

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

WHISTLEBLOWER PROTECTION ADVISORY COMMITTEE

Monday, April 20, 2015

1:03 p.m.

Frances Perkins Building  
200 Constitution Avenue, N.W., Room N-4437  
Washington, D.C.

## PRESENT:

Emily Spieler, Chair  
Dr. David Michaels  
Rob Swick  
Anthony Rosa  
Louise Betts  
Jon Brock  
Eric Frumin  
Kenneth Wengert  
Jennifer "J.J." Rosenbaum  
Gregory Keating  
Robert Miller  
Rina Tucker-Harris  
Christine Dougherty  
Ava Barbour  
Richard Moberly  
Marcia Narine  
Nancy Lessin  
Eric Harbin  
Megan Guenther  
Tom Devine

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1 P R O C E E D I N G S [1:03 p.m.]

2 WELCOME AND INTRODUCTIONS

3 CHAIR SPIELER: This is the Whistleblower  
4 Protection Advisory Committee, and I'm Emily Spieler.  
5 I'm honored to chair this committee.

6 Before we get started, I'd like to ask -- I  
7 think it's Rob --

8 MR. SWICK: Right here.

9 CHAIR SPIELER: Okay. Is going to give us  
10 the required safety and other instructions.

11 MR. SWICK: Thank you, Emily.

12 Welcome everyone to this gorgeous spring day  
13 in the Nation's Capital. I hope you get the  
14 opportunity to take in some of the foliage. It's most  
15 beautiful.

16 I'm Rob Swick, the director of the  
17 Whistleblower Protection Programs, and I welcome you  
18 all here today.

19 Just a few words about safety and related  
20 events.

21 Most importantly, the bathrooms -- you can go  
22 either direction, pretty much in any direction, you'll

1 be able to find one with a water fountain and so forth  
2 and so on.

3 Now, there's two types of an emergency event  
4 in this building, something called a shelter in place  
5 and then the call to exit.

6 In a shelter in place situation, we're good.  
7 We're right where we need to be. You stay put.

8 In the event of an evacuation, we'll be going  
9 out this back door here and straight out that stairway,  
10 all the way out and just follow the herd, and we'll,  
11 you know, try to work it out there.

12 There is a snack bar on this floor, on this  
13 corridor over here. There is a cafeteria that runs  
14 till 3:00 o'clock, I believe, on the sixth floor, and  
15 there's various vending machines throughout. I dare  
16 you to find them.

17 Also, I remind everyone please to silence  
18 your phones and, you know, put them on quiet, and if  
19 you have any questions, see me or Megan Smith or any  
20 member of DWPP. DWPP people will give you a hand.

21 With that, thank you, Emily.

22 CHAIR SPIELER: Okay. Thank you.

1           As I think most of you know, this committee  
2 was chartered and then recently re-chartered for a  
3 second two-year term, and our members were appointed  
4 for staggered terms.

5           We're delighted to welcome one new member  
6 from the labor side, Jennifer "J.J." Rosenbaum.

7           And as you also know, this committee is  
8 broadly charged to make recommendations regarding the  
9 policies and implementation of whistleblower  
10 investigations in the Department of Labor and  
11 specifically in OSHA, I guess, in the end, to help  
12 improve the situation for whistleblowers, with the  
13 long-term goal of allowing people to come forward  
14 regarding concerns without any fear of retaliation, and  
15 when retaliation occurs, to be able to rely on OSHA to  
16 help people out.

17           Some of you have not been to one of these  
18 committee meetings before, but as you know, it's our  
19 custom to have everyone in the room introduce  
20 themselves before we get started with the committee  
21 business, and then we will move on to the committee's  
22 business, and as you know, we will be meeting this

1 afternoon and tomorrow.

2           Today, we will be hearing from Dr. David  
3 Michaels and from the Whistleblower Directorate before  
4 our break, and after the break, we will also be  
5 discussing the current clarification of the  
6 investigation standard for whistleblower  
7 investigations, and finally, today, hearing public  
8 comment, and we do have some public comments that we  
9 will be receiving.

10           We will then adjourn until tomorrow, and our  
11 primary agenda item for tomorrow is to review, discuss,  
12 and hopefully transmit to OSHA the recommendations of  
13 the Working Group on Best Practices in Industry.

14           We will close our meeting tomorrow with a  
15 discussion of our next steps as a committee.

16           So, with that, I'm going to turn to Louise at  
17 my left -- actually, why don't we do it this way? We  
18 will first have the members of the committee introduce  
19 themselves, and if you could say what your role is on  
20 the committee, that would be helpful.

21           We will then turn to the people who work for  
22 OSHA, starting with Dr. Michaels, and then we will ask



1 the rest of you in the room to introduce yourselves.

2           It's my understanding that the ARAs from  
3 around the country are here joining us, and I  
4 particularly -- we always do have everyone introduce  
5 themselves, but I am particularly interested to learn  
6 who you are and hope that our work will be of  
7 assistance in the work you do on a continuing basis.

8           So, why don't we start with John?

9           MR. BROCK: John Brock. I'm a public member  
10 of the committee and a member of the Best Practices  
11 Working Group.

12           MR. FRUMIN: Eric Frumin, labor rep from the  
13 Labor Union Federation Change To Win.

14           MR. WENGERT: Ken Wengert. I am one of the  
15 management representatives with Kraft Foods out of  
16 Chicago.

17           MS. ROSENBAUM: J.J. Rosenbaum. I'm one of  
18 the labor representatives with the National Guest  
19 Worker Alliance.

20           MR. KEATING: I'm Greg Keating. I'm a  
21 management rep from Littler in Boston, and I'm on the  
22 Best Practices Committee.

1           MR. MILLER: I'm Bob Miller. I'm with the  
2 U.S. Department of Transportation, Federal Motor  
3 Carrier Safety Administration, and I'm the Federal  
4 Government rep.

5           MS. TUCKER-HARRIS: Good afternoon. I'm Rina  
6 Tucker-Harris. I'm with the Consumer Financial  
7 Protection Bureau, and I'm also a Federal  
8 representative.

9           MS. DOUGHERTY: Christine Dougherty. I  
10 represent the State Plan states.

11          MS. BARBOUR: Ava Barbour. I'm a labor  
12 representative from the United Auto Workers Union.

13          MR. MOBERLY: I'm Richard Moberly. I'm a law  
14 professor at the University of Nebraska College of Law,  
15 and I'm a public representative.

16          MS. NARINE: Marcia Narine, law professor at  
17 St. Thomas University, and I also consult corporations  
18 on corporate governance. I'm a management  
19 representative.

20          MS. LESSIN: I'm Nancy Lessin. I'm a labor  
21 representative. I'm with the United Steelworkers and  
22 Tony Mazzocchi Center.

1 DR. MICHAELS: We'll go through the OSHA  
2 members here.

3 My name is David Michaels. I'm Assistant  
4 Secretary of Labor for OSHA.

5 MR. HARBIN: My name is Eric Harbin. I'm the  
6 Acting Director for the Directorate of Whistleblower  
7 Protections Programs.

8 MR. ROSA: Good afternoon. I'm Anthony Rosa.  
9 I'm the Deputy Director for the Directorate of  
10 Whistleblower Protection Programs, and I'm also the  
11 designated Federal official for WPAC.

12 MS. BETTS: I'm Louise Betts with the Office  
13 of the Solicitor, and I'm counsel to the WPAC.

14 CHAIR SPIELER: So, Rob, if you could carry  
15 the mike back to people --

16 MR. ROLFSEN: I'm Bruce Rolfsen. I'm a  
17 writer, Bloomberg BNA, occupational safety and health  
18 reporter.

19 MS. ABRAMS: Good afternoon. Adele Abrams  
20 representing American Society of Safety Engineers.

21 MR. LUNDEGREN: Bruce Lundegren, Office of  
22 Advocacy, U.S. Small Business Administration.

1 MS. SMITH: Meghan Smith, Directorate of  
2 Whistleblower Protection Programs, WPAC liaison, and  
3 I'd like to remind everyone who's observing to please  
4 sign your name in the back of the room. Thank you.

5 MS. BERKOWITZ: Debbie Berkowitz, OSHA.

6 MS. JOHNSON: Marisa Johnson, Whistleblower  
7 Directorate.

8 MS. GARAHAN: Mary Ann Garahan. I'm the  
9 newly selected director of the Directorate of the  
10 Whistleblower Protection Program.

11 MR. ERSKINE: Jeff Erskine, Acting Assistant  
12 Regional Administrator for the Whistleblower Protection  
13 Program, Region I, Boston.

14 MR. MABEE: Michael Mabee. I'm a supervisory  
15 investigator for the Whistleblower Protection in Region  
16 I.

17 MR. MENDELSON: Rich Mendelson. I'm the  
18 Deputy Regional Administrator in OSHA, Region II, New  
19 York, and I'm a member of the Whistleblower Executive  
20 Steering Committee for OSHA.

21 MS. WIGGER: Hi. Teri Wigger. I'm the  
22 Assistant Regional Administrator in Region II, New

1 York.

2 MS. LOREK: Hi. I'm Karena Lorek. I'm  
3 Assistant Regional Administrator in region VII, Kansas  
4 City.

5 MR. CROUSE: Tim Crouse, supervisory  
6 investigator, representing Region V, Chicago.

7 MR. ZUCKERMAN: Hi. My name is Jason  
8 Zuckerman, and I represent employees in private  
9 practice.

10 MR. ROBINSON: Hello. Antione Robinson,  
11 Assistant Regional Administrator, Region IV, Atlanta.

12 MR. RUDZKI: Good afternoon. Jack Rudzki,  
13 regional supervisory investigator in Region III,  
14 Philadelphia.

15 MR. GOSSMAN: I am Steve Gossman, the ARA in  
16 Region X.

17 MR. WILSON: Hello. Cory Wilson, ARA, Region  
18 VIII, Denver.

19 MR. PAUL: Hello. Josh Paul, Acting ARA,  
20 Region IX in San Francisco.

21 MR. FAIRCHILD: Cleveland Fairchild, program  
22 analyst with the Director of Whistleblower Protection

1 Programs.

2 MS. STEWART: Christine Stewart, acting  
3 division -- policy division chief, DWPP.

4 MR. LERNER: Mark Lerner, Office of the  
5 Solicitor, Division of Occupational Safety and Health.

6 MS. GUENTHER: Megan Guenther, Office of the  
7 Solicitor, Fair Labor Standards Division.

8 MR. BARAB: Jordan Barab, Deputy Assistant  
9 Secretary, OSHA.

10 MS. SWANN: Gail Swann, management analyst,  
11 DWPP.

12 MR. LY: Viet Ly, program analyst, DWPP.

13 MR. BLANCATO: Phil Blancato, investigative  
14 specialist, DWPP.

15 MS. DARBY: Kimberly Darby, OSHA's Office of  
16 Communications.

17 MS. GIVENS: Laura Givens. I'm with DWPP.

18 MS. FALK: Sara Falk. I'm with DWPP.

19 MR. BARRETT: Otis Barrett, DWPP.

20 MR. BROECKER: Brian Broecker, DWPP.

21 MS. SEEMAN: And to carry on the chain here,  
22 I'm Laura Seeman, Division Chief for Field Operations,

1 DWPP.

2 MR. HOLCOMB: And I'll stop it. I'm Sid  
3 Holcomb, OSHA Office of Communications.

4 MR. CHARTIER: I'm George Chartier, OSHA  
5 Communications.

6 MR. SWICK: One more best practice, Emily,  
7 for the group, just a reminder that this meeting is on  
8 the record. So, if you spare our folks, try to talk  
9 one at a time, no cross talk, and again, remember to  
10 sign in if you haven't.

11 Thank you, Emily.

12 CHAIR SPIELER: Okay. So, I actually was  
13 going to echo that, remembering that this is a public  
14 meeting, and we actually, as a committee, are very  
15 committed to full transparency.

16 Detailed minutes are prepared after this  
17 meetings, and subcommittee meetings and all informal  
18 meetings of the work groups are all open to the public,  
19 and there are notices posted for those meetings.

20 So, as we go forward and we discuss work  
21 after this meeting that the committee or work groups  
22 will be taking up, you will have the opportunity to

1 usually listen in, frankly, since often it's done by  
2 telephone conference call, if you would like, and that  
3 is something we feel very comfortable about.

4 We're very interested in having input from  
5 the public where that seems appropriate.

6 And with that, I'm going to turn this over to  
7 Dr. Michaels.

8 WELCOME

9 DR. MICHAELS: Good afternoon. Thank you so  
10 much. It's really my pleasure to be with you today.

11 Let me also begin with some thanks, first to  
12 thank all of you. This is a very important committee,  
13 and it's a very well-functioning committee that really  
14 has made a big contribution to our work, and we're  
15 grateful.

16 I'd like to welcome J.J. and Bob. I think  
17 this is the first meeting for the two of you, and we're  
18 really pleased that you could join us, and we look  
19 forward to your contribution.

20 I want to thank everybody who has worked so  
21 hard on the subcommittees and the three chairs of the  
22 subcommittees, Dave Eherts, who is not here, who



1 chaired the 11-C committee; Eric Frumin, who chaired  
2 the Transportation Industry Work Group; and Jonathan  
3 Brock. Jon has done a tremendous job on the Best  
4 Practice Committee. I think we'll be hearing a lot  
5 more about that today.

6           This is also a nice opportunity for me,  
7 though, to thank the staff of OSHA and the Solicitor's  
8 Office, who have worked so hard on these whistleblower  
9 issues, and because in the audience today we have so  
10 many people from the national office and from our  
11 regions who really spend, you know, all their time and  
12 they are dedicated, committed, persevere on some very  
13 tough issues and really make a big difference, and so,  
14 I want to just express my gratitude to all of them, as  
15 well, since they're in the room today. It's a nice  
16 opportunity to do that.

17           So, I want to take a few minutes to just give  
18 you an update on what OSHA has done in a couple of  
19 different areas and, in particular, around  
20 whistleblower protection, and then, obviously, I'm  
21 happy to take your questions and comments, though I  
22 won't be here for the whole meeting, but I'll also get

1 a full report from both our staff and from your  
2 chairperson on discussions that went on today, rest  
3 assured.

4           So, first I want to just discuss briefly with  
5 you a report that we issued a month ago or so, in case  
6 you hadn't seen it.

7           It's called Adding Inequality to Injury: The  
8 Costs of Failing to Protect Workers on the Job, and  
9 that's on our website, and I think it's very much  
10 connected to the work that we do on whistleblower  
11 protection and the connection it has to preventing  
12 injuries and illnesses.

13           So, to put it in some context, what's often  
14 forgotten about sort of the toll of workplace injuries  
15 and illnesses in the United States is the Bureau of  
16 Labor Statistics reports or estimates that there are 3  
17 million injuries a year, more than 3 million serious  
18 injuries a year in the American workplace, and we know  
19 that's an undercount, but employers record more than 3  
20 million injuries a year, and we call them serious  
21 meaning that they are beyond just first aid. That's a  
22 very, very large number, and we take it for granted

1 that it's sort of acceptable that there are 3 million  
2 or more injuries a year. We don't think it's  
3 acceptable at all.

4 We don't have any statistics on the number of  
5 illnesses that occur in American workplaces. Employers  
6 record a small number of illnesses, but those are ones  
7 that are quite obvious to them.

8 But we know that large numbers of people are  
9 sick now based on exposures that occurred in the past,  
10 from asbestos, from benzene, exposures that hopefully  
11 are not occurring at all or not occurring very much in  
12 workplaces today.

13 But we don't really know much about workplace  
14 illnesses.

15 But we do know that when workers are either  
16 injured or made sick on the job, the biggest impact is  
17 on them, and the systems that are supposed to take care  
18 of them really are not doing very well.

19 We know from numerous studies that the cost  
20 of those injuries primarily are borne by workers and  
21 their families, and the estimates by a number of  
22 different economists are sort of in the range of 60

1 percent or more of the costs are actually borne by the  
2 workers themselves or their families.

3           Workers comp picks up a substantial portion,  
4 maybe 20 percent, and the remainder is picked up by the  
5 taxpayer through state programs and federal programs,  
6 which is really a cost shift onto the American taxpayer  
7 and endangers some of the important programs that the  
8 government provides, like the Social Security  
9 Disability Insurance Program, which, as many people  
10 know, is facing significant financial challenges right  
11 now, and part of the challenge they face is picking up  
12 costs of injured workers that should be paid by workers  
13 compensation.

