

UNITED STATES DEPARTMENT OF LABOR
VETERANS EMPLOYMENT AND TRAINING SERVICE

Meeting of the
Whistleblower Protection Advisory Committee
(WPAC)

Tuesday, April 26, 2016

9:18 a.m.

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U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C.

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 School of Law
 Jonathan Brock, Emeritus Faculty Member (Retired)
 University of Washington
 Richard Moberly, University of Nebraska
 College of Law

Labor Representatives

Sylvia Johnson, United Auto Workers
 Eric Frumin, Change to Win
 Nancy Lessin, Steelworkers' Charitable and
 Educational Organization
 Jennifer J. (J.J.) Rosenbaum, National Guestworker
 Alliance

Management Representatives

David Eherts, Actavis Pharmaceuticals
 Kym Gaylo, Proctor & Gamble
 Gregory Keating, Littler Mendelson, P.C.
 Marcia Narine, St. Thomas University School of Law

State Plan Representative

Lezlie Perrin, State of Washington

Federal Agency Representatives

Rina Tucker Harris, Consumer Financial
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 Eric Bachman, U.S. Office of Special Counsel
 Robert W. Miller, Federal Motor Carrier
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Committee Contacts

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P R O C E E D I N G S

WELCOME AND REMARKS

MS. SPIELER: Now we are going to get started.

MR. SWICK: Hi, I'm Rob Swick. I am with the directorate of the Whistleblower Protection Programs. I just wanted to go over, real quickly with you, a few things, safety concerns and building logistics.

First of all, there are two types of an emergency that can occur in the Frances Perkins Building. The first is a shelter-in-place. And when such an event -- shelter-in-place, we're in the right place. The second event is if we have to evacuate the building, and we will be leaving out the most closest stairway, which is right outside that door, right here.

There are bathrooms on all the corners, water fountains. There is a snack bar down the hall there, on the left corridor. There is a world-winning cafeteria on the sixth floor, and ATM on the third floor.

Should you need assistance, please feel free to reach out to me or any of the Director of Whistleblower Protection staff -- if you could all

1 raise your hands. We will be able to help you.

2 With that -- and when would you like to do the
3 walk-around, or --

4 MS. SPIELER: I'll do the introductions.

5 MR. SWICK: Okay.

6 MS. SPIELER: So, as I think pretty much
7 everyone in the room knows, I'm Emily Spieler, and I
8 chair this Whistleblower Protection Advisory Committee.
9 It was a committee that was first chartered in June of
10 2012, and had our first meeting in January of 2013,
11 re-chartered in 2014, and just re-chartered again,
12 posted, I believe, yesterday in the Federal Register.

13 Today we welcome several new members: Kym
14 Gaylo, who is the global SHE associate director for
15 Procter and Gamble; Leslie Perrin, from the department
16 of labor and industries division of Occupational Safety
17 and Health in the State of Washington. Several members
18 were reappointed, and will serve through November of
19 2017: Nancy Lessin; Jon Brock; and Marcia Narine, who
20 is joining us by telephone today. And Eric Bachman,
21 deputy special counsel for litigation and legal affairs
22 in the U.S. Office of Special Counsel, is replacing

1 Adam Miles as a federal member of the committee.

2 DOL has, by the way, posted a -- on April 1st
3 a Federal Register notice for additional members, and
4 nominations are due by the end of May. So if you know
5 people, now that we are on staggered terms, there will
6 be appointments, I believe, annually. Is that right?
7 And I would urge you, if you know people who you would
8 like to nominate for a position on this committee, to
9 offer their names up to the department.

10 With that, as is the tradition in this
11 committee, I will go around the room and ask that you
12 introduce yourselves, starting with the members of the
13 committee, with your affiliation, then members of the
14 staff, and then anyone else in the room who is present
15 today.

16 Brian?

17 MR. BROECKER: Brian Broecker, Office of
18 Solicitor, committee counsel.

19 MR. MILLER: I'm Bob Miller with the U.D.
20 Department of Transportation, Federal Motor Carrier
21 Safety Administration.

22 MR. MOBERLY: I'm Richard Moberly with the

1 University of Nebraska College of Law.

2 MS. PERRIN: Leslie Perrin, with the Division
3 of Occupational Safety and Health in Washington State.

4 MR. BROCK: Jon Brock, retired faculty from
5 the University of Washington.

6 MR. EHERTS: David Eherts, vice president,
7 global EHS at Allergan.

8 MS. ROSENBAUM: J.J. Rosenbaum, National
9 Guestworker Alliance.

10 MR. BACHMAN: Eric Bachman, U.S. Office of
11 Special Counsel.

12 MS. SPIELER: Greg?

13 MR. KEATING: I'm Greg Keating, a partner at
14 Choate, Hall & Stewart in Boston.

15 MR. FRUMIN: Eric Frumin from the Labor Union
16 Federation based in New York.

17 MS. GAYLO: Kym Gaylo with Procter and Gamble,
18 health, safety, and environment.

19 MS. HARRIS: Rina Tucker Harris with the
20 Consumer Financial Protection Bureau.

21 MS. LESSIN: Nancy Lessin, United Steelworkers
22 Union.

1 MS. SPIELER: Marcia, I know you are on the
2 phone. Would you introduce yourself?

3 MS. NARINE: Sure. Marcia Narine, St. Thomas
4 University in Miami. And is it possible for people to
5 speak up a little bit, or maybe put their microphones
6 closer when they're speaking? It's hard to hear most
7 of the people.

8 MS. SPIELER: Okay.

9 MS. NARINE: Thank you.

10 MS. SPIELER: I -- Sylvia Johnson, who is a
11 new member of the committee, was -- is delayed at -- I
12 know that she had a family emergency, and we aren't
13 exactly sure when she will arrive.

14 MR. ROSA: Hi. And I am Anthony Rosa. I am
15 the deputy director for the directorate of the
16 whistleblower protection programs here in OSHA. I am
17 also the federal -- the designated federal officer for
18 WPAC.

19 MS. SPIELER: So you have met Rob Swick.
20 Could the other members of DWPP please introduce
21 themselves?

22 MS. GARRAHAN: Good morning. I am Mary Ann

1 Garrahan, the director of the -- of OSHA's directorate
2 of whistleblower protection programs.

3 MS. JOHNSON: Marisa Johnson, DWPP.

4 MS. STEWART: Christine Stewart, I am division
5 chief for policy.

6 MR. LEE: Viat Lee, DWPP.

7 MS. SMITH: Britannia Smith, DWPP.

8 MS. SWAN: Gail Swan.

9 MS. COTERLIA: Sarah Coterlia, DWPP.

10 MR. BARRETT: Otis Barrett, DWPP.

11 MS. GIVENS: Laura Givens, DWPP.

12 MR. FAIRCHILD: I'm Cleveland Fairchild.

13 MEGAN: And Megan for DWPP on the phone.

14 MS. SPIELER: Thank you, Megan. Okay. Now
15 our guests, please.

16 (Audience introductions are made.)

17 WORK GROUP REPORT OUTS

18 MS. SPIELER: Thank you. As I think you also
19 all know, it is the job of this committee to advise
20 OSHA and the Department in order to make the
21 whistleblower program within OSHA more effective. And
22 to that end we had previously had three working

1 subcommittees, and two new ones have now been
2 appointed. And we are going to hear reports
3 out -- brief reports, because they met for the first
4 time yesterday afternoon -- brief reports from those
5 subcommittees as to their -- what -- their plans for
6 their work.

7 I would appreciate it if the chair of the
8 committee would also, for the benefit of the people who
9 are not familiar with the charges, if you would read
10 the charge in addition to the report that you are going
11 to give. Thank you.

12 Who wants -- let me see. J.J., do you want to
13 go first?

14 MS. ROSENBAUM: So this is a brief report back
15 from the outreach work group that met yesterday for the
16 first time. So just to review, the outreach work group
17 charge, as OSHA continues to make the whistleblower
18 program a priority, we recognize that not all employers
19 and employees are aware of statutory whistleblower
20 protections, or understand why they are important.

21 In addition, OSHA often hears criticism that
22 complying with its statutes it enforces is too costly.

1 Consequently, we are seeking your help in informing
2 more employers and employees about worker rights and
3 how protecting employees actually saves a company
4 money.

5 To this end, we would like WPAC to weigh in on
6 the following questions. What phrases and concepts are
7 most likely to get industry management interested in a
8 particular OSHA whistleblower guidance product? What
9 phrases or concepts are most likely to get labor
10 workers rights groups interested in a particular OSHA
11 whistleblower guidance product? What types of
12 whistleblower guidance products or communication
13 methods are most likely to be used by workers and
14 employers? And what organizations does WPAC recommend
15 OSHA consult with regarding whistleblower protections
16 and types of information or support they could provide?

17 So, as we discussed the charge yesterday for
18 the first time, we sort of saw three parts to it. The
19 first question was the frames and concepts that help
20 with outreach. The second was the types of
21 information, guidance products, and communications that
22 carry those frames and make them effective. And the

1 third was the organizations that would be most helpful
2 to receive those products.

3 As we were laying the groundwork for thinking
4 about the charge, there were a few things that we
5 started with, and sort of agreements. The first was
6 that there was a lot of helpful thinking and work from
7 the best practices work group, which John chaired
8 before, that we were bringing into this conversation.
9 Best practices is certainly a frame and concept that
10 WPAC has invested in thinking about, and that we think
11 is important, and will continue to break forward in
12 this work group.

13 Secondly, we are thinking about two types of
14 employers. The first is those that are willing and
15 really looking to learn best practices, and those are
16 the employers to whom the best practices products are
17 really geared. And the second is just acknowledging
18 that there are some employers out there that are
19 recalcitrant on compliance failures, and maybe in a
20 different place. And so we are going to think about
21 how to reach both those kinds of employers in the
22 context of our work.

1 And then, finally, we sort of all recognize
2 that we want to think about outreach in the context of
3 how to -- how it can be a collaborative effort with the
4 help and safety side at OSHA, and also with other
5 partner agencies, recognizing that outreach on
6 whistleblower issues may occur in the context of a
7 broader set of conversations that don't always start
8 with a whistleblower investigation.

9 So, kind of taking those general background
10 points, some of the next steps that we put on the table
11 were, first, reviewing the existing tools that are out
12 there, that WPAC has been created, they've been in a
13 process of prepping more to roll out, so really looking
14 at those and understanding what we think will work best
15 for the different constituencies, members of the
16 committee, also looking at some of the tools that the
17 health and safety side and other partner agencies are
18 using, and some of the tools that are being developed
19 in industry and labor and other places to try to make
20 those recommendations.

21 And as a subpart of that, looking at how the
22 websites are working. Where is the traffic actually

1 coming from? Where are employers and employees really
2 looking to try to get information, and what links and
3 cross-leveraging between different partner agencies or
4 different parts of the website would be helpful?

5 The second was pulling together research on
6 the cost side, and really getting into this issue of
7 how to show that retaliation is costing employers
8 money. And some members of the committee have
9 particularly good examples of metrics on good
10 observations and targeted responses and think that
11 there is a good amount of information where the
12 committee could be helpful in pulling that together,
13 and really helping make the case to employers that
14 being a learning organization is good for the bottom
15 line, in addition to, as several folks pointed out,
16 good from a humanitarian kind of perspective, or
17 because it's the right thing to do.

18 We also mentioned that it's important to
19 remember that there are increasingly other legal
20 overlays that might incent employers to adopt any
21 retaliation programs. We mentioned the California
22 anti-discrimination law that has come into place that

1 requires some additional anti-retaliation protections,
2 as well as requirements coming out of the new executive
3 order on federal contracting. So, increasingly, there
4 is more and more places that anti-retaliation
5 protections are coming up in the law.

6 We also talked about opportunities within
7 supply chain contracting for large employers who are
8 already implementing best practices to encourage the
9 adoption of those best practices and the training
10 throughout their supply chains, which helps to reach to
11 smaller businesses who have historically been hard to
12 reach.

13 We talked about looking across the touch
14 points of OSHA and its partner agencies with employers
15 to see where greater outreach on whistleblower
16 protection could help. Some examples might be the VPP
17 and SHARP and other safety and health management
18 systems; settlements on the health and safety side,
19 which could, at the same time, incent the adoption of
20 whistleblower protection programs. And again, looking
21 at the regulations coming out on federal contracting
22 and the requirement of anti-retaliation protections and

1 the remediation process there.

2 And then, in closing, we talked a little bit
3 about the idea of targeted outreach, and just this
4 question that -- this idea that it's not just putting
5 things out into the ether or up on the website, it's
6 really looking at where employers are open to improving
7 their anti-retaliation programs, and looking for
8 assistance, either because of the carrot stick
9 approach, looking at where, again, workers are in the
10 same position, and trying to make sure the information
11 is there, looking across OSHA and the partner agencies,
12 including best practices on how to do it.

13 And I think, finally, we mentioned some
14 products that include and highlight concrete
15 experiences and stories, both where workers brought
16 things forward and the employers responded and issues
17 were resolved, or where there was retaliation and the
18 whistleblower protector came in and resolved the
19 problem and the employer -- those -- some products with
20 concrete examples would be relevant and helpful, as
21 well.

22 So that's a very broad overview of a very rich

1 discussion. We appreciate the charge from WPAC, and I
2 think we think it will be a very helpful and fruitful
3 work group.

4 MS. SPIELER: Do any other members of the
5 committee -- and I should have said J.J. is the chair
6 of that subcommittee. Jon Brock, David Eherts, Eric
7 Frumin, Kym Gaylo, Rina Tucker Harris, Greg Keating,
8 and Lezlie Perrin are all members of that subcommittee.

9 Do any of you have any additions to J.J.'s
10 report, or are there any questions from members of the
11 committee, subcommittee, or others about the report?

12 MR. FRUMIN: I'm not sure you mentioned it,
13 but --

14 MS. SPIELER: You need to talk into the mic,
15 or --

16 MR. FRUMIN: Sorry, I'm not sure whether you
17 mentioned it. So one of the things that we discussed
18 was the availability of -- in the future -- of
19 information about current practices that the agency
20 observes at employers with whom it deals, whether it's
21 in the enforcement context or in the cooperative
22 programs context. You did mention the -- I think the

1 VPP program is an example.

2 So we're hoping that, going forward, that
3 information will be available to us. It's not now
4 systematically collected, but -- and we're not looking
5 for everything. But at least for examples, for
6 instance, of robust anti-retaliation programs in place
7 by employers that OSHA knows about through cooperative
8 programs, et cetera, which could shed some light on
9 what already constitutes "acceptable practice by the
10 agency" when evaluating in some detail employer
11 practices regarding retaliation, since that's going to
12 be helpful to us in seeing how we can translate that
13 into an effective message to a much larger group of
14 employers.

15 MS. SPIELER: Jon, did you have
16 your -- somebody over here had his hand up. Jon did.

17 MR. BROCK: No, I thought it was a good
18 summary.

19 MS. SPIELER: Great. Yeah, go ahead, Greg.

20 MR. KEATING: So my only comment is
21 that -- and now to put anyone on the spot right now,
22 but I -- one of the main reasons, I thought, for the

1 outreach committee was to -- well, one of the reasons
2 was to be a sort of a further to the best practices
3 recommendations. And I know the guidelines were issued
4 in October, and I know the public comment period ended,
5 but we're in a suspended animation right now, and I
6 don't know if we're going to get any type of report on
7 that today.

8 I also would like to -- if we are, to maybe
9 have an opportunity -- since the last meeting we really
10 had no opportunity, because they came out almost
11 coincidentally with our last meeting. I wonder if we
12 will have an opportunity to ask some questions or make
13 some comments, or --

14 MS. SPIELER: So, as I understand it -- and
15 perhaps this -- because of some internal issues I think
16 that the agenda came out the way it did. But I believe
17 that the report from DWPP will certainly include
18 a -- some status report on that, and that there will be
19 an opportunity to ask questions at that point.

20 So, I guess I would ask -- I understand your
21 concern, and I would ask that you hold it for this
22 afternoon.

1 MR. KEATING: Sure.

2 MS. SPIELER: I actually think you made
3 amazing progress yesterday afternoon. I would like to
4 thank the members of the committee and the chair, the
5 subcommittee and the chair. It's -- I think this is a
6 tremendously important issue and an opportunity for the
7 subcommittee -- for the committee, but more importantly
8 for OSHA to really think about how to both get
9 information out and have a more integrated view of what
10 they do between the compliance side and the
11 whistleblower side.

12 And so, I'm looking forward very much to
13 hearing more about the subcommittee's work at our next
14 full meeting, which will be in around six months.

15 So, with that, Marcia Narine is the chair of
16 the other subcommittee on training, and we are going to
17 attempt, Marcia, to have you do the initial report.
18 You are sitting in the middle, in case you want to
19 know, of the room, in a little box. And we will -- and
20 then I will open it up for your other committee members
21 and any questions. So go ahead, Marcia.

22 //

1 MS. NARINE: Okay. Good morning, all. We had
2 a very productive and substantive meeting yesterday. I
3 especially want to thank Anthony Rosa and Anthony Talia
4 from the OSHA Training Institute, who provided some
5 detailed information. So what I'm going to attempt to
6 do is summarize a lot of that detail. And this is also
7 including comments I received this morning from some
8 subcommittee members. But I'm sure -- and hope -- that
9 they will chime in if I miss anything.

10 Yesterday we had Anthony on the phone. I
11 don't know if he is there in the room or not. He's
12 from OSHA Training Institute. We will have another
13 person join our sub-group, Sue Ellen DeManche. She was
14 not on our call yesterday, but she is the director of
15 occupational health training, and she is going to join
16 our subgroup.

17 We started off with Anthony Rosa providing
18 background on the development of the whistleblower
19 training directive, and then Anthony Talia
20 provided -- I hope I'm saying it right, I'm not
21 sure -- provided detail on all the various training
22 offerings. And the key is that they're now focusing

1 more on process and on key competencies for the
2 whistleblower investigators, as opposed to being
3 statute-based.

4 One of the key questions that we're going to
5 be looking at and thinking about is what kind of
6 training should be delivered by webinar versus in
7 person, because they have skills and knowledge-based
8 training. There is a field advisory committee for
9 training courses, and OSHA has added a whistleblower
10 rep. So it appears that, in addition to the training
11 expertise and instructional design, it had a lot of
12 substantive contributions from people in the field.

13 Currently, the way the training is designed
14 now, we've added it up that there will be about 21 days
15 of actual instruction over a period of 3 years. Not
16 all of the training is yet completed, in terms of
17 design. And a classroom day is six hours of
18 instruction. So they have a course -- the first course
19 that people will take is fundamental knowledge and
20 skills, and it's going to be a blended four hours
21 online and some in person, emphasizing mainly 118.
22 That's six days of instruction.

1 Then there is another course on interviewing
2 techniques, which will be about three days; another
3 course on report writing, which will have six virtual
4 classes with a learning portion and some practice
5 sessions. They will be writing a portion of
6 investigation files, and having documentation turned in
7 for feedback. This one is something that's slated for
8 Fiscal Year 2017. It'll be six one-hour sessions over
9 a period of six months. They will also have
10 independent assignments, so this will likely be about
11 24 hours of instruction.

12 There is another course in legal concepts and
13 knowledge, where the students are required to do a
14 seven to eight-hour pre-training first. It's a both
15 knowledge and skills course, looking at different
16 statutes, but it will likely run over six days. And
17 that six days is over and above the seven to eight
18 hours of required pre-training.

19 There is another course on complaint
20 resolution and settlement negotiations. That will be
21 three days. It will not be web-based. They're still
22 working on that right now. And then OSHA is going to

1 start to develop two to three-hour webinars regarding
2 specific statutes that are grouped by subject matter.
3 This is not part of the operational plan yet. This is
4 where I think the committee members and the larger WPAC
5 can probably provide some additional resources and
6 assistance to the training group.

7 The course topics that they're looking for for
8 some of these statutes will be focusing on
9 environmental, energy, financial, consumer products,
10 and transportation statutes. They will be grouped by
11 statutes. And those will be more legal and rigorous
12 webinars. Those are not yet in development, and that's
13 the next phase.

14 Students typically have pre and post-tests,
15 and they get oral feedback from their instructors and
16 also from more experienced, you know, professionals
17 that are -- have been, you know, in the field for
18 years. And they are -- have written tests with a
19 minimum of 30 questions, with every class having three
20 to seven learning objectives.

21 Right now the current training only covers
22 federal investigators, but the state plans that have

1 requirements to meet or exceed the federal standards
2 can also send their people to federal trainings, or
3 they can develop their own.

4 One of the things we talked about was the OIG
5 report that came out in September 2015, and how this
6 training responds to that. And there needs to be a
7 balance, I guess. OIG wants a balance between -- and
8 that's the office of inspector general -- wants a
9 reasonable balance between timeliness and quality.

10 But one thing that Anthony raised to us, which
11 I think is important, is there are basically 100
12 investigators with 3,200 docketed cases, and 7,000
13 complaints filed from last year. So, in terms
14 of -- one of the biggest complaints from the OIG was
15 the timeliness. We're not sure that this training is
16 going to be able to address that. That seems to be
17 much more of a resource issue.

18 We then asked OSHA for priorities for the
19 subgroup. Their first priority for us was -- excuse
20 me -- helping to ascertain the takeaway that the
21 learner needs. What should be the required takeaways,
22 for example, at the end of the federal statute webinars

1 that I discussed? And those would be environmental;
2 energy; financial, which is mainly SOX; consumer
3 products; and transportation.

4 Another priority, that they need more
5 technical classes, such as advanced transportation.
6 And Robert Miller of FMCSA, who is one of our group
7 members, indicated that his agency has some
8 transportation materials. And again, this is where the
9 larger WPAC may be helpful in providing some resources,
10 because in addition to the development that they're
11 doing at these more formal webinars, OSHA employees
12 have individual development plans, or IDPs. They could
13 be one, two, or three-year plans, and they work with
14 their supervisors, and they can take courses in their
15 local areas. So another priority is to find some
16 shared resources for independent study for the
17 investigators.

18 The next priority would be to look at training
19 opportunities for training on other issues, such as
20 emotional intelligence, empathy without sympathy,
21 cultural differences for interviewing. And on that
22 last one, right now they have a one-hour offering in

1 the interview and training on dealing with cultural
2 differences. But some things that are particularly
3 important is that there is some nationalities or ethnic
4 groups where looking people directly in the eye is
5 considered difficult, or the way questions could be
6 answered can be difficult. So we really want to make
7 sure that the OSHA investigators are properly trained
8 on some of those nuances which could be critical in
9 getting to the bottom of the complaint.

10 And then we're also going to be looking at
11 lessons learned from case reviews that DWPP is doing,
12 and other lessons learned, so that if there are -- if
13 there is information that should be funneled to the
14 training group, they can act on it quickly and either
15 tweak or revise or develop new training offerings. So
16 we need to figure out what kind of pipeline there would
17 be for that.

18 Finally, we are going to get a task force -- a
19 matrix of the classes and one full set of training
20 materials after we get clearance from WPAC so that we
21 can be better prepared to make some recommendations.

22 And that's all I have for now, and hopefully

1 other members of the subgroup will add things that I
2 have missed that are important.

3 MS. SPIELER: Thank you, Marcia. Now, as I
4 understand it, Anthony, the -- while the charge to the
5 subcommittee specifically looks at internal training,
6 the Department may be open to widening that charge, as
7 we go forward.

8 The other members of this group are Eric
9 Bachman, Sylvia Johnson, who has been -- was absent for
10 these meetings -- okay, who is here now, but was not
11 part of the discussion yesterday -- Nancy Lessin,
12 Robert Miller, and Richard Moberly. Do any other
13 members of the subcommittee --

14 MS. NARINE: Well, actually, I will add one
15 thing, Emily, before we do that.

16 MS. SPIELER: Yeah.

17 MS. NARINE: We did ask about the possibility
18 about whether we should look at external training for
19 employers, unions, other kinds of civil society
20 organizations.

21 MS. SPIELER: Yeah.

22 MS. NARINE: That's not within our charge

1 right now, but it's something that, if the large group
2 believes we need to look at, we can take a look at
3 that. And we did ask OSHA whether that was one of
4 their priorities, and were told not at this time.

5 But I can see it being something that might
6 have some cross-fertilization with the outreach group
7 because, to the extent that new guidelines come out,
8 there will need to be some kind of training, especially
9 for small and medium-sized businesses and other
10 organizations that don't have a sophisticated
11 compliance program. So we can see some overlap there.

12 MS. SPIELER: Yeah. Thank you, Marcia. Any
13 comments or questions, additions from Marcia's report?

14 (No response.)

15 MS. SPIELER: Again, I think -- and with the
16 addition of the staff members who focus on training
17 within OSHA, I think it's going to be an incredibly
18 valuable committee. And I certainly am impressed with
19 the amount you already got done, given the -- that it
20 was only yesterday, and only the first meeting.

21 So I assume and I suspect that at our next
22 full WPAC meeting we will devote more time to the work

1 of the subcommittees. And if there are specific
2 recommendations that come, we will then be voting on
3 them. We do not anticipate any votes today on this or
4 any other matter.

5 I am going to move ahead with the agenda. We
6 have about picked up most of the time that we lost by
7 our delayed start. And we are going to ask our -- the
8 representative from the SEC to come and sit here and
9 talk with us.

10 Let me give a little background about these
11 next two presentations. When WPAC first was formed we
12 had a number of conversations about the fact that we
13 were both interested in knowing how some of the sister
14 agencies where there was shared responsibility were
15 dealing with retaliation complaints, but also learning
16 from other agencies in which there was no shared
17 responsibility as to how retaliation and whistleblower
18 complaints were managed in order to inform our own
19 conversations about what kinds of advice we could give
20 to OSHA with regard to improvements.

21 So, this morning we will hear from the SEC,
22 where, as you know, we have not only experts on the

1 hopefully everyone can see me.

2 I am Sean McKessy, I am the head of the SEC's
3 office of the whistleblower. The office was created as
4 a creation of the Dodd-Frank Act, and I will talk about
5 the retaliation aspects of that. July 21, 2010 is when
6 the Act was passed. We're going to talk about one of
7 my favorite aspects of it, which is the retaliation
8 section. But my real favorite is the section that
9 required the SEC to set up an office of the
10 whistleblower, and even more a favorite is the one that
11 said that they had to hire somebody to run the office,
12 because that created my job.

13 (Laughter.)

14 MR. MCKESSY: If you've heard that the
15 government can't create jobs, I'm here to tell you
16 that's not exactly true.

