just want to note that we haven't forgotten
18 about it, and hopefully we can find a solution to
19 that problem.

20 MS. SPIELER: Okay. So we've now heard
21 from all three of the work groups, and it sounds
22 to me as if all three of the work groups have

1 full plates going forward. I again want to thank
2 Larry Mann and Rick Inclima, and the other
3 members who aren't here of that work group, who
4 are not members of the Advisory Committee, for
5 your participation. It's really generous of you,
6 in terms of your time, and very beneficial for
7 us. And so thank you very much for doing that.

8 MR. FRUMIN: We should ask Marcia if
9 she's going to stay on.

10 MS. SPIELER: And I want to also thank
11 Marcia, who is playing a very critical role, not
12 only on this subcommittee but also on the Best
13 Practices subcommittee, and I fear how much of
14 her time we're taking.

15 Marcia, are you going to stay on the
16 line, at this point?

17 MS. NARINE: I'm going to jump off for a
18 few minutes because they're now making speeches,
19 but I'm going to come back on in about 10 or 15
20 minutes. I don't know when you're taking the
21 break, though.

22 MS. SPIELER: Okay.

1 MS. NARINE: I plan to appear for the
2 rest of the meeting, except for breaking off
3 right now.

4 MS. SPIELER: Okay.

5 MS. NARINE: Okay. Perfect. I'll call
6 back in a few minutes.

7 MR. FRUMIN: Okay. We'll be here to
8 answer.

9 MS. SPIELER: We're not going to take a
10 break at 2:45. I just want you to know that.
11 There's a possibility that Dr. Michaels is going
12 to come at about 2:45. Anyway, thank you, Larry
13 and Rick.

14 MR. INCLIMA: Thank you.

15 MR. MANN: Thank you.

16 MS. SPIELER: I have a sense that we have
17 a, we're on a glide path here. So, what I was
18 saying, I think all three of the existing work
19 groups have, although not fully evolved but
20 certainly articulated full work plans that will
21 take people's time over the time between this
22 meeting and our next meeting, which I anticipate

1 will be in about 6 months.

2 So given that, it sounds to me as if
3 where we should focus is what kinds of things we
4 think would be useful for us to discuss at the
5 next meeting, that may take some preparation for
6 the staff, between now and then, so that I can
7 work with them on the development of our ideas
8 for the next meeting, and I already have several
9 things on the list that have come up, and have
10 mentioned before.

11 So, obviously, the whole issue of
12 training and how we should think about it. I
13 think kicking that off with a presentation and
14 conversation, not only about what is currently
15 being done, what's being done by outside people,
16 what's being done by inside people, but also, to
17 the extent you can figure it out, what seems to
18 be working, what isn't as effective, what are the
19 best ways to reach people, I think would be very
20 useful for the full committee to hear, in order
21 for us to then launch a conversation on the issue
22 that we've now promised to do.

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1 Greg has asked several times, and I think
2 it's entirely appropriate, that we think about
3 having an industry side, management side
4 presentation at the next meeting, and we will
5 talk more about how to organize that and what
6 that should be.

7 We've talked a lot about the data issues
8 and the consistency of investigations, and I
9 think having a little bit more conversation about
10 what kinds of information we should think about,
11 in terms of developing it might be useful at this
12 point, so that staff can think about what they
13 can't actually do and what might be difficult to
14 do. We've explicitly talked about region-to-
15 region comparisons, but we haven't really talked
16 about comparing what, what specific parameters
17 would you like, is it possible to do that, and I
18 think we might have a bit of a conversation about
19 that right now.

20 The other two things I have, sort of
21 lower down on my list but things that have come
22 up that might be interesting for us to talk about

1 is an issue that Nancy raised about how things
2 work in dangerous work refusal across statutes,
3 and whether there's anything the Advisory
4 Committee should be thinking about in that
5 domain. I'm not sure we're ready to do that, but
6 it's something that I think should be on our list
7 for future thinking, and what I think some people
8 have been referring to as the NRC model. Is
9 there something we can learn from that, that
10 might be useful in other conversations? And both
11 of those, I think there's so much more that we
12 need to know to have the conversation, that it
13 will, in part, depend upon whether there's a
14 development of information, probably by us,
15 between now and the next meeting.

16 Before I go back to this investigations
17 and data question, are there other things that I
18 should have on my list, and Nancy and Anthony
19 should have on their list? I anticipate that I
20 will probably meet with Anthony once or twice
21 between our two meetings, and so it would be
22 helpful for both of us to hear what you think we

1 should be thinking about in the interim.