14           So, essentially we're seeing two things.  
15 Because of the way -- the experience of injured workers  
16 and the fact that they, themselves, are picking up most  
17 of the costs, essentially, for some employers, there is  
18 much less incentive to abate hazards, because they  
19 aren't paying the true cost of the illnesses and the  
20 injuries.

21           We know that, for many employers, they see  
22 what the real costs are injuries and they do

1 everything, again, to abate those hazards and prevent  
2 injuries from occurring, but far too many don't do  
3 that, because we wouldn't be seeing 3 million or more  
4 injuries a year if there was that -- the committed  
5 approach to preventing injuries from occurring.

6           So, essentially you have a system that  
7 essentially doesn't incentivize employers to abate  
8 hazards, because they're not picking up the true costs,  
9 and you've got a cost shift to the taxpayer, who are  
10 subsidizing unsafe employers.

11           So, we've issued this report, really, to  
12 raise these issues and talk about the importance of  
13 prevention.

14           The best way to address this problem, of  
15 course, is to ensure that workers aren't injured, that  
16 they're not made sick, and we'd like to encourage that  
17 conversation to take place in the United States today.

18           Certainly, protecting the voice of workers  
19 who raise concerns is a part of that conversation, and  
20 we're grateful for your work on that.

21           In focusing directly on the Whistleblower  
22 Protection Program, just to recap, this is -- since the

1 current OSHA leadership arrived -- and you've met  
2 Jordan Barab and Debbie Berkowitz here -- this is our  
3 sixth year of being in OSHA leadership.

4 I think we've made significant progress in  
5 building a more effective Whistleblower Protection  
6 Program. We've worked very hard on increasing the  
7 staff.

8 We've elevated the office to a directorate in  
9 the national office, led by a senior executive, which I  
10 think will make a very big difference to this.

11 We've developed our own budget line for the  
12 Whistleblower Protection Program. Before that, it had  
13 no specific budget line. We've made the program a  
14 major priority in the Department of Labor.

15 We've also developed a much closer working  
16 relationship with the Solicitor of Labor, because  
17 everything we do is jointly with the Solicitor of  
18 Labor, and we're grateful for Louise, who is actually  
19 taking on more and more responsibilities in the  
20 Solicitor's office and she's maintained this  
21 involvement in this committee, as well, because her  
22 input is always very important to this, and actively,

1 we collaborate on addressing whistleblower cases, no  
2 matter the small size or the large size of the monetary  
3 awards involved.

4           And I think, as a result of all this, the  
5 whistleblower program is clearly getting stronger. We  
6 face big challenges, though. The number of new  
7 whistleblower retaliation cases filed with Federal OSHA  
8 grows steadily every year.

9           In fiscal year 2014, we received 7,400 new  
10 complaints and documented more than 1,000 new cases for  
11 investigation.

12           So, even though we're receiving more cases  
13 than ever, our investigative staff is working very hard  
14 to help us keep pace.

15           In fiscal year '14, we completed 3,150 cases,  
16 essentially just keeping up with the cases that are  
17 coming in, awarding more than \$35 million to  
18 whistleblower complainants and reinstating 69 workers  
19 through merit determinations and settlement agreements.

20           Now, in December 2013, we launched a new  
21 online whistleblower complaint form, and that provides  
22 workers with additional avenues for filing

1 whistleblower complaints. So, not surprisingly, the  
2 online complaint form has proved extremely popular with  
3 the public, and it's increased the number of complaints  
4 that we've gotten.

5           From December 2013 through September 2014,  
6 OSHA received approximately 3,000 online filed  
7 complaints, over 40 percent of the new complaints  
8 received during the fiscal year '14.

9           So far this fiscal year, from October 1st to  
10 April 13th, we received an additional 1,800 online  
11 complaints.

12           So, we will continue to get more complaints.  
13 We don't want to discourage workers from filing  
14 complaints, and that will continue to be a challenge to  
15 us, and we have to address that issue, but we certainly  
16 don't want to discourage workers from filing complaints  
17 with us.

18           So, we've come a long way in the last six  
19 years, but we know that we still have quite a bit of  
20 work in front of us.

21           This is how we think about this.

22           We're focused on improving both the



1 efficiency and the quality of our investigation. We  
2 realize we have to do both.

3 We need to get more complaints in, if they're  
4 valid, and we have to deal with them quickly and  
5 fairly.

6 Focusing on improving the investigative  
7 process, we've emphasized an attentive caseload  
8 management, we've eliminated burdensome paperwork  
9 procedures, and we have restructured the regional  
10 whistleblower programs to strengthen oversight of  
11 investigative teams, and actually, the ARAs who are in  
12 the room are spearheading that effort, and we're very  
13 pleased that we have this new structure to make that  
14 happen.

15 We're increasing the training and skill  
16 levels of our investigators.

17 Now, because OSHA's improved investigatory  
18 efficiency has allowed it to serve more whistleblower  
19 parties, whistleblower complainants have received more  
20 damages or been awarded more damages through merit  
21 findings and settlement awards than before the backlog  
22 reduction campaign began in fiscal year 2012.

1           From fiscal years 2012 through '14,  
2 whistleblower complainants were awarded an average of  
3 about \$30 million per year in merit findings and  
4 settlements, compared with an average of \$14 million  
5 per year in the preceding 3 fiscal years.

6           For example, in fiscal year '14,  
7 whistleblower complainants were awarded about \$36  
8 million, more than double the \$15 million that was  
9 awarded to complainants in 2011, before we started this  
10 campaign to catch up with the backlog.

11           More whistleblower complainants were also  
12 reinstated through merit findings and settlements in  
13 the past three years.

14           An average of 76 complainants were reinstated  
15 each year from fiscal year '12 through '14, including a  
16 record 86 reinstatements in fiscal year '13, while an  
17 average of 63 complainants were reinstated each year  
18 from fiscal year 2009 through '11.

19           We have also issued a higher number of merit  
20 findings during the past 3 years, issuing an average of  
21 62 merit findings per year in those last three years,  
22 including a record 75 merit findings in fiscal year

1 '13, compared to an average of 50 merit findings each  
2 year in the previous 3 years.

3           So, I've tried to make this very clear to our  
4 entire staff across the country. Our goal is to  
5 improve both efficiency and quality for all of our  
6 whistleblower protection activities. We can't  
7 sacrifice one for the other.

8           But we also understand that these cases are  
9 not just numbers. Each one represents and directly  
10 affects people's lives.

11           That's why we are continuing to take steps to  
12 ensure we have consistent and thorough investigations  
13 throughout the country, and all of our assistant  
14 regional administrators are in town here to both  
15 observe this meeting and then we'll be meeting with  
16 them to address issues of consistency and to make sure  
17 everybody is on the same page and learn from each other  
18 and some of the best practices that each of the regions  
19 has developed.

20           We also have some updates in personnel.

21           As you've heard already, Mary Ann Garahan --

22 I chose Mary Ann Garahan to be the Director of the

1 Directorate for Whistleblower Protection Programs. I'm  
2 extremely pleased that Mary Ann agreed to do this.

3 She is currently Regional Administrator for  
4 Region II, Philadelphia, previously was in the national  
5 office, has been a valuable member of the OSHA team for  
6 25 years, and it think everybody will see she is quite  
7 a skilled manager with extensive technical experience  
8 in all of the OSHA programs.

9 She'll come back to Washington and begin her  
10 new role as Director of the Directorate for  
11 Whistleblower Protection Programs next month.

12 I am confident that Mary Ann will be an  
13 effective leader in whistleblower protection and will  
14 continue to build and strengthen this very important  
15 program.

16 Thank you for agreeing to do this, Mary Ann.

17 I think you'll get a chance to spend some  
18 time with her over the next day-and-a-half.

19 You also met very briefly Eric Harbin. He is  
20 the Acting Director. He has come in from the Dallas  
21 office, where he is Deputy Regional Administrator.  
22 We're very grateful that Eric has spent several months

1 with us, helping to manage the program until Mary Ann  
2 gets here.

3           And you've also met and we're very grateful  
4 for the work of Anthony Rosa. Anthony Rosa is our  
5 permanent Deputy Director of the Whistleblower  
6 Protection Program, has made a huge difference since  
7 coming.

8           I can't tell you -- the number of ways that  
9 he's helped this program, I can't count. I mean, it's  
10 really -- it's terrific.

11           I'm very grateful that you joined us, and  
12 it's a pleasure to have you as part of our team here.

13           Now, I want to let you know that we'll be  
14 seeking to fill six positions on this advisory panel,  
15 as people's terms end and then start again. They'll be  
16 vacant in December, December 1st, and we issued a  
17 Federal Register notice on March 17th with details.

18           So, nominations, including people who want to  
19 be re-nominated and other nominations have to be  
20 submitted to OSHA by May 18th of this year.

21           So, please let us know your thoughts, and  
22 other people we'd like to encourage to apply, as well,

1 or to be nominated.

2           So, I referred to earlier -- and I'll talk a  
3 little bit about this -- we're currently expanding all  
4 of our regional programs -- we're expanding into our  
5 regional programs what we think is a highly successful  
6 management structure where we have a dedicated  
7 assistant regional administrator, or ARA, who would  
8 oversee each regional whistleblower program, and this  
9 is essentially a promotion, a higher-level position in  
10 every regional office to supervise all of the  
11 whistleblower activities.

12           The ARA either will or already does report to  
13 our regional leadership, so that it elevates the  
14 program in the field in much the same way we've  
15 elevated the whistleblower program in the national  
16 office.

17           This new position, the ARA, allows for direct  
18 caseload management and oversight of whistleblower  
19 investigations by subject matter experts, which we  
20 believe will result in more efficient and effective  
21 investigations under all the statutes that we cover.

22           Now, the regions that have already

1 implemented this management structure tell us that both  
2 regional supervisors and investigators benefit under  
3 this new plan.

4           We've been working for more than a year to  
5 overhaul and expand our basic educational offerings,  
6 our training offerings for whistleblower investigators,  
7 and we're current designing and developing new  
8 curriculum for advanced training courses.

9           These courses will help build investigator  
10 skills as they gain more experience and grow during  
11 their careers.

12           In addition to these new courses, which will  
13 be rolled out next year -- Eric Harbin is going to fill  
14 you in on more of these -- we also developed some  
15 webinars which will educate our staff on the new  
16 statutes and regulations, along with other topics that  
17 we really need to address.

18           Recently, for example, the directorate issued  
19 a webinars focusing on the Fairfax memo, which is the  
20 OSHA policy on incentive programs. That's a very  
21 important issue to the field. We just did a webinar  
22 specifically on that.

1           That webinar is actually the first step in  
2 responding to the recommendations from the 11-C work  
3 group of your advisory committee that we received in  
4 September 2014 on educational practices for our staff.

5           We are also continuing to improve our work  
6 with our partner agencies and the whistleblower  
7 provisions we enforce, and that's why I'm very grateful  
8 we have representatives from a couple of different  
9 Federal agencies on this panel.

10           Currently, we're reviewing a memorandum of  
11 understanding with the Federal Aviation Administration.

12           This MOU will facilitate coordination and  
13 cooperation concerning the protection of employees who  
14 provide air safety information under the Wendell H.  
15 Ford Aviation Investment and Reform Act for the 21st  
16 Century, which we call the Air 21 act.

17           So, we want to do this more with all of our  
18 Federal partners to make sure we work closely with  
19 them.

20           We have to do that because the increasing  
21 number of whistleblower cases filed each year under all  
22 these different statutes requires this close



1 coordination.

2           And this new legislation, not surprisingly,  
3 is bringing new cases.

4           In fiscal year '11, there were 6 cases filed  
5 under the Consumer Financial Protection Act and 17  
6 under the FDA Food Safety Modernization Act.

7           Three years later, in 2014, we have 48 cases  
8 under the Consumer Financial Protection Act and 50  
9 cases under the FDA Food Safety Modernization Act.  
10 Needless to say, we expect more and more cases to come  
11 under these acts.

12           Just last year, we received 10 cases under a  
13 new piece of legislation, MAP 21, Moving Ahead for  
14 Progress in the 21st Century.

15           That statute was just passed in 2012, and so,  
16 the cases are just starting to come in, and now under  
17 the Seaman's Protection Act, we're receiving new cases.

18           So, we always have some new challenges to  
19 take on, to learn more and to take on cases and to  
20 reach out to other agencies to work more closely with  
21 them.

22           We're asking our partner agencies to add the

1 link to our website, [www.whistleblowers.gov](http://www.whistleblowers.gov), to their  
2 respective websites. In turn, we're going to make sure  
3 that the OSHA website provides a hyperlink back to each  
4 partner agency.

5 We believe this will improve customer service  
6 and help demonstrate a strong working relationship with  
7 our Federal agency partners.

8 Now, as communication with these partners is  
9 enhanced, we'll be able to assure that an effective  
10 process exists for sharing complaints and investigating  
11 information so that all the concerns raised by  
12 complainants are fully addressed.

13 We're exploring joint outreach opportunities  
14 with our Federal partners and we're assessing internal  
15 training needs so all of our customers are better  
16 served.

17 Another approach we're looking into -- we're  
18 moving forward with revising our Alternative Dispute  
19 Resolution Pilot Program, which ran through fiscal year  
20 '13, and it showed us that early resolution could be  
21 very effective in providing a viable alternative to the  
22 lengthy investigative process.

1           The early resolution process demonstrates  
2 that adding staff dedicated to the coordination and  
3 facilitation of early settlement negotiation provides a  
4 highly desired service to the program's customers.

5           So, in light of the results of this pilot,  
6 we're expanding the availability of the early  
7 resolution process to all the regions, and we've  
8 developed written instructions to establish the  
9 policies and procedures that apply to early resolution.

10           Something I talked about, I think, in our  
11 last meeting in September, I'm very happy to announce  
12 today that we're issuing jointly with OSHA and the  
13 Office for the Solicitor of Labor -- we have a memo  
14 clarifying the agency's position regarding  
15 investigative standards for OSHA's whistleblower  
16 investigations.

17           The standard that applies to our  
18 whistleblower investigations is whether OSHA has  
19 reasonable cause to believe a violation has occurred.

20           Because OSHA makes its reasonable cause  
21 determinations prior to a hearing, the reasonable cause  
22 standard is somewhat lower than the preponderance of

1 evidence standard that applies following a hearing, and  
2 we've scheduled a presentation later today to explain  
3 this clarification in greater detail and answer your  
4 questions.

5           You are very fortunate that Megan Guenther,  
6 who is with the Solicitor of Labor, who has worked very  
7 hard on this, will be presenting this in more detail,  
8 and I'm very pleased you can do that.

9           We've also made improvements with our 11-C  
10 appeals program. Over the last year, the directorate  
11 eliminated its backlog of pending reviews and has  
12 dramatically reduced the time taken to complete our  
13 reviews.

14           Complex cases are referred to our solicitors  
15 for further review and legal analysis, and if and when  
16 additional investigative work is needed, the case is  
17 remanded back to the field for further investigation.

18           So, we're working on this. We're developing  
19 ways to better track this for the public, and we'll  
20 keep you posted, but I really wanted to thank the  
21 Solicitor's office and everybody in that for their work  
22 on both these issues.

1           It's really been a great collaboration, and  
2 so, I'm very pleased with how it's going.

3           Now, we've also been working on the  
4 comprehensive written outreach plan for the Directorate  
5 of Whistleblower Protection Program, and we've also  
6 developed a bunch of new materials which will be part  
7 of that outreach.

8           Fourteen fact sheets are currently available  
9 on our website, in both English and Spanish, and more  
10 are on the way.

11           We've developed what we call a Quick Card on  
12 11-C, both English and Spanish, to quickly provide  
13 program information to the public, and we've redesigned  
14 our website, whistleblowers.gov, to enhance  
15 navigability and user-friendliness.

16           So, as you can see, the whistleblower staff  
17 and the solicitors have been very busy. We've really  
18 made protecting workers from retaliation for exercising  
19 their rights a major priority for OSHA, and we're  
20 grateful everybody has pitched in to make this happen.

21           The department's FY '16 budget request --  
22 actually, the President's FY '16 budget request for

1 whistleblower programs reflects our commitment to  
2 continuing to build the program.

3           The \$22.6 million request would support a  
4 total of 157 full-time employees. That's an increase  
5 of 22 positions over our current FTE level of 135.

6           Now, as everybody in this room knows, we  
7 cover a range of types of workplaces, and we enforce  
8 whistleblower provisions for 22 different statutes.  
9 So, I want to just share with you some of our recent  
10 successes.

11           As many of you know, we've been dealing with  
12 several 11-C investigations involving AT&T.

13           In multiple regions around the country, we've  
14 filed District Court cases against subsidiaries of AT&T  
15 on behalf of workers who suffered discipline after  
16 reporting workplace injuries.