17 So, talking about retaliation, Dodd-Frank
18 includes -- obviously, it's a statute that's about this
19 thick and has a number of different provisions to it.
20 The one that we'll talk about today is the retaliation
21 enhancements created under Dodd-Frank in our
22 whistleblower program section. And, you know, just to

1 state the obvious, our agency can only -- only has
2 jurisdiction over securities law violations. So to the
3 extent that there is retaliation about anything outside
4 of -- you know, retaliation happening because of
5 reporting of possible securities law violations, that's
6 not going to be within our bailiwick.

7 But very specifically within our bailiwick,
8 and for the very first time, our agency has the
9 authority to enforce retaliation protections. So, in
10 broad strokes, the Dodd-Frank whistleblower
11 anti-retaliation provisions are an add-on or
12 enhancements to the retaliation protections and
13 remedies that were provided under Sarbanes-Oxley.

14 Sarbanes-Oxley provided a number of provisions
15 requiring certain individuals to report up the ladder
16 if they're aware of securities law violations and had
17 protections built in, particularly for public company
18 employees who reported, pursuant to their obligations
19 under Sarbanes-Oxley, that they would not be retaliated
20 against, and there were certain remedies built on.

21 Now, those remedies under Sarbanes-Oxley, were
22 limited in some regards because it required individuals

1 who felt like bad things happened to them because they
2 reported securities law violations to go through a
3 process that is still in place, which is to report
4 through the Department of Labor and have a finding made
5 before you get access to the courts.

6 And Dodd-Frank included enhancements to that
7 anti-retaliation regime. It doesn't replace
8 Sarbanes-Oxley, and the process by which individuals
9 can report that they were retaliated against for
10 reporting possible securities law violations under
11 Sarbanes-Oxley is still existent, and clearly,
12 individuals still take advantage of it.

13 What Dodd-Frank did is it added other
14 mechanisms by which individuals who feel like they had
15 bad things happen to them in their workplace because of
16 reporting a securities law violation, there are now
17 other avenues to pursue, and there is also
18 enhancements, in terms of there is a longer statute of
19 limitations to report. If individuals feel like they
20 were retaliated against, there is enhancements to the
21 remedies that can be received, up to two-and-a-half
22 times back pay. Reinstatement is a remedy also that is

1 specifically enumerated in the statute.

2 For our purposes, the very interesting aspect
3 of the Dodd-Frank anti-retaliation protections is, for
4 the first time, Congress instructed the SEC that we
5 have the authority to enforce the retaliation
6 protections. So how did it do that? The whistleblower
7 program provisions, including the retaliation
8 protections, are built in to and, by statute, were
9 instructed to be housed in the Exchange Act of 1934,
10 which is, by definition, a statute that we have the
11 authority to and the mandate to enforce. So, by
12 putting the anti-retaliation protections in the
13 Exchange Act of 1934, the Congress was essentially
14 saying, "Okay, SEC, you now have a statutory mandate
15 and a statutory responsibility to think about
16 retaliation issues."

17 You know, the agency has been in place
18 since -- in the early 1930s, and I think it's fair to
19 say that most individuals who came to work at the SEC
20 did not think about employment-related issues.
21 Protections of employees is not really something that
22 historically we have been involved in. This is my

1 second stint at the SEC. My first stint was from 1997
2 to 2000. I was an enforcement attorney. And this was
3 not something that was ever on my radar screen. You
4 know, that was for somebody else.

5 You know, to the extent that there was a
6 securities law violation, of course we wanted
7 whistleblowers to tell us about it. We wanted
8 employees to tell us, and then we would take it from
9 there and bring appropriate action. But to the extent
10 that an employee felt like bad things happened to them,
11 that was not for us. Now it is for us.

12 So, one of the first challenges I had when I
13 took this job in February of 2011, the statute had
14 already been passed, our rules were more or less fully
15 baked. So the first priority I had was to sensitize
16 the enforcement staff to the fact that we now have this
17 new authority. And you may not have every asked
18 questions about these kinds of things.

19 But now it's appropriate -- not only
20 appropriate, we're required to pursue investigations
21 when timely, specific, and credible information is
22 provided that an individual who reported wrongdoing

1 had -- were harassed, demoted, fired -- constructively
2 fired. All of the traditional ways you'd think about
3 retaliation. And if those happened because an
4 individual reported securities law violations, that's
5 something that now we have the authority to enforce.

6 So we -- I spent a fair amount of my early
7 days just educating staff on this new authority, and
8 asking that they build into their investigation and
9 enforcement plans questions around, you know, if there
10 are credible allegations of underlying securities law
11 violations, one of the things we routinely now ask
12 companies is, "Did anybody report this to you,
13 internally? And, if so, can you provide us with any
14 information about their employment record from the time
15 that they reported, going forward, so that we can
16 assess whether the company was taking seriously the
17 fact that an individual raised their hand and said
18 that, 'We think that something inappropriate has
19 happened'?"

20 And if bad things happened, as I'm sure you
21 who have experience in this -- often times wildly
22 coincidentally, right -- bad things start happening

1 from the day the company becomes aware that an
2 individual has reported wrongdoing either internally or
3 to a regulator. And so, those are the kinds of things
4 that we're looking for.

5 We have, so far, brought one case under the
6 anti-retaliation protections. This was brought in June
7 of 2014. I will pause here for my crass commercial
8 break. If you're interested, I have a website,
9 [sec.gov\whistleblower](http://sec.gov/whistleblower). And if you go on there you'll
10 be able to find a link to the case that we brought.

11 This was a case that involved an individual
12 head broker at a hedge fund in Albany, New York, who
13 was asked to conduct in some self-interested trading on
14 behalf of the brokerage outfit. He got very
15 uncomfortable about doing that, and ultimately, after
16 pushing back several times and documenting his concerns
17 to the SEC, on July 28th of 2011 he reported to his
18 employer, "Not only am I no longer -- I am not
19 comfortable and I am not going to engage in the kind of
20 conduct you've asked me to, you should also know that I
21 have reported this to the SEC."

22 And from that moment -- literally, from that

1 moment on, everything went bad for him from an
2 employment perspective. So he was stripped of his
3 broker -- his head broker title, he was removed from
4 the trading desk, he was escorted up to another office
5 upstairs, away from the entire team. He was provided
6 with a stack of documents about five inches tall with a
7 yellow highlighter, and he was told, "Okay, sir, you're
8 so concerned with compliance, go through, you know,
9 tens of thousands of records of trades and highlight
10 the ones that you think are inappropriate."

11 He said, you know, "If you give me my
12 computer, I can do this in 30 seconds." They said,
13 "No, no, no. You're a compliance guy, we want you to
14 take your time. You sit in this office, and all you
15 need to do is highlight, you know, page by page, go
16 through." And -- "Oh, and by the way, since you are so
17 concerned about compliance, here are nine compliance
18 manuals. We want you to consolidate them into one
19 master compliance manual."

20 Now, this is a guy who was traded and hired to
21 be the head trader at a hedge fund, and now he is
22 essentially being marginalized to be a job that he's

1 not really qualified for, but because he was so
2 concerned about compliance, he was marginalized. He
3 ultimately left the company. So he -- and pursuant to
4 his tip, we had investigated the underlying
5 allegations.

6 As it turned out, he was correct, the company
7 was asking -- the hedge fund was asking him to conduct
8 inappropriate trading. And as we conducted the
9 investigation, we also asked questions about what
10 happened to this individual. From the day he reported
11 until the time he left nothing really went well for
12 him. And we asked for records about his prior
13 performance record. He was consistently rated highly,
14 he always participated in the highest end of the bonus
15 pool right up until, coincidentally again, the day that
16 he announced that he had reported to the SEC.

17 So we asked about that, we asked, you know,
18 "How is it that you decided that your head trader would
19 now become the head compliance guy?" Interestingly, in
20 this case, the company relied on counsel, and they
21 waived the privilege and allowed us to ask questions to
22 counsel. And as it turned out, counsel actually

1 advised the hedge fund that, "You can do literally
2 anything you want to this guy, as long as you maintain
3 his benefits and his salary at the same level," and so
4 they followed that advice and they just took him off
5 the trading desk and they kept him on his salary and
6 his benefits.

7 We thought that was horrible advice,
8 and -- but it did remove an element of intent that we
9 were not able to establish that the company aided and
10 abetted the retaliation violation because the
11 individuals did in good faith rely on counsel's
12 horrible advice. But in any event, we were able to
13 bring our very first retaliation charge. The company
14 settled for us -- settled with us in connection with
15 the underlying violation, and also agreed to pay a
16 penalty for retaliating against the individual.

17 Fast forward, the good news for the
18 whistleblower continues. About eight months later, one
19 of the aspects of our program that you may not be
20 familiar with is that we are able to pay whistleblowers
21 who provide us with good information. He did, and
22 provided us with information that helped us bring a

1 successful action where we got over a million dollars.

2 So, pursuant to the payment provisions of our program,
3 we were able to pay the whistleblower a substantial
4 amount, 30 percent of the amounts that we collected.

5 Now, you know, the story for him is not all
6 great. He -- obviously, he was fired, he's been
7 marginalized in the industry, and has had a hard time
8 finding another job as a broker. But we were able to
9 at least provide him with some level of recompense, and
10 we were able to fine the company.

11 So, one of the things that I get asked often
12 is, you know, "Okay, SEC, you now have the ability to
13 step in when you see retaliation, but what are your
14 remedies? What can you do?" I think it's too early to
15 say exactly the full scope of what our authority will
16 be.

17 The statute sets forth, as I mentioned, a
18 number of remedies that an individual can get,
19 including 2.5 times back pay, reinstatement. My own
20 sense -- and this is just me talking -- is those are
21 not traditionally remedies that we have the authority
22 to enforce. You know, generally speaking, when we have

1 violators, we punish the company through civil fines.
2 And at least in the one case we brought so far, that
3 was the extent of our remedy. So we fined the company.

4 The statute, as I mentioned, has other
5 avenues, including the OSHA process. Dodd-Frank also
6 included a right of direct action, a right of private
7 action. So an employee who feels like they've been
8 retaliated against can now access the courts
9 immediately without exhausting the Department of Labor
10 process. And this individual has availed himself of
11 those remedies, as well.

12 But I just wanted to emphasize that our role
13 in pursuing retaliation cases, at least at this point,
14 is limited to asking the company about how they took
15 action against an individual. And then, if we -- if
16 it's appropriate, fining the company for doing so. And
17 we let whistleblowers know that there are other
18 aspects, other remedies you may be able to avail
19 yourself of, but we're not the agency necessarily that
20 can get you everything that perhaps that you want.

21 One of the very interesting questions that
22 came out when we were proposing having this authority,

1 when the rules were proposed about how we would
2 implement the retaliation authority, one of the
3 questions was, "Does a whistleblower have to report to
4 us in order to be protected, or is internal reporting
5 sufficient?" And there was a lot of discussion about
6 this back and forth.

7 The commission has come out very clearly on
8 this and stated that we believe any individual who
9 reports -- well, let me take a step back. So the
10 statutory framework that Dodd-Frank puts in place says
11 that individuals are protected for certain protected
12 activities, one of which states, in essence, that an
13 individual who engages in activity protected under
14 Sarbanes-Oxley is protected. And Sarbanes-Oxley, as I
15 mentioned, allows for individuals to report -- at least
16 public company individuals, it allows and mandates that
17 they report to the internal compliance function.

18 So our view has consistently been -- and I
19 think, consistent with the statute -- individuals who
20 participate in internal compliance reporting, pursuant
21 to Sarbanes-Oxley, fall within the protections of the
22 anti-retaliation provisions broadly.

1 Interestingly, companies do not all agree with
2 that assessment, and have actually litigated on this
3 topic. And, you know, one of the interesting things
4 that I've observed -- my background is -- between my
5 two SEC stints I was in-house at three different
6 companies, so I have a sense of the industry
7 perspective on some of these things, and appreciation
8 for sometimes the difficulty of implementing an
9 in-house process under a regulatory umbrella.

10 But one of the interesting things that I've
11 observed is, in some instances, the companies that
12 argued when we were proposing this program, that in
13 order for somebody -- their employees to get paid under
14 the program, we, the SEC, should require that they
15 first report internally because, the company said -- or
16 corporate America said -- in the comment period, "You
17 can trust us. So if our -- we want our employees to
18 come forward. They want them to come to us first. It
19 will save you, the SEC, a lot of resources, and it will
20 save you from getting a lot of the HR-type reports that
21 we always get and we can handle before you need to
22 waste your regulatory resources." Always appreciate

1 corporate America helping us in a regulatory
2 standpoint.

3 Ultimately, the commission did not mandate
4 internal compliance reporting as a pre-requisite to an
5 award, but built in some incentives to allow for
6 internal reporting. But the reason I'm bringing this
7 up is that the interesting thing is some of the same
8 companies that argued very strongly that we needed to
9 mandate internal compliance reporting as a
10 pre-requisite to an award under the program are the
11 same companies that are now litigating in courts saying
12 that, "My employee who reported to me," or reported to
13 the company, and never reported to the SEC lose one of
14 the three benefits of the program. So they lose their
15 retaliation protections.

16 This irony is not lost on me or anybody at the
17 agency, that companies said, you know, "You have to
18 allow and you have to require our employees to report
19 internally, that's what we want them to do," and they
20 are now litigating against their own employees to say,
21 "You have lost your retaliation protections because you
22 reported internally."

1 The commission actually came out very strongly
2 -- and this doesn't always happen, but they issued
3 their own interpretive guidance around this topic, and
4 you can access that interpretive guidance on my
5 website -- to specifically say that, "We
6 believe" -- "The commission believes that individuals
7 who report internal wrongdoing, whether it be
8 internally or to us, ought to be protected under the
9 retaliation protections," and that we have a role to
10 play in pursuing those, regardless of whether the
11 individual only reported to us after they were
12 retaliated, as long as they tried to report the
13 wrongdoing internally.

14 There has actually been a split in the courts
15 on this. The Fifth Circuit was the first to weigh in
16 on this topic in a case called Asadi, GE Capital versus
17 Asadi. Interestingly, the issue of internal reporting
18 wasn't really even argued. It was one of a series of
19 arguments that GE Capital made.

20 And so we, as an agency, were caught
21 flat-footed. So we weren't a party to it, but we have
22 weighed as amicus on a number of these cases. We

1 didn't see this as one of the cases where we needed to
2 weigh in. Ultimately, the Fifth Circuit concluded that
3 because Mr. Asadi had only reported internally and had
4 not reported to the SEC, he was not entitled to be
5 protected under the anti-retaliation protections.

6 We have, since that time, been very actively
7 engaged in as amicus in this process, and the
8 commission did issue its interpretive guidance. The
9 Second Circuit recently came down in a case called
10 Berman that -- to the contrary, so that an individual
11 who reports internally is protected under the
12 anti-retaliation protections. So this sets up perhaps
13 a circuit split.

14 District courts around the country have
15 weighed in on this topic and have come down on both
16 sides. I think the majority of district courts have
17 come down on our side, but there is clearly a split.
18 And then, you know, obviously, the Supreme Court's
19 composition is a little bit in flux right now. But one
20 of the things that people are suggesting is that maybe
21 this is a topic that ultimately the Supreme Court will
22 resolve.

1 You know, one of the interesting aspects from
2 my perspective -- again, as someone who was in-house
3 and is now a regulator -- in my conversations with
4 people who either represent companies or work at
5 companies is to set a cautionary tale. You know, when
6 we implemented this program, as I mentioned, we didn't
7 mandate internal compliance reporting, but we built in
8 incentives to allow whistleblowers to report internally
9 and preserve their rights to still get paid under our
10 program. In fact, first program I'm aware of that
11 allows individuals to get paid, even if they reported
12 internally first.

13 And so, as a result of that, our messaging
14 around the program to individuals who may be aware of
15 securities law violations is we are more or less
16 agnostic. If you see something, we literally want you
17 to say something. And it's okay -- if you work for a
18 company that has a really good internal compliance
19 function, and you believe reporting it to that function
20 will get the wrongdoing stopped, then it's okay with us
21 if we never hear about it, because, you know, we're for
22 the protection of investors.

1 You know, we built in a mechanism to allow you
2 to report to us, but many of you employees work for
3 companies that will do the right thing. Ultimately,
4 the commission decided we can't know every single
5 company that we regulate and how seriously they take
6 retaliation. So the whistleblower is really in the
7 best position to decide whether their coming to us or
8 going through their internal process or both is the
9 right thing to do.

10 What is worrisome, and what I've tried to say
11 in my stump speeches when I'm in front of audiences of
12 employers and people who represent them is if it
13 becomes the law of the land that one of the three basic
14 elements of the program, anti-retaliation protections,
15 depends on individuals reporting to us, then you are
16 going to hear me and hear others at the SEC change our
17 messaging around, "If you see something you have to say
18 something to us. You would be crazy not to say
19 something to us because you will lose, fundamentally,
20 one of the fundamental three elements of the program,
21 your anti-retaliation protections."

22 And, I say to corporate America, you don't

1 want me to do that. So I don't understand why you're
2 taking a very myopic view in individual litigation.
3 You may win one individual litigation in Nebraska or in
4 Texas, but you may be losing a broader war. And so be
5 careful about what you're doing.

6 You know, I can't say that my words have any
7 more sway than anybody else's, but I do think, as
8 someone who used to work in-house, I appeal to general
9 counsels, you know, "You have to have a broader view of
10 what's good for your company and what's good for
11 employers. And if you continue to take these positions
12 that you're taking, it's going to result in a number of
13 people who otherwise are not inclined to report to us
14 to get the message that not reporting to us is at your
15 own peril."

16 So, that's where we are. I'm not here to make
17 news. I'm not allowed to make news. I probably should
18 have started with my usual disclaimer, which is the
19 views I express today are my own and not necessarily
20 that of the commission or its -- any of its
21 commissioners or the staff.

22 But I will say that we -- that one case that

1 we brought under the retaliation case will not be the
2 last one. So we are actively tracking a number of very
3 interesting investigations that have what appear to be
4 very credible allegations that individuals who reported
5 wrongdoing had bad things happen to them, up to
6 including being terminated. And we think that the
7 first case has sent a strong message that the SEC is
8 here to stay, and is here taking an active role in the
9 employment space, which I think came as a surprise to
10 some individuals, but is something, I think, that's
11 important.

12 Not entirely specific to the topic at hand,
13 but another species of bad things happening to
14 employers or employees or employers taking action
15 against employees to continue to engage in conduct and
16 shielding regulators from seeing it is what I call
17 "pretaliation", and this is where employers use either
18 their code of conduct, confidentiality agreements,
19 employment agreements, severance agreements to, in word
20 or substance, say to an employee, "You -- anything you
21 know about the company you have to keep between us, and
22 you may not ever report it to a regulator."

1 From my perspective, all I care about -- no
2 offense to anybody here -- is to the SEC. And so we
3 have a rule under our retaliation protections -- the
4 commission passed a rule that says, essentially, no
5 person shall take any action to preclude an individual
6 from reporting a possible securities law violation to
7 us.

8 You know, the basis for this is, you know, I
9 really love my job, and I want to keep it. And my job
10 will go away very quickly if corporate America could
11 contract out all of their employees to say, "You can
12 never report to the SEC if you want to keep your jobs,"
13 or, "If you want, you know, this bucket of money for
14 your severance, you have to follow our code of conduct,
15 which says that you can't report anything externally."

16 We have brought one case under that provision.

17 There is a company called KBR that was conducting an
18 investigation of a securities law allegation, and every
19 one of their employees who they interviewed was handed
20 a piece of paper that said, essentially, "Everything we
21 talk about is between you and I, and you agree that you
22 will never tell anybody else about anything that we

1 talk about in this room."

2 We got a copy of that agreement, we asked the
3 company how does this square with 21F-17(a). They
4 said, "Well, you know, we were just worried about them
5 running to the press or talking to their colleagues.
6 We didn't think about the SEC." And we said, "Well,
7 you kind of have to, you're a public company." And
8 long story short, we fined that company for violating
9 our rule 21F-17(a), and the company also agreed, as an
10 undertaking, to provide everyone who signed that
11 document with a new document that said, "If you
12 interpreted anything we said to suggest that you can't
13 report to the SEC, we're here to tell you that that's
14 not true. You can report to any regulatory
15 voluntarily, regardless of anything you've signed."

16 Again, I'm not here to make news, but KBR will
17 not be the last case we bring under 21F-17(a). This is
18 a space they were very actively investigating.
19 Something that I spend a lot of my time when I'm
20 educating our internal staff on is be aware that we
21 have this authority. Ask for documents that
22 individuals were asked to sign.

1 I can't tell you how many times lawyers who
2 represent whistleblowers come to us and say, "I would
3 love to have my guy come in and talk to you, but he
4 can't because he just cashed this huge severance check
5 and he was worried that if he talks to you he's got
6 this thing in his severance agreement that says he
7 can't speak to anybody," or they come in and say, "Hey,
8 listen, he's going to sign this agreement on Thursday,
9 so if you want to talk to him you better come in right
10 now -- you better have him come in right now." And
11 those are all things that we're very interested in
12 hearing about.

13 Like I said, the program and our ability to
14 enforce the securities laws will be severely
15 compromised if we allow corporate America to contract
16 out their employees. So this is an aspect of
17 retaliation that we are very interested in, you know,
18 kind of avoiding someone even getting to a point where
19 they can be retaliated against because they're
20 precluded from ever reporting to us.

21 So, in broad strokes, that's where we are,
22 from a retaliation perspective. As I said, more news

1 to come in this space. One of the things -- I don't
2 know about your agency experience -- you know, once
3 somebody brings the first successful action, I have
4 received so many calls now from across the country from
5 enforcement staff saying, "Hey, I want to get in on
6 this, what am I looking for, how do I bring a
7 retaliation case? I've got, you know, individuals who
8 say that bad things happened to them."

9 And so we've got a lot of momentum in this
10 space, and I'm looking forward to making additional
11 news to say that the SEC is here to tell you that your
12 employees ought to be protected if they report possible
13 securities law violations, whether it be internally or
14 to the SEC.

15 MS. SPIELER: Terrific. I'm going to ask you
16 to sit at the table.

17 MR. MCKESSY: I will.

18 MS. SPIELER: Because I think that there are
19 members of this committee who will -- and it really is
20 for the committee that we asked you to come -- will
21 have questions for you. And so why don't you swing
22 around and face us? No, really, with your back -- they

1 are not here for you to speak to, we are here for you
2 to speak to. Okay? Thank you.

3 MR. MCKESSY: Happy to do --

4 MS. SPIELER: So I'm going to open this up for
5 -- to members of the committee. Richard?

6 MR. MOBERLY: So this is Richard Moberly from
7 the University of Nebraska. And first I want to say
8 the Nebraska District Court case held actually in the
9 same way that your agency ruled on the internal
10 whistleblower issue. So I just want to correct the
11 record on that.

12 MR. MCKESSY: I was using that as an
13 example --

14 MR. MOBERLY: Yeah, well --

15 MR. MCKESSY: The finest cities in the middle
16 of -- in the Midwest. So --

17 MR. MOBERLY: Well --

18 MR. MCKESSY: Not a specific reference.

19 MR. MOBERLY: Yeah, right. So the question I
20 have, actually, to -- have a thousand personal
21 questions I want to ask you for my own personal
22 interest, but I'm going to try and keep it to what

1 might be interesting to the committee.

2 So, structurally, as I understand the SEC set
3 up, is you have enforcement agents or enforcement
4 officers who go out. And part of their duty, as you
5 said it, was to think about retaliation among the 100
6 other things they're thinking about, right? And OSHA
7 has taken a different structural position, where they
8 have enforcement officers who enforce the substance of
9 their statute, and then this whistleblower
10 protectorate, where they have officers who are on the
11 whistleblower side to deal with retaliation,
12 specifically.

13 And I was just wondering if you could speak to
14 a little bit of the advantages and disadvantages of
15 your structure, as compared to OSHA's structure with
16 regard to actual enforcement. And this is in light of,
17 you know, within five years, having one retaliation
18 case come up through the SEC. And I just wonder if you
19 could speak to that a little bit.

20 MR. MCKESSY: Sure. So just to frame it, we
21 have -- in the agency we've got a number of different
22 offices and divisions. And of note here we've got our

1 enforcement staff, which is about 1,100 people across
2 the country whose mandate it is to investigate possible
3 securities law violations and then, to the extent that
4 they ripen into investigation, to bring actual
5 litigation. So we've got a trial unit within that
6 grouping.

7 In addition we have the office of compliance
8 inspections and examinations, and that also is about
9 1,000 people, and their job is to conduct examinations
10 of our registered entities, so your broker-dealers,
11 your investment advisors. So about 2,100 of our
12 4,000-plus individuals are tasked with doing the work
13 to investigate and conduct examinations around possible
14 securities law violations.

15 I think one of the things that your question
16 touches on is, although we have some specialty units
17 within enforcement, in large part our enforcement and
18 examination staff are generalists in nature. And I
19 think that there may be some disadvantages when you
20 don't have individuals who are specifically tasked
21 about slivers of your mandate so that, for example,
22 if -- it could be an enhancement to our efforts if we

1 were, for example, able to hire investigators, similar
2 to other agencies have investigators, you know,
3 fact-finders on the ground whose mandate is specific
4 to, you know, what -- name the topic. And for these
5 purposes let's say it's retaliation, and you had a
6 fleet of investigators whose job it was to do the
7 fact-finding in connection with that. We don't have
8 that.

9 I guess one of the potential advantages to our
10 approach is often times when you have allegations of
11 one species of a securities law violation, it often is
12 the case that there are others. And I think one of the
13 advantages of having generalists involved is -- and
14 individuals with a mindset that is broader than a
15 particular type of violation -- is they can see it and
16 know that maybe they don't know all of the details of
17 it, but they know broadly what falls within our mandate
18 and within our jurisdiction, and have the ability to
19 expand an investigation that may have started out very
20 tailored, which is not to say that can't happen under
21 the other guidelines, but I think, as a general matter,
22 the way our offices are structured is with a mind that

1 we have a broad mandate to protect investors,
2 facilitate capital formation, and so we implement our
3 enforcement efforts with individuals with a broader
4 perspective.

5 And so, that's the way I see the pros and cons
6 kind of weighing out in that -- the structural
7 differences between the agencies.