2 Richard?

3 MR. MOBERLY: I think the one thing we
4 mentioned earlier, that Ava mentioned, and I just
5 wanted to reiterate, and Christine mentioned, is
6 state plans.

7 MS. SPIELER: State plans, although that,
8 I think, will be taken up in the 11(c)
9 subcommittee, initially, since it's only an 11(c)
10 issue.

11 MR. MOBERLY: Sure.

12 MS. GARDE: I'm not sure if your vision of
13 the NRC model topic includes looking at the
14 broader issue of the substantive regulations
15 across all industries that have whistleblower
16 protections, and how, I'll say, the parent
17 industry -- whether that's trucking, airline,
18 railroad, environmental, chemical, et cetera --
19 whether or not there is some value in
20 understanding how those parent regulators are
21 looking at their responsibility in the companion
22 manner.

1 MS. SPIELER: Yeah. No. That's actually
2 exactly what I was thinking about, but I'm not
3 sure we're there yet, for that kind of
4 conversation.

5 MS. GARDE: Okay.

6 MS. SPIELER: But I do think what was
7 partly interesting was how the NRC thinks about
8 the interrelationship with the retaliation-
9 specific investigation that OSHA does, and I
10 think it is a question that could be asked across
11 a number of different statutes as to what that
12 relationship should look like beyond the current
13 information-sharing MOUS, and that's a very big
14 topic and one that, I think, most of us --
15 perhaps, Billie, you as an exception -- most of
16 us don't know enough about to enter the
17 conversation. But I think it's something that
18 staff has already indicated an interest in
19 thinking about, and perhaps we can be helpful.
20 Other topics for us to be thinking about?

21 So let's go back to the issue of
22 investigations, data, and see if we can flesh

1 that piece out for our benefit, but, in
2 particular, for Nancy and Anthony's benefit, so
3 they can think about what is -- go back and think
4 about what they can actually do that would be
5 helpful to the committee. Who wants to kick this
6 off? Ava.

7 MS. BARBOUR: I mean, one of the things
8 that I brought up yesterday, which we have talked
9 about, is the region-to-region comparison, and I
10 know specifically I asked if we could -- which, I
11 think, is doable -- to get the quantitative data
12 that OSHA already gives us, broken down by
13 region. But then I have a question about, that's
14 quantitative data, which we might be able to draw
15 some initial thoughts about, but I wonder what
16 kind of qualitative data is available, that we
17 could get, on how regions are actually operating
18 and doing investigations.

19 MS. SPIELER: I'm looking at you guys.

20 MS. BARBOUR: And, I mean, that's what I
21 have. I don't know. I mean, I don't know what's
22 out there.

1 MS. SMITH: I think what would be
2 helpful, just tell us and then we're probably
3 going to have to research what is available, what
4 is releasable, what would require us to redact so
5 much that then it would be meaningless. So if we
6 can understand what you're asking for, then we
7 can kind of it --

8 MS. BARBOUR: Well, I was going to ask
9 about -- so, internal audits, for example, that
10 DWPP or, if it's older, some precursor to the
11 Directorate, may have done on particular regions.
12 I don't know if that's something that's
13 available, if it exists, if it would have to be
14 redacted, but that might be one thing that would
15 give us a little bit more qualitative
16 information, as opposed to the just how many
17 cases were filed, how many were settled, et
18 cetera.

19 MS. SMITH: Right. So my request is,
20 just give us the list. I won't be able to answer
21 you, yes, we can release it now, because we'll
22 have to check some things.

1 MS. BARBOUR: Sure. Sure. So I guess
2 that would be one internal, internal audits.

3 MS. SMITH: All right.

4 MR. EHERTS: I would just like to -- and
5 how to normalize that data. In other words, it
6 would be interesting that one region has more
7 open claims than another, but I'd like to know
8 how many businesses or how many employees are
9 represented in each region, so we kind of
10 normalize it. A region twice as big as another,
11 it would be reasonable to have twice as many open
12 claims, or normalize it by number of
13 investigators. But just think about how to make
14 the data meaningful to us, because we don't
15 understand the different parts of each region.

16 MR. KEATING: And I was just going to
17 say, if it's tracked, if it's possible to figure
18 out the average length, how long it takes to get
19 through an investigation in each region,
20 comparing. And I realize this is getting even
21 more granular, but by statute. I mean, I don't
22 know if you can do it that way.