17           In each instance, the company alleged that  
18 the employee violated a corporate workplace safety  
19 standard, but OSHA's investigation concluded that the  
20 safety standards were being used as a pretext for  
21 disciplining workers who reported injuries.

22           Our efforts are making a difference.

1           In Region V -- that's the Chicago region,  
2 covering Ohio west to Illinois -- after we filed in  
3 District Court, the company made all of the workers  
4 whole. They removed the discipline procedures and  
5 compensated the workers fully.

6           Now, this is still in litigation, and as it  
7 develops, we will keep everybody apprised.

8           In October 2014, the Kansas City Regional  
9 Office found that the Burlington Northern Santa Fe  
10 Railroad, BNSF, violated the Federal Railroad Safety  
11 Act when it retaliated against an apprentice  
12 electrician after he reported a shoulder injury.

13           The company terminated the employee after he  
14 suffered the injury, which required him to be  
15 transported to an emergency room and medically  
16 restricted from returning to work.

17           OSHA ordered the company to pay the  
18 apprentice electrician \$225,000, including \$150,000 in  
19 punitive damage, remove disciplinary information from  
20 the employee's personnel records, and provide  
21 whistleblower rights information to all of its  
22 employees.

1           In December 2014, our Boston Regional Office  
2 found the Metro North Railroad violated the Federal  
3 Railroad Safety Act when it retaliated against a coach  
4 cleaner after he reported a knee injury.

5           While driving the injured employee to the  
6 hospital, a Metro North supervisor intimidated the  
7 worker and threatened that reporting the injury would  
8 kill his chances for career advancement in the company.

9           Region I ordered Metro North to pay the  
10 employee a total of \$250,000 in punitive damage.  
11 That's the highest allowed, and I don't believe we had  
12 ever done that amount previously, because of the nature  
13 of this particular event, plus \$10,000 in compensatory  
14 damage and to cover his attorneys' fees.

15           Jeff Erskine and Mike Mabee from Hartford  
16 worked very hard on this case, and I'm very grateful  
17 for their work on this. So, thank you both.

18           Just a few weeks ago, in February, we won a  
19 Section 11-C case in court, in Seattle, against the  
20 United States Postal Service, who had retaliated  
21 against an employee who helped a coworker file an OSHA  
22 complaint.



1           The District Court judge reinstated the  
2 employee to a management level position, awarded him  
3 almost \$230,000 in compensatory damages and expunged  
4 his disciplinary record.

5           The judge found the Postal Service to be so  
6 hostile to OSHA and its employees' protected activities  
7 that the court permanently enjoined the Postal  
8 Service's Seattle facilities from violating 11-C of the  
9 OSHA act.

10           This month, our New York Regional Office  
11 found that a Bronx hair salon violated Section 11-C of  
12 the OSHA act when it retaliated against an employee who  
13 warned her coworkers about formaldehyde in hair  
14 straightening products and potential respiratory damage  
15 from exposure.

16           The salon was later inspected and cited for  
17 lack of a hazard communication program and improperly  
18 training its employees. We are now in court pursuing  
19 11-C charges in District Court in New York.

20           And we also won an 11-C case against a Boston  
21 dentist who had retaliated against an employee who  
22 helped a coworker file an OSHA complaint regarding

1 needle stick hazards. The District Court judge ordered  
2 the dentist and his office to pay the worker more than  
3 \$50,000 in back wages and \$333,000 in compensatory  
4 damage.

5 So, again, to the OSHA regional staff who  
6 worked on all these cases, thank you so much for the  
7 work that you've done on them.

8 But I have to tell you, we still face huge  
9 challenges. Just last week, in Alabama, we had to go  
10 to court to obtain a temporary restraining order, and  
11 we did obtain it from a Federal judge, against the Lear  
12 Corporation, which is an auto parts manufacturer.

13 A worker there complained about hazardous  
14 conditions, and what did Lear do? They fired that  
15 worker and they went to court and sued that worker.

16 We were outraged. We recently had completed  
17 an investigation at that site. We issued monetary  
18 penalties against Lear because of the hazards there,  
19 and then when the worker raised concerns, fired that  
20 worker.

21 There's a hearing on April 29th in court, and  
22 we expect to be in court to protect that worker's right

1 to raise concerns, but this case underscores the need  
2 for a new attitude on the part of some employers, and  
3 it really demonstrates the importance of the work of  
4 this committee in helping us reach out to employers and  
5 talking about essentially the way you address issues  
6 raised by employees around safety and health concerns  
7 or other concerns covered by the legislation that we  
8 are given the responsibility to investigate.

9           So, we need your help, and that's why you're  
10 here and we're so grateful for what you do.

11           I want to especially talk a little bit about  
12 the work of the Best Practices Work Group, and I know  
13 you've worked hard and I've seen many drafts of what  
14 you've done, drafting and proposing a set of  
15 recommended practices to give to this committee.

16           I look forward to hearing the committee's  
17 discussion on these practices and considering these  
18 recommendations and how we can get them out.

19           OSHA is committed to provide and showcasing  
20 these best practices that encourage employers to  
21 establish effective anti-retaliation reporting programs  
22 in their workplaces.

1           I know there are very good programs out  
2 there. There are many employers who understand exactly  
3 how to do this well, and we really have to learn from  
4 them and put these best practices out there.

5           With your assistance in collection -- we'll  
6 call it for the moment -- recommended practices and  
7 through your recommendations to us, we can collectively  
8 effect a positive corporate culture change that  
9 encourages employees to report their concerns without  
10 fear of retaliation while realizing benefits for  
11 employers who establish these programs in their  
12 workplaces.

13           So, to this committee as a whole, to all of  
14 you, whether or not you are on that committee, I would  
15 appreciate your brainstorming and advice on how OSHA  
16 can best reach out to workers and to employers and to  
17 educate them about all these issues, about  
18 whistleblower rights, the benefits of these rights, and  
19 protecting these rights for employers, and how we can  
20 all work together to protect these rights.

21           I think this will really play a key role as  
22 we implement our national outreach plan.

1           I know we've had three working groups. I  
2 appreciate your work on all of them. I appreciate your  
3 passion, your dedication, the time that you spent.

4           This committee really does work hard, and we  
5 recognize that, and I know you get no pay for this, you  
6 get no great honor except to know that you've really  
7 made a very important contribution to helping  
8 workplaces function better, and we're grateful for it.

9           We appreciate -- we're appreciative of your  
10 interest in promoting worker safety and health and the  
11 ability of workers to voice safety and health concerns  
12 without fear of retaliation.

13           The bottom line is this: Workers have to be  
14 able to report hazards without fear of reprisal. No  
15 one benefits if workers are silenced for sounding an  
16 alarm when they see a problem that could injure,  
17 sicken, or kill someone or impact their financial  
18 future.

19           The country needs to make sure these workers  
20 are protected. All this legislation says that, and we  
21 are the way to implement that.

22           We all pay a price when workers are silent.

1           So, again, thank you so much for coming to  
2 Washington to do the work with us, and I'm happy to  
3 take your questions or comments, and we'll take it from  
4 there.

5           CHAIR SPIELER: So, before we open it up for  
6 questions and comments, I just want to say that, from  
7 the time, Dr. Michaels, that you contacted me and asked  
8 me if I would chair this committee, until now, there  
9 have been enormous strides made by OSHA.

10           I don't think any of us thinks that we're  
11 there yet, but just the fact that there's an ARA  
12 structure out in the regions now and that people are  
13 here and focused on this issue -- it is a sea change  
14 from the way OSHA was previously organized around these  
15 issues, and I think it really will make a difference as  
16 we go forward, and I also didn't say in my opening,  
17 which I tried really hard to keep brief, that we have  
18 been staffed incredibly well by the people in DWPP and  
19 by Louise from SOL, and I want to thank Louise and  
20 Anthony, who has been our -- who is our contact person,  
21 and Rob and Megan and the other folks in DWPP for the  
22 work that you do.

1           I sometimes think that advisory committees  
2 are just one more thing for Federal employees, and I  
3 know that there are lots of rules to navigate when you  
4 have a Federal advisory committee, but I do think that  
5 this is a committee that is very committed to trying to  
6 make a difference, and as we go forward, we would also  
7 appreciate any ideas that you have for issues that we  
8 should be thinking about as a committee.

9           And with that, I'll open it up for  
10 questions/comments from the rest of the committee.

11           Nancy.

12           MS. LESSIN: Dr. Michaels, I know that OSHA  
13 put out a supplemental notice about the proposed rule  
14 of improving tracking of workplace injuries and  
15 illnesses, as well as that original rule.

16           Is there a timetable by which something might  
17 happen here or we might see what the fruits of those  
18 efforts are?

19           DR. MICHAELS: I've been at OSHA long enough  
20 never to say I know exactly when regulations will come  
21 out, but I think we're on target to complete our review  
22 of it, our work on it, within the next month or two,

1 and get it over to OIRA for their work. So, I think  
2 we'll see it within a few months.

3 MS. LESSIN: Thank you.

4 CHAIR SPIELER: Just for those of you who  
5 aren't quite focused on the inside baseball exchange  
6 there, what Nancy asked about was the record keeping  
7 rule and the rolling in of some of the issues around  
8 suppression of reporting into the record keeping  
9 requirements so that when companies have policies and  
10 practices that suppress record keeping, it would also  
11 be a violation of the record keeping rule, and the  
12 proposal also includes a component so that if someone  
13 were the subject of retaliation, as a component of  
14 that, it would also count potentially as a violation of  
15 the record keeping rule.

16 I know that OSHA has been considering that,  
17 and that is an issue that the advisory committee  
18 addressed in our recommendations.

19 So, it is something that we have considerable  
20 interest in, in view of the fact that it does touch  
21 that place where the OSHA general enforcement issues  
22 come against the OSHA retaliation issues, which are the



1 primary focus of this committee.

2 Other questions/comments for David?

3 Eric.

4 MR. FRUMIN: I want to second Emily Spielers's  
5 comments about the progress that's been made in the  
6 last few years on the whole whistleblower program,  
7 including the reforms at the regional level, and so,  
8 since the ARA's and other folks from the regions are in  
9 the room -- some of you I've met in the past; others,  
10 you know, maybe I'll meet now -- so, thanks for what  
11 you do every day.

12 You have a very hard row to hoe, and it means  
13 a lot when workers can believe that the assurances of  
14 protections that compliance officers give them during  
15 inspections, that those are meaningful, and if you  
16 weren't doing what you're doing, there would be no  
17 prayer that that would ever happen.

18 Having said that, there are many times when  
19 it's not a meaningful protection, for any number of  
20 reasons, the worst, of course, of which is the statute  
21 itself, and this committee has weighed in on the need  
22 to reform the statute and bring 11-C protections into

1 the modern era so that workers don't have to languish  
2 in the legal purgatory of an 11-C complaint for months  
3 and months or years waiting for the wheels of justice  
4 to grind on.

5 I want to just take this moment to thank the  
6 Solicitor's office and OSHA together for the work that  
7 was done recently in Region IV, in the south, and I  
8 appreciate the participation of people from Region IV  
9 here today, because you have a particularly difficult  
10 task.

11 It's a part of the country where workers have  
12 few rights that employers are bound to respect, at  
13 least in practice, and this recent incident that Dr.  
14 Michaels mentioned with the Lear Corporation speaks  
15 volumes to the innovation that's going to be necessary  
16 until we can see the reforms in 11-C that will someday  
17 give workers the hope that that right will be  
18 meaningfully vindicated.

19 The fact that this company treated workers  
20 this way in the midst of an OSHA investigation is  
21 really astonishing, and you have to wonder, what were  
22 those lawyers thinking?

1           Did they really expect an objective party to  
2 accept a slap suit against a complainant in the middle  
3 of an OSHA investigation?

4           I mean, it's just kind of hard to fathom how  
5 they would think that that was legit, and I was so  
6 heartened to see the work of the Solicitor's office and  
7 the OSHA folks in taking that action very, very  
8 seriously.

9           We saw you do that in the mining industry a  
10 year or two ago, and this kind of message needs to go  
11 out loudly throughout the land.

12           I wish penalties could have accompanied the  
13 judge's order, but maybe they're dumb enough to get  
14 into contempt.

15           So, thank you very much for the work that you  
16 do and for finding -- looking for practical ways to  
17 send that kind of message to employers for whom there  
18 is simply no line in the sand.

19           CHAIR SPIELER: Rina.

20           MS. TUCKER-HARRIS: I was just curious as to  
21 which city that was in Alabama.

22           DR. MICHAELS: Selma.

1           There are some news reports from the local  
2 newspaper. Maybe we'll make a copy and circulate --  
3 and give you some background on what's going on.

4           CHAIR SPIELER: Other questions or comments.

5           DR. MICHAELS: I was hoping we'd actually be  
6 able to get a picture together. This is a really  
7 august group, and we have a photographer here.

8           So, we can all stand up there, take a -- if  
9 that's okay with you. This is a good group to  
10 commemorate.

11          CHAIR SPIELER: Okay.

12          DR. MICHAELS: I'd like to do that.

13          (Off the record for photo shoot.)

14          CHAIR SPIELER: Next on our agenda, we're  
15 going to have a DWPP update and report from Eric  
16 Harbin, who is currently the Acting Director. I  
17 suspect at our next meeting we will hear from our  
18 permanent director who will be coming in, as you heard,  
19 next month.

20          Eric, why don't you go ahead?

21   DWPP UPDATE

22          MR. HARBIN: Okay. Thank you very much, Ms.

1 Spieler. It's a pleasure to be here.

2 As mentioned before, my name is Eric Harbin,  
3 and normally I'm the Deputy Regional Administrator in  
4 Dallas, Texas, but for the past seven weeks, I've been  
5 fortunate enough to be here with the Directorate of  
6 Whistleblower Protection Program and it's been quite an  
7 honor.

8 But one of the things I know, as Dr. Michaels  
9 started, he really thanked everyone here, but one thing  
10 I would actually like to do is thank Dr. Michaels for  
11 his leadership not only on safety and health issues but  
12 also making sure that workers have the right to  
13 exercise their whistleblower protection rights.

14 So, that's something I'm very proud of here,  
15 and I know everyone here with me, and they support Dr.  
16 Michaels in that.

17 I also wanted to let you know a little bit  
18 more about Ms. Garahan, Mary Ann Garahan, who was  
19 announced as the permanent director for the Director of  
20 Whistleblower Protection Programs.

21 As you know, she's been nearly three years  
22 the regional administrator in Philadelphia, Region III

1 for OSHA, and during that time she's got, actually, a  
2 very remarkable record.

3           They have a little over 13 million covered  
4 workers in their Region III, and during her time there,  
5 they've led to 125 successful whistleblower settlements  
6 in favor of the complainants, that being the workers,  
7 and it put 19 of the employees back to work and  
8 recovered over \$14 million for the workers. That is a  
9 remarkable sum.

10           During Mary Ann's tenure as a regional  
11 administrator, she also oversaw major enforcement cases  
12 and she expanded OSHA's outreach activities and the  
13 protection of vulnerable workers in her region.

14           Before serving as regional administrator,  
15 Mary Ann was here in the national office for many  
16 years.

17           Her last position was as the acting director  
18 of the Directorate of Technical Support and Emergency  
19 Management, and that time I actually spent a stint with  
20 her as the acting deputy for her, so I got to work with  
21 her very closely.

22           I'm very thankful for that.

1 I also would like to thank Emily Spieler for  
2 being the Whistleblower -- WPAC -- as well as the other  
3 work groups, Dave Eherts, Jon Brock, and Eric Frumin.

4 Also, as we introduced ourselves earlier, I  
5 wanted to thank the DWPP staff and recognize them for  
6 all they've done. Also in the audience here, we have  
7 the ARA's, the assistant regional administrators, who  
8 are a very hardworking group.

9 In particular, I also wanted to recognize a  
10 few people that each of you have been able to work  
11 closely with, and that's your WPAC points of contact  
12 starting with Anthony Rosa, your designated Federal  
13 official.

14 Christine Stewart, who is actually here  
15 helping on loan from Region VII in Kansas City. She's  
16 the Acting Division Director in DWPP.

17 Meghan Smith, who is your chief point of  
18 contact, as well Rob Swick and Marisa Johnson.

19 I will be here through the end of this week,  
20 and I'll just let you know that if there's anything I  
21 can do to make your time here any better, please let me  
22 know, and also, please feel free to contact me once the

1 meeting is convened.

2           And of course, as I mentioned, Anthony Rosa  
3 will remain the designated Federal official, and please  
4 also let Meghan Smith know if you have any issues.