8 MR. MOBERLY: Thank you.

9 MS. SPIELER: Other questions? Greg?

10 MR. KEATING: Thanks very much for taking the
11 time. It's very interesting to hear what you're up to
12 at the SEC. I have sort of a twofold question around
13 the interplay between SOX and Dodd-Frank.

14 And so the first is sort of a procedural
15 question, which is can you comment at all on the extent
16 to which OSHA and the SEC communicate when individual
17 charges are brought and, you know, refer maybe -- for
18 lack of a better word --

19 MR. MCKESSY: Sure.

20 MR. KEATING: -- cases to one another? And
21 that's the first question. And the second question is
22 I thought I heard you say a number of times that, you

1 know, when the commission sees that someone has
2 complained about Securities Act issues and then is
3 retaliated against, you will jump in.

4 The second question is that, you know,
5 the -- one of the things that's evolved a lot in the
6 last five years is the scope of protected activity
7 under SOX. And I guess I'm just asking you. Is it
8 your personal opinion that the Dodd-Frank retaliation
9 provision is really limited for activity arising out of
10 securities law or regulation complaints?

11 MR. MCKESSY: Sure. So first, on the
12 collaboration question --

13 MR. KEATING: Yeah.

14 MR. MCKESSY: -- I think it is -- well, there
15 is a couple of things I know for sure that are
16 happening on a routinized basis.

17 So, to the extent that an individual brings an
18 action alleging retaliation through the OSHA process,
19 it is routinely the case that, to the extent that there
20 are securities law issues involved, that those
21 complaints are routinely sent to our enforcement -- our
22 office of market intelligence, so that it can be built

1 into our database, our intelligence database, to say
2 that there are allegations out here of securities law
3 violation, including retaliation. And that happens on
4 a daily basis.

5 Probably the more ad hoc kind of collaboration
6 that happens is something that I'm not as directly
7 involved in, but I'm aware that, for example, if we
8 get -- and this happens, every agency gets
9 complaints -- and for whatever reason individuals think
10 that we have jurisdiction over it and it turns out that
11 we don't, we do try, as best we can, if we get
12 something that is not of interest to us or that we
13 don't have jurisdiction over but we are aware that one
14 of our regulatory partners does, and should be
15 interested in, we will try to find the right home. And
16 that certainly includes, if there are retaliation
17 allegations made outside of the securities law space,
18 we will try to find it a home.

19 One caveat there, and it's an interesting
20 caveat. When Congress passed the Dodd-Frank Act they
21 imposed upon us fairly strict confidentiality
22 responsibilities. So we are not permitted to directly

1 or indirectly identify a whistleblower who came to us
2 under the program, even to our regulatory partners,
3 absent additional safeguards. When it comes to OSHA,
4 for example, if we got the whistleblower's consent in
5 writing, we would be able to share identifying
6 information. Now, we're allowed to share the
7 underlying allegations as long as we don't cross the
8 line of directly or indirectly identifying.

9 So -- but subject to that sensitivity, I do
10 think it's routinely the case that we try to find a
11 home if something is completely out of our
12 jurisdiction, but also if we have co-extensive
13 jurisdiction, that we try to include our fellow
14 regulatory partners or SROs to the extent that
15 allegations are made that we can either together pursue
16 or, you know, bring parallel actions, whatever it may
17 be. So that's the approach to collaboration.

18 On the Sarbanes-Oxley Dodd-Frank relationship
19 question, as a general matter, as I said, our
20 jurisdiction is limited to instances of securities law
21 violation, and that's true under Sarbanes-Oxley,
22 continues to be true under Dodd-Frank. There's a

1 number of interesting questions that have come up about
2 how, if Sarbanes-Oxley continues to be -- and it
3 is -- you know, Dodd-Frank didn't repeal
4 Sarbanes-Oxley, so it continues -- the mechanisms that
5 were set up under Sarbanes-Oxley are still perfectly
6 viable and appropriate and enforceable, from our
7 perspective, and Dodd-Frank has enhanced them in some
8 regards, and in some regards created new avenues.

9 But one of the interesting questions that has
10 come up -- and I'm glad so far we haven't had to answer
11 it -- is what happens if we have an individual who is
12 an attorney? We allow -- attorneys can be
13 whistleblowers under certain circumstances, and they
14 bypass their internal compliance function and report to
15 us under Dodd-Frank. It turns out they help us bring a
16 good case. They fit within the exception to the
17 exclusion of attorneys, so we can pay them.

18 One of the questions I've been asked is, well,
19 what happens if that attorney did not report up the
20 ladder, as required under Sarbanes-Oxley? So you have
21 a violator of Sarbanes-Oxley who you're trying to
22 reward under Dodd-Frank, and this is, I think, a law

1 professor's dream, right? This is -- ask your law
2 students to answer the question. Fortunately, we
3 haven't had to, but I think -- I bring this up only to
4 say that the statutes continue to operate in parallel,
5 and are both vital tools in our arsenal, but I think
6 there are going to be instances where it is going to be
7 difficult for us to square our obligations to enforce
8 one, on the one hand, and enforce the other on the
9 other.

10 I'm not sure if that completely answers your
11 question, but --

12 MR. KEATING: Let me try -- I didn't
13 mean -- let me just -- can I just -- quick follow-up?

14 MS. SPIELER: I -- you're asking about the
15 effect of Lawson on Dodd-Frank?

16 MR. KEATING: No.

17 MS. SPIELER: Oh, okay, go ahead.

18 MR. KEATING: No. So a quick follow-up would
19 be, you know, SOX has a very short statute of
20 limitations. It was extended by Dodd-Frank to 180
21 days, but 180 days is 180 days. And conversely,
22 Dodd-Frank has up to six years, I believe, which is a

1 really long statute of limitations.

2 So if someone misses the statute of
3 limitations under SOX, and a year-and-a-half goes by,
4 and they have raised some concerns that are not
5 directly securities related, okay, they were bank
6 fraud, or wire fraud, or something that is directly
7 covered by SOX, I guess my question -- and it's really
8 ambiguous under the case law -- and again, I'm not
9 asking for your commission's opinion, or --

10 MR. MCKESSY: Right.

11 MR. KEATING: I mean do you agree this is kind
12 of an ambiguous, difficult thing, or is it your view
13 that your commission is looking only at securities law
14 violations?

15 MR. MCKESSY: I -- well, again, it's for the
16 commission to decide on these things, but my own view
17 is that, although some aspects of the retaliation
18 protections are in the securities law space, there are
19 certainly some aspects of it that are broader. And my
20 own view would be that the retaliation protections in
21 particular, and the extensions of the statute of
22 limitations, because there are certain remedies that

1 are only available outside of the securities -- the
2 SEC's process ought not to be viewed so myopically.

3 And so that individuals who fall
4 within -- even if they don't allege securities law
5 violations, may be entitled to take advantage of those
6 extended statute of limitations issues. Again, outside
7 of my particular expertise, but my own view is that,
8 although there are certain aspects of it, certainly,
9 that are clearly delineated specifically for us to
10 implement, I think there are certain remedies that are
11 available to individuals outside of the securities law
12 context, and my own view is that retaliation ought to
13 be viewed in that rubric.

14 MR. KEATING: Thank you.

15 MS. SPIELER: Okay, wait. I just want to ask.
16 Is there anyone here from the wage and hour division?
17 Okay, so we will continue this discussion until the
18 break time. If they don't show up, we'll just proceed
19 without them.

20 Go ahead, Dave.

21 MR. EHERTS: That's good news. I'm Dave
22 Eherts, and I'm a management rep, so I'm acutely

1 interested. I'm vice president of environmental health
2 and safety at a big pharma company, and I'm acutely
3 interested in your discussion of internal
4 whistleblowers and protection thereof, because I make
5 an argument to my leadership daily that we need to be a
6 learning organization.

7 And we actually desperately want the
8 information employees have, especially when it pertains
9 to hazards in the workplace, when it pertains to
10 mistakes or errors people are making, whether it be
11 financial or safety, and that it's really important
12 that we encourage people to report to us early and
13 often, because if we can nip them in the bud it's a
14 much more effective way of correcting this behavior and
15 setting a culture that we want. Or, if it's a
16 workplace hazard, we can catch it before somebody else
17 becomes injured.

18 And so, I want to encourage you to stick to
19 your guns on this internal whistleblower issue because
20 I would argue that enlightened people in industry will
21 support you.

22 MR. MCKESSY: Well, I appreciate that. And,

1 you know, I guess -- not to put particular individuals
2 on the spot, but, you know, one of the questions -- and
3 I won't ask you, but one of the questions I
4 consistently ask when I'm addressing a group -- and
5 part of my job is to do that, to educate people
6 in-house and people that represent companies on the
7 aspects of the program -- one of the questions I ask
8 is, you know, to what extent are you educating your
9 employees on the fact that our program exists, and that
10 in -- built into that program are specific incentives
11 to encourage you to report internally.

12 And most of the time I hear, "Sean, you seem
13 like a nice enough guy, you know, you used to be one of
14 us. But I don't want my employees to know anything
15 about you. I don't want them to know anything about
16 your program, you know, because if I let them know that
17 there is an opportunity to report to a regulator,
18 that's already something I don't want to have happen."

19 And I personally -- I know this can often
20 sound as a regulatory Pollyanna-ish discussion, having
21 been in-house before, but I think that's a lost
22 opportunity to educate your employees. If you really

1 want them to feel empowered if they see something to
2 say something, providing them with a full menu of
3 options -- and I have no problem with companies taking
4 very aggressive -- encouraging statements. You know,
5 we really take seriously if you think that you see
6 something wrong, we want you to report to us, and then
7 you have to demonstrate it. Right?

8 I mean one of the things I always say is,
9 having worked at three companies, if you think you've
10 got the best compliance program, you've -- you know,
11 you got a website, you've got mandatory training,
12 you've got the whole thing, but everybody who reports
13 ends up fired or, you know, in a new position, and you
14 think your employees aren't aware of that, then you're
15 naive. I mean people -- the culture you set is going
16 to be way more important than the system you put in
17 place. And, you know, employees talk around the water
18 cooler all the time about, you know, "So-and-So raised
19 their hand and, guess what? Now they don't work here
20 any more."

21 So, as I said, right now I think that we are
22 aligned. And, I -- you know, when I took this job, one

1 of the, you know, questions, "How can you, as an
2 in-house guy, go in and, you know" -- I don't believe
3 that I'm on the wrong side or the antagonistic side to
4 corporate America. I hope that -- I think we're more
5 aligned philosophically than we are -- nobody wants to
6 have enforcement staff come and look into them. I get
7 that. But in terms of what we're trying to do, we're
8 trying to do the same thing you are: encouraging
9 people who are aware of violations to come forward and
10 stop it before a \$1 million problem becomes a \$10
11 million problem becomes a \$100 million problem becomes
12 an Enron, WorldCom, no longer a job problem.

13 And so -- but, as I said, as a steward of a
14 program that is intended to protect -- be advocates for
15 whistleblowers, if the Supreme Court says that if you
16 don't report to us you lose one of the three benefits,
17 I am going to have to, as a responsible regulator,
18 let -- educate employees to say, "You ought to report
19 to us." I don't know if it's going to come to that,
20 but I don't know that I have an option, as an advocate
21 for whistleblowers in the SEC space.

22 MR. EHERTS: I would say my responsibility

1 internal to my company, then, is to make that
2 irrelevant. I would like employees to report
3 internally, regardless of what the external
4 opportunities are. And, in fact, we have metrics in
5 place where we encourage reporting to the point that we
6 have quotas on how many reports different departments
7 have to have internally.

8 There is an old adage from aviation, these old
9 single engine planes, mechanics used to say that if
10 it's not leaking oil, it's out of oil. And so if you
11 have zero reports, it's not that you have the perfect
12 workplace, it's that you have no program to collect
13 those reports. And so we desperately want employees to
14 give us their opinion, and we keep track of rates of
15 employees giving us their opinion, and we reward high
16 rates.

17 And therefore, it's irrelevant whether they go
18 external or not, because hopefully everything is fixed
19 internally. And it's not a \$1 million problem; often
20 it's a \$100 problem. And it can get fixed very quickly
21 if only we know.

22 MR. BACHMAN: And I just want to say thank you

1 again for a very informative presentation. And I just
2 had a couple quick -- more process-oriented questions.

3 So, when your office becomes aware that there
4 is a whistleblower retaliation component to a claim
5 that's come in the SEC, how do you coordinate with the
6 enforcement attorney who is taking this more generalist
7 approach on -- was there a violation of a securities
8 law to make sure that, you know, in this particular
9 investigation the whistleblower retaliation aspect of
10 it is really investigated thoroughly?

11 MR. MCKESSY: Yeah. The best way we could do
12 that is to do what I do and what my deputy does, which
13 is travel the country and educate our enforcement
14 staff. You know, at the end of the day, we are the
15 centralized subject matter experts on whistleblower
16 interaction to the SEC writ large. And so, we
17 are -- we make ourselves available as the resource that
18 they can lean on to say, "Okay, I've got credible
19 allegations."

20 You know, sometimes it starts with, "I think
21 this is credible, what do you think?" And we're
22 there -- because we get kind of a centralized view of

1 the kinds of allegations and the kinds of evidence that
2 are presented, we have the centralized view to say,
3 relative to -- you know, "Los Angeles has a much better
4 case that follows this fact pattern. Here is the kinds
5 of things you would like to have in that regard."

6 And so, the model we have set up is, although
7 we have generalists throughout the agency, we have this
8 centralized group, which is mine, that educates
9 individuals that we have this authority, and then
10 markets our ability to help them bring cases. We've
11 developed a pretty healthy inventory of model document
12 requests, model testimony questions, the kinds of
13 things you need to look for, and so that's the -- now
14 we compete with others, right, because there are other
15 individuals in the agency who have their own pet
16 projects that they want to make sure that we're looking
17 into this or that or the other.

18 So -- but as I said, you know, once we brought
19 that first case, the enthusiasm -- I have had to do
20 much less pushing and a lot more pulling now, in terms
21 of getting people sensitized to and being aggressive
22 about pursuing credible fact patterns that include

1 retaliatory conduct.

2 MR. BACHMAN: And about how many complaints
3 per year do you all receive that involve whistleblower
4 retaliation?

5 MR. MCKESSY: Yeah, we don't break it down by
6 that. You know, we got just under 4,000 whistleblower
7 TCRs last fiscal year. And so any figures I gave on
8 how many of those have retaliation would be anecdotal
9 and probably a rough guess. But I am here to tell you
10 that we are tracking a number of very credible
11 allegations of retaliation across the country, and we
12 are very encouraged -- I mean it's encouraging, from
13 our perspective, discouraging from a corporate America
14 standpoint, the number and kinds of activities that
15 have been reported that seem to have some legs to it.

16 MR. BACHMAN: Thank you.

17 MS. SPIELER: Other questions?

18 MR. KEATING: Just a quick one. On the
19 21F -- I think it -- any -- I know you're continuing to
20 pursue and look for incidents where actions may muzzle
21 or have a chilling effect on people. Is there any
22 thought or -- I mean one of the things that we did

1 that was a very successful, in my opinion, result was
2 this best practices work group. We came up with
3 guidelines, and I think the Department may be acting on
4 those.

5 Any clarity that can be given around sort of,
6 you know, "We know that these types of things are okay.
7 We're not going to tell you what -- you know,
8 what -- lay out there what we think is not okay. But
9 these types of things are okay, as long as you have the
10 following language in a settlement agreement or a
11 severance agreement or a confidentiality agreement or a
12 code of conduct"?

13 MR. MCKESSY: Yeah, we're asked this question
14 all the time. And, you know, one of the things that I
15 find enjoyable about my job is when I'm
16 speaking -- people ask me to give them, you know,
17 dispensation: "You can say this and I'll be okay."

18 And look, I think, as an agency, we're always
19 trying to think of ways to be creative and letting
20 those who are subject to our jurisdiction know the way
21 we're thinking about certain things. The danger,
22 obviously, is always when you say, "As long as you say

1 these things, then we'll be okay," it takes away, I
2 think, a very important part of our jobs, which is to
3 not only go by what is said, but also get to context
4 and get to, you know, the kinds of things I was just
5 talking about.

6 You know, I think by all accounts Enron got an
7 A-plus in their compliance. You know, people from the
8 outside world, looking at what -- the kinds of things
9 that they had in place, the kinds of words that they
10 were using to encourage their employees were exactly
11 the kinds of things that everybody agreed are the kinds
12 of things we want people to say. But unfortunately,
13 the culture didn't lead to it.

14 And so, my own view -- and we've been asked
15 this question a lot -- my own view, as -- from a
16 regulatory perspective, I don't know why I would want
17 to go any further than what our rule says, which is no
18 person shall take any action that impedes an individual
19 from reporting to us. And that allows us to approach
20 each case on a very facts-and-circumstances basis.

21 Now, we brought the KBR case, and that's now
22 public. And what KBR was willing to do and what they

1 were willing to say in their documents is now
2 instructive to other companies. And I'm asked all the
3 time, "If we now implement what KBR says, will you
4 leave us alone?" Well, the answer is no. KBR
5 was -- we fashioned that settlement around what we
6 thought was appropriate, given the context of how those
7 facts arose.

8 That said, if you're doing something
9 completely contrary, or you're doing what they were
10 doing before, and that led us to bring an action, then
11 you ought to be thinking about that. But I -- and
12 there is -- so there is always education to be brought
13 out of -- when people want to know what's on our mind,
14 read our litigation releases. Read -- when we bring a
15 case against a company, particularly a company that may
16 be in your space, those are the kinds of things that
17 are interesting to us.

18 But I think it's dangerous to then extrapolate
19 that to say, "As long as I do what the company did when
20 the SEC told them the remedy, then I'm then safe." It
21 gives you -- when you come to the table with us, it
22 gives you something, you know, a interesting argument

1 to say, "Well, wait a minute," you know, "You told KBR
2 to do this, and as soon as we read that opinion we went
3 out and did it." That certainly can be persuasive, but
4 it's not going to be dispositive.

5 So, this is a long way of answering your
6 question. I think there may be some mechanisms other
7 than actual enforcement actions to educate the public
8 on what we're thinking. You know, I certainly spend a
9 lot of my time talking about this topic. But -- and
10 we've been asked on both sides, you know, the
11 whistleblower community has asked us -- you know, has
12 written the commission public letters to say, "You
13 ought to say these are the 10 things you can't do," and
14 then, on the other side, you know, "Give us the 10
15 things that, if we do, we'll be okay," and -- that's
16 very hard, to thread both of those needles.

17 And so again, my own view is from a regulatory
18 standpoint. We want to message, you know, be thinking
19 broadly about the fact -- you know, are you doing
20 anything that, in word or substance, tells your
21 employees that they report wrongdoing to a regulator at
22 their peril? And if you are, you ought to take actions

1 to address that.

2 MR. EHERTS: Could I follow up --

3 MS. SPIELER: Yeah, go ahead, Dave.

4 MR. EHERTS: I just have one last learning I'd
5 like to communicate and that's that I think we have a
6 very sensitive tool to determine retaliation in my
7 workplace, and that's that we rate supervisors and
8 managers and departments by the number of observations
9 we receive from employees. And we have rates between
10 30 and 90 percent, so we get a lot of reports.

11 Well, the minute one of those departments goes
12 to zero, that's an indication that there must have been
13 retaliation, because people stopped reporting. Why
14 else would they? I'm sure you haven't fixed all of the
15 issues.

16 And so, what we do is we carefully monitor the
17 number of good observations that come in by department.

18 And the first time we see a sharp drop we investigate
19 what happened to cause that drop.

20 MR. MCKESSY: And that's the kind of thing
21 that would be very difficult for us, as a regulator, to
22 kind of implement. I think that's, you know, that's

1 appropriate for your context. And, you know, I
2 certainly don't have any problems with it. But it may
3 not be appropriate for a very small company or the
4 like. And, you know, our jurisdiction does cover from
5 the very smallest public companies to the biggest. And
6 to set forth some framework for all of those and all
7 the species would be very difficult to implement, I
8 think.

9 MS. SPIELER: Other questions or comments?

10 (No response.)

11 MS. SPIELER: So I was actually surprised that
12 you say you started there in 2011, and the first case
13 was brought relatively recently.

14 MR. MCKESSY: In 2014, correct.

15 MS. SPIELER: Yeah. So why do you think that
16 there was that lag time before you initially litigated
17 a case? And do you think that the people who were
18 raising concerns that fell in your retaliation
19 bailiwick all went off to -- and filed their own
20 complaints in court, instead of waiting?

21 MR. MCKESSY: Yeah, I -- obviously, it is a
22 question that is asking for more speculation than

1 actual data-driven answer. I can say that, you know,
2 when I took the job -- when I look back on my first
3 five -- my five years here, when I first took the job
4 it was a mad scramble to understand, first of all, what
5 is this office going to look like?

6 You know, confidentiality was something that
7 was brand new. You know, the statute said that
8 anything we got in writing, until we passed our rules,
9 would be -- would have to be deemed to be a
10 whistleblower complaint. And so, our obligation not to
11 identify whistleblowers extended to every writing we
12 received during this period of time.

13 And so -- and I'm not saying this for sympathy
14 on my job, but I spent a lot of my early days on the
15 job trying to get our minds around and educating our
16 staff on what our confidentiality requirements were,
17 while still building an office, while still coming up
18 with policies and procedures, while hiring individuals
19 to work in the office.

20 And then, as we evolved, I started getting a
21 lot of reactionary questions, subject matter expert
22 questions about how do we deal with whistleblowers in

1 our investigations. What can we -- can't we do in
2 connection with putting a whistleblower on the stand,
3 and those kinds of questions. Then we started to get
4 our first trickle of claims rewards. And how do we
5 process those? And how do we do that?

6 And I'm not -- retaliation questions didn't
7 start becoming part of what I thought was a mandate for
8 us to spread until we had put out a lot of the
9 immediate fires we needed to. And that's not an
10 excuse, I just think it is a practical reality, that
11 our agents -- you know, people who work for the
12 enforcement division were not sensitized to the fact
13 that we have this authority. And I, frankly, didn't
14 have either the resources at the time to be the
15 cheerleader I've become for that species of our
16 workings until I had had some time to kind of get my
17 legs under me and figure out how this was going to
18 work. So that's one aspect of it.

19 The other aspect of it is it is a truism that,
20 you know, under Dodd-Frank a tip has to have come in
21 the door after July 21, 2010. And our rules were
22 passed in August of 2011. So -- and if you think about

1 a tip coming in the door at any given time, the reality
2 is even the best tips take time to be reviewed,
3 investigated. And then, if it needs to, to be
4 litigated.

5 So there is a number of reasons why it seems
6 like a long time passed between things happening -- and
7 I hear this all the time -- you know, I
8 submitted -- you know, if I hear again, you know, "I
9 gave you Madoff on a silver platter, I gave you this,"
10 I mean the public just believes that they give -- even
11 the best, best tips take time for us to assimilate,
12 work our way through, decide whether and how to
13 investigate, and then bring a successful action. So
14 all of those timing issues, I think, are the reason
15 that it took us a little bit of time.

16 And look, frankly, as a pragmatic matter -- I
17 think this is true of most regulators -- when you get
18 new authority, the first time you speak on it you want
19 to win, right? So you're looking for the case. And I
20 gave you a thumbnail of the facts. I mean the facts
21 here gave us what we thought was a very compelling
22 case. You know, the dates lined up that he -- he

1 announces, and he had the email where he told his
2 employer, "I told the SEC," and then he had a very
3 significant chronology.

4 And so, all of those things, I think, go into,
5 you know, when you pull a lever, when you think you've
6 got a credible case, versus when you've got a win. So
7 all of those, I think, have contributed to how we have
8 approached this new authority, and I think have driven
9 some of the timeframes in bringing these actions.

10 But as I said, once you have one, the momentum
11 has accelerated. And you know, we're tracking a whole
12 bunch of very interesting allegations of retaliation,
13 and I think in the future we'll look back and say,
14 "Well, it took a little while for the first one to be
15 brought, but then it became more of a rolling, regular
16 basis."

17 MS. SPIELER: Just one other -- do you have
18 any idea how many private actions have been filed under
19 this -- under the Dodd-Frank provisions?

20 MR. MCKESSY: I don't. No, I don't.

21 MS. SPIELER: Other questions?

22 MR. MOBERLY: This is Richard Moberly again.

1 So I'm on the training subcommittee. And I don't know
2 if you heard we gave a report beforehand. And I heard
3 you say that part of the way you are spreading the word
4 about retaliation to your enforcement agents is you and
5 your deputy -- I think you used the term
6 "cheerleader" -- going out and about to tell them about
7 it.

8 Are there specific training -- is there
9 specific training that you have provided to enforcement
10 investigators that we can learn from here, as we think
11 about training retaliation officers, investigators?

12 MR. MCKESSY: Yeah. So, you know, we've tried
13 to take a multi-layered approach to our training
14 vehicles. So the day our rules went into effect I
15 conducted a training on the -- on all of the rules,
16 division-wide. And so, by video link, everybody from
17 the enforcement division was required to sit and listen
18 to me for two hours talk about what this new authority
19 was.

20 And then we have cascaded that, you know,
21 under a number of different vehicles. So we have our
22 own page on our -- the enforcement intranet site has a

1 whistleblower page to it. And on there are housed the
2 kinds of documents I was talking about before: model
3 questions to ask, model document requests, you know, an
4 overview of the program, considerations. And clearly,
5 within that -- those written materials are documents
6 specifically tabbed and related to retaliation cases.

7 I have visited personally all 11 of our
8 regional offices in person. And every time I get asked
9 to speak on a panel that's anywhere near one of our
10 regional offices I make a point to visit in person.
11 There is nothing like in-person training. And you
12 know, it's an interesting thing.

13 Not coincidentally, every time I visited an
14 office in person, the calls we get from that office
15 skyrocket. Because, you know, having a voice, having a
16 face that someone, you know, actually showed up and
17 enlightened them -- and so that's a big part.

18 And sometimes the training is an overview if
19 we go to an office that has a lot of new employees that
20 need to hear kind of the big speech. But now that
21 we're mature enough, we kind of rely on our intranet
22 and our internet site to do the broad education, and we

1 try to do tailored trainings in connection with what we
2 think is hot either for that office or from our
3 perspective. And so, certainly in the recent -- the
4 last six months or so, or let's say since the first
5 retaliation case was brought, we have tailored some of
6 our training, internal training, specific to
7 retaliation cases.