1 MS. GARDE: I think that's important, to
2 get that --

3 MS. SPIELER: That would have to be by
4 statute.

5 MS. GARDE: Yeah, by statute.

6 MS. SPIELER: Let me just say, I'm not
7 sure averages are always adequate, either, so
8 distributions are important, and I don't know how
9 much you can do that, but ranges and medians, as
10 well as averages can tell us something.

11 MS. GARDE: I think the information, not
12 just about the cases but about the region. How
13 many offices? How many investigators? How many
14 of those investigators themselves have been
15 trained? I know I do a lot of training and I've
16 had some of the OSHA investigators in my class.
17 Do they go to other classes? Where are they
18 getting trained? A lot of time I feel like the
19 competence of the investigator is really
20 influencing, obviously, the quality of their
21 work, and spending a lot of time educating some,
22 and some regions have great investigators who

1 understand the laws and the subtleties of the
2 law, and some don't get it at all.

3 MS. SPIELER: So one of the things I
4 think this is telling us is that this would turn
5 our attention to the internal workings of the
6 agency, with regard to whistleblower laws, and,
7 obviously, you've been the subject of various IG
8 reports, but what we're looking for is not to be
9 an oversight committee but to figure out how we
10 can be useful in helping OSHA think about making
11 your operation more effective.

12 And so, as we think about these data
13 requests, it's essentially, I think, a request
14 for us to understand better what is going on, in
15 terms of the investigatory process, the training
16 of inspectors, the distribution of your
17 resources, so that we can think with you about
18 this. And I want to be careful about that,
19 because I don't think it's appropriate for the
20 Advisory Committee to move into a kind of
21 oversight role, and I think it would create
22 significant tensions that we really don't want to

1 have.

2 So when you feel that there needs to be a
3 conversation about that, you should surely let me
4 know.

5 There was another hand. Ava? I'm sorry.
6 Christine.

7 MS. DOUGHERTY: In terms of the state-
8 plan states, I know all the FAME reports are
9 available online, but if there's any additional
10 information that can be provided about each state
11 and their plan. Also, whether or not -- I think
12 Anthony mentioned yesterday that OSHA now has
13 dedicated discrimination investigators in the
14 regions, rather than you're a CSHO one day, and
15 you're investigating a discrimination case
16 another.

17 But I think some state plans still do
18 that. Minnesota moved away from that model. We
19 have dedicated discrimination investigators, but
20 it would be interesting to see, in states, are
21 they doing a better job if it's discrimin only?
22 Is it the problem maybe with some of these

1 investigations that they're doing discrimination
2 and compliance, and then some confusion as to
3 really what their role is? Everybody that I work
4 with says, you know, when I invite them to join
5 me on the discrim team, "I'm not touching those
6 cases, ever. If somebody makes me take those
7 cases, I'll find another job."

8 So we've moved away from that model. We
9 don't share that information, those two parts,
10 anymore. But I think a lot of states do, just
11 from the nature of the number of complaints that
12 they have, and the size of the programs. If
13 you're only investigating one case a year, you're
14 not going to need a dedicated discrim
15 investigator, so how are they being trained and
16 what do they know?

17 MS. SPIELER: Yeah, Jon.

18 MR. BROCK: On this, I agree that we
19 shouldn't become the management consultant on
20 internal process, but I think it's useful, or
21 hopefully it will be useful, because of the
22 experience that people -- I mentioned something

1 about this earlier -- that people here have in
2 processing other kinds of things, or exposure to
3 other agencies that have done some interesting
4 things, that you must know about most of them,
5 and also because there are some clients from both
6 sides of the table here.

7 So, along with the data that you're
8 talking about, is there a companion piece that
9 would be simple to give us, to help us understand
10 how you're organized, how a case comes in and
11 what trail it takes, because it seems to me that
12 a lot of the performance data, and the regional
13 consistency data, and things like that could have
14 a relationship to how it's organized. And,
15 again, we don't want to be the management
16 consultants, but some folks here do business with
17 other agencies, and might have some ideas that
18 would be worth considering.