5           She's currently on loan from DWPP to the  
6 Office of the Executive Secretary, but we're looking  
7 forward to the day when she comes back to DWPP.

8           I wanted to mention to you -- give you a  
9 field update.

10           As much as the Directorate of Whistleblower  
11 Protection Programs does, the bulk of the work is  
12 actually done in the field, in one of OSHA's 10  
13 regions.

14           As Dr. Michaels mentioned earlier, we have  
15 several pilot programs that were used.

16           There are a couple that were extremely  
17 successful, and the agency as a whole has decided to  
18 implement those programs, one being the assistant  
19 regional administrator for Whistleblower Protection  
20 Programs.

21           It was filled in Regions V and IV, had  
22 overwhelmingly positive results, and as Dr. Michaels



1 mentioned, we have expanded to all regions, and all of  
2 the regions have either filled the position or are in  
3 the process of filling the position for the assistant  
4 regional administrator.

5           One of the key things it really does is, just  
6 like -- in the regional structure, typically, up until  
7 now, you had three assistant regional administrators,  
8 one for enforcement programs, one for cooperative and  
9 state programs, and one for administrative programs.

10           What this does is this elevates the level of  
11 the whistleblower program in each of the 10 regions.

12           So, now we actually have four assistant  
13 regional administrators in each of the regions. We're  
14 in the process of filling all four positions.

15           What it does is it lowers the supervisor to  
16 investigator ratio. I'll give you an example.

17           In Region VI, where I'm from, in Dallas,  
18 previously we had one regional supervisory investigator  
19 supervising 11 investigators and 1 admin staff, and now  
20 we actually have reduced -- it made it difficult to  
21 manage all of the investigators, but now we've actually  
22 reduced the ratio of supervisors to investigators.

1 It's now in the range of five to one. It makes it much  
2 more manageable.

3 It provides subject matter expertise, and it  
4 actually copies what is in place in the Directorate of  
5 Enforcement Programs and throughout the regions.

6 So, another thing that was piloted and we are  
7 actually continuing it, as well, is the Alternative  
8 Dispute Resolution Initiative. Some of you may be  
9 aware that it was piloted in Regions V and IX. It was  
10 very successful. It was overwhelmingly successful.

11 We have decided to expand that. This will  
12 call, typically, for a new position, an alternative  
13 dispute resolution coordinator.

14 Currently, DWPP is in the process of getting  
15 through the directive to help give guidance to the  
16 fields, to each of the 10 regions, on how to utilize  
17 the alternative dispute resolution position.

18 Leading up to this, we worked with the  
19 Federal mediation and conciliation services to develop  
20 some training for the ADR position, and with the help  
21 of the FMCS, OSHA now has the training materials in  
22 place that will allow us to do our own in-house

1 training for the ADR coordinators.

2 With regards to training, we also are working  
3 to establish a parallel whistleblower training track at  
4 the OSHA Training Institute.

5 We currently have what we call a TED in place  
6 for our safety and health people, and soon we'll have  
7 it in place for our whistleblower investigators.

8 We're working to explore new avenues for  
9 providing additional Federal statute and special topic  
10 training.

11 As mentioned previously, Anthony Rosa gave a  
12 WebEx a few weeks ago on the incentives program  
13 regarding the Fairfax memo, and this training will be  
14 supplied on demand through our learning link.

15 To further ensure that we are conducting  
16 quality investigations, we are constantly improving our  
17 database system.

18 By refining our data collection and  
19 reporting, we're better able to discover, analyze, and  
20 address trends occurring both in our investigations and  
21 in various industries.

22 As you came into the meeting today, you

1 received a two-page sheet with investigation data for  
2 each of the regional programs and the program as a  
3 whole, and I'll hold mine up to display it.]

4           If yours is printed in color, there will be a  
5 yellow highlight. It's this two-page document.

6           What I wanted to do is take a minute to  
7 explain it to you.

8           So, the data on the summary sheet is derived  
9 from the first two pages of OSHA's Investigative Data  
10 Report, which is a standard report that the  
11 Whistleblower Protection Programs use to track  
12 whistleblower data trends.

13           Page 1 of the summary sheet provides basic  
14 caseload monitoring measures, including the number of  
15 cases received and completed during a given timeframe,  
16 as well as a number of cases pending at the end of the  
17 timeframe.

18           So, the first three columns provide data on  
19 the cases that were completed during fiscal year 2014.  
20 You have total cases completed, and it's broken down by  
21 region as you go from the top to the bottom, Regions I  
22 through X, and then also a total, a summary at the

1 bottom.

2           Percent of the cases that were completed  
3 within 90 days -- and again, it's -- as you move from  
4 the top to the bottom, it breaks it down by region, and  
5 the average days to complete the cases per region.

6           So, the column in the middle, new cases  
7 received, shows the total number of cases received and  
8 docketed for an investigation during the same time  
9 period, and again, it's by region.

10           This does not include complaints that were  
11 filed with the agency but were screened out because  
12 they were untimely or were not prima facie cases, and  
13 again, this is the new cases received.

14           And then the three columns to the right show  
15 the data on the cases that were pending with the agency  
16 at the end of the fiscal year, September 30, 2014,

17           So, it has the pending cases at the end of  
18 the fiscal year, the percent of pending cases over 90  
19 days, and the average days pending for the cases that  
20 were pending at the end of the fiscal year.

21           Page 2 of the summary sheet provides data on  
22 the determinations that complainants received in the

1 cases that were closed during the time period.

2 So, you know that OSHA investigations can end  
3 in one of five ways:

4 OSHA dismisses the case, issues a merit  
5 finding, a complainant can withdraw their complaint, or  
6 the complainant kicks out of the OSHA process by filing  
7 a complaint in District Court, or the parties resolve  
8 their dispute through a settlement.

9 To break it down a little further, OSHA  
10 breaks the settlements into two categories: settled,  
11 which OSHA is a party to the settling of the case, or  
12 settled other, which refers to a private settlement to  
13 which OSHA was not a party.

14 OSHA calls these six categories of case  
15 resolutions determinations.

16 In the second page of the summary sheet, it  
17 shows the number of determinations that were issued to  
18 complaints under the six determination types, and  
19 again, as I mentioned, it's broken down by region.

20 One thing I want to point out, when you  
21 compare the total number of determinations issued in  
22 the fiscal year to the number of cases completed on the

1 first page, you'll see the determinations total is  
2 larger, and this is because determinations counts the  
3 resolution received by each individual complainant,  
4 while the cases completed measure counts the case  
5 docket numbers that were closed during the time period.

6 Because OSHA occasionally lists more than one  
7 complainant on the same case number, there will be more  
8 complainant determinations than there will be case  
9 numbers closed.

10 Next to each total number of determinations,  
11 the table shows the percentage of total determinations  
12 issued that each determination type accounted for.

13 For example, the 809 total merits  
14 determinations issued in the fiscal year 2014 report  
15 accounts for 25 percent of all determinations.

16 On the right-hand side of the table, two  
17 columns provide data on the remedies received by  
18 complainants in the merit determinations, settlements  
19 and merit findings that were issued during the  
20 timeframe.

21 The damages column shows total monetary  
22 damages provided to complainants in merit findings or

1 settlement agreements during the timeframe, and then  
2 the reinstated column shows the number of complainants  
3 that were reinstated.

4 Now, on Friday, each of you received an email  
5 from the designated Federal official, Anthony Rosa, and  
6 it was a four-page document, and I think we're in the  
7 process of getting printed copies for you if you don't  
8 already have it.

9 Is that correct?

10 MR. ROSA: That is correct.

11 MR. HARBIN: A lot of the information is very  
12 similar, but there's a couple of things I wanted to  
13 point out.

14 There's one row that's labeled EPA. This  
15 refers to all six of the environmental statutes that  
16 OSHA enforces. I think you may still only have it in  
17 an electronic copy at the moment.

18 And likewise, on the second page, it  
19 corresponds to the second page of the summary, which I  
20 just covered briefly with you.

21 And the third and fourth pages provide data  
22 on which type of protected activity was alleged by



1 complainants who received a determination during the  
2 time period, and this goes through each of the statutes  
3 that OSHA covers.

4           And then page 4 expresses the totals listed  
5 on page 3 in terms of percentages. Page 3 will be just  
6 numbers, raw numbers of complainants or the particular  
7 statute that was referenced, and then page 4 breaks it  
8 down into percentages.

9           One of the things Dr. Michaels referenced  
10 earlier was the DWPP administrative review forum. It  
11 was called a DWPP review or appeals process.

12           One of the things that DWPP has done is they  
13 have meetings -- we have -- the administrative forum  
14 meetings have been a success.

15           At these meetings, staff members discuss  
16 cases that may need more investigation or might need to  
17 go to the full Administrative Review Committee.

18           The full committee consists of members from  
19 DWPP and the national Solicitor's office.

20           Through these discussions, DWPP has been able  
21 to identify areas for improvement in OSHA's 11-C  
22 investigations and have meaningful discussions on

1 policy issues.

2           One thing I just really wanted to make clear  
3 for all of you is this is not a rubberstamp process.  
4 We have actually sent cases back to the field for  
5 further clarification or investigation.

6           As Dr. Michaels mentioned, we have posted  
7 online, back in December of 2013, the online  
8 whistleblower complaint form. We have received over  
9 3,000 online filed complaints during FY 2014, which is  
10 a remarkable number.

11           Dr. Michaels mentioned our Spanish language  
12 web page and updated fact sheets. We're also working  
13 to make information more accessible to the public.

14           About two weeks ago, the Spanish language  
15 whistleblower web page was launched.

16           We're also in the process of issuing mini-  
17 fact sheets on each of our statutes and updating our  
18 older fact sheets.

19           Last week, for example, we issued fact sheets  
20 on the Clean Air Act, the Federal Water Pollution Act,  
21 and the Safe Drinking Water Act. About a month prior,  
22 we issued a fact sheet on the Seaman's Protection Act.

1 DWPP has worked with OSHA's Director of  
2 Enforcement Programs to draft and publish a bulletin  
3 regarding whistleblower rights and responsibilities for  
4 the agency's temporary worker initiative.

5 The bulletins were issued under the  
6 initiative outlining how joint employers share  
7 responsibilities in protecting the safety and health of  
8 their workers.

9 The bulletin was published in March and is  
10 posted on OSHA's temporary worker web page, and a copy  
11 of that bulletin is in your package.

12 The Directorate of Whistleblower Protection  
13 Programs is responsible for promulgating regulations  
14 specifying the procedures for the handling of  
15 retaliation complaints filed under the 22 statutes OSHA  
16 administers.

17 Since the September 2014 meeting, OSHA has  
18 published a final rule and continued work on several  
19 other whistleblower rulemakings.

20 On March 5th of 2015, OSHA published a final  
21 SOX rule.

22 In addition, the agency is continuing its

1 work on final whistleblower regulations under several  
2 other statutes, responding to public comments received  
3 on previously published interim final rules, including  
4 the Food Safety Modernization Act, the Affordable Care  
5 Act, the Seaman's Protection Act, the Consumer  
6 Financial Protection Act, the National Transit System  
7 Security Act, and the Federal Railroad Safety Act.

8 Finally, the agency is continuing its work on  
9 an interim rule for the Moving Ahead, or MAP 21 Act.

10 We continue to strengthen our interagency  
11 relations. Since so much of our work and statutes  
12 address non-OSHA issues, it's critical that we  
13 strengthen interagency relationships.

14 We've begun to meet regularly with our  
15 various partner agencies. Last month, for example, we  
16 met with the FAA to ensure smooth coordination in the  
17 handling of whistleblower complaints between our agency  
18 and theirs.

19 Our whistleblower investigations manual  
20 continues to be an item that we've worked hard to  
21 improve on. We continue to update chapters to make it  
22 more consistent for our investigators.

1           As Dr. Michaels mentioned, around 11:00  
2 o'clock today, we issued -- OSHA and the Solicitor of  
3 Labor drafted a new policy memo that clarified that the  
4 standard that applies to OSHA's whistleblower  
5 investigations is whether OSHA has reasonable cause to  
6 believe a violation occurred.

7           In other words, OSHA's policy is to issue  
8 merit findings in whistleblower cases that provide for  
9 ALJ hearings when it has a reasonable cause to believe  
10 that a violation occurred, which is a lower standard  
11 that the preponderance of the evidence standard that  
12 applies at a hearing before an administrative law  
13 judge.

14           In cases under Section 11-C, OSHA should be  
15 consulting with the Solicitor of Labor regarding  
16 whether a case is suitable for litigation no later than  
17 when we, OSHA, recognize that there is a reasonable  
18 cause to believe that a violation occurred.

19           As mentioned previously, Megan Guenther from  
20 the Solicitor's office will be presenting that this  
21 afternoon.

22           Now, during the last few meetings of the

1 Whistleblower Protection Advisory Committee, there were  
2 some recommendations that came from WPAC.

3           One of those recommendations was that OSHA  
4 develop and offer statute-specific periodic training to  
5 transportation and other industries subject to  
6 whistleblower laws.

7           In response to that, OSHA is actively engaged  
8 in a nationwide outreach plan which will include fact  
9 sheets, wallet cards, and other information and  
10 materials for all industries under its jurisdiction,  
11 including the transportation industry.

12           OSHA also looks forward to WPAC's Best  
13 Practices Work Group recommendations regarding  
14 recommended practices for employers, which will be  
15 tomorrow.

16           A second recommendation from WPAC was  
17 regarding punitive damages, that OSHA should work with  
18 the Office of the Solicitor to achieve better  
19 coordination between OSHA investigators and the Office  
20 of the Solicitor regarding the appropriateness of  
21 punitive damages in particular cases.

22           And in response to that, I wanted to let you

1 know that OSHA enjoys an excellent working relationship  
2 with the Office of the Solicitor and continually works  
3 with this office on all meritorious determinations.

4           During these discussions, OSHA continues to  
5 seek, where appropriate and applicable, the imposition  
6 of punitive damages, and we intend to continue this  
7 process in all future merit determinations.

8           A third recommendation from WPAC was the  
9 development of outreach with regard to incentive  
10 programs, specifically the Fairfax memo of March 12,  
11 2012, and in response, OSHA, in March 2015, conducted  
12 an internal webinar on the incentives/disincentives  
13 from the Fairfax memo.

14           More than 400 OSHA employees participated in  
15 the webinar, and the feedback was very positive.

16           In addition, OSHA is actively engaged in a  
17 nationwide outreach plan which will include, among  
18 other items, outreach information and materials  
19 including the Fairfax memo, as well as its possible  
20 implications under 29 CFR 1904, OSHA's record keeping  
21 rule.

22           As mentioned previously, the agency is

1 currently seeking public comment on a proposed rule to  
2 change its existing regulation with regards to record  
3 keeping.

4 A fourth item that WPAC recommended was that  
5 OSHA lobby to expand protections. For example, longer  
6 statutes of limitations for some of the regulations  
7 from 30 to 180 days.

8 OSHA is well aware of the limitations of  
9 Section 11-C of the OSHA act. In fact, as Assistant  
10 Secretary David Michaels testified in April of 2014  
11 before the Senate Health Committee regarding the very  
12 same recommendations presented by WPAC.

13 However, until Congress enacts any amendments  
14 to the act, OSHA is limited in its authority and  
15 ability to make any changes.

16 One of the older recommendations from the  
17 March of 2014 WPAC meeting was for greater transparency  
18 in OSHA's investigations.

19 OSHA has modified its initial opening  
20 letters, what we call notification letters, and asked  
21 the parties to share each other's position statements  
22 and rebuttals during the beginning of investigations.



1           However, OSHA has and will continue to share  
2 one party's documentation with the other party as part  
3 of the agency's nonpublic disclosure policy, as  
4 outlined in our manual.

5           In addition OSHA issued a memo in June to its  
6 field offices regarding the importance of cross  
7 referrals between the whistleblower and compliance  
8 teams in instances where both a retaliation allegation  
9 and an ongoing safety and health hazard may be present.

10           The last item that we have as a  
11 recommendation from WPAC that's open is consistency in  
12 application and WPAC recommended that OSHA take steps  
13 such as internal training programs to improve  
14 consistency in the application of laws, regulations,  
15 and statutes subject to OSHA's jurisdiction.

16           In response, OSHA has been diligently working  
17 on overhauling its whistleblower training program.

18           A work group comprised of regional and  
19 national whistleblower managers was convened.

20           A new whistleblower competency model was  
21 developed, along with a training directive and the  
22 clearance process, mirror that of the safety and

1 health, or CSHO, side of the house.