8 One other thing that we did is we actually had
9 -- we offered an education panel that had the three
10 attorneys who brought the first retaliation case on,
11 and I moderated the panel for all of enforcement. And
12 so, one of the messaging I was able to say is, you
13 know, if you are concerned that you are not a
14 retaliation expert, and that, you know, that's not in
15 your sphere, the good news is you are tied with these
16 three individuals in second place for the number of
17 retaliation cases that have been brought. You know,
18 only these three people have actually been involved
19 with an actual retaliation case.

20 And so, they were able to talk on a real-time
21 basis. You know, we had this panel a month after we
22 actually brought the case, and they were able to go

1 through the decision trees that they had to confront,
2 the issues that came up, this waiver of -- you know,
3 the attorneys advising them on this issue, and how they
4 dealt with that. So those are -- and, you know, it's
5 an iterative process, right? We never feel like we've
6 educated everyone and we can just kind of sit on our
7 laurels. We are out and about all the time, you know,
8 between my deputy and I, talking to our individuals.

9 And then, you know, each regional office, each
10 of our special units has an attorney assigned to them
11 from our office, so that's their go-to person.
12 Obviously, they can talk to anybody, including me, and
13 probably every day every one of us is responding to one
14 question about a subject matter issue, often times
15 retaliation or confidentiality or -- and it is -- one
16 of the reasons I feel like I've got the best job in the
17 agency is every day is a new day. I never know what
18 question I am going to be asked, and we are asked
19 questions about how to implement the program on a daily
20 basis.

21 So, I hope that's helpful. I mean I think
22 it's important, whenever you're doing education, to

1 have a variety of voices, a variety of mechanisms. You
2 know, obviously, you want to provide written resources
3 when you can. There is nothing that takes the place of
4 in-person training, allowing people to ask very
5 specific, practical questions.

6 You know, when you're trying to give an
7 overview like I just gave, it's very difficult to go
8 into the weeds. But if you go to an office and they
9 can say, "I'm actually bringing a case, and here are
10 the facts," and allowing other people to hear, that
11 kind of practical training is invaluable in those kinds
12 of settings.

13 MS. SPIELER: So it's actually time for our
14 break. And I understand someone from wage and hour
15 just arrived. I need to suggest that we put this off
16 for our next meeting. I think we might be able to
17 formulate some specific questions around training and
18 outreach, and overlap between the populations that OSHA
19 may be concerned about and wage and hour may be
20 concerned about with regard to retaliation complaints,
21 and we -- so, in the interim before our next meeting
22 perhaps the work groups could also help formulate those

1 questions.

2 And I do -- I can't -- I don't know who it is
3 here who came, but -- and we appreciate your showing
4 up, but unfortunately we are running behind on our
5 agenda at this point, and we had anticipated having our
6 conversation with you starting at 10:15, and it is time
7 for a break, which I am sure the committee needs. And
8 we will -- we have made commitments starting at 11:00
9 to outside speakers, other outside speakers.

10 So, I would suggest that we take a 10-minute
11 break now and reconvene and move on to the rest of our
12 agenda. And my apologies, but I hope you will be able
13 to come back.

14 (A brief recess was taken.)

15 MS. SPIELER: Okay, why don't we get started?
16 Over the next hour the committee is going to be
17 hearing from people from outside the committee who have
18 asked to speak to us.

19 The Railroad Workers United had sent in a
20 specific request to be added to the agenda. And is a
21 representative of RWU here and ready to speak? So if
22 you could, come forward and take a seat at the table.

1 So we're running a little behind, so if it's possible
2 to shorten this, that would be great. But we've
3 allocated a half-hour for this.

4 And is Mr. Sheumake here?

5 (No response.)

6 MS. SPIELER: So I'm going to -- I think it's
7 Charles -- Charles Sheumake has sent us a letter about
8 the issues that have been raised by RWU that we're
9 going to be discussing, and I'm going to be -- ask that
10 that - that his letter dated April 14th be marked as an
11 exhibit for the -- as he will not be responding, and
12 I -- would you please give us your name and other
13 identifying information? And then you can go ahead and
14 make your statement, and we will have -- members of the
15 committee will then ask you questions.

16 RAILROAD WORKERS UNITED PRESENTATION

17 MS. ROOKAIRD: I am RWU. My name is Kelly
18 Rookaird. I am wife of Curtis Rookaird, a railroader
19 that was illegally fired from BNSF. I will just read
20 my statement and my resolutions, what I feel need to be
21 changed.

22 Hello, my name is Kelly Rookaird, wife of

1 Curtis Rookaird, former BNSF conductor that was
2 unlawfully fired on 3/19/2010 following an incident
3 that occurred at Cherry Point, Washington. My husband
4 was fired performing an air brake inspection on an oil
5 train. His claim was found to have merit by OSHA
6 Region 10. It was obvious to the OSHA investigator,
7 the FRA, and us that was clear case of retaliation
8 initiated from Stu Gordon. In the Seattle federal
9 court his trial is to be held next month, May 16th
10 through the 27th.

11 BNSF egregious behavior has caused us
12 devastating financial harm. Washington State Senator
13 Patty Murray's office was working with our mortgage
14 company to prevent our home from foreclosure for
15 four-and-a-half years. But because of the retaliation
16 from BNSF, it prevented Curtis from gaining employment
17 from a large employer during the background check
18 process, and we ultimately lost our home, nearly became
19 homeless.

20 Since the process for prevailing in their case
21 is so lengthy, we have lost all of our main assets.
22 Our adopted special needs boys have been overwhelmed

1 with grief of loss, as well. The only home they've
2 ever had, instability, our family's reputation and good
3 standing within our community. Our previously
4 excellent credit is gone.

5 I have also lost my employment due to conflict
6 of interest, as the company does business with
7 Berkshire Hathaway. All this has caused me tremendous
8 grief and I am plagued with health concerns for the
9 first time in my life.

10 My proposed resolutions. Impose substantial
11 fines towards railroad officials indirectly to railroad
12 presented or formerly employed by the railroad to obey
13 and respect your findings by non-negotiable immediate
14 one million initial personal fine for retaliation
15 (sic).

16 If worker is granted employment reinstatement
17 from the findings imposed, 10,000 per day to be awarded
18 to the employees, the worker from railroad, for not
19 reinstating the worker immediately upon the preliminary
20 order -- should be order of Department of Labor
21 Secretary findings (sic).

22 Denying workers their due process of law. In

1 these cases, increased workers punitive damage cap up
2 to five million each, since the current cap
3 is -- 250,000 is completely inadequate. The cap should
4 be large enough to be an actual deterrent. Raising
5 this cap is the single most important safety measure
6 that could be enacted since 250,000 cap is so low,
7 which is no apparent deterrent at all. Continuing
8 these practices to raise velocity of how fast they move
9 cargo over the safety of the workers and the risk of
10 the communities throughout the United States (sic).

11 When OSHA investigators request documentation,
12 they must have subpoena power and strict sanctions
13 towards the railroad for not following all of the
14 discovery guidelines. During an OSHA investigation it
15 must be mandated that the investigators interviewed all
16 parties involved without fear of retaliation toward
17 employees for their testimonies. If railroad carrier
18 retaliates, intimidates, threatens workers for their
19 cooperation, then that member of the railroad
20 management must be sanctioned equivalent with the
21 criminal charges made and personal sanctions, along
22 with the sanctions against the railroad carrier for

1 each alleged threat.

2 Impose \$30,000 fines or higher for each
3 violation. Congress funding for -- and designated
4 screener. Administrative worker for initial process
5 and determination of whether the case has merit or not
6 for the OSHA investigator (sic). The investigator
7 should only be investigating and completing their
8 reports.

9 Streamline the Secretary findings report
10 without all the beginning laborious novel writing
11 before the actual findings.

12 Investigators have no more than 20 open active
13 cases at a time in order to effectively process
14 expeditiously their work, but it needs to flow in the
15 use of rotation of incoming cases (sic). Adopt a
16 format like the EEOC does their investigations. The
17 due process letter should only consist of, on page one,
18 a check box of merit and not -- or not. On page two a
19 brief description of incident. Thereafter, follow the
20 actual order of Secretary findings, period. And 30-day
21 effective deadline from receipt of Department of
22 Labor's office to get out the findings from the

1 regional investigator to the worker.

2 Any and all of these recommendations shall be
3 non-negotiable towards the carrier, not subject to
4 chapter -- or bankruptcy in any form or fashion.

5 Additionally, I feel like the accord dated
6 2012 between BNSF and Department of Labor OSHA has
7 not -- was not designed to be a get-out-of-jail card
8 for the railroad. It was only to be used as a way to
9 settle certain cases, not this one. Not retaliation
10 from railroad towards the workers.

11 The carrier should show respect for the
12 government entity and not current -- completely
13 disregard, as they are today.

14 My husband is a conscientious workers. And if
15 BNSF would have cared about safety they would have kept
16 him and promoted him.

17 Lastly, I move the congressional funding for
18 these crucial issues of great concern with a smoother,
19 shorter timeframe for all fairness of the workers to
20 work in harmony with the railroads, because justice
21 delayed is justice denied.

22 Mr. Anthony Rosa, please provide me a copy of

1 all the names outstanding railroad whistleblower cases
2 and how many might there be throughout the entire
3 United States.

4 Thank you for your time and consideration for
5 addressing these critical issues. And I have an
6 enclosure I would like to give you.

7 MS. SPIELER: Do you have a written copy of
8 your comments that we could --

9 MS. ROOKAIRD: I only have one copy. I can
10 send it to you.

11 MS. SPIELER: I'm wondering if we shouldn't
12 add that to the exhibits to make -- because sometimes
13 when the transcript is made, it isn't as accurate as
14 the written statement. So I think that the original
15 request to speak that came from the Railroad Workers
16 United should be part of the record, as an exhibit.
17 And then your statement, as well, should be probably
18 number three. And if you could send it to the staff,
19 that would be very helpful.

20 MS. ROOKAIRD: Yes, ma'am.

21 MS. SPIELER: I really appreciate your taking
22 the time. I want to caution both you and the members

1 of the committee that we are not in a position to
2 discuss individual cases in this forum. We can,
3 however, discuss process and general questions of what
4 OSHA can do in terms of improving its process, and --

5 MS. ROOKAIRD: That was part of my
6 resolutions.

7 MS. SPIELER: Yeah. No, I understand that.

8 MS. ROOKAIRD: Just through our experience.

9 MS. SPIELER: Yeah. And I want to ask,
10 because originally your request to speak -- there were
11 quite a few names on the list of people who might
12 speak. Is there anyone else who is joining you today?

13 MS. ROOKAIRD: Yes, there is. Mike Elliott --

14 MS. SPIELER: Well, I would suggest that the
15 rest of you come to the table. And if you could,
16 identify yourselves for the record. Did you also want
17 to make statements, or --

18 MR. ELLIOTT: Yes, I would like to make a
19 statement, and --

20 MS. SPIELER: Okay, if -- okay. So please
21 have a seat.

22 MR. ELLIOTT: Sure.

1 MS. SPIELER: If you could identify yourself
2 and speak into the microphone, that would be --

3 MR. ELLIOTT: Sure. My name is Michael
4 Elliott. I am a whistleblower. I am also the former
5 chairman of the Washington State Legislative Board for
6 the Brotherhood of Locomotive Engineers and Trainmen.

7 MR. KURTZ: My name is Jeff Kurtz. I'm a
8 retired railroader. I'm formerly the Iowa State
9 legislative board chairman for the Brotherhood of
10 Locomotive Engineers and Trainmen. And I retired in
11 2014 after 41 years of service on the railroad.

12 MS. SPIELER: Mr. Elliott?

13 MR. ELLIOTT: Great. I have a statement. And
14 at some point, if I'm running too long, just cut me
15 off. I'll try to answer some questions, and I can send
16 the document in to add to the record so we don't take
17 up too much time.

18 MS. SPIELER: Yeah. May I ask if your
19 colleague also has a statement to --

20 MR. KURTZ: Yeah.

21 MS. SPIELER: Oh, okay.

22 MR. KURTZ: Yes, I --

1 MR. ELLIOTT: Yeah, he has one also.

2 MS. SPIELER: That makes it a little difficult
3 to know when to cut you off. So how about --

4 MR. ELLIOTT: Oh, all right --

5 MS. SPIELER: -- if you keep it to under five
6 minutes.

7 MR. ELLIOTT: Yeah, it's right about five
8 minutes -- a little bit over, perhaps.

9 Good morning, Committee, and thank you for the
10 opportunity to comment. My name is Mike Elliott, and
11 I'm a whistleblower. Previously, I worked on the
12 Burlington Northern Railroad, and later on its
13 successor, the BNSF Railway Company. For 17 years I
14 worked full time in the crafts of switchman, brakeman,
15 conductor, and locomotive engineer. Simultaneous with
16 my work on the railroad I performed collateral duties
17 as vice chairman and later as chairman of the
18 Washington State legislative board of the Brotherhood
19 of Locomotive Engineers and Trainmen.

20 As a union official, my primary
21 responsibilities were workplace safety, health, and
22 education of the nearly 900 BLET union members living

1 in Washington State.

2 In March 2011, BNSF retaliated against me for
3 reporting signal system concerns critical to both
4 public and worker safety brought to me by my
5 membership. Within weeks of having initiated a Federal
6 Railroad Administration focused inspection that
7 uncovered hundreds of federal defects, a BNSF manager
8 staged a workplace conflict after I had signed out from
9 work and while under mandated federal arrest. I was
10 arrested by police in front of my coworkers, jailed,
11 and taken before a magistrate in chains and charged
12 with felony assault. BNSF refused my union's request
13 to postpone personnel hearings associated with staged
14 conflicts, and then provided those hearing materials to
15 prosecutors.

16 After nearly nine months of court-imposed
17 restrictions on my civil rights, a Tacoma, Washington
18 jury acquitted me of all charges associated with the
19 staged conflict. Following BNSF's adverse employment
20 actions, I filed the whistleblower complaint under the
21 Federal Railroad Safety Act.

22 In the weeks and months that followed, the

1 OSHA investigator organized and logged emails and other
2 important documents I had saved associated with my
3 reporting of the signal safety concerns on the high
4 volume, high profit BNSF Seattle subdivision. But by
5 2013, the backlog of whistleblower cases at OSHA would
6 not allow for additional investigation on my case.

7 Consequently, I decided to pull my case from
8 OSHA and file a lawsuit in federal district court. In
9 June 2015, after over 4 years, 2 separate BNSF
10 dismissal hearings, and a federal -- pardon me -- and a
11 felony criminal trial, I finally had my day in court
12 before a jury of my peers. After a six-day trial, the
13 jury took less than three hours to conclude BNSF had
14 broken the law under the whistleblower provisions of
15 the Federal Railroad Safety Act. The jury awarded me
16 \$1.25 million, of which \$250,000 was in punitive
17 damages, the maximum amount allowed under existing law.

18 I would like to offer some suggestions for
19 improving the whistleblower process under FRSA. I am
20 going to let Jeff talk and get his in, and then you
21 could ask some questions. Thank you.

22 MS. SPIELER: Great, thank you.

1 MR. KURTZ: What I'm going to talk about today
2 is the rules and how they're written to undermine the
3 whistleblower law.

4 In 2007 there is a -- July of 2007 there was
5 an FRA report titled, "The Impact of Participatory
6 Safety Rule Revision on Incident Rates, Liability
7 Claims, and Safety Culture in the U.S. Railroad
8 Industry." The report states in its abstract that even
9 though outcome data were statistically inconclusive, a
10 number of indicators in this study suggested a positive
11 benefit on carriers that used a process that included
12 cutting back on rules, allowing employees a hand in
13 determining those rules, and putting those rules in an
14 easy-to-understand format.

15 Interviewees reported more enforceable safety
16 rules, increased compliance, and overall employees in
17 several -- overall improvements in several aspects of
18 safety culture, such as labor management relations.
19 The report also states that the present condition of
20 the rules and regulations may in themselves inhibit
21 safety.

22 Well, you ask any employee that has been

1 around since 2007 how things have changed, and they
2 will tell you that the rules and regulations and
3 policies have become more complex and have increased in
4 size. And that's why we contend that the rule-making
5 apparatus itself is out of whack and is contrary to
6 safe practices.

7 I've got an example of -- right before I
8 retired, of a case that I helped represent an employee
9 on. And it was over what we call a trip optimizer on a
10 locomotive, which is like a cruise control. And one of
11 our members had a serious problem with this trip
12 optimizer, which is -- the problem had him jumping
13 ahead 35 miles on his territory, which would have put
14 him in different speed restrictions and different
15 grades on his territory. In short, it would have led
16 to a disaster if he hadn't taken steps to disarm it and
17 run his train without it for the rest of the trip.

18 He took the steps to turn it in formally, so
19 we would have a record of failure on the trip
20 optimizer -- "we," being the union, the local
21 union -- because if there isn't anything on an official
22 record, and if an optimizer fails and an engineering

1 conductor get in trouble because of it, the carrier
2 could say there was no record of an optimizer failing
3 before, and so it must have been the employee's fault
4 that they got in trouble.

5 Well, first of all, he was criticized in
6 writing for not turning it in the right way, whichever
7 way that is. We're not sure what they meant by that.
8 And then, about a month-and-a-half later, he was
9 disciplined under what they call the low hours policy.
10 Now, low hours is a policy where no one knows what it
11 is, no one -- no parameters are given, as far as what
12 is required in terms of work.

13 And furthermore, according to the COO, Carl
14 Ice -- he gave this in a town hall in Fort Madison,
15 Iowa in 2014 -- he said, "No information is going to be
16 given," because if it is, according to him, people will
17 only work that much and no more.

18 Now, anyway, we filed under the Whistleblower
19 Act for several reasons. One, if he was found guilty
20 of violating low hours again, which we still have no
21 idea what constitutes this policy, so it's very fluid
22 -- he was told he would be terminated. One of the

1 tenets of low hours is it never goes away. It stays
2 there. So if you were found guilty of a violation,
3 then it could be held over your head forever.

4 Now, think about it, a policy that is -- I
5 guess the best description would be fluid -- being held
6 over your head for 20 to 30 years. The second reason
7 is it seemed awful funny that this was done so soon
8 after he turned the optimizer in. In fact, for the
9 month in question that he was cited for, he was
10 available for service 23 out of 25 days that he was on
11 an extra board, which -- an extra board is a board that
12 they use to call you for extra work. And one of the
13 days off that he was off was to take his 85-year-old
14 widowed mother to the doctor, since he is her primary
15 caregiver.

16 The hours he works, when he is available for
17 service, is governed solely by the carrier, and not in
18 any way, shape, or form by him. He cannot walk off the
19 job early if he wants. If they want him to work more
20 hours, have him work more hours.

21 The decision rendered by OSHA on this case was
22 that, since a letter and discipline would have been

1 generated by the policy whether he had turned in the
2 optimizer or not, this case was dismissed. And I
3 called after the decision to ask if the railroad
4 suddenly made a policy that 10 employees be terminated
5 every Tuesday, if a whistleblower just happened to be
6 one of those employees, would we get the same answer,
7 and I was told that OSHA doesn't rule on bad policy.

8 I think the whistleblower law could be a very
9 good law. It seems like the people that are tasked to
10 enforce it are very sincere. But I think that we've
11 got problems that we need to address, and I think that
12 some of the scope of what they do needs to be expanded.
13 So thank you.

14 MS. SPIELER: Thank you. I believe you also
15 had some suggestions, and I wanted to give you the
16 opportunity to offer them.

17 MR. ELLIOTT: Thank you, Madam Chair.
18 The -- one of the first recommendations to the panel
19 here is the heavy caseloads and lack of adequate office
20 support staff, those were factors in my own case. When
21 I had communications with the investigator, the
22 investigator was spending a lot of time on clerical and

1 other issues that -- the expertise of the investigator
2 ought to be working on the case, and then have the
3 support staff do the other things.

4 I was told that some of the support staff
5 positions they currently have are being canvassed out
6 as people retire, and they're not going to replace
7 those positions. So if you could give another thought
8 to that, to make sure that there is adequate support
9 staff for the investigators we have, their caseloads
10 are already heavy, but that was one of the things in my
11 case that caused me to take it out because after a
12 certain amount of time had passed we said, "We got to
13 keep this moving."

14 Another suggestion would be some type of a
15 kick-out option that sends the case directly to the
16 administrative law judge from the investigator, without
17 some type of supervisory review. If the ALJ says,
18 "Well, you know, I think there is enough for a
19 preliminary ruling here," something along those lines
20 seems like that would help move these cases along
21 without going through the full process of supervisory
22 oversight.

1 As far as supervisory oversight, I think we
2 got to be careful to ensure that there is -- that
3 mid-level and higher supervisor bias is eliminated.
4 And I'm going to give you an example. I believe, and
5 it's my opinion, any former railroad manager is not
6 capable of making an unbiased evaluation of a railroad
7 whistleblower case. It's just not possible. Once
8 you're indoctrinated in that line of thinking, I think
9 it's -- your mind is poisoned to that sort of unbiased
10 ruling. So, I would ask that this panel and OSHA look
11 carefully at those relationships in all the various
12 regional offices.

13 Just to give you an example on my own
14 case -- while it wasn't OSHA, it was the FRA -- one of
15 the managers who was involved in the staged accident at
16 work, or the staged conflict, then resigned, went to
17 FRA, and tried to get a job on the same territory as an
18 inspector. Well, I complained about that most
19 strenuously, and the guy resigned. But point is that
20 we shouldn't be getting into those types of scenarios
21 at all.

22 Oh, and another good one for OSHA would be

1 subpoena power. Once I got my case into federal
2 district court, and we had subpoena power, that turned
3 up some very, very damning evidence against the BNSF in
4 terms of what they had withheld from OSHA. So I think
5 you need to take a look at that and see if it's
6 possible to get your investigators subpoena power on
7 these railroads.

8 Let's see. The Railway Labor Act process.
9 Department of Labor needs to take a look at it. I mean
10 what's --

11 MS. SPIELER: I think that's way outside the
12 scope of this committee.

13 MR. ELLIOTT: Okay. Well, that was in there,
14 I thought I'd throw it out there --

15 MS. SPIELER: Yeah.

16 MR. ELLIOTT: -- but we'll just brush over
17 that one.

18 (Laughter.)

19 MR. ELLIOTT: That's a whole other discussion,
20 maybe --

21 MS. SPIELER: Yeah.

22 MR. ELLIOTT: -- for another forum. Thank

1 you. Okay. Let's move down.

2 Okay, on the OSHA side of it -- now this is
3 something when this is re-evaluated by you all and the
4 Department, is the \$250,000 punitive damage cap, it's
5 ridiculous. I mean that's absolutely no deterrent to a
6 multi-billion-dollar corporation like BNSF, and their
7 parent company, Berkshire Hathaway, absolutely none.
8 So we need to look at that. I think it should be at
9 least five million at this level, internally, to OSHA.
10 And then at the federal district court level it should
11 be removed. Let the jury decide, based on the facts,
12 on what happened. So, take that into consideration,
13 please. That is -- that would be a big one, because
14 they understand that kind of talk.

15 I heard -- the gentleman that spoke before me
16 talked about whistleblower programs in other
17 departments of government. And if there can be a
18 sharing of that information between OSHA and these
19 other departments to initiate other whistleblower type
20 of activities -- and I'm going to use my case for an
21 example.

22 The territory over where I was reporting the

1 serious signal violations, there was \$800 million in
2 federal high-speed rail funds that went into that
3 subdivision in that area along the I-5 corridor. They
4 need to take a look and see, you know, "Hey, you're
5 supposed to be improving the track structure, the
6 infrastructure, the signal systems. Where did that
7 money go and what was it used for?"

8 So I just think the communication between OSHA
9 and other agencies, SEC, whoever it might be, to
10 check -- "Hey, check your whistleblower stats," we need
11 to take a look at this.

12 This -- again, this might be beyond the scope
13 of OSHA, but in federal district court on -- when you
14 win an award there, there is -- the interest rate is
15 ridiculous, it's --

16 MS. SPIELER: Yeah, definitely beyond the
17 scope of what OSHA can do anything about.

18 MR. ELLIOTT: Okay. Well, anyway, that's
19 another one that -- I will take that to the judicial
20 side.

21 MS. SPIELER: Let me stop you here, because I
22 think it's important that -- you've raised some

1 important issues --

2 MR. ELLIOTT: Sure.

3 MS. SPIELER: -- very much from the heart,
4 some of them are within the -- what -- the scope of
5 what OSHA might be able to address.

6 MR. ELLIOTT: Sure.

7 MS. SPIELER: Many of them are -- would
8 require statutory change.

9 MR. ELLIOTT: Right.

10 MS. SPIELER: But I would like to give the
11 committee a chance to ask you questions if they would
12 like. And so -- and we are going to need to move on,
13 so --

14 MR. ELLIOTT: Right, thank you.

15 MS. SPIELER: Eric?

16 MR. FRUMIN: Eric Frumin. One of the
17 questions that's been raised repeatedly before this
18 committee concerns the accountability, the ultimate
19 accountability, of managers who engage in retaliatory
20 behavior. And this was also true specifically in the
21 rail sector.

22 So I was wondering if you could -- you

1 mentioned about the problem with the manager who stages
2 this conflict and who then tried to get a job for FRA.

3 But within the employer, the company itself --

4 MR. ELLIOTT: Right.

5 MR. FRUMIN: -- are you aware of any change in
6 the status of the -- either the direct manager or any
7 of the people that he or she reports to regarding this
8 trail of tears, here, you know, the management
9 misconduct?

10 MR. ELLIOTT: Right. Well, I'm glad you
11 brought that up. That was on my list. Not one of the
12 managers involved in the misconduct and violations of
13 the law under my case was disciplined in any way. In
14 fact, one of them claimed that the incident that
15 he -- that the conflict that he staged caused him
16 post-traumatic stress disorder, and he was allowed to
17 retire on a full railroad board retirement. Not one
18 manager.

19 This, the amounts of money I told you here
20 that the jury awarded, again, that was against BNSF
21 generally. No effect. So those managers went on. One
22 of them, the general manager, went on to be promoted to

1 a vice president. So, I mean, we need to look at that.
2 The committee needs to look at that. And when you
3 have something like this that's this egregious,
4 that -- these managers shouldn't be promoted, shouldn't
5 be allowed to go into other government jobs and just
6 sail off into the sunset, so to speak.