19 MS. SPIELER: So there is an underlying
20 concern, obviously, that Mr. Mitchell raised
21 yesterday, about the thoroughness of
22 investigations, and data can't really get at

1 that. But as you move forward in your work
2 toward having more consistency among the regions,
3 having better supervisory structure, it would be
4 useful, I think, for the committee to hear from
5 you, not necessarily data-driven, about how
6 you're addressing the kind of question that he
7 raised, if the complainants, witnesses aren't
8 being called, if the investigator can't meet with
9 people face-to-face. Is that part of what you're
10 tracking when you think about this?

11 Certainly, he offered, in essence, a
12 small number, but a small number at a single
13 employer where 100 percent of cases were
14 dismissed, and I'm sure some of them deserved to
15 be dismissed, but when you get 100 percent of
16 cases being dismissed in a single employer, with
17 a relatively sophisticated union rep, you do
18 wonder whether there's something about the
19 investigatory process that isn't working.

20 Now, it could be that the investigator
21 feels that with the sophisticated union rep it
22 should have been a better original complaint.

1 There could be a million things that underlie
2 that, but it is worrisome, and I suspect you find
3 it worrisome, as well.

4 And so thinking about letting us know how
5 those things are being followed up on, I think,
6 would be reassuring for members of the committee,
7 and we'll hope to hear from you about that next
8 time. Nancy?

9 MS. LESSIN: So just adding to that,
10 there's the piece of what looks like it could be
11 problematic in the actual investigation of those
12 11(c) complaints, but the other step, then, is
13 that that's supposed to be being reviewed by
14 somebody else, so it's not just the actual
15 investigation. It would be the review process,
16 and, again, looking for system failures. Is this
17 an outlier -- it doesn't happen anywhere else --
18 or what's the model out there? Is this model
19 being now used other places? Does the model
20 work?

21 So that whole piece, again, I think,
22 would be useful to take a look at.

1 MR. BROCK: Okay. I'd like to mention
2 two ideas in regard to the investigation process,
3 that I think bear some detailed examination,
4 systematic examination going forward, and I'm not
5 sure whether the empirical information that we'll
6 be getting from the allegation summaries, or
7 other data in the IMIS system can help with this
8 or not, so I'm at a bit of a loss to say how this
9 might be studied.

10 But the two issues are as follows. One
11 is the relationship between the enforcement
12 function and the whistleblower complainant's role
13 in the compliance enforcement activity. Was the
14 whistleblower complainant either a complainant to
15 or an informant in a compliance inspection, and,
16 if so, what were the implications of that?

17 I mentioned earlier that when MSHA
18 briefed us some time ago, I raised this question
19 with them, and I'm still awaiting their detailed
20 response, but, in essence what they say is where
21 they get a retaliation complaint --

22 [Incoming call.]

1 MR. SWICK: This is the Whistleblower
2 Protection Advisory Committee.

3 MS. NARINE: This is Marcia Narine.

4 ATTENDEE: Welcome back. You're on.

5 MR. SWICK: Hi, Marcia. By coincidence,
6 Eric is talking again. We're talking about
7 potential future activities for work by the
8 committee, particularly regarding the
9 investigation process.

10 MS. NARINE: Okay.

11 MR. FRUMIN: So, if MSHA apparently takes
12 more seriously retaliation against people who are
13 directly involved with their inspections, either
14 as complainants or informants, and that's a very
15 robust relationship that their inspectors have
16 with workers, including complainants. I mean,
17 they're at the coal mines every 3 months, other
18 mines twice a year. They know these people and
19 when an employer retaliates against a miner who
20 is involved with an MSHA inspection, you know,
21 that's big time.

22 But you can just turn on Law & Order, or

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1 read your favorite crime novel, or whatever, and
2 there's a long history of law enforcement
3 agencies taking very seriously the protection of
4 informants. Well, how does that shake out, in
5 terms of whistleblower investigations? Does it
6 make a difference to your investigator whether
7 the person who is complaining had any kind of an
8 active role in an inspection? I know it makes a
9 difference to some employers, including the ones
10 who fire workers for filing complaints. It makes
11 a big difference to them.

12 And what's the message to the employer
13 community when, were it to be the case, or what
14 would be the message, were it to be the case that
15 it didn't make a difference to OSHA, that OSHA
16 didn't take any further or more severe action if
17 the complainant was fired for filing a complaint,
18 or speaking to an inspector, or testifying, or
19 something like that. So I think that bears some
20 examination.