2 OSHA's overhauled training program increased  
3 the number of mandatory courses from two to five within  
4 three years of hiring new whistleblower investigators.

5 In addition, OSHA will develop statute-based  
6 webinars and have them available on demand in its  
7 internal training database, or Learning Link, as we  
8 call it.

9 With that, I complete my update from the  
10 Whistleblower Protection Programs, and I'll be happy to  
11 answer any questions you may have.

12 CHAIR SPIELER: Thank you.

13 I have to say that you have certainly been  
14 responsive -- the directorate has certainly been  
15 responsive not only to the formal recommendations of  
16 this committee but also to the areas in which there has  
17 been obvious consensus in the conversations without any  
18 formal recommendation, and I think we are very aware of  
19 that, and I think it is really terrific that we can  
20 bring to the agency, through our conversations,  
21 concerns, and that they have been heard and that you  
22 have thought about them and, in certain cases, acted on

1 them and always acted on them appropriately, and it  
2 does make us feel like it's worth coming.

3           So, thank you for that.

4           Marcia?

5           MS. NARINE: Thanks. That was very helpful,  
6 but I do have a couple of questions.

7           The first one is, I wasn't sure that I  
8 understood what you were saying about WPAC's  
9 recommendation about punitive damages.

10           I didn't understand whether you were saying  
11 that -- you were clarifying what you already did or  
12 that something changed.

13           That's question number one.

14           And the second question -- I may have more  
15 after I see the other pages -- relates to the big  
16 disparity in results between the regions, because I  
17 can't see, just glancing at it, necessarily a reason.

18           Is it because of staffing issues, or is there  
19 some other explanation that might show why there's some  
20 disparities in terms of -- especially when I'm looking  
21 at the average days pending, average days to complete,  
22 that kind of thing.

1           MR. HARBIN: Okay. If I may, I'll take on  
2 the first question, and then I'll circle back around to  
3 the second question.

4           So, the first question was regard to punitive  
5 damages.

6           There was a recommendation of WPAC that --  
7 and I'll read more about it to you -- OSHA should work  
8 with the Department of Labor's Office of the Solicitor  
9 to develop consistent, articulable standards regarding  
10 the circumstances when punitive damages would be  
11 appropriate in an OSHA Act Section 11-C retaliation  
12 case, whether based on the standards set forth in the  
13 whistleblower investigations manual or some other  
14 standard.

15           WPAC further recommended that OSHA work with  
16 the Offices of the Solicitor to achieve between  
17 coordination between OSHA investigators and the Office  
18 of the Solicitor on the appropriateness of punitive  
19 damages in particular cases.

20           And finally, WPAC recommended that OSHA apply  
21 these consistent, articulable standards and seek  
22 punitive damages in appropriate cases in order to more

1 fully remedy and deter egregious conduct.

2 MS. NARINE: I remember all of those, because  
3 I was here when we made all those recommendations. So,  
4 my question was, were you explain -- were you  
5 clarifying what you're already doing or were you saying  
6 that something has changed?

7 MR. HARBIN: Clarifying what we were already  
8 doing.

9 MS. NARINE: Okay. Thank you.

10 CHAIR SPIELER: Let me just interrupt for one  
11 second. This is housekeeping.

12 We need to label things as exhibits for the  
13 meeting, and so, the first will be the initial two-page  
14 printout of the investigation data determinations and  
15 remedies, and the second exhibit will be the  
16 investigative data by statute of all regions, four  
17 pages.

18 (Exhibit Nos. 1 and 2 were  
19 marked for identification.)

20 CHAIR SPIELER: I'm wondering if it would be  
21 useful to divide this conversation between the data  
22 questions that maybe we could do all together and other

1 issues. Clearly, punitives was another issue, but why  
2 don't we do this?

3 Questions and comments about everything other  
4 than the data first and then questions and comments  
5 about the data, and that way -- we've handed out the  
6 summary data on allegations under statutes and --  
7 actually, the statute-based data, four pages, and you  
8 can take a minute, if you haven't already looked at it.

9 We did receive it by email last Friday. So,  
10 you may have already looked at it in the meantime.

11 Eric.

12 MR. FRUMIN: Thanks.

13 So, you mentioned the recommendation for  
14 upgrading your training and outreach efforts, which was  
15 actually one that came from the Transportation Work  
16 Group, and so, the committee -- the full committee,  
17 when it accepted that recommendation and referred it to  
18 you, was very interested in both the parameters and the  
19 content of such training.

20 We actually amended the report to say that we  
21 wanted to look at that ourselves. So, whatever the  
22 appropriate way would be for you to share with us that

1 information, it would be in the -- continuing in the  
2 spirit of the recommendation that we made to you.

3           Obviously, there's a lot that you need to do  
4 internally and decide what aspects of it are  
5 appropriate, but I can tell you that the only way we  
6 made that recommendation in the first place was -- the  
7 only way we were able to come to consensus on it was  
8 with a shared understanding on our side that we would  
9 have some ability to have some influence in what those  
10 materials, that outreach would look like, for a whole  
11 host of reasons.

12           I don't want to belabor the situation now but  
13 just to say that a number of the people in that  
14 discussion in the work group and then this full  
15 committee felt that that -- felt that we could provide  
16 a useful role there.

17           So, I'll leave it at that, however you think  
18 would be appropriate, but we would very much appreciate  
19 that opportunity before the ink is dry,

20           MR. HARBIN: Okay. Thank you.

21           CHAIR SPIELER: Other non-data questions or  
22 comments?

1 Ken.

2 MR. WENGERT: Thank you for the update.

3 I guess I'm more interested in your thoughts  
4 as you're transitioning out, what your thoughts are for  
5 opportunities for improvement. Where do you see it  
6 going?

7 MR. HARBIN: With regards to --

8 MR. WENGERT: -- the entire program. Where  
9 do you see the biggest opportunities?

10 MR. HARBIN: That's actually a difficult  
11 question to answer, cause that's probably a little  
12 above my pay grade. That might be more for Dr.  
13 Michaels.

14 But I tell you one of the great things is to  
15 see that the program was elevated. As I mentioned, the  
16 change in the structure where the assistant regional  
17 administrators were put out into the field.

18 I'm actually -- I did spend two years here in  
19 OSHA's national office, but I actually spent my other -  
20 - I started in '97, so doing the math here -- the other  
21 16 years I spent in the field, and I really heartens me  
22 to see how much Dr. Michaels and the rest of the



1 leadership in OSHA have put into strengthening -- kind  
2 of leveling the playing field, if you will, between the  
3 whistleblower programs and the other enforcement  
4 programs that we have in the agency. It really brings  
5 it forward.

6           And then the -- I can remember a time when  
7 the strength for the whistleblower program out in the  
8 field was very, very low, and to see us up now -- I  
9 think the latest data puts us in the 135 or so people  
10 across the agency that are involved in the  
11 Whistleblower Protection Program.

12           It really bolsters the standing of the  
13 program.

14           So, to me, coming from the field, that's one  
15 of the things that I really see moving the program in  
16 the right direction,

17           CHAIR SPIELER: Greg.

18           MR. KEATING: Can I just ask a quick question  
19 about the ADR pilot that you mentioned? You mentioned  
20 that it's been overwhelmingly positive. You worked  
21 with FMCS and OSHA is now training its own people.  
22 Practically, how does it work, though, if you could

1 just give a little bit more meat on the bone.

2 MR. HARBIN: We actually have the directive  
3 that really gives the guidance to the field on how the  
4 ADR program is going to work, but generally speaking,  
5 early on, it will be offered to the -- basically you  
6 have the complainant, the worker, and the respondent,  
7 the employer -- will be offered the opportunity to  
8 participate in this alternative dispute resolution.

9 This will be very, very early on, once the  
10 complaint is filed, and both parties will have to agree  
11 to participate in it, and at that time, the  
12 investigation -- if both agree to participate in it,  
13 the investigation will stop for about three weeks,  
14 roughly, and allow for this process to proceed.

15 That's kind of the gist of it. If you want a  
16 little deeper explanation, Mr. Rosa might be able to  
17 help us out on that.

18 MR. KEATING: Well, specifically, Anthony,  
19 what I'm interested in is who would then do the  
20 mediation? How is it paid for? That kind of thing.

21 MR. ROSA: The mediation will be done in-  
22 house by a dedicated, full-time employee of OSHA that

1 is no longer involved in the enforcement side of the  
2 house.

3           That is, a person that has been trained,  
4 either from FMCS or internally through the documents  
5 that we received, cause what we did with FMCS, Federal  
6 Mediation Conciliation Service, was asked them to  
7 provide a train-the-trainer course for us so that our  
8 field people that came in here to the national officer  
9 can then train the rest of the staff but also develop  
10 training modules and training materials for us so that  
11 we can use those in-house.

12           So, it will be done by a dedicated person  
13 that is no longer doing enforcement activity. That is,  
14 a person that's dedicated to complaint resolution.

15           CHAIR SPIELER: Richard.

16           MR. MOBERLY: Thanks again for coming here.

17           One of the things I heard you say was that a  
18 recommendation was greater transparency in OSHA  
19 investigations, and then I missed or didn't hear what  
20 was being done in response to that recommendation, if  
21 you could just tell me a little bit more about that.

22           MR. HARBIN: So, OSHA has modified its

1 initial opening letters, our notification letters, and  
2 asked the parties to share each other's position  
3 statements or rebuttals, the parties being the  
4 complainants and the respondents.

5 MR. MOBERLY: That's a new requirement?

6 MR. HARBIN: The new issue is that we have  
7 modified the opening letters and asked that they --  
8 asked them to share each other's positions. So, that's  
9 just a change -- I believe "change" would be the right  
10 word.

11 MR. MOBERLY: Right. What we have done in  
12 our initial notification letters to the parties, that  
13 we have encouraged them to share their responses with  
14 the other party.

15 That would expedite the review process by the  
16 other side, and it would also show a good faith effort  
17 from one party sharing it with the other party, but it  
18 would also save us our resources of having us go ahead  
19 and sending it out.

20 We still send it out to the other party. We  
21 do have to provide -- we do have to review it and  
22 provide certain redactions that need to be made under,

1 you know, nonpublic disclosure or FOIA act, but if the  
2 other party shares it directly, that saves a lot of  
3 time and they can expedite the process, and it creates  
4 greater transparency between the two.

5 But we are still committed -- if one party  
6 does not share with the other party, we are still  
7 committed to making that copy available to them.

8 MR. HARBIN: Another thing that I mentioned  
9 is that when OSHA has reason to believe that there is a  
10 safety and health complaint and a whistleblower  
11 investigation ongoing, both investigations will proceed  
12 at the same time and together, to the extent possible.

13 CHAIR SPIELER: Just as clarification, does  
14 that mean a referral from a whistleblower investigator  
15 to a safety CSHO would sort of count as a complaint,  
16 the equivalent of a complaint?

17 MR. HARBIN: A referral is pretty similar to  
18 a complaint.

19 CHAIR SPIELER: Okay.

20 MR. HARBIN: A complaint would be something  
21 from an active worker, a current employee of that  
22 worksite, and then a referral is made by someone who is

1 not an employee but has a very good understanding that  
2 that condition may exist at the moment.

3 CHAIR SPIELER: Okay.

4 MR. ROSA: And we would clarify with the  
5 person calling that he or she is willing to file both  
6 complaints. We want to make sure that they understand  
7 the difference between a safety and health complaint  
8 and a whistleblower complaint.

9 But when a complaint comes in and they're  
10 alleging both issues, we want to capture all the  
11 information and share it with both sides of the house.

12 CHAIR SPIELER: Jon.

13 MR. BROCK: I had a further question about  
14 the mediation program, two questions.

15 One is, what types of cases are going into  
16 that? Are there certain categories of cases or  
17 profiles that tend to make their way into it?

18 And secondly, what's done to ensure that it's  
19 a level playing field? And in particular, what sort of  
20 support does the worker get for coming in there and  
21 participating?

22 MR. HARBIN: With regards to the first

1 question, I don't think we've had the process in place  
2 long enough to characterize any particular kind of  
3 cases that might be going into the ADR program.

4           And with regards to the second case, the  
5 alternative dispute resolution approach, it's just --  
6 from OSHA's standpoint, we only would have one person --  
7 - that would be the ADR coordinator -- involved in it.

8           MR. ROSA: Correct. And like I indicated,  
9 both parties need to request it, and that information  
10 is maintained separate from the investigative file,  
11 which means whatever happens during those negotiations  
12 are not shared with an investigator if the mediation  
13 fails.

14           So, it stays separate, under the ADRA. It  
15 has to be maintained separate and not part of the  
16 record in terms of the investigative file.

17           So, that gives the parties greater  
18 opportunity to discuss anything they wish to discuss  
19 that they may not have wanted to discuss if the case  
20 was ongoing investigation.

21           MR. KEATING: Does each region have a  
22 dedicated ADR coordinator?

1           MR. ROSA: We are in the process of working  
2 on that.

3           MS. LESSIN: If both parties agree, then it  
4 proceeds, but I would -- I think the selling point, if  
5 I'm not mistake, is, for example, with 11-C, the  
6 average time it would take to resolve a complaint is a  
7 year.

8           So, the ADR would be, here, we can do it  
9 quicker, right?

10          So, my question is, has there been an  
11 analysis when -- when you said there were two regional  
12 pilots and it was working very well and we're going to  
13 expand it, have you looked at the settlement that came  
14 out of ADR -- clearly, it happened quicker, but what  
15 the settlement was versus what a settlement is likely  
16 to be going through the non-alternative dispute  
17 resolution process?

18          What does the worker get? You know, is it  
19 equal and one is just shorter days, or do they lose  
20 something going through? So, that's the first  
21 question.

22          MR. HARBIN: Well, the answer to that would



1 be, no, we have not looked at it. It would be hard to  
2 determine, because as you might imagine, during the  
3 investigative process, a lot of times things turn up  
4 that no one was expecting, and it would really alter  
5 the outcome of the investigation, and the ADR, the  
6 alternative dispute resolution, as you mentioned, it  
7 allows for a very fast resolution of the case and some  
8 permanency to the closing of the case, so -- but we  
9 have not gathered any data with regards to differences  
10 between what was settled upon and what the final  
11 outcome might have been otherwise.

12 MS. LESSIN: So, what would be of concern to  
13 me is the decision that says it's working so we're  
14 going to expand it. What does "working" mean?

15 MR. ROSA: Well, there's one thing I wanted  
16 to add on to what Eric had mentioned.

17 There will be one possible difference, and  
18 that would be in the amount of back pay, because if you  
19 settle it sooner, you have less back pay, but OSHA is  
20 still committed to ensuring that non-monetary relief is  
21 there from the beginning or throughout the  
22 investigation, whatever the case may be.

1           So, again, we don't have all that specific  
2 data, but we do maintain that anything that would be  
3 part of the settlement, provided that a full  
4 investigation had taken place -- it's still there in an  
5 early resolution phase, albeit being a smaller back pay  
6 -- a smaller back pay award.

7           MS. LESSIN: Can we get that data? Is that  
8 data knowable? Is it something that we can get? And  
9 also, I'll just add on my other question about which  
10 types of cases went to ADR, and you said we can't  
11 characterize.

12           Well, clearly, in the two regions where this  
13 had been going on, you should be able to characterize  
14 that. Is that correct? I mean, you know which cases  
15 went into ADR. So, we could look at that data, at  
16 least.

17           So, those are two data sets that, you know, I  
18 would very much like to see.

19           MR. BROCK: Can we get the guidelines for the  
20 program that you provide to the parties and the  
21 investigator?

22           MR. HARBIN: Sure. We should have the

1 directive -- the directive is in the clearance process,  
2 in the final stages of clearance, and when it is  
3 completed, we will get a copy of it to the members of  
4 WPAC.

5 MR. BROCK: Thank you.

6 CHAIR SPIELER: Marcia.

7 MS. NARINE: I have another data/ADR type  
8 question, and that relates to -- I'm very familiar with  
9 the ADR process with the EEOC, where the agency  
10 recommends very quickly and people tend to take it up,  
11 for a variety of reasons.

12 Employers may be just in it for completely  
13 different reasons than the workers.

14 I'm wondering if you have any data, anecdotal  
15 or otherwise -- obviously both sides have to agree to  
16 it, but do you know which side tends to ask for it  
17 first? Do you see it more coming from the employer's  
18 side, from the worker's side?

19 And then, what feedback have you been getting  
20 -- since you said it's very popular and successful --  
21 from both the workers and the employers, and has any of  
22 that feedback been used to maybe make some tweaks to

1 the program going forward?