7 MR. FRUMIN: Well, so, in other words, the
8 message within the company -- and the guy from the SEC
9 alluded to this, you know, what's the message within
10 the company about, you know, who wins and who
11 loses -- the message within the company is that
12 managers who engage in what -- I mean I wasn't at the
13 trial, but it looks like --

14 MR. ELLIOTT: Right.

15 MR. FRUMIN: -- it was misconduct to me,
16 within that company was that they are, at a minimum,
17 not penalized and, if anything, on the other hand, were
18 rewarded. Is that a --

19 MR. ELLIOTT: That's --

20 MR. FRUMIN: Is that an accurate conclusion?

21 MR. ELLIOTT: -- a fair statement.

22 MR. FRUMIN: Yeah.

1 MR. ELLIOTT: And that was, again, if I could
2 have gone through all of my stuff that's in
3 there -- Jeff, did you want to comment?

4 MR. KURTZ: We -- there was a situation on my
5 home road after I retired where a crew was in what we
6 call a control point, and they were working the
7 switches. They didn't think the instructions they got
8 were legal, from the chief dispatcher, who would be the
9 guy that would control those switches. He threatened
10 them repeatedly.

11 Finally, they invoked what we call the Good
12 Faith Challenge. It's a federal regulation. They
13 said, "If we're going to do this, we're going to invoke
14 this good faith challenge," which lets those guys -- it
15 lets them refuse the work, and has the manager put it
16 in writing, what he was trying to get them to do. This
17 manager told them that he was going to terminate them
18 if they did this.

19 So, it was brought up to our local management
20 what happened, because this was all on tape. And they,
21 our local union officers, were told, "Well, let's just
22 keep this quiet, and we're going to talk to him

1 privately." And the crew ended up doing what they were
2 told, because they were intimidated, you know? Because
3 railroad justice is not good. I mean you wait years
4 before you get back to work, no matter if you're right
5 or not.

6 So, they did the illegal process. And they
7 were told later, "Yeah, well, we'll talk to this
8 manager." That's what happens. So --

9 MS. SPIELER: Nancy? And I know I'm going to
10 have to cut this off, because -- part of the problem is
11 we're running now a bit late, and we have to reconvene
12 at 1:00, because Dr. Michaels and possibly the deputy
13 secretary are coming at 1:00. So they don't have any
14 flexibility in their schedules. So a couple of more
15 minutes, and then we're going to have to move on. We
16 have three other speakers who want to talk during the
17 public comment period.

18 Nancy, go ahead.

19 MS. LESSIN: So I have two questions. I will
20 do them both.

21 The first is I believe it was in 2012 OSHA and
22 BNSF negotiated an accord because of some serious

1 problems. So my first question is have you noticed a
2 change since that accord, in terms of the kinds of
3 things that you're talking about?

4 The second has to do -- I think, Mr. Kurtz,
5 you were talking about a situation where there were too
6 many rules, or the low hours rule, and it couldn't be
7 shown that that was -- the person who had talked about
8 the trip optimizer problem, that that -- that he might
9 have gotten it anyway. And so, it wasn't a case.

10 And I was just reviewing something that we
11 call the Fairfax Memo. It has to do with injury
12 reporting and discipline from that, but it talks about
13 in some cases an employer may attempt to use a work
14 rule as pretext for discrimination and careful
15 investigation is needed. This is an OSHA memorandum,
16 and it talks about vague rules, which this one sounds
17 like, "may be manipulated and used as pretext for
18 unlawful discrimination."

19 So, I just -- is that kind of what you're
20 saying happened? Because if that is the case, then I'm
21 going to talk to OSHA about, you know, this is a
22 specific memorandum for injury reporting retaliation,

1 but it --

2 MS. SPIELER: Yeah. I'm going to ask that you
3 keep your reply brief.

4 MS. LESSIN: Seems like it might be related to
5 what you're talking about.

6 MR. ELLIOTT: Right. I think they're using
7 the rule book and all these nebulous rules as pretext,
8 like Ms. Lessin has indicated, to retaliate against
9 whistleblowers and people that are injured in the
10 workplace.

11 I think when you still look at who is leading
12 the pack of whistleblowers, it's companies like BNSF
13 and the other railroads, without any question. I
14 think, when you look at those -- your own facts and
15 figures and statistics, that the deterrent effect of
16 the whistleblower program is not bringing about the
17 change we had hoped to in the industry. So we need to
18 continue to work on that, they need to be punished
19 commensurate with their misconduct.

20 MR. KURTZ: I just wanted to comment about the
21 agreement between OSHA and BNSF. Since 2012 things
22 have changed. It's gotten worse. The people that -- I

1 will tell you. Let me write rules, regulations,
2 policies. Believe me, I will be able to do anything I
3 want. And that's basically what the railroads do.

4 I mean you can talk to all of the local union
5 officials, they will tell you the same thing, that
6 you're not going to get around this maze of rules,
7 you're not going to get around this maze of regulations
8 and policies, because of the fact that they have an
9 infinite capacity to write rules. And if you're in
10 compliance with one, you're going to be violating
11 another rule.

12 So, yeah, it's -- the FRA knows it's a
13 problem, the carrier know it's a problem, the unions
14 know it's a problem. And it's going to continue to be
15 a problem until it's addressed.

16 MS. SPIELER: Okay, a quick question from J.J.

17 MS. ROSENBAUM: Thanks. I just wanted to
18 thank you all for being here, and say it's really
19 important for the committee to hear from
20 whistleblowers, families of whistleblowers, and union
21 folks trying to support whistleblowers.

22 I just wanted to ask you, Ms. Rookaird. You

1 had a number of important recommendations, but -- and I
2 was trying to listen across the presentations. The
3 three that I heard come up in both of the
4 recommendations were broader subpoena power or more
5 aggressive pushes to get the documents early in the
6 investigations that open up what really happened;
7 issues of caseload and staffing that slow down
8 investigations and cause significant delay, and the
9 impact of that both on the investigation and the
10 quality of it and the ability to win and also the
11 impact on families during that time; and then also the
12 sort of question of punitive damages and penalties
13 being at a level that they change behavior.

14 I just wanted to ask you, Ms. Rookaird, if
15 there are any other high-priority recommendations you
16 wanted to lift up as we close.

17 MS. ROOKAIRD: Well, I'm going to let
18 Mike -- because we have pending litigation --

19 MR. ELLIOTT: Yeah, she's got -- pardon
20 me -- pending litigation, so she's worried about that.

21 I think that once the ALJ has ruled, there should be
22 some sort of a penalty for not reinstating them and for

1 trying to drag out the process. And that's what, you
2 know, BNSF and the other railroads, generally, their
3 lawyering is about, is delay.

4 And I think her last statement, or her closing
5 statement, was justice delayed is justice denied. It
6 is absolutely true here, folks. We need to take a look
7 at this. I know that the committee can only make
8 recommendations, and we can't make a broad brushstroke
9 of changes, but the ones that we talked about, the
10 internal ones that you just mentioned of support staff,
11 adequate support staff, that's as start, and subpoena
12 power --

13 MS. ROOKAIRD: They need to --

14 MR. ELLIOTT: And the subpoena power to get
15 the evidence, I mean -- in my case, once we got to
16 district court, that's where some of the real damning
17 documents were recovered.

18 MS. SPIELER: I want to echo J.J.'s thanks for
19 your coming forward and raising these concerns with us.
20 It is incredibly important for the committee to hear
21 them. And thank you very much for your thoughtful
22 remarks.

1 So, we are now going to move into a public
2 comment period that I'm going to get a little more
3 aggressive --

4 MR. ELLIOTT: Thank you, Committee.

5 MS. SPIELER: -- about timekeeping. Let me
6 just -- I'm going to suggest -- we have three people
7 who are here who would like to speak: William Wahoff,
8 Larry Mann, and -- is it Larry? Larry Halprin. I'm
9 going to suggest that we start with Mr. Wahoff, who has
10 requested five minutes. And then Larry Mann -- and I
11 will hold you to five minutes, as well. And then Mr.
12 Halprin. And we will stick to 15 minutes for that.

13 While you get settled, however, Brian needs to
14 just check -- quickly check on the exhibits from this
15 last discussion.

16 MR. BROECKER: Yes, thank you. Just to
17 clarify the exhibits for the record, the first exhibit
18 that will be marked Exhibit No. 1 is the Charles
19 Sheumake letter from BNSF Railway.

20 The second exhibit, that will be marked as
21 Exhibit No. 2, is the Railroad Workers United Original
22 Request to Speak, signed by Janet Wallace.

1 Exhibit No. 3 will be the statement, the
2 written statement, from Mr. Rookaird, whose testimony
3 was just given. And I understand that there is written
4 testimony from Mr. Elliott and Mr. Kurtz, as well?

5 MS. SPIELER: I don't -- not that I know of.

6 MR. BROECKER: No?

7 MS. SPIELER: No.

8 MR. BROECKER: Mr. Elliott and Mr. Kurtz,
9 since you're here, do you both have written statements
10 that you'd like to submit as exhibits?

11 MR. ELLIOTT: Is that okay if we get them to
12 staff?

13 MR. BROECKER: Of course.

14 MS. SPIELER: Okay.

15 MR. BROECKER: Certainly. Okay, so the
16 statement from Mr. Elliott will be marked as Exhibit
17 No. 4, and the statement from Mr. Kurtz will be marked
18 as Exhibit No. 5.

19 MS. SPIELER: Okay. And as Exhibit No. 6 we
20 had a statement submitted to us by Don Davis. And in
21 the interest of time I am not going to read it, but I
22 will ask the committee members to read it so that we

1 can discuss it at a future time.

2 MR. BROECKER: That's been marked as Exhibit
3 No. 6.

4 MS. SPIELER: Mr. Wahoff?

5 PUBLIC COMMENT PERIOD

6 MR. WAHOFF: Yes, thank you. Thank you, Ms.
7 Chairman -- Chairperson, I should say. I am Bill
8 Wahoff of the law firm of Steptoe and Johnson PLC. And
9 we are from the heart of the United States. We have
10 offices in Ohio, Kentucky, Pennsylvania, West Virginia,
11 Denver, and in Texas. So we are the other Steptoe, not
12 the one with the Washington office. I always have to
13 say that.

14 I wanted to address in less than five minutes
15 to help the Chair a couple of things regarding
16 procedures in whistleblower investigations.

17 And the primary -- first of all, I share the
18 outreach subcommittee's concern that employers don't
19 know about the retaliation whistleblower laws and the
20 breadth of them. And so, incorporating just some quick
21 suggestions, incorporating that information in opening
22 conferences, in the on-site consultation, and

1 others -- other opportunities for communication would
2 be really important.

3 Also, just acquainting employers with the
4 general procedure of these whistleblower
5 investigations, because employers are very familiar
6 with OSHA safety and health investigations and the
7 procedure -- opening conference, et cetera, et cetera
8 -- but the whistleblower investigations, not so. So
9 the procedure side of it.

10 Then one final comment, and then I will stop.

11 I would suggest that the -- any settlement
12 negotiations be as -- as done in the EEOC, deferred to
13 a separate mediator, okay, rather than having the OSHA
14 investigator conducting settlement negotiations for the
15 whistleblower. It's a much -- you know, any federal
16 judge, any state court judge -- judges like to have
17 other people do their mediations. That's become
18 standard practice, even in state courts.

19 It would be a much better appearance, I would
20 submit, if the -- if that were deferred to a separate
21 person to do settlement negotiations in whistleblower
22 cases.

1 With that, I will conclude. Thank you very
2 much, and it's a pleasure seeing everyone.

3 MS. SPIELER: Thank you very much. And I
4 think those are all very salient points, in terms of
5 conversations we're currently having.

6 Just any quick questions?

7 (No response.)

8 MS. SPIELER: Great, thank you. And thank you
9 very much for making the time to come.

10 Mr. Mann?

11 MR. MANN: Again, I'm Lawrence Mann, I'm
12 counsel to the Academy of Rail Labor Attorneys, and I'm
13 also rail safety coordinator for the transportation
14 division of the Sheet Metal, Air, Rail, Transportation
15 Union. That -- the transportation division is
16 basically the United Transportation Union formerly,
17 which represents conductors and engineers. ARLA, these
18 are attorneys throughout the country that probably
19 handle, I would say, over 90 percent of whistleblower
20 cases throughout the country.

21 And, as counsel to ARLA, I am the recipient of
22 the problems that have arisen. So I want to briefly

1 mention several that I think will need some statutory
2 recommendations to the Secretary. And if I have time,
3 some other issues I would like to raise. I will
4 subsequently set this in some detail to the committee,
5 because I know I don't have time to tell you all the
6 issues.

7 One that I want to mention is, under the
8 statute, as you know, that the action must be brought
9 within 180 days. And it's entitled, "Statute of
10 Limitations." That's under D2(a)ii. And we have two
11 cases pending where the cases arose within OSHA and it
12 stayed for more than four years. The railroad -- both
13 railroads -- have now alleged that a four-year statute
14 of limitation applies.

15 There is a general statute of limitation that
16 Congress adopted. It's 28USC -- United States
17 Code -- Section 1658. And basically, what it says, if
18 there is not a specific statute of limitations within a
19 federal of law, a four-year statute of limitations
20 applies. Well, I can tell you that the whistleblower
21 lawyers throughout the country have no knowledge of
22 this, they just simply are unaware of this, and it

1 caught them blindsided.

2 So what I'm recommending is that there be a
3 specific statute of limitations in the law if the 180
4 days is not the actual statute of limitations.

5 Another issue relates to your preliminary
6 reinstatement of workers. I know that your order is
7 that the railroads' objections do not stay
8 reinstatement, if that's ordered. However, a federal
9 court has issued an order that stated that only final
10 orders are enforceable. So your reinstatement order is
11 non-effectual. And I recommend, on behalf of everyone
12 who is handling whistleblower cases, that the statute
13 be amended to mandate that the -- your temporary
14 reinstatement orders be enforceable.

15 Another issue that has arisen -- and you cut
16 me off whenever you think my time is up --

17 MS. SPIELER: Okay.

18 MR. MANN: I will just keep going. We have a
19 situation where certain times employees are simply
20 incapacitated, and they are unable to request an
21 ambulance. Now, I am aware of a number of cases where
22 that has occurred. And the railroad's position -- and

1 these are all the railroads -- their position is that
2 only the employee may request an ambulance. So I am
3 requesting that you make a recommendation to the
4 Secretary that that statutory provision be changed so
5 that anyone could be able to request an ambulance where
6 someone is incapacitated.

7 We have a problem also after an ALJ decision
8 has been rendered and it's adverse to the employee.
9 The railroad's positions have been -- and are,
10 currently -- that you are no longer able to access the
11 courts. That's their legal position.

12 MS. SPIELER: I'm going to tell you you have
13 30 seconds left.

14 MR. MANN: Thirty seconds. Well, that's one
15 issue I think needs to be handled legislatively.

16 We still have the disparate enforcement issue.
17 As you may remember, I am on the railroad working
18 committee with Eric, and we've made that recommendation
19 to you last year.

20 The subpoena power issue, we've made that
21 recommendation. And it's really important. We need
22 that.

1 I will just stop now.

2 MS. SPIELER: Thank you very much. And if you
3 do take the time to write out more extensive
4 comments --

5 MR. MANN: I will.

6 MS. SPIELER: -- we will look forward to
7 seeing them.

8 MR. MANN: I will.

9 MS. SPIELER: Mr. Halprin?

10 So it's a couple of minutes to 12:00 now.
11 We -- I am going to say that we are going to stop at
12 12:15. We have to be back here by 1:00, so it'll be a
13 quick lunchtime for people. I think we can get through
14 the cafeteria in that time, but it's critical that you
15 be back here at 1:00.

16 Go ahead, Mr. Halprin.

17 MR. HALPRIN: Thank you. I will try not to
18 take 15 minutes, and give you a little more time to
19 eat.

20 MS. SPIELER: I think there may be questions
21 for you. So if you could make your comments brief --

22 MR. HALPRIN: That's fine.

1 MS. SPIELER: For those of us who have
2 actually read through all the materials --

3 MR. HALPRIN: Well, I do appreciate that. I
4 assume that, for the most part, it's something people
5 haven't seen before.

6 So I represent the Great American Insurance
7 Company and Strategic Comp. They are workers comp
8 carriers dedicated to workers comp and dedicated to
9 reducing injuries, illnesses, and deaths in the
10 workplace. They have been in operation for 23 years,
11 insured over 1,000 companies, currently insure about
12 700 mid to large-sized companies with about 300,000
13 total employees.

14 So they have tried a number of different
15 measures to try to bring about an improvement in
16 workplace safety and health with the particular charge
17 they have. They are usually challenging companies in
18 relatively hazardous occupations or industry sectors.
19 They've tried various measures and behavioral safety,
20 some of the various other techniques that people have
21 suggested, and found that, through their experience,
22 the only one that really works is an incentive program

1 that's tied to lost work day cases.

2 They've found that, in order to change a
3 company's operations and behavior and be successful,
4 you basically have to change the culture. And I've
5 done various things with lots of companies. If you
6 start writing programs and having meetings and all the
7 other things that people might do, it takes too long to
8 bring about the kind of change that persuades employees
9 to buy in. And if you're looking for buy-in in a
10 cultural change up and down the line, they have found
11 the incentive programs are the only things that work.

12 Now, when you have an incentive program, some
13 of the other things that people watch for -- you know,
14 number of safety communications, number of meetings,
15 those things -- may go up. But the idea is, instead of
16 counting meetings or communications which don't
17 necessarily achieve anything, the bottom line is
18 looking at the way to improve safety and health by
19 reducing injuries, illnesses, and deaths.

20 So, they -- through their success, they have
21 had 39 percent less indemnity claims than would be
22 projected by the National Compensation Center, 58

1 percent less what I would call catastrophic accidents,
2 which is either fatalities or some sort of claim which
3 results in a \$475,000 claim or more.

4 So I spoke to NACOSH not too long ago, and one
5 of the questions was, well, maybe some of these claims
6 are just being diverted to the health insurance
7 carrier. Well, realistically, health insurance
8 carriers ask lots of questions when claims get up to
9 \$475,000 and long before they do. Employees do not
10 find it appropriate -- if you want to call it
11 that -- to engage in fraud so that they can win a
12 \$100 -- no, had the opportunity, you know, four out
13 of -- see the -- let me describe the programs.

14 Incentive programs are based on putting 75 to
15 125 employees in a group. And then, if the entire
16 group goes without -- a month for a lost work day case,
17 then there is certain money that's put into a pool, and
18 then everybody gets a chance to draw. And only four
19 out of, let's say, 75 or 125 workers actually get the
20 \$100. So if you look at that, and you think about a
21 large claim, no employee is going to forego wage
22 replacement for lost time and pay high deductibles and

1 copays for the opportunity to win \$100 and engage in
2 fraud on top of it. It just doesn't happen.

3 So, what they've done is they've developed
4 this program. It's worked effectively. And then, of
5 course, they go out in the field, they use it. It's
6 been very effective. And then they get concerns from
7 their insureds who say, "Well, OSHA is writing these
8 memos" -- Fairfax Memo, whatever you want -- and then,
9 of course, this committee has developed best practices,
10 OSHA's got some language in it, safety and health
11 program draft guidelines and the whistleblower
12 guidelines, all of which seem to try to discourage
13 various incentive programs without any regard for
14 whether they actually work or not.

15 And as a matter of fact, the agency hasn't
16 really collected any data or attempted to collect any
17 data. There is, unfortunately, a -- there is anecdotes
18 and there is bias, and those things have come together
19 and people say, "Well, if there is any negative
20 consequences that could come out of something, then
21 that's going to discourage reporting."

22 Well, there are lots of negative consequences

1 in this world that come from various things, or
2 potential. On the other hand, there are some positive
3 consequences that come out of them. And the mere fact
4 that you might be discouraged by 1 factor from doing
5 something when there are 20 relevant factors doesn't
6 mean in the end result somebody is not going to report
7 a case.

8 So, there is two things to keep in mind.
9 First of all, bottom line, when you go through this
10 particular focus that they have -- and, of course, in a
11 five-year program they basically have avoided 101 cases
12 that statistically would have resulted in claims of
13 \$475,000 or more with their insureds. If you project
14 that to what could be done with the rest of the
15 industrial community, if they had similar
16 programs -- and some of them do and some of them
17 don't -- you get a huge number of lives saved and limbs
18 saved. And, in exchange for that, when you look at
19 that, then having a 90 -- no, 100 percent
20 record-keeping accuracy doesn't become very important.

21 OSHA has developed a number of databases, and
22 none of them have actually shown the kind of problem

1 that supposedly justifies discouraging or actually
2 trying to prohibit incentive programs. If you look at
3 the data the American General Industrial Medicine
4 article from 2014, it does not find any statistical
5 relationship between safety award cases and reporting.

6 What it does find is, typically, there is one case
7 that is under-reported, and then they go into large
8 description about how much confusion there is with the
9 actual OSHA reporting system.

10 I've been counseling clients for a long time
11 about it. It's not quite as bad as the Internal
12 Revenue Code, but if you've ever tried to understand
13 it, you would know that it's something that can only be
14 handled by somebody who does it day in and day out.

15 So, when you take a survey like AGIM did, and
16 you correlate workers comp cases to the Bureau of Labor
17 Statistics survey, which is then given to organizations
18 which don't do record-keeping on a normal basis, but
19 simply are told, "By the way, this is going to be your
20 year to collect the data," and there is no enforcement
21 mechanism, a small employer is not going to call me up,
22 get an expert, or otherwise try to figure out what the

1 record-keeping requirements are. They're going to put
2 something down that falls within some zone that they
3 think is credible, and that's it.

4 So we've got a study that was done, they
5 didn't find any problem that was poorly structured
6 based on a BLS survey rather than OSHA 300 data, which
7 didn't find any problem, anyway. If you look at all
8 the other studies that supposedly show a problem, OSHA
9 record-keeping data from Eastern Research Group, from
10 OSHA's national emphasis program, they show 90 to 95
11 percent accuracy.

12 So I'm not saying there is no problem at all,
13 but when you weigh the potential for some loss in
14 accuracy against saving lives and limbs, there really
15 isn't a close case. And so this point is that people
16 have to look at this data and see that there is a
17 trade-off, but pure accuracy just for the sake of
18 accuracy is not worth losing lives and limbs, and --

19 MS. SPIELER: So I'm actually going to
20 interrupt you to open it up for discussion, because I
21 think most of us -- or maybe all of us -- have read
22 your written statement and the attachments to it, and I

1 think it would be worth allowing some conversation
2 about that --

3 MR. HALPRIN: Sure.

4 MS. SPIELER: -- now, before we have to break.
5 Dave?

6 MR. EHERTS: Yeah. I'm specifically
7 interested, because I do this for a living. I'm a vice
8 president of EHS, and I'm very open to learning what
9 works and what doesn't.

10 So -- and I haven't had a chance to look at
11 the primary data. So I'm interested in why you chose
12 certain thresholds and certain periods of time for the
13 analysis, but I think we can do that at a later point.

14 I am interested in cause and effect. So, for
15 instance, back in 1993 -- I've got a quick story to
16 tell you -- I was working at Merck Pharmaceuticals.
17 They had one of the best EHS programs in the
18 pharmaceutical industry. Rhone-Poulenc, a big chemical
19 conglomerate in France, bought an American company
20 called Rorer. They started RPR, became Sanofi
21 eventually, and they built a site in the U.S. And the
22 site in the U.S. had a very high TRIR. And France was

1 berating the leadership at that site to get the TRIR
2 down.

3 So they tried to recruit me -- I was very
4 young at the time -- from Merck to put the program in
5 there. And so the vice president starts by saying,
6 "I've got a problem you can help me fix. I need to get
7 the TRIR to zero."

8 And my answer back in 1993 was, "Oh, that's
9 easy. Put everybody in a group of 10, try to get
10 friends together, the maintenance group together, the
11 laboratory people together, and then tell them if none
12 of those 10 report an injury for the year, if they're
13 accident free, all 10 get a Sony Walkman." It was back
14 in 1993. "But if one of those 10 report an accident,
15 nobody gets it." I said, "Your rate will approach
16 zero. You don't need me."

17 I stood up to leave, and he said, "Hold on. I
18 want a safety program."

19 And I said, "Oh, that's different." And I sat
20 down. And I said that -- I'm very interested in your
21 data specifically, because there is a difference
22 between association and cause and effect. And I'm all

1 for incentive programs. In fact, we're running one
2 similar to yours, we're just incentivizing different
3 behavior. And I think that's the crux of the
4 discussion.

5 So we're incentivizing the reporting of
6 near-misses, unsafe conditions, suggestions for
7 improvement. We call all those things good
8 observations. And the sites have a target to get
9 numbers of good observations in. And we incentivize a
10 high reporting. And the nexus between that and a lower
11 TRIR is that those good observations turn into
12 corrective and preventative actions. And those
13 corrective and preventative actions, therefore, take
14 hazards out of the workplace, or they change rules.

15 One recommendation, "Shouldn't we be wearing
16 safety glasses over there? We're riveting." Or,
17 "Shouldn't we have steel-tip shoes over here? We're
18 working, rolling around heavy racks." So those
19 recommendations from employees that we incentivize turn
20 into changes in the workplace that reduce accidents.
21 And we've got good statistical analysis ourself,
22 greater than 95 percent correlation in using

1 Yates-corrected chi-square analysis that sites with
2 good observation programs have lower injuries.

3 And since we're incentivizing the reporting of
4 injuries, we think our data on the TRIR side is good.
5 So that's the nexus that I would argue is there between
6 good observations, employer participation in the
7 program, and low injury rate.

8 MR. HALPRIN: Right.

9 MR. EHERTS: I'm interested in how your
10 lottery turns into lower accidents. What's the
11 connection between the lottery --

12 MR. HALPRIN: I think it's the same principle.
13 The difference -- the lottery, you have a group, it's
14 got the incentive to look out for each other's backs,
15 if you want to put it in colloquial terms, and they do
16 that. So, instead of getting involved in doing
17 observations on some sort of scheduled basis and
18 creating paperwork that then has to be followed up on,
19 they look out for each other because they say, "If we
20 don't look out for each other, somebody is going to
21 have an accident, and we're going to lose the ability
22 to compete for a prize."

1 So, basically, you condense everything down
2 into the motivating factor and the buy-in that makes it
3 work, but they don't have the resources necessarily to
4 do all the paperwork, to fill out an observation and
5 send it in and have them all collected. And they end
6 up, in their mind, with the same benefit, but without
7 that commitment of resources which they don't have.