21 That's also sort of a gateway to the
22 question of how do your whistleblower

1 investigators and CSHOs relate to each other when
2 they have parallel inspections going on? What
3 are CSHO's doing to make sure that workers and
4 employers get a strong message about the need to
5 protect informants, even if there is no
6 complaint? Let's say it's a programmed
7 inspection, or some other inspection. What's the
8 politics in that work place, from the minute the
9 inspector shows up, about the likelihood that
10 these workers are going to suffer by virtue of
11 just being observed talking to inspectors, and
12 how does that look from the agency's standpoint?

13 Well, that's a question that really needs
14 to be answered, not just by this Directorate but
15 by DEP, the enforcement people, by the regions,
16 the area offices, by the Training Institute, and
17 I think that bears some detailed examination.
18 Again, I don't know whether you have data that
19 could actually inform us about it, but I think
20 that's very important.

21 At the end of the day, what I'm concerned
22 about is that workers who are faced with the

1 choice of either cooperating with inspector,
2 CSHOs, in enforcement cases, or are perceived by
3 the employer to cooperate, whether they are at
4 risk or not, and what's the milieu for that?
5 What's the message to employers?

6 You know, we know that OSHA takes it
7 seriously when employers refuse entry, when they
8 obstruct investigations in other ways. You get a
9 solicitor, you get a goddamn warrant, you go in
10 there, and you raise hell. Well, as far as I'm
11 concerned, harassing a complainant and a witness
12 should be treated at least as strongly, and yet I
13 can tell you that's not my impression. There
14 could be good and sufficient reasons for that.
15 It may be simply that the tools you have are
16 inadequate, but there could be other reasons.

17 Lastly, along the same lines, the
18 question came up about referrals back and forth
19 between the CSHO side and the whistleblower side,
20 whether one side or the other should open up an
21 inspection. I went back and looked at both
22 manuals, both the FOM on the CSHO side and the

1 Whistleblower Manual, and I actually couldn't
2 find any specific reference, much to my
3 amazement, saying that if a CSHO finds out about
4 harassment of a witness they should make a
5 referral to whistleblower, and, likewise, in the
6 course of a whistleblower complaint investigation
7 it turns up an allegation of violation of a
8 standard, it should be referred.

9 Now, my impression is that that happens,
10 and it's supposed to happen, and I remember going
11 back to 1979, with the famous Kepone case in
12 Virginia, when a whistleblower, an 11(c) case, a
13 complaint was filed about gross poisoning of
14 workers, which was ignored. They never made the
15 reference to the CSHOs. And as a result, half a
16 dozen workers mixing pesticides in a converted
17 gas station in some town south of Richmond were
18 grossly poisoned, and the James River was
19 poisoned, and a bunch of fishermen lost their
20 livelihoods. This was a scandal of the first
21 order.

22 And from that moment on, it was an

1 article of faith that if information regarding a
2 hazard came up in a whistleblower case, it was
3 supposed to be referred, so imagine my surprise
4 when I didn't see anything in either manual about
5 that.

6 So I'll leave it to you to answer that
7 question -- what's the process? -- but it's
8 related to the overall question I'm raising about
9 the integration of the two kinds of
10 investigations.

11 MS. SPIELER: And that issue has clearly
12 come up before, the sort of integration of the
13 safety-health side, the enforcement side, and
14 compliance side, with the whistleblower side.

15 MR. ROSA: Actually, in the Whistleblower
16 Manual, there is a provision in the manual.
17 There's a section in the manual, and I can raise
18 that with Emily, to the committee, that it does
19 state that the investigator should go through the
20 RSI and defer that to the particular safety side.

21 MR. SWICK: It's in Section 1, but we
22 also did this follow-up memo.

1 MR. ROSA: Yes, we did the memo recently
2 that was published, since the last WPAC meeting,
3 that pretty much clarified that both sides are
4 going to share the information with each other,
5 and we made references to both the FOM and the
6 Whistleblower Manual.

7 MR. FRUMIN: Good. I missed the memo so
8 I didn't see the reference.

9 MS. SPIELER: So I noticed that Dr.
10 Michaels has arrived, and wondered whether you
11 wanted to -- is he still here? We're close to --

12 DR. MICHAELS: Why don't you do your work
13 and then I'll happily --

14 MS. SPIELER: Okay. And we may have. So
15 what we've been discussing, again, is issues that
16 we might want to take up in the future, that it
17 would be useful to have the staff thinking about
18 in the interim, and any issues that we would like
19 to focus on at our next committee meeting. Greg.