2 MR. HARBIN: At this point, we do not have  
3 any of the data responsive to your question, but we  
4 will certainly take that into consideration going  
5 forward. Those are very good points to make.

6 CHAIR SPIELER: I would make one final point,  
7 which is -- I'm trying to imagine how this works,  
8 particularly given the number of workers who are likely  
9 to be un-represented when they go into this process and  
10 the number of employers who may have legal  
11 representation.

12 And maybe this is a conversation for our next  
13 meeting, because it would be useful, I think, to see  
14 the directive and talk about it, because it isn't clear  
15 to me that workers necessarily know the full range of  
16 what they can expect, short- or long-term, and it is --  
17 if you have only your mediator there with them and  
18 there's some -- I wouldn't say pressure, but a goal of  
19 settlement, then it may not be as balanced a playing  
20 field as perhaps we would like it to be.

21 And so, I hope, in looking at the directive,  
22 that you think about those issues, and I suspect you

1 have, since you are generally attentive to those  
2 issues, but I think after we see the directive, it  
3 might be useful to have a further conversation about  
4 this at our next meeting.

5           And if you can put data together, that would  
6 actually be useful, because the question of what do you  
7 mean when you say it worked well is always a question  
8 that I think you'll hear from members of this  
9 committee.

10           And each of us, I bet, could tell you  
11 anecdotes about conversations about working well.

12           Are there other questions or comments?

13           J.J.

14           MS. ROSENBAUM: Just two more pieces on the  
15 data set, if they're available.

16           One would be if limited English-proficient  
17 workers are participating at the same rate as other  
18 workers and how those issues are being dealt with.

19           And also, if claims involving temporary  
20 staffing agencies for particular sectors are coming up  
21 more or being chosen more to participate.

22           MR. HARBIN: Thank you.

1 CHAIR SPIELER: Okay.

2 So, I asked you to segment off comments and  
3 questions about the data set, and I'm going to open it  
4 up now for questions or comments about the data.

5 MS. NARINE: If you could answer, to start  
6 off with, the one I'd asked originally about the  
7 disparities in the --

8 CHAIR SPIELER: So, disparities among the  
9 regions --

10 MS. NARINE: Is it really a staffing issue,  
11 or is there something else going on?

12 MR. HARBIN: I was actually curious about  
13 exactly what you meant by disparities between the  
14 regions.

15 MS. NARINE: I'm looking at some that have a  
16 much -- I'm trying to understand why there's such a  
17 disparity in average days to complete, average days  
18 pending, because if I look at the number of cases that  
19 some of the regions have, I can't get my mind around a  
20 specific correlation, so -- and maybe if I spent a lot  
21 of time looking at this document, I might be able to  
22 figure that out, but if you know something right off

1 the top of your head, that might be helpful.

2 MR. HARBIN: Mr. Rosa spends a lot of time  
3 analyzing the data, and I'm going to defer to him on  
4 this.

5 MR. ROSA: I can give you a little history  
6 behind this, cause I was the ARA in Region IV, before I  
7 came here, and I was one of the two pilots, and as you  
8 see the numbers from Region IV, I can at least provide  
9 what my experience is.

10 The numbers are -- you can see like average  
11 days pending is pretty low and average days to complete  
12 is pretty low. It wasn't like that. It was different.

13 So, what's happened is that, as we mentioned  
14 earlier, Dr. Michaels mentioned it and so did Eric  
15 Harbin mentioned that two regions had piloted this ARA  
16 structure and developed some initial strategies of how  
17 to do caseload management, and that caseload management  
18 had increased in the efficiency of getting the cases  
19 completed without affecting the outcome, because you  
20 see the outcome in those two regions, that it didn't  
21 affect the outcome.

22 That's been implemented in all the other

1 regions, and you will see, for example, Region VII has  
2 done a significant increase, Region VI has done it, and  
3 I don't want to name -- cause all my colleagues are  
4 here, but each region is working on it, one by one.

5 CHAIR SPIELER: He wouldn't even if you  
6 weren't here.

7 MR. ROSA: To be quite honest with you, it  
8 takes time, because when I started this initiative --  
9 we called it the backlog initiative, and I started this  
10 in 2010.

11 It actually took two years for the numbers to  
12 get worse before they got better, because we needed to  
13 tackle the underlying issue of what was going on with  
14 how we were doing our investigation and how it was  
15 being supervised and reviewed.

16 So, you're going to see trends that is going  
17 to take some time for the rest of the other regions to  
18 fall in line, and there could be other variables.

19 There could be a staffing issue. There could  
20 be, you know, a small region that has two or three  
21 people that are out for whatever reason that can cause  
22 some effect.



1           So, there could be other variables that we  
2 can't necessarily control, but the average that you  
3 will see is where the regions are moving in that --  
4 kind of that same direction.

5           MS. NARINE: Thank you. That's very helpful.

6           CHAIR SPIELER: Nancy.

7           MS. LESSIN: I just want to make sure that  
8 I'm looking at this correctly, and I'm looking at --  
9 page 3 is -- the data set on page 3 for FY 2014, and  
10 I'm looking at the subset of complaints coming in  
11 alleging retaliation for participating in safety and  
12 health activities versus complaints coming in alleging  
13 retaliation for reporting accidents and injuries, and  
14 in particular, I'm looking at FRSA and OSHA 11-C, and  
15 it appears to me, once again, in this most recent  
16 Federal fiscal year, that there are more complaints  
17 coming in for workers alleging retaliation for  
18 reporting injuries than for participating in safety and  
19 health activities, and I want to make sure that that is  
20 what I'm seeing.

21           MR. HARBIN: That is correct. That is what  
22 you're seeing.

1 CHAIR SPIELER: And particularly under FRSA.

2 MS. LESSIN: Okay. And what is complaint  
3 management? What is that? What is that category?

4 MR. ROSA: That's when they file a safety and  
5 health complaint internally to management.

6 MR. KEATING: So, complaint management is  
7 where there is alleged retaliation because I complained  
8 to management.

9 MR. ROSA: Correct.

10 CHAIR SPIELER: Yes, Christine.

11 MS. DOUGHERTY: I just want to add, as a  
12 person that goes in a state plan state and checks the  
13 boxes for, you know, reporting this stuff, is that  
14 these categories is what you consider to be the primary  
15 complaint of the employees.

16 So, they might have --

17 MR. ROSA: That's correct.

18 MS. DOUGHERTY: They might have made a  
19 complaint to management. They might have participated  
20 in safety and health. They might have also reported an  
21 injury. So, the individual person doing the intake is  
22 deciding which one is the primary category.

1 MR. ROSA: Thank you for raising that.

2 CHAIR SPIELER: EOC data has the same  
3 problems.

4 MR. ROSA: Yeah. And we mentioned that at  
5 the last meeting when I gave the data overview, that  
6 certain fields only allow us to do one entry.

7 So we're in the process of -- and we actually  
8 have it in our schedule -- some data changes and  
9 upgrades we want to do as resources permit that's going  
10 to allow us to check multiple boxes.

11 CHAIR SPIELER: It can lead to different data  
12 problems.

13 MR. ROSA: Correct.

14 CHAIR SPIELER: Eric.

15 MR. HARBIN: One thing I wanted to point out  
16 to Ms. Lessin is that, if you look at complaint  
17 management and you follow it down to OSHA, the number  
18 is actually higher than participation in safety and  
19 health activities and higher than reporting accidents  
20 and injuries combined.

21 MS. LESSIN: Correct. I saw that. I just  
22 wanted to parse the two that I talked about.

1           MR. FRUMIN: So, these data, by statute, are  
2 very helpful in understanding -- in giving outsiders  
3 like us a little clearer focus on the different aspects  
4 of the program, because obviously the -- if you look at  
5 the top three statutes -- OSHA, FRISA, and STA --  
6 together they account for, you know, like 90 percent of  
7 the whole program.

8           So, whatever is going on under SOX or, you  
9 know, environmental statutes, your basic meat and  
10 potatoes practices are going to be driven by those, and  
11 so, the relationship of what happens under the OSHA act  
12 itself to these cases, to me, is particularly  
13 important.

14           So, when looking at Marcia's point, you know  
15 -- well, here I'm looking at these disparities among  
16 the regions, and I'm saying, wow, Region II -- this is  
17 my home region. I love Region II. Rich Mendelson will  
18 tell you I love Region II.

19           But they have 778 days to complete. Why is  
20 that? That's crazy. That's off the charts. And then  
21 I know that Region II also has, I think, like the  
22 highest rate of employer contests.

1           It's not just the whistleblower program which  
2 may suffer from, shall we say, employer intransigence  
3 and dragging things out or people hiring too many  
4 lawyers or whatever you want to say it is.

5           I mean, so I'm speculating here -- this is  
6 speculation, but it would be -- it just points to --  
7 the first lesson of this, to me, is that -- is that  
8 even though we're looking at however many different  
9 statutes, the relationship to the enforcement and  
10 compliance program, particularly under OSHA, is -- it's  
11 very important to take that into account.

12           The other thing is that, if it were possible  
13 to look at the statute data in a more malleable form,  
14 that would give us a chance to use our own imaginations  
15 here and follow some leads. That would be helpful.

16           So, I don't know if that is possible,  
17 particularly that would include the regional data, so  
18 we could compare --

19           CHAIR SPIELER: Could you explain what you  
20 mean by "malleable"?

21           MR. FRUMIN: Well, these are PDFs of Excel  
22 files. So, getting Excel files instead of PDFs would

1 be cool.

2 I spent the last half-hour transposing a PDF  
3 document numbers into an Excel spreadsheet on my  
4 computer here so I could even run some numbers while  
5 we're talking.

6 So, that's one, but particularly the  
7 allegation data, to me, are really important, what  
8 we're talking about here.

9 Granted, we're dealing with primary  
10 allegation not the allegation summaries that we know  
11 are so important. We had some experience in the  
12 transportation group with looking at the allegation  
13 summary information, and that was extremely helpful, as  
14 well.

15 So, in whatever form that you eventually feel  
16 comfortable sharing that data, it would be -- it would  
17 make it easier for us to provide you some more  
18 thoughtful feedback.

19 MR. HARBIN: Thank you very much.

20 We continue to look at our data and what's  
21 available to us. We do have certain limitations on  
22 what we're able to get out of the data.

1           As mentioned by Ms. Dougherty, we're relying  
2 on the one person who is entering the information, and  
3 so, it makes it a little difficult, but we will  
4 continue to look at how we get our data in, what we can  
5 -- what we're able to share with you.

6           MR. FRUMIN: I appreciate that.

7           MR. HARBIN: Thank you.

8           CHAIR SPIELER: Richard.

9           MR. MOBERLY: We've talked about several  
10 different issues related to settlement. So, one of the  
11 things I noticed on this, there's "settled," and it has  
12 some sort of OSHA as a party, and then there's "settled  
13 other."

14           Does that incorporate some of the ADR  
15 programs that we've been talking about? What does it  
16 mean when OSHA is a party? Cause I know, under some  
17 statutes, like SOX, they have to approve the settlement  
18 agreement.

19           Does that mean they're a party or is that --  
20 they do that for all --

21           MR. ROSA: Well, under the OSHA "settled" or  
22 the one that says just simply "settled" means that the

1 parties agreed to the standard OSHA settlement  
2 language, which we means we have -- in the  
3 whistleblower manual, we have standard language.'

4           If it says "settled other," that means that  
5 that was most likely a third-party settlement, a  
6 private settlement to which OSHA received a copy and  
7 then approved it.

8           So, it's not necessarily OSHA standard  
9 approved language, but OSHA would have to approve it  
10 anyway, but that's the difference between those two  
11 columns.

12           MR. MOBERLY: So, it wouldn't say which of  
13 these were actually as part of the ADR program.

14           MR. ROSA: It does not say that, no.

15           MR. MOBERLY: What were the regions of the  
16 ADR program?

17           MR. ROSA: It was piloted in Region V and  
18 VIII.

19           MR. MOBERLY: Thank you.

20           MR. HARBIN: Chicago and San Francisco.

21           MR. MOBERLY: Thanks.

22           CHAIR SPIELER: Christine.



1 MS. DOUGHERTY: The data on the four-page  
2 Exhibit 2, again, it's Federal data that's showing 338  
3 OSHA complaints. We've got 25 state plan states that  
4 do nothing but the 11-C, and those numbers aren't  
5 reflected here.

6 So, we're even looking at more in the 11-C  
7 area that are filed nationally than just 338.

8 MR. HARBIN: That's a good point. That  
9 carries true not only for our whistleblower program but  
10 also on the safety and health side. We separate the  
11 Federal between the -- from the state plan.

12 CHAIR SPIELER: I actually have just a couple  
13 of comments and questions, and then, unless there are  
14 other people burning to ask questions, we'll take a  
15 break. We're running a bit behind.

16 On the first exhibit, do you have -- there's  
17 a column for "reinstated." Do you have any idea how  
18 many of these involve preliminary reinstatement?

19 MR. HARBIN: No.

20 CHAIR SPIELER: Do you keep any data on  
21 preliminary reinstatement?

22 MR. HARBIN: No, we do not keep data on

1 preliminary reinstatements.

2 MR. ROSA: Our database currently just has  
3 one box that says "reinstated."

4 CHAIR SPIELER: I really urge you to --

5 MR. ROSA: In fact, another thing that we  
6 have been looking at is whether we can -- how we -- how  
7 many cases were offered reinstatement to how many  
8 accepted reinstatement. So, we're also looking to  
9 that, as well.

10 CHAIR SPIELER: And on Exhibit 2 -- do you  
11 know how many -- which cases go on to ALJ hearings and  
12 which ones don't, and whether it's reflected by a  
13 particular outcome at the OSHA level, or is that just  
14 completely sort of not opaque in the data?

15 Because you have the kicked out, but we don't  
16 really know which ones have gone to ALJ. Obviously not  
17 11-C but under the other statutes.

18 MR. ROSA: Some of the things that may be  
19 affected by an ALJ decision could be the total amount  
20 of money and/or the reinstatement, cause that amount is  
21 constantly changing.

22 We don't have a field that says initial --

1 you know, initial relief order and current relief  
2 order. We just have one column that says how much was  
3 ordered relief and whether the person was reinstated or  
4 not.

5 CHAIR SPIELER: So, that includes ALJ relief  
6 ordered?

7 MR. ROSA: If, for example, we issued a merit  
8 case and the ALJ reversed it, we have to go back to the  
9 system and modify that record.

10 CHAIR SPIELER: Right. But what if you issue  
11 a non-merit and then it goes on to an ALJ and an ALJ  
12 awards --

13 MR. ROSA: Correct.

14 CHAIR SPIELER: -- damages? Then how does it  
15 show up here?

16 MR. ROSA: What we do is we go back to the  
17 system and -- we don't mark it as an agency merit.  
18 This is the merit done outside of our agency.

19 CHAIR SPIELER: Right.

20 MR. ROSA: But we do have to go into the  
21 database and update any monetary amount and whether the  
22 judge ordered reinstatement.

1           CHAIR SPIELER: Okay. But we don't know how  
2 many went to ALJ.

3           MR. ROSA: No.

4           CHAIR SPIELER: Okay. I, by the way, do  
5 think it's really interesting that \$20.3 million of the  
6 total amount of damages that were ordered, of the \$35  
7 million total, was in SOX cases, and given the small  
8 number of SOX cases in the system, and it speaks to  
9 perhaps their importance in the system from other  
10 points of view, but it certainly -- by combining them,  
11 it creates a kind of odd total picture that I think, as  
12 an advisory committee, we should think about.

13           MR. ROSA: And that all pretty much also  
14 depends on what types of settlements occurred that  
15 year. You may have a case that may have settled for a  
16 significant amount of money and not necessarily have  
17 settlements that have that much money.

18           So, some years, you may find, depending what  
19 the settlement amounts occurred within that particular  
20 fiscal year, you know, those numbers may fluctuate, but  
21 traditionally, SOX usually does have a high settlement  
22 amount.

1           MR. FRUMIN: In 2012, based on some data you  
2 gave us then, or last year, the SOX money was 5.5  
3 million.

4           MR. ROSA: Right.

5           MR. FRUMIN: So, it does fluctuate quite a  
6 bit, and in that year, FRISA was higher --

7           MR. FRUMIN: -- was 8 million. So --

8           MR. ROSA: Right.

9           MR. FRUMIN: -- hence, longitudinal data,  
10 longitudinal series of the same case data, as well as a  
11 more detailed -- ability to look at more detail would  
12 also be helpful when you're thinking what you can  
13 provide to us.