8 MR. EHERTS: Well, I think taking care of each
9 other is a huge component. But another component is
10 finding hazards and getting them fixed. And so, how
11 does watching out for each other's back turn into
12 fixing unsafe conditions in the workplace? Is there a
13 program that they --

14 MR. HALPRIN: Well, they -- that's it. I mean
15 you're talking about people that -- the normal
16 experience I've had is that people that usually work in
17 the facility are best aware of the hazards and how they
18 might be fixed.

19 MR. EHERTS: Absolutely.

20 MR. HALPRIN: So, you know, they had a bakery
21 operation and they had -- one of them had carts with
22 handles that were on the outside of the cart, so people

1 go pushing the carts and they'd go by each other and
2 smash hands. And somebody said, "Well, why don't we
3 put the handles on the inside, so that we don't do
4 that?"

5 MR. EHERTS: Excellent.

6 MR. HALPRIN: So there is a naturally driving
7 force that motivates people to do the things that will
8 protect each other without as much of the paperwork
9 that you might get if you went with the leading
10 indicators and started taking records of all those
11 things and sending them in. They just don't have the
12 resources in many cases for that kind of system. So
13 they end up with the same benefit without all the
14 paperwork and the burden that will discourage some
15 people from participating.

16 MR. EHERTS: Well, I would argue --

17 MS. SPIELER: Let me -- I'm going to stop you,
18 Dave --

19 MR. EHERTS: Okay.

20 MS. SPIELER: -- because I think there are
21 others, including myself, who have questions.

22 MR. EHERTS: Very good.

1 MS. SPIELER: And we're running out of time.

2 Eric?

3 MR. FRUMIN: Has Great American sought to have
4 these data published in a peer-reviewed journal?

5 MR. HALPRIN: That's a good suggestion, and I
6 think we're talking about it. So far we've just tried
7 to get the information to OSHA, to NACOSH, to your
8 committee. That would be a logical --

9 MR. FRUMIN: And who are the main analysts of
10 these data?

11 MR. HALPRIN: I don't know their names. I
12 mean you saw the statistics.

13 MR. FRUMIN: What's their affiliation?

14 MR. HALPRIN: I can't tell you that. I don't
15 know.

16 MR. FRUMIN: Okay. And did the people
17 doing -- structuring the comparison or the analysis
18 look at the studies on the under-counting of cases
19 that's in the literature?

20 MR. HALPRIN: I think they looked at a fair
21 number of them, yeah.

22 MR. FRUMIN: And so is there a reason why you

1 didn't reference any of those in your document?

2 MR. HALPRIN: Because -- there is two things.

3 One is the under-counting has no statistical
4 relationship in any of them with incentive programs.
5 And two, even if there was some under-counting, which
6 I've suggested, the OSHA findings have been that the
7 countings have been in the 90 to 95 percent accuracy
8 rate.

9 So the question is, if you're going to save
10 lives and limbs, does it really matter if you miss a
11 case now and then? And you make a decision
12 that -- first of all, like I said --

13 MR. FRUMIN: All right --

14 MR. HALPRIN: The tail is wagging the dog.
15 There is on evidence --

16 MR. FRUMIN: Right, but the under-count data
17 that you talk about is only from the evaluation of the
18 NEP, rather than from the multiple other studies like
19 those in the peer-reviewed journal, BLS, Michigan --

20 MR. HALPRIN: There are no --

21 MR. FRUMIN: -- that look at the under-count.

22 I mean you want to talk about the under-count from the

1 NEP, but not the other studies about the under-count.
2 Your analysis of the NEP results doesn't discuss
3 incentive programs. They didn't really look at that.
4 But you go into quite a bit of detail about that, but
5 you don't discuss the under-count studies from other
6 sources. And I'm just wondering why that is.

7 MR. HALPRIN: Because we haven't found any
8 that find a statistical relationship between
9 under-counting and incentive programs.

10 MS. SPIELER: I'm going to exercise the
11 prerogative of chair to ask a question. Sorry, Nancy.

12 MR. HALPRIN: Sure.

13 MS. SPIELER: So I actually am fascinated by
14 the -- what your internal data show with regard to the
15 reduction in catastrophic injuries and the effect on
16 the MOD factors that -- which is clearly the goals of
17 your companies and what you're selling.

18 I'm interested in knowing, because of this
19 tension between what you are labeling as bias within
20 the worker and community and the unions, and how OSHA
21 views it, and apparently how Mr. Eherts views it, and
22 how you view the incentive programs, I would be very

1 interested in knowing whether there have been any
2 direct-to-worker surveys done by an independent or
3 study organization that asked the workers themselves
4 what their perception is about how the safety
5 incentives work.

6 And if there haven't been, whether you think
7 your company would be willing to set up a situation
8 where an independent research organization could come
9 in and really take a look at this question by going
10 directly to the workers with a guarantee that there
11 would be no retaliation against them for participation
12 in a study that looks at the effectiveness of safety
13 incentives as a component of actually improving safety,
14 as opposed to changing claiming behavior.

15 MR. HALPRIN: Well, first of all, I will pass
16 that on.

17 But I would like to be clear about one thing.
18 There is a difference, to me, from a legal standpoint,
19 between something that a worker might say could be a
20 factor that they would consider and might -- in an
21 ideal world, if you weigh things to discourage --

22 MS. SPIELER: There are people who know how to

1 design these surveys.

2 MR. HALPRIN: Right.

3 MS. SPIELER: I would not include myself in
4 them.

5 MR. HALPRIN: But, I mean, it's --

6 MS. SPIELER: All I'm interested in knowing is
7 whether there is any way of cracking this nut of
8 disagreement by actually going in and having
9 independent review of what's going on in these
10 companies.

11 MR. HALPRIN: What I'm saying is if the
12 independent review is to find out whether there is a
13 case that's not reported, to me that makes sense.

14 You -- or ask a worker, "Did you actually have
15 a case that you failed to report?" That would be a
16 legitimate question. Asking them whether there is some
17 factor that might discourage them in some way to some
18 degree from reporting is not what I consider relevant.

19 MS. SPIELER: Okay. So I gather your answer
20 is, "Yes," you would -- "we welcome it, but we would be
21 interested in knowing how the survey would be
22 conducted."

1 MR. HALPRIN: Certainly.

2 MS. SPIELER: Great. Thanks. Nancy, go
3 ahead, and then we'll break for lunch.

4 MS. LESSIN: Sure. So just a couple things.
5 I also noticed there have been studies, actually, on
6 looking at safety incentive programs and their
7 relationship with reporting that are in the literature,
8 in peer-reviewed journals: one from 1999; there is
9 another from 2012; there is many others that are not in
10 yours at all. You say there is no evidence, but there
11 are peer-reviewed journal articles.

12 Secondly, if, in fact, the idea of having
13 prizes for this low, you know, worker comp, you know,
14 whatever this association is, was a way to prevent
15 catastrophic injuries, then I would think that the
16 Chemical Safety Board, whose job in this country for 18
17 years is to look at how to prevent catastrophic
18 injuries and tragedies and fatalities, would have
19 looked at this and included it in its recommendations
20 in all of the catastrophes they are investigating. At
21 no point in any of theirs is there a suggestion that
22 this is something that is going to prevent the next

1 catastrophe.

2 Further, the --

3 MR. HALPRIN: Okay, the Chemical Safety
4 Board --

5 MS. LESSIN: -- issue that you
6 talked -- pardon me?

7 MR. HALPRIN: The Chemical Safety Board is a
8 politicized animal. But beyond that, catastrophe has
9 two different meanings. Here we are talking about a
10 claim of \$475,000 or more. Chemical Safety Board is
11 talking about a chemical release that might engulf an
12 entire community, so --

13 MS. LESSIN: It actually does explosions and
14 worker death, which I think you were talking about.

15 The other thing is that you referenced the NEP
16 with OSHA, looking at the records review. And
17 according to the GAO's 2012 report on safety incentive
18 programs, it -- the GAO report documents that OSHA
19 inspectors received inadequate guidance on how to
20 assess incentive programs for enforcement purposes.
21 The NEP did not select a nationally-representative
22 sample. And, according to the GAO, OSHA cannot use the

1 results of the NEP to determine the effectiveness of
2 safety incentive programs and other workplace safety
3 and health policies on injury and illness reporting.

4 So the GAO said, "We're not looking at this
5 because it was inadequate." You use that as the
6 centerpiece of saying, you know, there is no
7 connection. The GAO says you can't look at this in
8 regard to safety incentive program. That's the GAO.

9 MR. HALPRIN: The agency, I think, is a very
10 cooperative group, and competent group of
11 professionals. They made a decision not to examine the
12 issue, and didn't collect the data they would have
13 needed to examine the issue. That's not our fault.

14 MS. LESSIN: The last issue that I want to --

15 MS. SPIELER: Okay, so -- Nancy, I'm sorry.

16 MS. LESSIN: Okay.

17 MS. SPIELER: I am going to cut this off.

18 MS. LESSIN: Okay.

19 MS. SPIELER: I think you've raised some
20 significant points. Later in the day we will put into
21 the record the various materials that you filed with us
22 in advance of the hearing, so that it is available. As

1 I've said, you've raised significant points.

2 Mr. -- I understand that you just recently
3 asked for time, but I think we cannot do it now.
4 If -- we may be able to allow you to say something
5 later if you want to hang around through the day.

6 Okay, so we're going to break for lunch. And
7 again, to the committee members, we must be back in our
8 seats by 1:00. Thank you very much.

9 (Whereupon, a luncheon recess was taken.)

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1 A F T E R N O O N S E S S I O N

2 MS. SPIELER: So, why don't we reconvene?

3 Welcome, Deputy Secretary Lu and Dr. Michaels,
4 Assistant Secretary for OSHA. I'm just going to turn
5 this over to the two of you, and we really are
6 delighted you could be with us.

7 DEPUTY SECRETARY LU: Well, thank you for
8 having me. I don't want to steal too much of Dr.
9 Michaels's time. This is really just a chance for me
10 to say thank you.

11 When I met with all of our DFOs for all the
12 advisory committees, I said, "You know what? I see the
13 resumes and the CVs of all the people that come through
14 the advisory committees. I see the work product that's
15 best practices for protecting whistleblowers. I have
16 to, you know, read all this stuff, clear this stuff,
17 and it just dawned on me you all are doing such
18 incredibly important work, you're not getting
19 paid -- I'm not, at least, aware that you're getting
20 paid -- you are doing this on your own time.

21 I know it's not only the time here in
22 Washington, but it's the time that you do in other

1 meeting subcommittees, consultations between
2 meetings -- and this is a lot of work. And I just
3 really just came on behalf of the Secretary to say
4 thank you.

5 And I would do that -- and I have
6 actually -- this is the second of three advisory
7 committee stop-by's I'm doing. You may have seen the
8 Energy folks are down the hallway. And I would say
9 that to everyone, but I will say that we appreciate
10 your work, particularly on a subject like
11 whistleblower. Whistleblower protection is one of a
12 high priority of this administration. We've done some
13 great work on this issue.

14 And, as the Secretary always says, "Look, we
15 don't have" -- at least I have not had an original idea
16 during my time here, and I benefit from the great
17 expertise of not only a wonderful staff at OSHA, but
18 also people from outside. And so, the input that you
19 provide based on your years of experience, your
20 collective wisdom, is critically important for us to do
21 our job.

22 And when I read a document like this best

1 practices, I said to David on the way up here this is
2 fantastic. I mean I sort of think about this more
3 broadly not only in the whistleblower context, but how
4 do I become a good leader, how do I foster a culture in
5 which people are allowed to say, "Hey, something is not
6 right here"?

7 And so, this has broader applicability, and I
8 just want to thank you for your work on this. But,
9 more importantly, your service to this committee. We
10 have an open door. I hope to come by again before the
11 end of this administration and hear from all of you.
12 And I get updates, not only from the DFO, but from the
13 OSHA staff on your recommendations that come out of
14 this. And, as I said, before things go out the door, I
15 have a chance to see them, as well.

16 So, the advisory committees are a critical
17 part of what we do here at the Department. We could
18 not do our work without all of you. So thank you for
19 your service.

20 OSHA UPDATE

21 DR. MICHAELS: Thank you so much for joining
22 us. I'm happy to also be here, first, to thank all of

1 you. As you heard from Deputy Secretary Lu, we so --

2 MS. SPIELER: Thank you very much for joining
3 us.

4 DR. MICHAELS: We so value your work. It
5 really -- we already see its impact in many ways when
6 people talk about the development of the whistleblower
7 protection activities of OSHA. They clearly are
8 influenced by you, and I think people really see it,
9 and I think there is great potential to do even more.

10 I also wanted to take this opportunity to
11 thank the OSHA staff and the SOL staff who work, first,
12 directly for the committee, and Anthony, who is a,
13 really, just fabulous leader for this, and Brian, who
14 is now with a solicitor -- you know, comes from
15 our -- from OSHA, as well, so knows these issues. And
16 also the folks from the other agencies who have been
17 helping us out.

18 And also let me take a moment to thank the
19 OSHA whistleblower protection staff, MaryAnn Garrahan
20 and your team. And I know we have quite a few of them
21 here. It's a small office, so I think almost the
22 entire office is here to learn from you, direct from

1 you, and to be here to be resources for you. And it
2 really is -- it's a small office, given the huge
3 responsibility we have, and they do a remarkable job,
4 and I'm grateful for what they do.

5 So, since, you know, we've met last, I know
6 there are two new groups that this group has put
7 together, the outreach -- excuse me, the outreach group
8 and the new training work group. I don't see -- is
9 Marcia on the phone, or -- Marcia, thank you so much
10 for chairing that group. And J.J., also. It's
11 really -- I think there is some very important work
12 that you can do when we have high expectations of you.

13 As you no doubt heard, we have been working
14 through the comments that we've received on the
15 recommended practices document. And they've really
16 been eye-opening to us. And they're great. I mean
17 we've gotten lots of comments, some saying, you know,
18 equal and opposite things, so it's hard to sort of go
19 through them all and adjudicate them and say, "Well,
20 what makes the most sense and what fits into our
21 rubric," but I think we've really stirred up a lot of
22 really great conversation.

1 And I know, talking to folks outside of
2 OSHA -- and I think you will hear from some of them
3 today -- that this document was read widely, not just
4 in this country, but overseas. I'm sorry, the original
5 document that you wrote, then the OSHA draft document
6 have been widely read. And I think you're already
7 having an impact, I think, as we perfect this document
8 and get something out that we're really -- that we
9 could all embrace. We will be -- have a bigger impact.
10 So we're really pleased about that.

11 A couple of just updates. Since the last time
12 we met you may have heard already you all were really
13 very instrumental in helping us think about these
14 reasonable cause questions. And I know we've discussed
15 it a little bit, but the reasonable cause memo, which
16 came out in April 2015, a year ago, now has been
17 integrated into the latest version of the whistleblower
18 investigations manual. So that's really become much
19 more sort of concretized.

20 We're trying to both expand and strengthen the
21 training programs that we do for our staff. And
22 really, we're talking mostly about our field staff.

1 And so our -- at our OSHA training institute we have a
2 couple of new courses that have come on now. We have
3 launched two new classes of -- course on the
4 fundamentals of whistleblower investigations, and then
5 an interviewing techniques course. And we are
6 developing two new courses, legal concepts and
7 settlement techniques.

8 We've issued -- and this always takes a long
9 time, and we have been working hard on this, and we
10 appreciate the help of the solicitor's office in this,
11 too -- final rules for conducting investigations for
12 several different rules. Most recently, I guess, food
13 safety has come out.

14 It's always interesting when people -- you
15 know, it gets a lot of press, and it makes it look like
16 it's a new activity, though in fact it continues what
17 we're doing. But sometimes it even gets written up as,
18 you know, new, onerous, you know, job-killing
19 regulation, since no one really understands the way we
20 work. But they're very useful, in terms of our
21 process, and we've gotten, I think, three or four out
22 since the last meeting. So our staff has done a great

1 job on that.

2 We're also working to update our online
3 complaint form to make it more user-friendly. You
4 know, the process of the federal government to change
5 any sort of a form is a long one. It requires a couple
6 of rounds of public comment, and so we're now -- I
7 think we're approaching the end of that, as well.
8 We've gotten a little -- actually, even gotten a little
9 bit of public comment on it.

10 We're always looking at the budget, and the
11 budget's -- you know, the cycle has started again. And
12 there are some people who say we will not get a new
13 budget this year because of the political situation,
14 we'll just get a continuing resolution.

15 But we're always hopeful, because every year
16 when the President submits a budget to Congress,
17 it -- the President always asks for an increase in
18 whistleblower protection staff. And it shows, really,
19 the commitment of the Labor Department and the White
20 House to this program, because there are many programs
21 that don't get an increase. We are usually among the
22 biggest increases requested this -- for expanding our

1 whistleblower protection program.

2 When Congress actually does pass a new budget
3 we usually get an increase, as well. Since I've been
4 here, every time Congress has done something other than
5 simply a flat, you know, continuing resolution, we have
6 gotten an increase. So we are hopeful that if there
7 is -- if Congress does pass -- do a new budget this
8 year, we expect to get more resources.

9 But obviously, one can't predict, and
10 it's -- it wouldn't be unexpected if Congress just says
11 that they don't want to pass a budget this year because
12 the election is coming, and just gives us a CR. And
13 that's tough, I mean, because with a CR, flat funding,
14 it's actually a decrease in funding. Certain costs are
15 always going up. But with our relatively small staff,
16 I think we continue to work very hard and do a really
17 great job.

18 Those are just the basic points I wanted to
19 touch upon. I'm happy to answer any questions that you
20 have about either short-term things or some of the
21 longer directions. I think, as I said, this committee
22 has really made a huge contribution to our work, and I

1 expect that will continue. So I'll take a couple of
2 questions, if you like.

3 Sylvia? Nice to see you.

4 MS. JOHNSON: Thank you, good to see. Sylvia
5 Johnson from UAW. You mentioned Congress and --

6 DR. MICHAELS: Get closer to your mic.

7 MS. JOHNSON: Oh. Oh, yeah.

8 DR. MICHAELS: I can hear you, but --

9 MS. JOHNSON: I forget. You mentioned
10 Congress and the unlikely event that they might pass a
11 budget. Should they pass a budget, what kind of
12 increase could you expect to see --

13 DR. MICHAELS: Well --

14 MS. JOHNSON: -- within OSHA, more broadly,
15 and within the whistleblower --

16 DR. MICHAELS: You know, it's really hard to
17 predict, but the President's budget asked for an
18 increase in several areas. Usually, you know, the
19 reality is we rarely see as much as the President's
20 budget asks for. Usually some compromise between, you
21 know, nothing and, you know, what the President's
22 budget -- but outside of the whistleblower protection

1 area there was an increase in -- asked -- requested in
2 enforcement.

3 Also in -- for our state plans, because we
4 haven't been able to increase the amount of money going
5 to state plans in quite a long time, and that's very
6 important to do, an increase in compliance assistance.

7 But the increase in the President's budget on -- for
8 whistleblower protection was an increase of \$3.4
9 million in -- and to add 22 FTEs.

10 In the past, Congress has actually gone not as
11 far as the President has asked, but actually given us a
12 generous increase, and we are ever hopeful to see it.

13 MS. JOHNSON: Thank you.

14 DR. MICHAELS: But we will see.

15 MR. FRUMIN: David, we have talked --

16 DR. MICHAELS: Identify yourself, please.

17 MR. FRUMIN: Sorry, Eric Frumin. We've talked
18 here yesterday in the outreach group and previously
19 about the relationship between the work of this
20 directorate, the whistleblower program, and the safety
21 and health enforcement, and expressed an interest in
22 OSHA finding ways to enhance its work to prevent

1 retaliation by incorporating assurances or other kinds
2 of provisions in enforcement activities such as
3 settlement agreements to try to address retaliation, in
4 addition to whatever happens as a result of complaints
5 coming through the whistleblower program itself.

6 So, I'm curious whether you could comment on
7 that at all -- that is, the likelihood that the
8 enforcement program could start addressing this in a
9 more robust way. There are pro forma, you know,
10 warnings against 118 retaliation, but 118 violations
11 for 40 years, it hasn't been that helpful.

12 And then a corollary to that is the
13 forthcoming regulations and guidance on the executive
14 order on fair pay will be describing -- if it's
15 anything like the draft, will be describing labor
16 compliance agreements as mitigating factors. And one
17 of the criteria for evaluating those, as well, will be
18 whether they contain anti-retaliation provisions. So
19 also sort of enforcement-related, both things in the
20 offing. Wonder whether you could comment on those.

21 DR. MICHAELS: No, and you certainly raised an
22 important issue. I can't speak to where the -- the

1 regulations around the fair pay and safe workplaces
2 regulations, you know, where the final will come down
3 on these issues, because it's still in process.

4 But in terms of our own enforcement
5 activities, I know that this is an area that you have
6 raised with us, which I think there is real commitment
7 to try to coordinate or work better, because we
8 recognize that this is -- the bifurcation of
9 anti-retaliation investigation from safety inspection
10 is not a good one, and we need to make sure that
11 they're better linked in our field work. You know, we
12 can have discussions here in the national office, but
13 until, you know, the offices and the field start better
14 coordinating, we won't see that.

15 And so, you know, we've discussed this with
16 the leadership in both our enforcement programs and our
17 whistleblower protection programs, and raising it with
18 the field staff and saying, "How can we do this
19 better?" And I think you've been very helpful to us,
20 and we're grateful for that.

21 MR. MOBERLY: Good afternoon, Dr. Michaels.
22 Thank you for coming. Richard Moberly. And you have

1 testified in front of Congress and talked with us about
2 OSHA and the need for statutory reform. We have had
3 whistleblowers come and tell us today about more
4 instances of where this statute itself is problematic.

5 And I was wondering if you could update us on where
6 that might stand.

7 DR. MICHAELS: Well, you know, the Obama
8 Administration has been supportive of the Protecting
9 America's Workers Act, and the -- in particular, the
10 components of that that would update the 11(c)
11 provisions and allow us to do a better job making sure
12 that workers are not retaliated against for raising
13 safety and health concerns.

14 I know that that legislation has been
15 reintroduced by Senator Franken and Representative
16 Courtney, I believe. I haven't seen -- I actually
17 haven't read the newest version. But until Congress
18 acts on that sort of thing, we won't see the sort of
19 changes that we think are required. I won't speculate
20 on the likelihood of Congress passing that this year.

21 But we have long recognized the importance of
22 that, and the limits to this. On the other hand, what

1 we're trying to do and, really, with your help, is to
2 do as much as we can within that current legal
3 structure. And I think, in particular, there was
4 a -- the collaboration between the solicitor's office
5 and OSHA has very much improved.

6 And a few years ago, Trisha Smith, our
7 solicitor of labor, issued a memo talking about the
8 importance of that work to the field solicitors. And
9 we've been working much more closely with them than
10 ever, and really getting much more -- bringing much
11 more important cases to fruition. And I think we are
12 having an impact, though I think there is a limit to
13 what we can do, given the legislative parameters.

14 MS. LESSIN: This is Nancy Lessin. A
15 follow-up question, I think, to that, who we heard from
16 this morning were rail workers dealing with FRSA. And
17 they had a number of concerns, some of them statutory,
18 some of them maybe things that could happen without a
19 change in the statute.

20 But when, then, is the relationship between
21 OSHA and the agency for whom you're enforcing their
22 whistleblower protection? Can OSHA talk to FRA about

1 the kinds of things that we heard, and how often does
2 that happen, and what's that relationship?

3 DR. MICHAELS: Yes, we actually do have -- we
4 try to have an active relationship with all of the
5 agencies whose legislation, anti-retaliation
6 legislation, we investigate and enforce.

7 And let me turn this over. Anthony, actually,
8 has been helping -- Anthony and MaryAnn have been
9 spearheading these outreach -- we've -- some have gone
10 very well, I think.

11 MR. ROSA: Well, actually, yes. This is
12 Anthony Rosa. We actually have, for the past several
13 years, a memorandum of agreement between OSHA and the
14 FRA. And in this memorandum of agreement it allows us
15 first -- in fact, we do this with all of our partner
16 agencies, but we do it with the Federal Railroad
17 Administration. We meet with them in person at least
18 twice a year. We share information.

19 What we actually do, we work with them
20 to -- first we look for opportunities where there is
21 outreach. We always want to try to find outreach. I
22 know in the safety and health side we have compliance

1 assistance specialists here within OSHA. But with the
2 partner agencies we're always looking for opportunities
3 to reach out to those industries and provide the
4 workers with the knowledge of what their rights are.

5 We also share with the partner agencies on a
6 continuing basis copies of all complaints that are
7 filed, so that these agencies can actually investigate
8 the underlying the issues to which the retaliation
9 allegation has been raised.

10 We also, in our weekly -- in our biannual
11 meetings, what we also do is we send -- we give a copy
12 of all -- a report of all of the FRSA complaints -- in
13 this particular case for the FRA -- just to make sure
14 that no case has fallen through the cracks, because
15 sometimes in the office they may have forgotten to send
16 a copy of a complaint. So we make sure that they
17 double-check their records to make sure that all the
18 complaints that we received they also received and they
19 have investigated.

20 And we do an annual report with the FRA. We
21 actually work with them and -- as part of the MRA, we
22 work with them on what types of outreach, what types of

1 technical assistance we have. Because, as I was
2 mentioning yesterday in one of the work groups,
3 we -- in our program it's -- we find it -- we need to
4 identify the reasonableness of the complainant. So
5 many times we contact a partner agency to -- when the
6 complainant tells us a particular scenario, we contact
7 the partner agency if we're not sure what the scenario
8 would look like, so that we have a better understanding
9 of what the complainant -- why the complainant raised
10 the specific concern or, you know, safety issues.

11 So we are -- we have constant dialogue with
12 our partner agencies here in the national office, as
13 well as in the field. And especially with the FRA.

14 DR. MICHAELS: And, you know, what's useful
15 about meetings like this is, if there are other sort of
16 policy issues that we're not seeing out of individual
17 cases, we will get them from -- I haven't been briefed
18 on this morning's session, for example, but, you know,
19 as those -- we learn about those, then we could raise
20 those in those meetings, as well, because we have an
21 ongoing dialogue.

22 MR. ROSA: And there have been instances -- I

1 know when I was in Atlanta there was an instance where
2 the FRA has actually a regulation that deals with
3 anti-harassment that they're going to actually issue a
4 fine against the employer. And we had a particular
5 case to which they -- because we had found merit to the
6 case under the FRSA, they were able to use that in
7 order to impose a fine against a particular railroad.