20 MR. KEATING: Because I didn't want to
21 leave it dangling out there, if it's conceivable
22 to at least think about the issue that I raised,

1 either this morning or yesterday afternoon, about
2 whether there is a way for the process to
3 consider some sort of an early resolution Rule 68
4 type offer, that an employer could say, "We would
5 like to resolve this and we're putting X on the
6 table," and if, then, years go by and less than X
7 is collected, there's some sort of attorney fee
8 cutoff, or whatever. I would appreciate if that
9 vehicle could be considered.

10 MS. SPIELER: So, I'm going to make a
11 suggestion about that, because I've thought about
12 doing this today, but I'm not sure, at this
13 point, that it's appropriate. But I think
14 there's an issue that's come up in a number of
15 the subcommittees, and that will continue to come
16 up, which some people have called incentives, and
17 I think of as, you've said carrots, rewards for
18 employer behavior, and how should that play out?
19 How should it play out in remedy? How should it
20 play out?

21 And I think it's a conversation that
22 would be a difficult one for us to have, but

1 maybe we have to have it, at some point, as a
2 full committee. To what extent should employers
3 be rewarded for certain kind of behavior within
4 processes. I see the Rule 68 suggestion as one
5 similar to that, where the actions by the
6 employer would have certain consequences for
7 employees.

8 I think it's a difficult conversation for
9 the committee to have, and the experience of the
10 transportation work group gridlock, I think, is a
11 little bit of reflection of perhaps how this
12 would break down, but I'm certainly willing to
13 try to have a full committee discussion about
14 these kinds of issues, because I know it keeps
15 coming up, and then the subcommittees keep
16 backing away from it. So, point taken.

17 MR. KEATING: Thank you.

18 MS. SPIELER: Other issues that we should
19 consider in the future? I'm sure there are a
20 hundred. Let me put it a different way. Other
21 issues that we should be working on between this
22 meeting and what will hopefully be a meeting in

1 about 6 months, when we will reconvene with the
2 same three subcommittees. So the interim work
3 that we will be doing, I think, will be in the
4 subcommittees, and then anything that we need
5 from OSHA, I think should probably be funneled
6 through me, so that we can be clear about not
7 pretending we're your only job. Yeah, Nancy.

8 MS. LESSIN: Two questions. One is the
9 information that the Transportation Group is
10 going to be getting specific to transportation,
11 can that be shared with the full committee, or is
12 that a problem?

13 MR. SWICK: It's my sense that we're
14 going to discuss it in the work groups and see
15 where it goes, and if it's appropriate then we'll
16 make that determination at that time. At this
17 point, we're only anticipating giving out the
18 first 3 years of statutes. Once we've had an
19 opportunity to vet it and OSHA consider the
20 implications of it, then we'll have to have the
21 managers make that decision. But, maybe.

22 MS. SPIELER: Actually, I'm sorry. We

1 have to have a conversation about this. That
2 doesn't make any sense, because the work groups
3 are public meetings, and anybody can call into a
4 work group meeting, and anybody can get what's
5 distributed to the work groups. So it doesn't
6 make sense for that to be true and have a member
7 of the Advisory Committee not have access to the
8 information.

9 MR. SWICK: I think it's a fair
10 discussion, but since we haven't gone over the
11 data with the work group yet, it might be
12 premature to discuss here.

13 MS. SPIELER: Okay, but, Nancy, if you
14 want to call into the Transportation Work Group,
15 I think that it's okay.

16 MS. LESSIN: Eric, can you put me on your
17 list? Thank you. And then I have this other
18 little matter before we --

19 MS. SPIELER: Nancy wanted to correct a
20 record about something that was said by the NRC
21 representative yesterday, which wasn't actually
22 specifically germane to the whistleblower and

1 chilling effect conversation that were having,
2 but was relevant to the issue of workers' rights
3 under that statute, and I'm just going to let her
4 do that so that the record is clear, as she has
5 requested.

6 MS. LESSIN: So, I actually was going to
7 ask some specific questions about whistleblower
8 rights associated with walk-around
9 representatives during an NRC investigation and
10 couldn't get there because I believe I was told
11 that workers and their representatives do not
12 have rights to accompany the NRC when they are
13 doing an inspection, and, in fact, on the NRC
14 website itself, Section 19.14 talks very
15 specifically about presence of representatives of
16 licensees and regulated entities and workers
17 during inspections.