14           CHAIR SPIELER: I want to make clear that it  
15 isn't so much that the advisory committee needs data as  
16 that I think we have a shared view that, in order to do  
17 the kind of planning and strategic thinking that you  
18 need to do in the directorate and the ARA's need to do  
19 in the regions, that the data we're talking about would  
20 be very useful to you.

21           We actually also understand the huge  
22 impediments within the agency for both changing data

1 sets and for obtaining data, and I think every member  
2 of the committee would join me in saying any way we can  
3 be helpful in that process, we would be more than  
4 willing to do that.

5 And with that, let's take a somewhat belated  
6 break, 10 minutes.

7 (Recess.)

8 CHAIR SPIELER: Next on the agenda is Megan  
9 Guenther to talk to us about the clarification  
10 regarding investigative standards for whistleblower  
11 claims.

12 CLARIFICATION OF THE INVESTIGATIVE STANDARD  
13 FOR OSHA WHISTLEBLOWER INVESTIGATIONS

14 MS. GUENTHER: Good afternoon. My name is  
15 Megan Guenther. I am the counsel for whistleblower  
16 programs in the Fair Labor Standards Division in the  
17 Solicitor's office.

18 I advise OSHA's national office on a variety  
19 of the statutes, mostly the ones that go -- entirely  
20 the ones that go to ALJ hearings, with the exception of  
21 the Surface Transportation Act and the Seaman's  
22 Protection Act.



1           The point of it is really to clarify and  
2     reinforce what is the standard, what is the standard in  
3     many, many of the statutes that say that the objective  
4     of OSHA's whistleblower investigation is to determine  
5     whether there's reasonable cause or reason to believe  
6     that a violation of the statute has occurred.

7           This means in cases that provide for ALJ  
8     hearings, OSHA should be issuing merit findings when it  
9     believes there's reasonable cause to believe there's a  
10    violation, which is a somewhat lower standard than the  
11    standard that applies at a whistleblower trial before  
12    an administrative law judge.

13           Under Section 11-C of the OSH Act, the memo  
14    clarifies that OSHA, if it has not already done so --  
15    and we're going to emphasize this, because OSHA and the  
16    Solicitor's office have a very fluid relationship.

17           They consult early. The Solicitor's office  
18    has an open door to OSHA when questions arise during an  
19    investigation.

20           But OSHA has not already, the latest point at  
21    which it should start talking with the Solicitor's  
22    office about whether an 11-C or other case that goes to



1 District Court litigation is appropriate for litigation  
2 is when OSHA has reasonable cause to believe there's a  
3 violation.

4           And we thought that this clarification would  
5 be helpful, because while that is the standard in the  
6 statutes, it's standard in the regulations, there are  
7 parts of OSHA's manual that could be read as applying a  
8 higher standard, and we just wanted to put this out to  
9 make sure that whistleblower investigators are on the  
10 same page, that there's consistency through the program  
11 about what the investigative standard is, what the role  
12 of the investigator is.

13           This would -- by focusing on the appropriate  
14 investigative standard that is whether there's  
15 reasonable cause or reason to believe a violation has  
16 occurred, it may help with avoiding prematurely  
17 dismissing cases that could potential be meritorious.

18           It can promote consistency, and in some  
19 circumstances, it may also help OSHA reach a merit  
20 finding more quickly, because they are looking at  
21 whether the person could succeed based on the evidence  
22 gathered in the investigation.

1           They're not looking for an absolute level of  
2   certainty that the whistleblower will succeed in a  
3   hearing.

4           Just to kind of say what -- reiterate what  
5   the memo says about what reasonable cause means, it's  
6   not that you, as an investigator, believe everything  
7   the complainant says nor do you believe everything the  
8   respondent says.

9           It's also not that you don't conduct an  
10   investigation.

11           Based on everything that's submitted and  
12   gathered during the investigation -- and there's no  
13   change in how the investigations are conducted in terms  
14   of which side gets what documentation. OSHA still will  
15   engage in all of its information-sharing between the  
16   parties.

17           But based on all of what's gathered or  
18   submitted during the investigation, does OSHA believe  
19   that a reasonable judge could find the complaint has  
20   merit? Could the person win at trial?

21           And if OSHA believes that a reasonable person  
22   could succeed, then it should be issuing a merit

1 finding in those cases that provide for findings, that  
2 go to ALJ hearings, and under 11-C, if it hasn't  
3 already started working with the Solicitor's office, it  
4 should begin working with the Solicitor's office.

5           And I think that is all I have prepared to  
6 say about the clarification, but I'm definitely  
7 available to answer questions if folks have questions  
8 for me.

9           CHAIR SPIELER: Questions?

10           MS. LESSIN: What changes do you anticipate  
11 seeing as a result of this memo, if any?

12           MS. GUENTHER: Probably the changes will be  
13 at the margins, because I think that a lot of folks in  
14 the program already will -- had internalized that the  
15 reasonable cause standard is the standard that applies,  
16 that an investigator steps back a little bit.

17           But you know, to the extent that we may have  
18 implied there was a higher standard, now we've been  
19 explicit that investigators should be looking at this  
20 "could succeed on the merits" standard, rather than  
21 kind of a higher, definitely the whistleblower will be  
22 successful.

1           CHAIR SPIELER: I could be wrong, and I feel  
2 like I should know the answer to this by now, but in  
3 those -- under those statutes where people can take  
4 their case to an ALJ, does OSHA have to close its  
5 investigation before they can proceed to an ALJ?

6           MS. GUENTHER: Yes.

7           CHAIR SPIELER: Can they request that it be  
8 closed in some way at the point at which the time  
9 period for an investigation has passed in order to move  
10 more quickly to the ALJ?

11          MS. GUENTHER: No, not under the rules as  
12 they currently are.

13          CHAIR SPIELER: So, presumably this  
14 clarification would speed up that process, but I'm  
15 wondering about your thoughts about this -- and maybe  
16 it's off-topic, but it does seem to me that if a  
17 complainant is represented by counsel and intends to  
18 take a case forward to an ALJ if there isn't a quick  
19 settlement during the investigative process, that  
20 speeding them along might make a lot of sense from both  
21 OSHA's standpoint and the parties' standpoint.

22           Is there any way to imagine that OSHA could

1 move toward that, or is that beyond what you can  
2 discuss?

3 MS. NARINE: I had a similar question. Are  
4 you trying to analogize to requesting an immediate  
5 notice of right to sue at the EOC?

6 CHAIR SPIELER: Like that.

7 MS. NARINE: I was going to ask the same  
8 question.

9 MS. GUENTHER: You know, that's off-topic.  
10 There was -- there was an item on OSHA's operating plan  
11 a couple of years ago -- maybe it was even last year --  
12 not pursued kind of very actively lately -- that was  
13 kind of along those lines.

14 CHAIR SPIELER: But presumably what we're  
15 talking about right now may help to move cases more  
16 quickly through the process.

17 MS. GUENTHER: Correct.

18 MR. KEATING: As everyone on the committee  
19 knows, I represent management, and I will also  
20 acknowledge that my large area of focus as I litigate  
21 these cases around the country is more in the SOX-  
22 related cases.

1           So, with those caveats, I can also tell you  
2 that one of the things that is frustrating for  
3 employers that I represent is that there are really  
4 four bites at the apple in these cases.

5           There's the investigative stage. Then  
6 there's the ALJ stage, which is de novo, as I  
7 understand it.

8           MS. GUENTHER: Uh-huh.

9           MR. KEATING: Then there's the ARB, which is  
10 again de novo, and even if the ARB has heard and fully  
11 been briefed on the case but it hasn't gone to a final  
12 determination, they can still kick out and go to  
13 Federal court, again de novo.

14           And there are circumstances where these cases  
15 go on for years and can take a lot of time and money  
16 and expense to defend from an employer's standpoint,  
17 and while I understand lowering the standard at the  
18 investigative level on one hand to make it faster and  
19 essentially take a first glimpse and then if there's  
20 really no reasonable cause to believe that anything  
21 exists, only then kick it out, I would jus note that,  
22 if that's going to be the determination, then I can

1 find a lot of employers being frustrated that they then  
2 have to go through an ALJ trial de novo when an  
3 investigator has found that there's not even reasonable  
4 cause to think this would prevail.

5 MS. GUENTHER: The ARB reviews the ALJ for  
6 substantial evidence. So, it's not de novo.

7 MR. KEATING: Okay.

8 MS. GUENTHER: Your other question, as I  
9 understand it, was employers will be frustrated if the  
10 -- if OSHA finds reasonable cause --

11 MR. KEATING: If the investigator finds that  
12 there is no reasonable cause to believe a violation  
13 exists, which is a lower standard than even what an ALJ  
14 would have to decided, and yet they then have to go  
15 before an ALJ, de novo, and start all over again.

16 MS. GUENTHER: But that's the way it  
17 currently is, as well.

18 CHAIR SPIELER: Isn't that statutory?

19 MS. GUENTHER: That's statutory, right. So,  
20 right now, when you get a non-merit finding out of OSHA  
21 -- what you get under this memo will resemble in many  
22 ways what you get now, which is it will say there was

1 no reasonable cause. It will say, if you're getting a  
2 dismissal, this is why.

3           You know, if there is reasonable cause, it  
4 will say there is reasonable cause and this is why, and  
5 then it will have an order which you need to object to  
6 or else the order will become a final order of the  
7 Secretary.

8           Those two basic things have not changed, and  
9 either way, before and now, either party can object and  
10 ask for a de novo review.

11           So, that kind of -- you know, the kind of  
12 four bites at the apple that you're talking about  
13 doesn't change with this. You have the same bites you  
14 had before.

15           MR. KEATING: So, then I guess I'd ask, then,  
16 what was the compelling reason to go and undertake this  
17 exercise to create the memo clarifying the standard?

18           MS. GUENTHER: Part of it's that the standard  
19 is statutory, and the OSHA investigation is supposed to  
20 -- some of the statutes say 60 days is the amount of  
21 time an investigation should take. It's not -- under  
22 the statute -- you know, meant to be a 778-day process



1 for the investigation. OSHA's role is kind of a  
2 screening role and toward a preliminary reinstatement,  
3 help flesh out the issues.

4 And to the extent we can make clear what the  
5 appropriate investigative standard is and apply that  
6 consistently and accurately across the country, it will  
7 help with the process more generally.

8 CHAIR SPIELER: Thank you, Megan.

9 We're going to move now to the public comment  
10 part of this meeting. I know we have at least one  
11 person who has asked to speak, but before we do that, I  
12 know the agency has received one comment that was sent  
13 in electronically and anonymously, and in order to make  
14 sure it's part of our record, I have asked Anthony Rosa  
15 to read it to the committee members.

16 MR. ROSA: All right. It was sent to us on  
17 April 1, 2015, to the Whistleblower Protection Advisory  
18 Committee, WPAC, Occupational Safety and Health  
19 Administration, OSHA, Washington, DC.

20 To Whom It May Concern: I am writing to call  
21 your attention to a critical issue in the investigatory  
22 process of whistleblower retaliation complaints that I

1 believe is having a significantly harmful impact on  
2 actual whistleblowers that have suffered retaliatory  
3 discharge and a chilling effect on potential  
4 whistleblowers.

5           Specifically, I want to call to your  
6 attention what I believe to be either a lack of  
7 awareness among OSHA staff concerning deadlines  
8 contained in OSHA's whistleblower rules related to  
9 issuing of an order of preliminary reinstatement of a  
10 wrongfully discharged employee or a routine lack of  
11 compliance with such deadlines due possibly to a lack  
12 of OSHA staff resources or inadequate internal policies  
13 and procedures.

14           By way of background, certain of OSHA's rules  
15 for investigating claims of retaliation require OSHA to  
16 order preliminary reinstatement of a discharged  
17 employee within 60 days after the filing of such  
18 employee's complaint with OSHA if OSHA has reasonable  
19 cause to believe that the employee engaged in protected  
20 activity, the employer was aware of such protected  
21 activity, the employee suffered adverse employment  
22 action, and the employee's protected activity was a

1 contributing factor in employer's decision to take  
2 adverse employment action.

3 For example, 29 CFR 1980.105 and 29 CFR  
4 1985.105.

5 Additionally, such rules set forth specific  
6 timeframes for employers to respond to a complaint of  
7 retaliation, presumably to enable OSHA sufficient time  
8 to issue an order of preliminary reinstatement with the  
9 60-day period where warranted.

10 Yet, based on my personal knowledge and prior  
11 comments to and discussed of the WPAC, it appears that  
12 these deadlines are routinely ignored and that  
13 wrongfully discharged whistleblowers are suffering  
14 extreme financial hardship for months or even years  
15 while OSHA conducts its investigation.

16 Such financial hardship can lead to severe  
17 emotional distress, foreclosure or repossession of  
18 homes or other property, substantial reputational harm,  
19 adverse credit standing, physical ailments cause by the  
20 emotional distress, diminished ability to obtain new  
21 employment due to adverse credit standings, etcetera,  
22 and these harms may be sustained not only by the

1 whistleblower individual but also the whistleblower's  
2 spouse, children, and other dependents.

3           The anti-retaliatory statutes of OSHA's own  
4 whistleblower rules require preliminary reinstatement  
5 within 60 days of the filing of an employee's complaint  
6 with OSHA presumably are designed to mitigate the  
7 damages sustained by an employee that was potentially  
8 wrongfully discharged by placing the financial burden  
9 on the employer during the pendency of OSHA's full  
10 investigation.

11           Stated differently, OSHA's rules require the  
12 preliminary order of reinstatement to be issued within  
13 60 days of the filing of the employee's complaint,  
14 presumably to avoid placing an undue hardship on the  
15 employee during the pendency of OSHA's full  
16 investigation, where OSHA, based on the information  
17 gathered within the initial 60-day period, has  
18 reasonable cause to believe retaliation and violation  
19 of law has occurred.

20           If potential whistleblowers come to believe  
21 that they may have to wait months or even years to be  
22 reinstated if wrongfully discharged, such employees may

1 simply conclude that it is not worth it to come  
2 forward.

3           By failing to comply with its own rules  
4 concerning the deadlines for issuing an order of  
5 preliminary reinstatement, I'm concerned that OSHA is  
6 inadvertently creating a significant disincentive to  
7 potential whistleblowers and is undermining the goals  
8 that the anti-retaliation statutes enacted by Congress  
9 were designed to achieve.

10           Accordingly, I respectfully request that the  
11 WPAC evaluate and discuss:

12           (1) OSHA's process for issuing an order of  
13 preliminary reinstatement.

14           (2) OSHA's compliance with its own rules  
15 requiring that preliminary reinstatement be ordered  
16 within 60 days of the filing of a complaint of wrongful  
17 retaliatory discharge.

18           (3) The awareness among OSHA staff of the 60-  
19 day deadline for ordering preliminary reinstatement on  
20 the applicable OSHA rules and anti-retaliation  
21 statutes.

22           Thank you in advance for your attention to

1 this important issue affecting America's employees that  
2 are committed to doing what is right even when doing so  
3 exposes them to a risk of retaliation and the attendant  
4 consequences of such retaliation.

5           And by the way, this was an anonymous  
6 complaint filed.

7           CHAIR SPIELER: I think maybe the right thing  
8 to do is to mark that as Exhibit 4 for the meeting  
9 record, and we can return to those issues tomorrow when  
10 we talk about the sort of next topics that the WPAC  
11 would like to address.

12           MS. NARINE: Do we get a copy of that letter?

13           PARTICIPANT: Sure, we can get you a copy.

14           CHAIR SPIELER: Thank you.

15   (Exhibit No. 4 was marked  
16   for identification.)

17           CHAIR SPIELER: While we're marking exhibits,  
18 I'd like to mark as Exhibits 5-A and B the "Know Your  
19 Rights," one in English -- "A" in English, "B" in  
20 Spanish, and hand them out to the committee members.

21

1 (Exhibit Nos. 5-A and 5-B  
2 were marked for  
3 identification.)

4 CHAIR SPIELER: And 6 is the NBC news report  
5 on the TRO in Alabama.

6 (Exhibit No. 6 was marked  
7 for identification.)

8 CHAIR SPIELER: Is Tom Devine here? I know  
9 that you requested the opportunity to address the  
10 committee, and you're on.

11 MR. DEVINE: Thank you for accepting my  
12 participation in today's program. I'm sorry that I  
13 couldn't be here for the full meeting. I just had  
14 schedule conflicts with my clients.

15 But I made sure that they would be cancelled  
16 in order to find time to participate, because the  
17 stakes and the issue I'm speaking about are extremely  
18 high.