8 So we do look for opportunities that we work
9 together. And we also look for opportunities when we
10 can investigate together.

11 MS. SPIELER: So I think there are a couple of
12 things that we heard this morning that would be -- you
13 don't have to react now, but I thought they were
14 interesting.

15 Mr. Wahoff from Steptoe and Johnson brought us
16 some very concrete suggestions, and among them relates,
17 I think, to the issue that Eric raised, which is that
18 he feels that his clients are familiar with the
19 procedure for OSHA compliance inspections and less
20 familiar with the issues of retaliation, and suggested
21 that maybe there is something that should be inserted
22 into opening conferences and closing conferences on the

1 compliance side that deals with the anti-retaliation
2 questions.

3 And although I think it's likely that our
4 outreach committee may come back with that as well, I
5 just thought it was an interesting point, coming from
6 where he's sitting, as a representative of employers,
7 feeling that -- getting the word out and educating
8 people in a better way about this by linking the
9 processes that OSHA engages in would be very useful.

10 And so, I just wanted to --

11 MR. ROSA: No, thank you.

12 MS. SPIELER: Yeah. And the other more
13 troubling -- and I have no idea how to deal with this
14 in response to a question that Nancy Lessin asked this
15 morning -- the people who came from the railroad
16 suggested that the BNSF agreement has not been
17 effective. And I know that that's been a -- something
18 that the -- this administration has been quite proud
19 of, and we have been assuming that there was an
20 effectiveness.

21 And I have no idea whether this is an isolated
22 pocket of concern, or a broader pocket of concern, but

1 it does tell us, I think, that the effective
2 negotiation of that kind of agreement probably needs to
3 be followed up on in terms of evaluation of its
4 effectiveness on an ongoing basis. And I thought it
5 was important for you to be aware of that, as a
6 concern.

7 DR. MICHAELS: No, I appreciate that, and I
8 will certainly look into that. I will get briefed on
9 what we learned this morning, and think about how we
10 might proceed.

11 MS. SPIELER: Other questions or comments for
12 Dr. Michaels?

13 (No response.)

14 DR. MICHAELS: Well, let me again thank all of
15 you. This really -- it's great to see how this
16 committee has gelled, progressed, and, really, the
17 contribution it's made has been very significant. And
18 I am personally very grateful. Thank you.

19 MS. SPIELER: Thank you for making the time
20 for us.

21 (Applause.)

22 MS. SPIELER: Welcome.

1 DWPP UPDATE

2 MS. GARRAHAN: Good afternoon, everyone. I'm
3 MaryAnn Garrahan, the director of OSHA's whistleblower
4 programs, and it's a pleasure to be here. And I do
5 want to echo Dr. Michaels's thanks to the committee.
6 We truly appreciate all of your hard work and your
7 dedication. And what you do helps us tremendously.

8 And for the purposes -- I want to thank the
9 four new members. And for your purpose I want to just
10 briefly say that our directorate, as Dr. Michaels
11 mentioned, is very small. You know, we call it small
12 and mighty. We have Anthony Rosa, who is the deputy.
13 We believe we have some of the best and brightest
14 individuals in our program in OSHA, and also across the
15 country in the whistleblower program.

16 And we're responsible for, here in D.C.,
17 promulgating regulations, developing national
18 performance measures, policy and procedures, supporting
19 OSHA's 10 regional offices. It was mentioned earlier
20 this morning that we have approximately 100
21 whistleblower investigators across the 10 regions.

22 We also strategize on agency outreach efforts

1 and provide outreach, as well. And we run an
2 administrative review process for requests for reviews
3 of regional determination on complaint investigations
4 under 11(c) of the Act.

5 So, before I go into the update I want to
6 thank DWPP staff, particularly Meghan Smith, who is on
7 the phone, and Marisa, and Josie Gross. Due to their
8 logistical and programmatic help, they really are the
9 ones who make this meeting happen.

10 And then, second, I just want to mention that
11 if you would hold your questions until I kind of
12 finish, then we're -- Anthony and I are more than happy
13 to respond to whatever questions you have.

14 So, I'm going to start by saying at the last
15 meeting I mentioned two agency milestones in OSHA's
16 operating plan for this fiscal year. One involves a
17 customer service measure related to website traffic,
18 and the second one has to do with updates to our
19 training. This kind of fits in well with the two work
20 groups here. I know J.J. mentioned earlier in her
21 report out this morning about learning from website
22 traffic.

1 So we've started using a tool called Google
2 Analytics, and we look at it, we provide some
3 statistical analysis in order to better understand not
4 only who is looking at what on our site, but where are
5 they coming from to our site, as well. And what we've
6 learned so far, for example, is that the three most
7 visited statutes are the STA, the Surface
8 Transportation Assistant Act, page; the Federal
9 Railroad Safety Act; and our Aviation Investment and
10 Reform -- what we refer to as our AIR21 -- page.

11 And we've also mentioned -- I know Anthony had
12 talked about and I will talk a little bit more about
13 our work with our partner agencies, but you know, we
14 have set up links to some of our -- we're hoping to get
15 links on -- with all our partner agency web pages, but
16 we've already seen some success where we're seeing
17 traffic from those links from our partner agencies back
18 to our page. So that's good news. In particular,
19 we're seeing those on the EPA ones and the Consumer
20 Financial Protection Board links.

21 The other milestone I had mentioned was about
22 a training. And Marcia gave a nice overview of the new

1 courses that OSHA has developed for the whistleblower
2 program and the ones that are under development. And I
3 just want to re-emphasize that training is a very high
4 priority for this agency. And we very much appreciate
5 the efforts of the work group, and we will look forward
6 to your work in what the committee as a whole
7 recommends to OSHA on this topic.

8 As with many aspects of the whistleblower
9 program, we have come a long way in making
10 improvements. And not only did we go from a system of
11 generalist to safety and health enforcement and also
12 whistleblower investigation to specific whistleblower
13 investigations, we've also realized that our training
14 needed to be very specific for our whistleblower
15 investigators, as well.

16 And that has been, again, a priority. And
17 you've heard from Marcia on some of the areas that
18 we've already been able to accomplish in a relatively
19 short period of time. And the Department is tracking
20 our progress on that. It is in our agency operating
21 plan.

22 The other thing that I want to mention along

1 the lines of training is what also is a priority for
2 the agency on training is training our management team.

3 And I don't think we're unusual as an agency that,
4 when it comes to promoting people, we tend to promote
5 our best technical people and we don't always take the
6 time to really provide the types of training that they
7 need in order to, for example, review other people's
8 investigative files or turn things around, you know, in
9 terms of timely.

10 And so, as an agency, not only under the
11 whistleblower program but under our safety and health
12 enforcement as well, we are developing some specific
13 training for our management team, as well. And we
14 think that's going to go a long way to improving
15 quality and efficiency.

16 So, I'm not going to go into -- as I say,
17 Marcia gave a nice update on that. The next thing I'm
18 going to mention is the 11(c) administrative reviews.
19 I told you that's one of our very important functions
20 that we take extremely seriously. We do this because
21 most of you probably know, unlike other whistleblower
22 statutes, the 11(c) section of the OSHA Act does not

1 allow for complainants to appeal their determinations.

2 So our directorate takes on that function.

3 And since the last time I gave an update -- so
4 I'll just report out. On the first 6 months of Fiscal
5 Year 2016 -- that's from October through March -- we've
6 had 82 requests for reviews that were filed. And this
7 is an increase of six over the same period from last
8 year. And in the first 6 months of Fiscal Year 2016 we
9 issued final determinations for 79 cases, and that's 5
10 less than, say, a year ago for the same period of time.

11 That slight drop in productivity, we believe, we due
12 to working out kinks in a new process change that
13 involves providing more explanation to the requester in
14 the final determination letters that we give.

15 You know, we've been criticized as an agency
16 for rubber-stamping, and we want to make sure our
17 letters are, you know, addressing all the issues that
18 they raised to us.

19 Now, Dr. Michaels gave an update on some of
20 the regulations activity. Since the last meeting we
21 published a final rule on procedures for handling
22 retaliation complaints under the Consumer Financial

1 Protection Act. And an interim final rule for the
2 MAP-21, that's moving ahead for progress in the 21st
3 Century Act. And a final rule on the FDA Food Safety
4 Modernization Act.

5 Now, we're moving forward with the final rule
6 for the Seaman's Protection Act. And also the
7 Affordable Care Act and the -- and also, just to give
8 you a heads up, the interim final rule for MAP-21 was
9 published on March 16th, and it's open for public
10 comments until May 16th. And then we'll develop the
11 final rule. We are really pushing to get everything
12 cleaned up by the end of the calendar year on these
13 regulations.

14 Dr. Michaels had mentioned about -- we had
15 issued and we've been sharing with the committee about
16 a reasonable cause memo. It clarified three causation
17 standards that we apply, depending on the statute
18 that's involved. For example, the but-for causation,
19 motivating factor, and contributing factor. And we
20 incorporated that memo into our manual, and we also
21 issued a new chapter on information disclosure,
22 addressing our non-public disclosure policy for ongoing

1 investigations, as well as the procedures under the
2 Freedom of Information Act, the Privacy Act, and the
3 sharing of information with other federal enforcement
4 Agencies.

5 Overall, I want to mention for better
6 transparency and consistency we are developing a
7 process where we will be linking our policy memos to
8 our manual until we actually get the manual updated,
9 and we think this will be helpful not only to the
10 public, but also to our investigators, as well, to
11 ensure better consistency instead of -- because we
12 often will get policy out via a memo because it's a
13 little quicker, it gets a lot of review. But
14 it's -- getting our manual updated takes a long time.
15 So you can be looking to that. We expect to get that
16 up in a couple of months.

17 You had a question about how we deal with our
18 partner agencies. And Anthony gave, you know, some
19 really good examples. We take that work extremely
20 seriously. We do -- we work not only with partner
21 agencies, but, you know, also sister agencies. Now,
22 our partner agencies would be the agencies that

1 actually enforce the regulations that we enforce the
2 whistleblower anti-retaliation section on. The sister
3 agencies would be like Sean's group in SEC that has a
4 whistleblower or anti-retaliation program.

5 And for example, our partner agency of SEC is
6 the office of market intelligence, you know, which we
7 meet with. And again, you know, our -- we think it's
8 very important to be meeting with these partner
9 agencies, so that we can make sure our regional offices
10 are sharing all the complaints. As Anthony says, we
11 try to do a double check on that to ensure that they're
12 getting everything and also discussing any other
13 matters that we think is important.

14 It's not really intuitive for workers to know
15 under these 21 statutes outside of 11(c) that OSHA is
16 the agency covering the Whistleblower Protection Act.
17 So it's very important that we do outreach. We have a
18 lot of work ahead of us, because we don't think we're
19 really where we need to be, in terms of the outreach,
20 and that's why we're really looking forward to the work
21 that the outreach group is going to be helping us, as
22 well, because there are some statutes that we receive

1 very little complaints. And when we meet with our
2 partner agencies, they're rather surprised. And, you
3 know, we think, again, education outreach is going to
4 make a difference.

5 And we mentioned that we're working on the
6 links. We're also working on, if they have call
7 centers, you know, 800 numbers, we're working with
8 standard language that the call center can use if they
9 receive something.

10 Now, I also mentioned we're reaching out to
11 our sister agencies, and we think that's very
12 important, as well, because we think we can learn a lot
13 from them, and they likewise are learning a lot from
14 us. And we have reached out to quite a few.

15 We have talked with them on topics, you know,
16 such as -- you know, in terms of what they do, from a
17 standpoint of outreach, what they do with training.
18 And really, this is going to be a long-term
19 relationship we see, you know, because we see
20 that -- and in terms of we have -- as Dr. Michaels
21 mentioned, we're updating our electronic whistleblower
22 complaint form. And the reason we're updating it is so

1 that it is going to really screen out better so we're
2 getting the correct ones that apply to us, and also
3 giving information to the complainants, where maybe
4 there are -- complaints outside of OSHA should go. And
5 we see that, you know, working with, again, our sister
6 agencies on that, we could probably do something across
7 the government. So, we're really excited about working
8 with our sister agencies and learning from them.

9 Now what I'd like to do is highlight a few
10 recent enforcement whistleblower cases in the last six
11 months.

12 Earlier this month OSHA ordered JPMorgan Chase
13 to reinstate an employee after the company terminated a
14 loan delivery operations manager at one of their New
15 Jersey offices who raised concerns about financial
16 transactions to his superiors. The agency ordered the
17 company to pay over \$151,000 in back wages, over
18 \$51,000 in compensatory damages, and out-of-pocket
19 medical expenses.

20 OSHA's investigation found that the loan
21 manager engaged in protected activity when he raised
22 numerous concerns to bank management -- and this was

1 between November of 2013 and May of 2014 -- about
2 failures to properly record loans, both internally and
3 to government regulators, and for refusing to override
4 a failed compliance test and falsely reported as having
5 passed. The bank reinstated by removing the employee's
6 responsibility -- retaliated by removing the employee's
7 responsibilities, eliminating his position, and
8 subsequently terminating his employment.

9 And then, this past March, OSHA filed suit
10 against Lear Corp -- this is a seating company -- with
11 three of its managers for suspending and terminating
12 employees for reported workplace hazards in violation
13 of the OSHA Act (sic). The suit seeks back wages,
14 interest, and compensatory and punitive damages. And
15 additionally, the suit seeks an order directing Lear to
16 remove all references to this matter from the
17 employee's personnel records, and barring Lear from
18 future violations of the OSHA Act.

19 OSHA has alleged that the company harassed
20 employees, reduced their overtime, segregated them from
21 coworkers, suspended and later terminated one of the
22 employees in retaliation for raising health concerns

1 associated with exposure to cyanide.

2 In early March the agency found that Jake
3 Rieger Farms wrongfully terminated a driver who refused
4 to operate a truck that was unsafe. In January of 2015
5 this Iowa commercial motor vehicle enforcement stopped
6 and ticketed the driver of this tractor trailer truck
7 for operating an unsafe tractor trailer, and for
8 lacking proper state registration. The driver was
9 directed to a repair shop, contacted his employee, and
10 returned to Nebraska.

11 OSHA found that on January 2015 a coworker
12 drove the employee back to the repair shop to retrieve
13 the truck. The company directed him to drive the
14 vehicle, which was -- still lacked the proper
15 registration -- back to Nebraska. The company told the
16 driver to start his return trip after law enforcement
17 personnel left the area. When the driver refused to do
18 so, the company immediately terminated him and forced
19 him to find his own transportation back to Nebraska, a
20 distance about 170 miles.

21 So, OSHA ordered this company to pay the
22 driver \$25,000 in punitive damages and \$30,000 in

1 compensatory damages, which includes back wages,
2 repayment for tickets paid by the driver that was
3 issued by the Iowa DOT, attorney fees, and
4 transportation back to Nebraska, and compensation for
5 distress. So, despite some of the successes we have
6 seen with these cases, we still have a lot of work
7 ahead of us.

8 So, I'll move from enforcement to outreach.
9 And again, I want to thank the committee, this time for
10 your list from the last meeting of your outreach
11 contacts that you provided us. We have made good
12 progress in filling in contact information for many of
13 those organizations. We have also added organizations
14 from those who responded to the recommended practices
15 document that we posted for public comments. So we
16 really expect to get very good use out of that. So I
17 want to thank you for that.

18 One thing we're in the process of doing -- we
19 think that it's going to be helpful -- is we're
20 completing some wallet cards that our investigators,
21 compliance officers, partner agencies, and others can
22 disseminate that give protected activity and filing

1 deadlines for five different statutes that OSHA
2 administers. We started with 11(c), STA, FRSA, AIR-21,
3 and SOX.

4 We're also in the process of developing a
5 whistleblower rights poster. This would be similar to
6 the OSHA poster, though employers would not be required
7 to post it. Again, we're working on that.

8 We -- and I have teamed up with EBSA, which is
9 part of the Department of Labor, Employee Benefits
10 Security Administration, the Internal Revenue Service,
11 representatives from various state exchanges, and HHS,
12 the Health and Human Services, to explain to small
13 employers and human resource professionals that
14 retaliating against employees for asking for a right
15 covered under Title I of the Affordable Care Act is
16 prohibited. And we have been going around the country
17 with the team of other federal agencies, talking about
18 this. So we think that this is also very important,
19 and something that we have not done in the past.

20 We've also -- we have also a number of
21 outreach-related products we would like to develop,
22 including a summary of the steps that are involved in

1 an OSHA whistleblower investigation. You know, we
2 think that this summary would be a -- very important to
3 the complainant and also the respondent.

4 You know, right now we have a directive. And
5 for someone to go on our website and get to the
6 directive and find out what the process is can be a bit
7 much. So we're thinking something that would be an
8 overview to understand all the steps involved in the
9 process would be helpful.

10 You know, and again, I want to thank the work
11 group, the outreach work group, for your great start.
12 And we look forward to, again, the eventual committee
13 recommendations in this area, as well.

14 So, I have saved the best for last, and that
15 is I want to talk about the -- your best practice
16 document and what we've done with -- what we've posted
17 on the website. I want to start by once again thanking
18 the committee for your best practice document. As Dr.
19 Michaels mentioned, we very much appreciate the work
20 that you have done to put this together. It was no
21 easy task. It was a very difficult task, and we
22 appreciate all the expertise that you brought to

1 putting that document, that recommendation to us,
2 together.

3 And we also understand just by having a
4 diverse group really helped. And you reached
5 consensus, which is really outstanding work on your
6 part. Labor, management, public input into that
7 document.

8 Now, what we did was we took that, took your
9 recommendations, and put it into a format that would be
10 something more in line with what we believe is
11 appropriate for dissemination from a federal agency.
12 And what we wanted to do is ensure -- and we put a lot
13 of effort into that work, it just wasn't one person, it
14 was a lot of work and a lot of review went into that,
15 and -- but we wanted to make sure that all the good
16 work that you had done was incorporated, and that we
17 didn't miss any major concepts.

18 And we also -- you know, again, the agency
19 decided that perhaps others might have something to
20 contribute, as well. And so a decision was made to
21 post not only your best practices document, but our
22 recommended practice document, so the public could see

1 both of them. And we -- at a total of -- and as you
2 know, the comment period closed this past January,
3 mid-January, and we got a total of over 3,800 public
4 comments. And I guess over 3,700 of those were due to
5 a mass mail campaign conducted by the National
6 Whistleblower Center.

7 So there were approximately 60 comments, kind
8 of unique comments, submitted for the document.
9 They -- the public commenters included individuals,
10 labor unions, industry trade groups, companies, law
11 firms, quasi-government entities like the U.S. Postal
12 Service, the Washington Metropolitan Area Transit
13 Authority, and then whistleblower organizations and
14 other non-profits.

15 And the big comment themes included the belief
16 that the document only applies to 11(c) or OSHA
17 safety-related whistleblower statutes, a concern that
18 the document would be mandatory, concern with how the
19 document interplays with a new reporting role,
20 discussions about the document's treatment of incentive
21 programs, requests for examples, and concerns that the
22 document could be detrimental to whistleblowers. And

1 that came from the -- I had mentioned the writing
2 campaign by the National Whistleblower Center. You
3 know, they pointed out that not all whistleblowers are
4 reporting internally as a protected activity. And
5 they're a little confused over the scope of our
6 document, you know, versus others.

7 So, I just want to let you know, in terms of
8 where we are with this. We are carefully, carefully
9 reviewing all the comments. And I can't stress that
10 enough. You know, it's -- it really is something that
11 is a very high priority of -- you heard from Dr.
12 Michaels, you know, in terms of the -- we want the best
13 document that possibly can be out there. We want to
14 make sure it's not too long, so that we lose people,
15 so, you know, there is many things we're considering.

16 You know, in terms of -- I can't say in terms
17 of exactly what's going to be in it, what's not going
18 to be in it at this point, because again, it will be
19 getting a very high review, and -- but I will say that
20 there is a good chance the title will be changed
21 slightly. There is the appearance of -- it will look a
22 little bit differently. You know, we're really

1 getting -- we really are getting some kind of marketing
2 experts involved, too, so that the right amount of
3 white space and illustrations are put into it.

4 So, we are doing all we can do, in terms
5 of -- oh, we're also following up with some of the
6 commenters, where we've had, you know, questions to,
7 you know, make sure we understand, and we're continuing
8 to do that to make sure we fully understand when people
9 make comments.

10 And you know, it was open to everyone, and
11 some of the WPAC members did elect to comment as
12 individuals. And, believe me, we are taking, you know,
13 all those comments into consideration and really going
14 very closely, looking at each one.

15 So, with that topic, which I know is near and
16 dear to you, you know, we're -- I'll also mention that
17 our expectation for finishing that is some time this
18 fall. In terms of Dr. Michael's standpoint, the
19 earlier the better. He really wants to get that out.
20 And that's where -- you know, he made a decision not to
21 get back to -- you know, in terms of work -- back and
22 forth with the advisory committee, because it just

1 takes too long to do that, because it has to come from
2 a full recommendation from the committee.

3 So, you know, we have every intention
4 to -- you know, in terms of get something out. That's
5 the plan. We have the advisory committee, as I say,
6 working on some other very important areas, which we
7 really are looking forward to getting your feedback on.

8 And with that, if you have any questions, Anthony and
9 I are open.

10 MS. SPIELER: Nancy, go ahead.

11 MS. LESSIN: Just a couple. The first is any
12 of the -- you talked about some successful cases. Were
13 any of them decided through your alternative dispute
14 resolution, or were these done in the traditional way?

15 MS. GARRAHAN: The ones I reported on were
16 done in the traditional way.

17 MS. LESSIN: Okay.

18 MS. GARRAHAN: But what I'd like to do for
19 your next -- for the next meeting is really give you an
20 update -- I think that is important -- on our ADR
21 program and our -- you know, what we have found so far,
22 and how it's working.

1 MS. LESSIN: Great.

2 MS. GARRAHAN: I think that's a very good
3 point.

4 MS. LESSIN: Specifically on that, I would
5 love to understand if there are particular statutes for
6 which ADR seems to be working better than others. And
7 also, look at the data that you have. What were
8 the -- you know, what were the awards under an ADR case
9 versus maybe a matched or a non-ADR, just to get a
10 sense of that?

11 The other quick question is you talked about a
12 number of drafts, a wallet card, a poster. Is there
13 any time for us to look at drafts of these, or is it a
14 quick process that needs to get out? And I don't even
15 know if that would be possible, but --

16 MS. GARRAHAN: Yeah.

17 MS. LESSIN: -- I would, you know --

18 MS. GARRAHAN: You know, as much as we would
19 love your feedback, it's the type of thing
20 that -- these committees run under the FACA rules. And
21 I know you all have that FACA training. And in terms
22 of -- it's not like we can just informally get

1 feedback. And it just takes a while, because then a
2 work group would have to discuss it, and then the work
3 group would have to go to the full committee. So it
4 just -- but a -- yeah --

5 MR. ROSA: I just want to point out that all
6 of these documents we are clearing everything through
7 our office of the solicitor, and we are also sharing it
8 with our whistleblower executive steering committee,
9 which is a group of some regional administrators, to
10 make sure that -- you know, so we are following all the
11 processes to make sure that the information that we
12 have in these documents is in compliance with our
13 rules. But, yeah, it does take some time.

14 MS. GARRAHAN: It takes some time. But the
15 other thing I want to mention that -- our outreach
16 products, not like, you know, rulemaking, which takes,
17 as you know, particularly for OSHA, years and years and
18 years, we can always update our outreach products, too.
19 And we like to do that periodically, anyways. So do
20 keep that in mind.

21 MS. LESSIN: So I just say this comes from a
22 concern. There was a larger-than-wallet card at one

1 point in the recent past that kind of had this slogan
2 of "stop, think, act" that was really problematic. So
3 I would just hope that that theme wouldn't continue,
4 that you --

5 MS. GARRAHAN: Yeah, now I think you --

6 MS. LESSIN: -- would find a different theme.

7 MS. GARRAHAN: Yeah, it's not. Thank you.

8 MS. SPIELER: A similar observation. There
9 was at least one thing at one point posted on the
10 website that almost promised that you would take
11 forward a case under 11(c), and I think I -- we had
12 some correspondence about that.

13 And so, perhaps, after -- even if they're
14 done, you could not necessarily have recommendations
15 from the committee, but you could bring them to the
16 committee for individual -- for reactions from the
17 committee, so that you could take those under
18 advisement as you continuously revise the documents.

19 J.J., go ahead.

20 MS. ROSENBAUM: I think for the outreach work
21 group, one of the things that we had identified doing
22 was doing a more comprehensive review of the existing

1 outreach materials and seeing if there were overall
2 themes that we could point out, or if there were
3 additional complementary materials, those sorts of
4 things. So there is a process --

5 MS. GARRAHAN: Yeah.

6 MS. ROSENBAUM: -- as you were saying, where
7 we'll be doing some of that.

8 MS. SPIELER: Greg?

9 MR. KEATING: It's Greg Keating. Thank you
10 very much for the report, and especially for the last
11 but by no means the least topic.

12 I completely understand, given the time
13 constraints, the difficulty of sort of going back and
14 forth. And this is maybe as much a question for Emily
15 or for the collective committee, but, as you know, a
16 lot of work went into the recommended practices, 18
17 months worth of sessions. And I have to particularly
18 call out Jon Brock, our chairperson, who really did an
19 amazing job of keeping the boat going and drafting,
20 editing, and revising, and drafting and editing, and
21 just stating a fact. The guidelines that came out were
22 certainly very similar, but there was a lot that was

1 not included.

2 And I guess my question is, is there any way
3 consistent with FACA rules and our own charter perhaps,
4 to have, if -- assuming he'd even be willing to do it
5 -- somebody like Jon available between now and the
6 fall to liaison with you or with anyone who is working
7 on it on your group, and just try to sort of point out
8 certain things that you might want to consider from
9 that expertise or area?

10 MS. GARRAHAN: Well, actually, Jon has pointed
11 out -- he elected to comment as an individual, and he
12 did compare the two documents. And we are taking his
13 comments very seriously, and going through them. And
14 if we have any questions, Jon, we will follow up with
15 you on that. And believe me, again, Dr. Michaels is
16 very interested in ensuring that we go through, you
17 know, every comment very, very seriously, very
18 thoroughly.