18 It says, "If, at the time of the
19 inspection, an individual has been authorized by
20 workers to represent them during commission
21 inspections, the licensees or regulated entity
22 shall notify the inspectors of such authorization

1 and shall give the worker's representative an
2 opportunity to accompany the inspectors during
3 the inspection of physical working conditions,
4 and each worker's representative shall be
5 routinely engaged in NRC licensed or regulated
6 activities under the control of the licensees or
7 regulated entity, and shall have received
8 instructions as specified by a different
9 section."

10 So, I will never get to ask my
11 whistleblower protection questions, but it is of
12 concern to me that our representative from the
13 NRC, who was talking about chilling effect,
14 doesn't know information about what are protected
15 rights that would be protected, then, under
16 whistleblower, and that is of concern.

17 MS. GARDE: I think you misunderstood
18 what she said and how it works. Inspectors don't
19 take members, union representatives or members of
20 the licensee with them on an inspection, like a
21 walk-around inspection. They don't do that.
22 Licensees do that. A company does that. The

1 company often has the represented employees or
2 non-represented employees, or health and safety
3 representatives go on their inspections, but the
4 NRC, as a standard practice, doesn't take -- they
5 can talk to anybody. They may say, "In this case
6 I want these five people to come with me," but
7 they do not routinely check in and have a union
8 representative with them on an inspection. Their
9 inspections are so anybody can come and talk to
10 them, but they don't take people with them when
11 they go out on their inspection. That's just the
12 way they've always done it.

13 MS. SPIELER: I'm going to intercede
14 here, because this isn't a matter that's really
15 in front of the whistleblower committee that's
16 set up by DOL, and we're certainly not going to
17 resolve what is clearly a disagreement in what's
18 required in terms of the walk-around rights in
19 that industry, although if someone were
20 retaliated against for asserting rights for walk-
21 around, given that OSHA has the jurisdiction over
22 whistleblower complaints under that statute,

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1 presumably, I assume, OSHA would view that as
2 retaliatory activity that was recognizable, and
3 perhaps people in the whistleblower work in OSHA
4 would want to sort of circle back to that, but I
5 don't think we're going to resolve a disagreement
6 about the interpretation of that statute here.
7 Sorry.

8 MS. LESSIN: But I'm --

9 MS. SPIELER: I'm stopping this
10 conversation, actually. I understand that I have
11 certain prerogatives as chair, and I am now
12 exercising them, although I am often lenient
13 about this.

14 Are there any other issues that we should
15 take up today, as a full committee? I think
16 we've covered a huge amount in the last day and a
17 half. I think we crammed a little too much in
18 yesterday, but we thought some of the
19 conversations today would take longer than they
20 have. And I do want to allow, if we've missed
21 anything, to give committee members the
22 opportunity to chime in now, and I will pause at

1 that moment.

2 And, otherwise, before I turn this over
3 to Dr. Michaels, I want to say just a special
4 thank you to the staff, to Meghan, to Rob, of
5 course to Anthony and Nancy, especially to
6 Katelyn, and to Louise who has joined me up here,
7 and been a fabulous coach up here, and, of
8 course, to all the members of the committee, the
9 chairs of the subcommittees, who have done a
10 terrific job in bringing forward issues to the
11 committee, and I think that we had a very
12 important conversation about a number of issues
13 this time that will connect us to our next
14 committee meeting, and that, I think, is a big
15 improvement on some of the work we've done
16 before, as a committee, and I want to thank Nancy
17 and Anthony for working with me on that.

18 So, I think that that concludes the
19 formal part of our meeting. I didn't actually
20 think we'd be done this early, but it's lovely,
21 Dr. Michaels, to have you close us out.

22 DR. MICHAELS: I would have worn a tuxedo

1 and we'd have more of a formal closeout.

2 MS. SPIELER: Yes. Apparently we do.
3 Surely, Mr. Secretary, you should join Dr.
4 Michaels.

5 DR. MICHAELS: I was going to thank all
6 of you. You know, I knew this wasn't going to be
7 easy, and you've dealt with just a portion of
8 some of the tough issues that we deal with. We
9 put this committee together to take on these very
10 tough issues, so I know that there's been really
11 some, I wouldn't say heated discussion, but some
12 real discussion and some tough issues to deal
13 with, and we very much appreciate the dedication,
14 the commitment, the wisdom that you've brought to
15 us, and I think we've made great progress.