19 The Government Accountability Project and the  
20 Zuckerman Law Firm have presented a petition to the  
21 Department to tighten up its policy that shields  
22 whistleblowers from gag orders that would directly or

1 indirectly restrict or chill protected activity under  
2 the statutes the Department is charged with enforcing.

3           We recognize that the Department has had a  
4 policy since the 1980s that's consistent with the  
5 objectives that we're seeking, but we believe that it  
6 has become outdated over time and it needs a makeover  
7 in order to keep pace with the corporate tactics that  
8 are restricting the flow of protected information.

9           I'll start by just giving kind of a menu of  
10 some of the common tactics that are current very common  
11 and prevalent but do not necessary find themselves  
12 being restricted under the current Department of Labor  
13 policies.

14           I'll say in overview that my analysis is  
15 actually consistent with one of the members of the  
16 advisory committee, Professor Moberly, who, along with  
17 Mr. Zuckerman and another attorney, Jordan Thomas, who  
18 specializes in SEC issues, published a Law Review  
19 article on this in the ABA Journal of Labor and  
20 Employment Law for fall of 2014.

21           I basically viewed these restricted into five  
22 categories.



1           The first one is conditions of employment  
2 that bar confidential whistleblowing to government law  
3 enforcement agencies.

4           Sometimes this requires an advance notice to  
5 the corporation of all the evidence that an employee is  
6 going to be providing to a government law enforcement  
7 agency.

8           There's two fundamental problems with this.

9           Number one, many people remain silent  
10 observers rather than blowing the whistle at all if  
11 they can't do it confidentially, due to fear of  
12 retaliation.

13           It's why we have all these statutes. There's  
14 a genuine fear of retaliation.

15           And many whistleblowers will choose to bite  
16 their tongues rather than rely upon the uncertainty of  
17 legal rights. We will restrict the flow of  
18 information.

19           Second, to the extent that the corporation is  
20 guilty of misconduct, particularly if there's criminal  
21 misconduct, this is making obstruction of justice a  
22 prerequisite for employment.

1           It can absolutely destroy the government's  
2 law enforcement investigation if the defendant knows  
3 about all the evidence of its own alleged misconduct  
4 before the government sees it, but this is a common  
5 tactic.

6           The second tactic that we're concerned about  
7 is waiver of statutory benefits for whistleblowing.  
8 This would cancel, as a condition of employment, the  
9 leverage in America's most effective anti-corruption  
10 laws, laws such as the False Claims Act, which also  
11 requires confidentiality.

12           These laws have skyrocketed fraud recoveries  
13 involving federal spending, and the Dodd-Frank law,  
14 which has similar incentives for whistleblowing  
15 disclosures, has led to probably the largest volume of  
16 protected activity in recent memory.

17           Both of these would cancel the catalyst for  
18 these disclosures and would significantly undermine law  
19 enforcement.

20           The third is simply imposing blanket prior  
21 restraint on the corporate labor force, that they  
22 couldn't say nothing to nobody without advance notice

1 and permission.

2           Prior restraint is the primary obstacle or  
3 challenge for freedom of speech, and the corporate  
4 whistleblower laws are designed to protect corporate  
5 freedom of speech when there's a public interest stake.

6           They cannot coexist with blanket prior  
7 restraint, and that's why the Federal Whistleblower  
8 Protection Enhancement Act has two provisions in it  
9 that outlaw gag orders which would conflict with its  
10 protections.

11           It makes trying to issue or implement or  
12 enforce those gag orders a violation of the  
13 Whistleblower Protection Act per se, because it cuts  
14 off the flow of information. It's not even necessary  
15 to retaliate. The information never gets out of the  
16 box.

17           We don't need to wait, however, for statutory  
18 reforms. The Department can do this through  
19 regulations.

20           A fourth common tactic is to declare/require  
21 as a exit condition for the employee to receive  
22 severance or benefits and avoid future problems that

1 they sign a declaration that the corporation is  
2 innocent of any wrongdoing under Federal law.

3           To the extent that the employee is aware of  
4 any wrongdoing, again, this triggers all the same  
5 prejudices that will open the door, then, for an  
6 investigation of what the employee is aware of so that  
7 it can be cleaned up before the government becomes  
8 aware of it.

9           And finally, a very significant indirect  
10 restraint on speech is slap suits against employees for  
11 violating these provisions.

12           Very frequently, the provisions themselves  
13 are void as a matter of public policy or they're  
14 defective on numerous grounds, some of which I've  
15 covered in this summary, but the employees are sued for  
16 breach of contract, they're referred for criminal  
17 investigation and prosecution, they are the subject of  
18 unrestrained legal attacks on them because they have  
19 provided evidence to relevant law enforcement  
20 authorities.

21           Unemployed whistleblowers cannot afford to  
22 call the legal bluff that many of these lawsuits pose,

1 represent, and it means merely by having the money to  
2 file them, the companies can frustrate the purpose of  
3 the corporate whistleblower laws.

4           These are just five highlighted examples of  
5 the type of tactics which are making the current  
6 Department of Labor anti-gag system just a little bit  
7 out of date. It needs to be modernized.

8           Our petition is fairly straightforward.  
9 We're petitioning the Department to say that it  
10 violates the whistleblower protection statutes and DOL  
11 is charged with enforcing if a company issues,  
12 implements, or tries to enforce one of these  
13 nondisclosure de facto gag orders, nondisclosure  
14 policies, forms, or agreements.

15           This would sweep everything out from  
16 confronting the employee at the initial job interview  
17 with these demands to filing a lawsuit against them  
18 that was contrary to the DOL rule.

19           That itself would be retaliation, illegal  
20 retaliation.

21           The second thing that we're petitioning is  
22 for systematic fact-finding on the scope of this

1 phenomenon. The Department needs to be aware of it in  
2 order to keep pace with the tactics and to keep pace  
3 with new developments and evolutions of these tactics.  
4 They're limited only by the imagination.

5 Finally, proactive guidance to help prevent  
6 these practices from recurring and to provide warnings  
7 to the industry.

8 These proposals are not particular bold or  
9 creative.

10 As I stated, they mirror provisions of the  
11 Whistleblower Protection Enhancement Act, and actually,  
12 they mirror appropriations restrictions that have  
13 existed on Federal spending that could undercut  
14 whistleblowing since 1988, since fiscal year 1988.

15 They are consistent with a similar petition  
16 that the Labaton Law Firm and Jordan Thomas have filed  
17 with the Securities & Exchange Commission, and are  
18 being taken very seriously.

19 We're meeting with the Commission staff next  
20 week to follow through on their enforcement, and  
21 they're starting to take enforcement actions against  
22 firms which engage in these practices.

1           But the Securities & Exchange Commission and  
2 even the Whistleblower Protection Act programs are a  
3 very tiny fraction of the labor force compared to the  
4 workers who are protected by the Department of Labor  
5 statutes which you're advising on.

6           So, our plea is for the Department of Labor  
7 to catch up and for you folks to help the Department do  
8 it.

9           Thank you.

10          CHAIR SPIELER: Thank you, Mr. Devine.

11          I'm wondering if members of the committee  
12 have discrete questions for clarification, would you be  
13 willing to respond to them?

14          MR. DEVINE: Oh, absolutely.

15          CHAIR SPIELER: Are there questions for Mr.  
16 Devine?

17          MS. TUCKER-HARRIS: You stated that the way  
18 currently it works is that the whistleblowers are  
19 subject to legal prosecution? Could you please explain  
20 that?

21          MR. DEVINE: Yeah. There haven't really been  
22 any restraints on the scope of legal counterattacks.

1           The most common is suits for damages for  
2 breach of contract, but there have been tortes filed  
3 for theft of company property, misappropriation of  
4 company property, for failing to honor responsibilities  
5 to protect the company's process by sharing it with law  
6 enforcement officials.

7           There have been referrals for criminal  
8 prosecutions. There are suits against the lawyers who  
9 represent the whistleblowers who make disclosures to  
10 the government, bar actions that are attempted against  
11 them.

12           The scope of the counterattacks has been  
13 limited only by the imagination.

14           MS. TUCKER-HARRIS: Thank you.

15           CHAIR SPIELER: Nancy.

16           MS. LESSIN: You can determine whether this  
17 is clarification, but in order to do the things that  
18 you're asking, who needs to do what? Is this something  
19 that can be done internally? Is this something that is  
20 a new regulation? Is this something that -- can you  
21 just describe a little bit about what it would take to  
22 do what you're asking?



1           MR. DEVINE: Well, the Secretary of Labor,  
2 presumably through the assistant secretary, could issue  
3 a policy that guides enforcement to challenge these  
4 types of practices as violations. That would be the  
5 most expeditious way to start neutralizing the  
6 practice.

7           It could also be done through proposed  
8 regulations that have more legal authority, but  
9 frankly, in my opinion, aren't necessary to guide the  
10 Department's exercise of discretionary authority.

11          MR. KEATING: I don't have so much a question  
12 as a comment.

13          CHAIR SPIELER: I think you should save it,  
14 then, cause we'll have a conversation about this in  
15 terms of whether we want to take it up at all, and  
16 we'll do that tomorrow.

17          So, what I had hoped was that we could get  
18 any clarifications we needed now from Mr. Devine and  
19 not engage in a full conversation about it until later,  
20 if that's okay.

21          MS. NARINE: Then I'm not sure if I should  
22 ask my question.

1           MR. KEATING: The only problem with that,  
2 Emily, is that I don't think Mr. Devine will be here to  
3 hear the comment, as opposed to --

4           CHAIR SPIELER: But I'm not sure -- with all  
5 due respect to Mr. Devine, do we need him here to hear  
6 your comment?

7           MR. KEATING: As long as what we're going to  
8 say is going to be on the record in response to some of  
9 his representations.

10          CHAIR SPIELER: Actually, what I'm  
11 specifically trying to avoid here is a back-and-forth  
12 with Mr. Devine on the substance.

13          I think that we can talk among ourselves with  
14 the assistance from the OSHA staff about what he's  
15 presented, and I wanted to make sure that we understood  
16 what was presented in order to have that conversation,  
17 but I don't think we need to respond to it on the  
18 record at this point in order to make the record clear.

19          MR. KEATING: Okay. Then I would like to  
20 make one comment for the WPAC, not in response,  
21 necessarily, to Mr. Devine, but as you know, I have  
22 worked with John and the best practices committee for a

1 year-plus now trying to come up with some clear  
2 guidance for employers, because in my view, as I've  
3 said from the first meeting, there are two ways that we  
4 can try and change behavior and protect whistleblowers.

5           One is through enhanced enforcement  
6 initiatives, and another is through providing clear  
7 guidance so that employers know what is the right thing  
8 to do, and one of the things that has happened in very  
9 recent weeks is the stepped-up enforcement, led first  
10 by the SEC in its now somewhat famous 135,000 --

11           CHAIR SPIELER: I think we just had a  
12 miscommunication that I want to clarify. This is  
13 exactly the conversation I think we should have  
14 tomorrow.

15           MR. KEATING: All I was saying is I think it  
16 would be helpful for the best practices initiative if  
17 we could tomorrow talk about how we can expand the  
18 emphasis on that area.

19           CHAIR SPIELER: We absolutely, I think,  
20 should include that in our conversation about best  
21 practices, and in fact, I believe, from conversations  
22 I've had with some other members of the committee that

1 there are other areas in which we may want to suggest  
2 expansions or modifications of the current report  
3 that's come to the full committee, and we'll talk about  
4 this tomorrow, but what I am hoping we can do is add  
5 those concerns to the report we then send on to OSHA,  
6 hopefully by the end of the day tomorrow, and I  
7 absolutely agree that it should be added to the  
8 discussion.

9 MR. KEATING: Okay.

10 MS. NARINE: I don't know if you were reading  
11 from a document. I have a number of questions on some  
12 of the points that you raised, but if you were  
13 summarizing from something that you were reading and  
14 that document could be provided to us, it would be  
15 helpful, so I wouldn't have to ask any questions.

16 CHAIR SPIELER: So, the petition has been  
17 filed --

18 MS. NARINE: Okay.

19 CHAIR SPIELER: -- and I believe it's a --  
20 it's certainly a public document.

21 MR. DEVINE: I'm glad to share it. I only  
22 brought one.

1 MS. NARINE: Then you won't get it back.

2 CHAIR SPIELER: So, I'm not sure we can  
3 really discuss it in depth at this meeting, and it may  
4 require us to bring it back to the committee later, but  
5 is it posted anywhere, Tom?

6 MR. DEVINE: I'm assuming that it's posted on  
7 Mr. Zuckerman's -- yes, it is.

8 CHAIR SPIELER: Okay. We'll make sure that  
9 it's available to the full committee, and if it would  
10 be helpful to have it before tomorrow, we probably  
11 could do that, but my suggestion is that -- we will  
12 circulate the link to the document to the committee  
13 immediately after closing today, and it will be  
14 available to you.

15 MR. DEVINE: I'm glad to email a copy, too,  
16 but I think you folks have it.

17 CHAIR SPIELER: Yeah, I think so, too. And  
18 to the extent possible, we will roll it into our  
19 conversation tomorrow about best practices, which is  
20 not necessarily completely relevant to the petition  
21 that's -- in terms of the OSHA processes, but may be  
22 relevant to the recommendations we make with regard to

1 best practices.

2 Further comments or questions for Mr. Devine?

3 (No response.)

4 CHAIR SPIELER: If not, I want to thank you  
5 for bringing this to our attention and for spending the  
6 time with us this afternoon.

7 MR. DEVINE: Thank you.

8 CHAIR SPIELER: I believe that concludes the  
9 agenda for this afternoon. We will convene again in  
10 this room at 9:00 o'clock tomorrow morning.

11 The agenda for tomorrow, as you know, is that  
12 we will be -- for the lion's share of the day, we will  
13 be discussing the best practices proposal.

14 John will be making an initial presentation,  
15 in the order of an hour, and then we will work our way  
16 through the proposal.

17 Just for you to think about, I have a couple  
18 of suggestions about this.

19 One is that we not vote on it along the way  
20 but that we vote as a package at the end to transmit it  
21 forward, or presumably not, and the second is that we  
22 be able to articulate either things that we believe are

1 missing and should be added or things that you have  
2 concerns about, and we will transmit it with those  
3 comments to OSHA so that the final document -- rather  
4 than trying to wordsmith what is a lengthy and complex  
5 document tomorrow, I have been specifically asked by  
6 the Assistant Secretary for us to make every effort to  
7 turn this over to OSHA at the close of this meeting so  
8 that they can begin to work on it internally, and so,  
9 what I hope we can do is forward it with our comments  
10 and thoughts to OSHA for them to get to work on it.

11           We will then, at the close of the day,  
12 discuss next steps for WPAC, some of which may involve  
13 some of the issues that have been raised to us today,  
14 and anything else that you want to discuss.

15           My plan is to meet with the new Director of  
16 DWPP after she finds her balance and make sure that  
17 we're in concert and can plan our next work with her.

18           So, I will be doing that over the next couple  
19 of months, but I think any conversation we can have  
20 about our future work tomorrow would very much inform  
21 that process.

22           Marcia.

1 MS. NARINE: I have a concern, then, if there  
2 is an attempt to try to bring the last proposal into  
3 the best practices work that you want to turn in  
4 tomorrow, because that could be a whole three-day  
5 conversation in itself, and that's what concern  
6 would be.

7 CHAIR SPIELER: And it may be that we will  
8 choose to hold that back. That is, I think, one option  
9 for things that are newly raised, would be to say  
10 here's as far as we got, here's some issues that we've  
11 decided need further conversation by the committee, and  
12 that we want to make sure that OSHA understands that  
13 it's not yet a complete document.

14 MS. NARINE: We spent a year just haggling  
15 over sentences in this document.

16 CHAIR SPIELER: I absolutely do not want  
17 tomorrow's meeting to be a wordsmithing meeting,  
18 because at the end of the day, the wordsmithing is  
19 going to be done by OSHA.

20 So, my goal as chair is going to be to try to  
21 keep us on track in order to transmit to OSHA a usable  
22 document that they could get to work on.



1 MS. NARINE: That was my concern, to say we  
2 recommend you think about this, but we haven't had a  
3 chance to fully flesh out all of the issues.

4 CHAIR SPIELER: Yeah.

5 MS. NARINE: Okay.

6 CHAIR SPIELER: So, that essentially shapes  
7 tomorrow, and with that, we will adjourn until tomorrow  
8 morning at 9:00 o'clock.

9 (Whereupon, at 3:56 p.m., the committee  
10 adjourned, to reconvene Tuesday, April 21, 2015, at  
11 9:00 a.m.)

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