16 So I really do want to thank all of you,
17 and our terrific staff, and the Solicitor's
18 terrific staff, and Louise, especially, who is up
19 there, helping us do this. So thank you all, but
20 what I really want to do is introduce our
21 Secretary of Labor, Tom Perez, who has been a
22 fighter for worker rights, for making sure

1 justice takes place in workplaces, in his many
2 jobs before he got here, and it's great having
3 him as the Secretary of Labor, and he has to come
4 up here to at least get a chance to see you
5 before you broke. So let me turn this over to
6 Secretary Perez.

7 MR. PEREZ: Good afternoon, everyone, and
8 I think there are folks on the phone, as well?

9 MS. SPIELER: One person.

10 MR. PEREZ: So, to our friend on the
11 phone, as well, good afternoon. I did want to
12 come here to say thank you. You know, earlier to
13 day I was on the phone with a reporter, talking
14 about the work that I used to do in the police
15 misconduct space, because I used to -- the whole
16 issue of Ferguson is obviously on the nation's
17 mind, and the Attorney General today announced
18 that he's doing what we call pattern and practice
19 investigation, which is one of the things that I
20 used to oversee.

21 And I bring that up, and the relevance of
22 this conversation is I spent a good part of my

1 life, and continue to spend a good part of my
2 life doing civil rights work here at DOL, and at
3 DOJ before that, and we could not survive. When
4 I did police cases, our most important witnesses
5 were often police officers, and it's very hard
6 when you're a police officer and you see your
7 fellow officer doing something that is wrong and
8 illegal, to come forward, but it's indispensable
9 to the administration of justice and to the
10 securing of justice, to have those courageous
11 people.

12 We used to do a lot of work in the
13 employment space, in fire departments and other
14 public sector employers, and, again, but for
15 those courageous people coming forward, we
16 wouldn't have been able to do it. So I have
17 lived a huge part of my professional life
18 depending on courageous people, and one of the
19 things that excited me the most about coming to
20 the department was to see the robust portfolio
21 that David leads, and his very able team leads,
22 in this area.

1 And we know there's a lot of moving
2 parts, we know there are a lot of challenges, and
3 we know that there different statutes, and that's
4 one big challenge, is that some of them, the more
5 recent ones, tend to be stronger, and the ones
6 that have been on the books for a while tend to
7 have more challenges. So your input on how we
8 deal with this amalgam of statutes, all of which
9 are designed to get at something that's
10 fundamentally important to access to opportunity,
11 which is making sure that folks who are in the
12 workplace who see things have a voice.

13 Your input is indispensable, and your
14 expertise is undeniable, and your wisdom is
15 appreciated. And the fact that you get no money
16 for this is another tribute to your dedication,
17 because we need that. This is an area where we
18 have placed a significant amount of energy and
19 focus, and are going to continue to. But it's an
20 evolving area.

21 Our police work at DOJ, we do it so
22 differently than we did 10 years ago, and I

1 suspect the same is true here, in our
2 whistleblower work. The concept is the same, and
3 the values and aspirations are the same, but how
4 we do it is evolving as we learn, and sometimes
5 from our own mistakes.

6 And so I am very grateful for your
7 presence and your expertise, and I hope you'll
8 continue to provide it to us, because I have
9 great confidence in the staff. I have incredible
10 confidence in David and his team, and we have so
11 many others folks -- I think David Weil was here
12 earlier -- you know, other people who really have
13 some incredible insights on this.

14 And so I want to make sure that the
15 Department of Labor's Whistleblower Program is
16 second to none. That's our goal, plain and
17 simple, and with your help we will get there.

18 So, thanks again. I appreciate your
19 time, and, David, I appreciate your leadership,
20 as well, and that of your very able team.

21 DR. MICHAELS: Thank you all so much.

22 MS. SPIELER: Thank you very much.

1 [Chorus of thank yous, and applause.]

2 ATTENDEE: Are you all done yet?

3 MS. SPIELER: We were just finishing up.

4 DR. MICHAELS: I wanted to specifically
5 call out Nancy Smith and Anthony Rosa. Nancy is
6 our Acting Director of Whistleblower Programs and
7 Anthony became our permanent Deputy Director last
8 week, and thank you for their great work,
9 supporting this activity, and all of our work,
10 and thank you all.

11 MS. SPIELER: Thank you.

12 [Applause, followed by attendees greeting
13 and thanking each other.]

14 MS. SPIELER: I just want to make it
15 clear that the committee meeting is adjourned.

16 [Whereupon, at 3:10 p.m., the meeting was
17 adjourned.]

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