19 So, we do have that information --

20 MR. KEATING: Okay.

21 MS. GARRAHAN: -- so that's very helpful to
22 us.

1 MS. SPIELER: Jon?

2 MR. BROCK: Well, I'd be happy -- if you asked
3 me some questions about it some time, I'd be happy to
4 respond.

5 But I'd like to say that those were not really
6 individual comments. That was a necessity, I thought,
7 to point out the work that had been submitted contained
8 an approach and concepts that would be considered when
9 they -- if they reached the professional field and
10 organizations, would be considered in many respects as
11 new and innovative, because you really wouldn't find at
12 least some of those practices in existing programs.
13 Even the people on the committee who run programs like
14 that or advocate for programs like that in the
15 workplace on a daily basis learned a lot from the
16 experts that we brought in from outside the committee
17 and from each other.

18 And the reason that I took the trouble to go
19 through that line by line was because a very high
20 proportion of the valuable concepts were either omitted
21 or severely diluted, including the emphasis on
22 prevention, the techniques related to that and to other

1 things, combining aspects that are really not
2 combinable that require separate activity. And in
3 addition, misunderstanding or creating the potential to
4 misunderstand the incentives impact -- of course you
5 heard the same things I heard this morning.

6 So, I think, in the interest of what we're all
7 here to do -- and I recognize that the work that all of
8 you do here is hard work, I worked here a long time
9 ago. It was hard then, it's a lot harder now. And I
10 know that five years ago the things that you summarized
11 here, and that Anthony summarized here and at other
12 meetings, were things that weren't even on the agenda.

13 So I know there is a lot going on here, there is a lot
14 of work to do and a lot of improvement.

15 But if we would like to have those best
16 practice guidelines make a difference in the workplace,
17 then it has to contain the features that will make a
18 difference. And what was put out in the public comment
19 is certainly -- it puts something out there, just like
20 if you put out the steps in an investigation it would
21 be informative. But that document described a reactive
22 program, not a proactive program, not a program with

1 prevention, not a program that would lend new insights
2 to the field, and that would get the people around this
3 table and the people that they deal with in their
4 professional circles excited about paying attention to
5 that.

6 So, as you go through the comments -- I read
7 all the comments also, and there are certainly some
8 legal and policy questions that we missed and that
9 narrowed consideration. And the process of developing
10 consensus required balancing of words and the way
11 things were put out. And certainly there are format
12 questions that you have to be concerned about, not just
13 marketing -- which is great, that you're attending to
14 that -- but also your agency, not, you know, a
15 non-profit organization, you have to do certain things.
16 All of that -- you know, those are constraints we all
17 recognize.

18 But I urge you to really -- to have some kind
19 of dialogue with us, not just with me -- there is
20 people around this table that know much more than I do,
21 I was only the scribe, I was privileged, but I was only
22 the scribe -- so that when it's issued, that it will

1 have an impact in the workplace. Otherwise, the work
2 that we did and the work that I know you're going to do
3 and have already done will not be particularly
4 worthwhile.

5 So I say that with all respect and with all
6 sense of constructive input to an effort that we've all
7 made and we're all trying to do our best, all of you
8 working on it now, all of those who worked on it
9 before. But I think those omissions need to be
10 considered in a very substantive way, relative to
11 impact, not simply with respect to editorial expediency
12 and so on. And if something is left out, there may be
13 very good reasons to leave things out or to change
14 things, but there should at least be good reasons. And
15 I think that will only be revealed through dialogue,
16 and I want to encourage you to find a way, properly
17 following the rules, to engage people other than myself
18 in that dialogue.

19 MS. GARRAHAN: Okay. Thank you, Jon. And one
20 thing else I wanted to just quickly mention too is,
21 since we did get some significant comments, what we
22 plan to do when we issue the final document is also

1 post a response to how we came to some of our
2 decisions. It's not going to go into every one, every
3 single detail, like we do when we issue a regulation,
4 where we call it a preamble.

5 But we think, out of respect, too, to people
6 who took the time to comment, we thought it would be
7 beneficial to point out some items and actually show a
8 crosswalk where someone might have wanted it worded
9 this way, and we worded it this way, and maybe why we
10 worded it a certain way. So we're hoping that's going
11 to be helpful, as well.

12 MR. BROCK: Thank you.

13 MR. EHERTS: So I'm a bit concerned also about
14 the individual back-and-forth. I know we want to stay
15 very, you know, precisely within the rules for the
16 federal advisory committee, but is there like the art
17 of the possible? Like how quickly can we move? So if
18 you got something back to the committee and they then
19 forwarded to a subcommittee, and we acted very quickly
20 to get recommendations back to the committee with the
21 proper notification time, just how fast could that
22 happen?

1 MS. GARRAHAN: Not fast enough. And that's
2 why, again --

3 MR. EHERTS: Even if we took out all the time
4 in the middle? So we did the notifications exactly at
5 the minimum? So we couldn't get that information back
6 and forth within a month or two?

7 MS. GARRAHAN: Yeah --

8 MR. EHERTS: No?

9 MS. GARRAHAN: Again, this is something that's
10 been decided at the highest level, that it just, you
11 know, wouldn't feasibly work.

12 MR. EHERTS: Okay.

13 MS. GARRAHAN: Back and forth. But again, it
14 has been very helpful that we got some specific
15 comments in. And we didn't intentionally -- we didn't
16 try to miss anything that was significant. There was a
17 lot of thought put into it. But it has helped, getting
18 comments.

19 MS. SPIELER: Anyone else?

20 (No response.)

21 MS. SPIELER: I hope at the next meeting -- I
22 think that an ADR update would be extremely helpful.

1 MS. GARRAHAN: Absolutely.

2 MS. SPIELER: And anything that's going on
3 with regard to your evolution of data collection I
4 think would also be useful for the committee at our
5 next meeting.

6 MS. GARRAHAN: Okay. And, you know, one thing
7 I would like to mention, speaking about both ADR and
8 our data, is I would like to share some good news. And
9 I know you have heard from us, that we have a very old,
10 clunky database, and that the rest of the agency -- now
11 it's been, what, six, seven, at least, years -- has
12 gone to a much newer system. And we've been waiting
13 for funding, waiting for funding, waiting for funding.

14 Well, the good news is that our agency, our
15 administrative programs, has set aside some funding to
16 get us started this year, and they actually think we
17 will, a year from now, be on that new system. That is
18 going to be a tremendous help to our program, because
19 we will be able to do more data analysis. I know a lot
20 of people ask for data, and we just can't get it. For
21 example, ADR, we have people manually keeping track
22 over ADR, because we don't have a field for that.

1 So we're very, very excited about that. And
2 last week we had -- all of you had heard who have been
3 here -- and for the new people -- the agency not only
4 has this directorate, which is relatively new, but we
5 have new positions and a regional office, which is
6 a -- going to make a huge difference. There are
7 assistant regional administrators for the whistleblower
8 program, instead of being -- reporting to, say, the
9 safety and health program.

10 And we had those individuals in this past
11 week. The first time we had them in was last year, so
12 it's the second time. And you know, we talked about
13 the data collection, but also I know another topic that
14 this group has mentioned, and that's the
15 enforcement -- safety and health enforcement and
16 whistleblower working closer together. That was a hot
17 topic, as well, and we have some really good follow-up.
18 It was a very productive meeting. So I wanted to
19 share that, as well.

20 MS. SPIELER: Terrific. Other questions,
21 comments?

22 (No response.)

1 MS. SPIELER: Anything you want to add,
2 Anthony?

3 MR. ROSA: No, I just wanted to say, as
4 MaryAnn mentioned, we did have a very good meeting last
5 week, and we actually had a brainstorming session, as
6 we were talking about when we move into this new
7 database system, this is an opportunity to put
8 everything we want to put in that so-called wish list
9 of the fields that we can't track, like ADR, like
10 several of the processes that we can't track right now.

11 And we're working on developing a work group that's
12 going to help us go through that transition.

13 And just to reiterate what MaryAnn mentioned
14 and was talked about earlier, that we're also looking
15 for -- it's important to bring the field managers
16 here, and they actually had an opportunity to listen to
17 the Railroad Workers United, because it's important for
18 field managers to know what really is going on inside
19 the industry coming from the workers themselves. But
20 we're also looking for -- as the field managers went
21 back to their regions, they also took the message of
22 finding opportunities to cross-coordinate with the

1 safety and health side. So that was an important
2 opportunity to get them together and share that
3 message.

4 MS. GARRAHAN: And just one more thing.
5 Lezlie, as the state representative, please know that
6 we do want state involvement as we move forward with
7 our moving to OIS.

8 MS. SPIELER: Eric?

9 MR. FRUMIN: Yeah, I want to follow up on
10 something that Jon said in his response to the draft
11 recommended practices, and it's related to some of the
12 frustrations that we all feel with the obvious and
13 severe limitations under which the program operates.

14 Whether it's the nature of the 11(c) statute,
15 the case load for the investigators, the clunky data
16 system -- that's probably a generous description -- and
17 I have to step back and say, well, you know, what could
18 be done differently? Because to just operate within
19 that box is really -- I mean it's necessary, you have
20 no choice, but there's got to be another way to think
21 about it, to try to deal with a larger problem of, you
22 know, employers who just feel free to retaliate, you

1 know, without consequence.

2 And Jon's point about thinking that
3 these -- that the best practice, recommended practices,
4 needs to think about a proactive program. You know,
5 the -- it's definitely that. It does need to be very
6 clear that this is not just -- that a reactive approach
7 doesn't cut it, that a proactive, preventative program
8 by the employer, an anti-retaliation program that
9 actually means something is important. But I think
10 that would be true, as well, for the whistleblower
11 program within the agency, to think in terms of
12 prevention as much as responding to the cases.

13 So you've mentioned several things you're
14 doing, and I just want to reiterate that general idea,
15 whether it's working more closely with enforcement, or
16 outreach, or whatever, that if there are opportunities
17 that are credible to take prevention seriously in the
18 same way that the safety and health enforcement takes
19 prevention seriously, not simply responding to
20 incidents that are reported or complaints, that those
21 opportunities are really, really important.

22 Are they a distraction, if you want to call it

1 that, from the difficult work of keeping up with the
2 caseload and not, you know, abandoning that? Well,
3 yes, they are. And are you short-staffed? Yes, you
4 are. But we're -- under the current conditions, you're
5 never going to catch up with this beast simply by
6 reacting to it. And my hunch is that if the agency
7 more broadly supports a stronger anti-retaliation
8 effort, that it will pay off in terms of trying to
9 limit the caseload to something more manageable, even
10 while you're fighting for funds or, you know, whatever
11 the other frustrations are.

12 MS. SPIELER: Other comments or questions?

13 (No response.)

14 MS. SPIELER: Do you have any thoughts for us,
15 as we go forward?

16 MS. GARRAHAN: Well, you know, kind of
17 emphasize that what you do as -- things I reported out,
18 you see how they directly relate to, you know, what we
19 work on here. So I think it's important, in terms
20 of -- for the work groups. And I know that they're set
21 up a way so that we have the appropriate OSHA
22 representation on the work group, in terms

1 of -- obviously, they're not official part of the work
2 group, but they're there as your support folks. And I
3 think that that's helpful, so that you're not kind of
4 duplicating efforts, or you're on track of what's going
5 to be helpful to OSHA.

6 So I know, as someone involved in an advisory
7 committee in that past, that that's really, really
8 important. So, you know, feel free, as a work group,
9 to reach out to those folks. And if there is
10 additional support that's needed, we will, you know,
11 provide it as well. Sometimes we need to reach out to
12 other directorates. And, you know, if you need some
13 field perspectives, you know, we can pull those in, as
14 well.

15 MS. SPIELER: Terrific. Great. So we're
16 moving -- clearly, we constructed this agenda in a way
17 that we should have rethought. But we are ahead of
18 time now, and we do -- we have a meeting wrap-up time.

19 But before we do that, I just -- I wanted to give Rick
20 Inclima a minute to speak. He had asked this morning,
21 and we really ran out of public comment time. And so,
22 go right ahead, Rick.

1 MR. INCLIMA: Thank you, Madam Chairman, and
2 thank you to -- for the -- to the committee. It's a
3 pleasure to be before you again. My name is Rick
4 Inclima. I'm director of safety and education for the
5 Brotherhood of Maintenance of Way Employees Division.
6 We represent 35,000 men and women who build, inspect,
7 maintain the railroad tracks and bridges around the
8 United States. And I work closely with our other
9 sister rail unions representing probably, in total,
10 about 180,000 rail workers.

11 I wanted to just touch base on the testimony
12 this morning from the rail workers that you heard, and
13 the concerns about both retaliation and accountability.

14 There is a mechanism currently available under the
15 Federal Railroad Administration's
16 regulations, and it's 49CFR209.303. And what
17 49CFR209.303 provides is a mechanism for FRA to
18 institute disqualification proceedings against both
19 employees in safety sensitive positions or managers who
20 have oversight responsibility for those safety
21 sensitive employees.

22 And you know, what we have advocated in the

1 past, and what I'm going to bring to this committee, is
2 where you have patterns of violations, where a manager
3 or a -- you know, a region of managers are consistently
4 violating whistleblower rights or engaged in such
5 egregious activity against an employee in a
6 whistleblower case, you know, the FRA has the ability
7 and the power to initiate these disqualification
8 proceedings under 209.303.

9 Frankly, you know, the MOU structure is
10 already there for the cooperation between OSHA and FRA
11 to -- you know, to proceed along these lines.
12 Certainly, in my view, even news of such action,
13 whether it actually occurs or even is being considered,
14 would quickly spread across the country throughout the
15 ranks of rail managers. When they realize that they
16 would be held personally accountable for their actions,
17 rather than hide behind the railroad shield, you will
18 see a massive change very quickly.

19 The 209.303 procedures do include due process
20 for those employees. Like I said, the regulation and
21 the MOU exists, and it's there for, really, just a
22 matter of utilizing and leveraging those tools that are

1 already there through the cooperation of OSHA and FRA
2 to -- you know, to hold people accountable for
3 egregious activities.

4 Now, in a -- BMW has submitted comments to
5 OSHA along these lines. I'm not sure if it was within
6 the best practices comments or the guidance document,
7 but it was fairly recent, and I would certainly be
8 happy to follow up with any of you on those issues.

9 You know, in a perfect world, where we see
10 these patterns, the OSHA investigator, whether it was
11 as pattern of activity or egregious activity, ideally
12 the OSHA investigator would make a recommendation to
13 their counterparts at FRA and then cooperate on a
14 209.303 proceeding. So that's what I wanted to bring
15 to the committee, you know, just to let you know that
16 it's out there. The mechanism and the structures are
17 already in place, it's just a matter of using the tools
18 that are currently available. Thank you.

19 MS. SPIELER: A question from Nancy.

20 MS. LESSIN: Has this been used? And how
21 successful has it been?

22 MR. INCLIMA: Well, that's a great question,

1 Nancy. 209.303 has been used against safety-sensitive
2 employees. Some of my own members. And you know, we
3 deal with those cases through the due process.

4 I recently filed a FOIA request with FRA
5 on -- about how many managers have actually faced these
6 same proceedings. My guess is there is none. I have
7 not received a response yet, but, you know, we haven't
8 been able to uncover any of that. So again, it's a
9 under-utilized tool that needs to be brought to light.

10 MS. SPIELER: Thank you very much.

11 MR. INCLIMA: Thank you very much.

12 MS. SPIELER: One housekeeping matter. The
13 information that was filed with us by Mr. Halprin
14 should be made a part of the record. And so this is
15 Exhibit No. 7. A would be the cover letter dated April
16 18th, B would be the set of exhibits that start with
17 Exhibit No. A. C would be the letter dated February
18 22, 2016 regarding OSHA docket number OSHA-2015-0018
19 and 2013-0023.

20 What am I up to? D would be the comments of
21 Strategic Comp and the Great American Insurance Company
22 before OSHA February 22, 2016. E would be the

1 January -- I clearly didn't put these in the right
2 order -- January 19, 2016 letter to Dr. Michaels. And
3 lastly, the comments dated January 19, 2016.

4 Okay, Nancy?

5 MS. LESSIN: I had a question about that. So
6 that's going to go up as exhibits on our website. But
7 if there was false or flawed information in that
8 material, are we or are members of the public allowed
9 to put counter-documents, peer-reviewed journal
10 articles --

11 MS. SPIELER: No. The answer is no.

12 MS. LESSIN: No? Okay.

13 MS. SPIELER: This is -- during our public
14 comment period we invite people from both management
15 and labor to come and provide us with their views about
16 what is happening, and we accept them as part of the
17 record. We don't accept them on either side as
18 inherently true, and certainly, as a committee, we are
19 entitled to scrutinize them again on either side. But
20 we are not in a position to put something up on the
21 website. If you, as an individual, want to write
22 something and publish it, you are free to do that, of

1 course, as is anyone else on the committee.

2 David?

3 MR. EHERTS: But of course the discussion, the
4 questions and answers, are all part of the record.

5 So --

6 MEETING WRAP-UP

7 MS. SPIELER: Yeah, yeah. Okay. So,
8 the -- sorry, I lost my train of thought. We're about,
9 well, half-an-hour ahead of time. We had a
10 half-an-hour allocated to meeting wrap-up. I'm
11 not -- actually, I'm totally open to any suggestions
12 about what you would either like to make sure we pursue
13 in a future meeting, discuss at a future meeting, or
14 any other observations about the work groups that will
15 be doing their work between the meetings, or questions
16 you would like to ask about the work group process that
17 would help in the intervening period.

18 Dave?

19 MR. EHERTS: Yeah. I just -- I consider that
20 we're a very well-led committee, and still we've had
21 frustrations getting discussion back and forth with
22 OSHA, because we have to follow the Federal Advisory

1 Committee Act so carefully. And I'm just wondering if
2 we couldn't have a federal advisory committee on
3 federal advisory committees, and just --

4 (Laughter.)

5 MR. EHERTS: Because there must be ways to
6 structure our meetings and our subcommittee meetings in
7 anticipation of recommendations coming so that the
8 notification periods can be overlapped. Because I
9 think, if we had been able to work more quickly, we
10 could have had a much more constructive dialogue with
11 OSHA. We could have answered questions almost in real
12 time.

13 MS. SPIELER: Are you talking now about the
14 best practices recommendation, or is there something
15 else that --

16 MR. EHERTS: Well, I think that's a great
17 example, because we did a lot of work on those and put
18 them forward. But then OSHA really couldn't go back
19 and forth with us very much within the rules, so they
20 had to issue them based upon their interpretation of
21 what they thought would be the best thing to do.

22 And had Jon's group had a chance to go back

1 and forth a couple times, there -- may have been much
2 improved. And so I'm just -- and I know that if we
3 notified one meeting after another, there is not nearly
4 enough time to do that.

5 But I'm just wondering. I mean I'm sure you
6 could figure out a way to set these things up in a
7 manner such that we could react more quickly. Is that
8 possible?

9 MS. SPIELER: So it's an interesting question,
10 because I think, conceptually -- and MaryAnn, you
11 should jump up and down if you think I'm getting this
12 wrong, or whoever else is here, Brian or anyone else
13 from SOL -- but it's -- this is an awkward
14 conversation, I think, because the agencies, the
15 departments, set up federal advisory committees to
16 solicit advice.

17 MR. EHERTS: Not to go back and forth.

18 MS. SPIELER: Not to go back and forth. And
19 so, in a sense, the advice is given, and it can be
20 accepted or not accepted, or accepted in part. And
21 it's -- and that is, in fact, the structure, the nature
22 of the relationship.

1 So -- which is hard, because, on the one hand,
2 you convene a group of people like the people who
3 worked on the best practices guidance, and who have an
4 incredible amount of expertise coming in, and then
5 spend a lot of time taking -- talking to people out in
6 the field, and hammering out a kind of understanding
7 about what really matters. And it's hard, I think, to
8 transmit all of that in a document.

9 And so, there is something inherently almost a
10 little insulting in the fact that, okay, you kind of
11 send off this document and the agency has not just no
12 obligation, but really no -- and no duty, but really,
13 the system is not set up so that they come back to you
14 again. I feel -- I was about to say it's kind of like
15 when you send a kid out into the world and you think,
16 "What are they doing?"

17 MR. EHERTS: You know what dawned on me,
18 though, is that I think OSHA had very good reason for
19 doing what they were doing, it's just that the
20 committee didn't understand it as we were working for
21 those 18 months.

22 MS. SPIELER: Yeah.

1 MR. EHERTS: And so, if they could have
2 interjected, or if we could have sent the first draft,
3 and they could come back and say, "Well, that works,
4 but in the real world, this doesn't" --

5 MS. SPIELER: Yeah.

6 MR. EHERTS: -- "and these are the legal
7 reasons why it won't," I think they have got very good
8 reasons. But had Jon's group been given a shot at it,
9 I think it would have been a much improved --

10 MS. SPIELER: Yeah. You know, so I think that
11 it may be that if the DWPP were more evolved at the
12 time that we began working on that document, that the
13 nature of the dialogue would have been different. But
14 as MaryAnn has correctly pointed out, they were in a
15 scramble to -- a little like the discussion we had
16 about the SEC whistleblower office this morning.

17 And so, I don't know if it would have been a
18 different kind of dialogue between the agency and the
19 committee if it were a more mature organization
20 internal to OSHA, but they really had
21 other -- legitimately, I think, had other priorities in
22 order to get -- improve the on-the-ground whistleblower

1 program. And therefore -- again,
2 legitimately -- thought, "Well, we have this great
3 group of experts. We'll let them spend their time on
4 that, while we do this."

5 MR. EHERTS: Right.

6 MS. SPIELER: And I think partly this is
7 the --

8 MR. EHERTS: And they got all that done.

9 MS. SPIELER: -- result of that.

10 MR. EHERTS: Right.

11 MS. SPIELER: And we did. But I think it's
12 very interesting to me, the relationship that has
13 already been set up around both the training and the
14 outreach work, where there are -- it's very clear that
15 there will be an ongoing dialogue between the people
16 who are doing the work within OSHA and the committee,
17 so that it's very unlikely, I think, that
18 something -- this kind of disconnect would happen
19 again.

20 And again, I think that's partly a reflection
21 of the fact that, with permanent leadership in DWPP and
22 more people out in the field, that there is just a

1 greater depth and ability to be in that kind of
2 dialogue with us. So --

3 MR. EHERTS: Fair enough.

4 MS. SPIELER: Is that fair, MaryAnn, do you
5 think?

6 MS. GARRAHAN: No, that's fair, yeah.

7 MS. SPIELER: So -- Eric?

8 MR. FRUMIN: So I'm thinking ahead to
9 the -- both the work of the outreach group and our own
10 next meeting, six months from now.

11 With regard to the question that I and others
12 have raised about the improving the interaction between
13 the whistleblower program and safety and health
14 enforcement, so assuming that the outreach group and
15 maybe the training group, as well, continue to have
16 some discussion in the interim, I think there will be
17 -- the next meeting will be ripe for having a chance
18 to interact in the meeting with the
19 enforcement -- what's called the enforcement
20 directorate at OSHA, and DWPP in the same room at the
21 same time, so that with six months advance notice,
22 they'll have an opportunity to think about and share

1 with us how they can move forward more effectively
2 together, so that the whole is more than the sum of the
3 parts, leveraging each of their respective capacities
4 and authorities, and so forth.

5 By then we should also have the executive
6 order on fair pay, which will also directly address the
7 question of anti-retaliation provisions and enforcement
8 settlement agreements for federal contractors --

9 MS. SPIELER: You know, I'm not sure everyone
10 here is familiar with it, so --

11 MR. FRUMIN: Okay. Well --

12 MS. SPIELER: Just in two sentences.

13 MR. FRUMIN: In two sentences? The President
14 issued an executive order a while ago. We're about to
15 see the regulations implementing it, which requires a
16 different way for the major federal contracting
17 agencies to learn about and consider the effect of
18 labor law violations on the federal contracting bidding
19 process, so that when Lockheed Martin is putting in a
20 bid for a \$5 billion weapons system, and they've got
21 OSHA violations, for instance, the fact of those
22 violations is no longer irrelevant to the decision by

1 the contracting officer as to whether Lockheed Martin
2 is a responsible contractor and qualifies for that bid,
3 which is a huge change in federal regulatory authority
4 and federal procurement policy.

5 And the Labor Department is at the center of
6 the collection of that information, the interpretation
7 of that information for the contracting agencies. And
8 it'll shine a light on -- quite a light on the nature
9 of the violations and how both the agencies and the
10 cited employers, the bidders, deal with those
11 violations. And retaliation discrimination issues are
12 clearly described as one of the violations that could
13 raise questions or problems for a contract, even
14 potentially disqualify a contractor.

15 But likewise, the main thrust of the executive
16 order is to get bidders qualified, not disqualified.
17 So let's make sure that the black list misnomer is not
18 applied here. It's not a black list, it's to get
19 bidders qualified. And one of the best ways to qualify
20 them is to get a settlement agreement, what's called a
21 labor compliance agreement, which says to the agency
22 and to the labor agency, like OSHA or Wage and Hour,

1 and to the Defense Department, this company has gotten
2 right with the Lord and they've resolved their
3 problems.

4 However, it's supposed to have assurances that
5 workers can report violations, and to do so in an
6 atmosphere free from retaliation. So again, there will
7 be a need to put specifics on how anti-retaliation
8 provisions are memorialized in settlement agreements
9 between labor enforcement agencies and major companies
10 accounting for a quarter of the U.S. GDP. So those
11 regulations are, I think, imminent as well.

12 So, without prejudging them, but just going on
13 the basis of the guidance, the draft that was released
14 for public comment, my hope is -- my expectation is
15 that, for both of those reasons, both the leveraging
16 that we've talked about earlier as well as the arrival
17 of the effective procurement regulations, this joint
18 discussion with the enforcement side of OSHA and the
19 whistleblower program, with the committee, will be
20 important and useful, timely, and will also be related
21 to -- at least judging from what we've said so far
22 yesterday -- the work of the outreach group.

1 MS. SPIELER: So, MaryAnn, if you would take
2 that and think about it, we would very much appreciate
3 it.

4 Other -- Greg?

5 MR. KEATING: So, just in terms of thinking
6 ahead -- and I -- you know, I was and am very excited
7 to be on the outreach work group, but coming here I was
8 kind of scratching my head a little bit, thinking,
9 well, since we don't have any guidelines, you know,
10 yet, what are we reaching out about?

11 And my analysis has been informed a bit,
12 hearing Eric. There is another angle to this, this
13 sort of -- the enforcement angle, and reaching out to
14 make sure -- and I understand that, and I respect that.

15 But I think a big piece of what we were trying to
16 reach out about was this exciting new guidelines around
17 an effective compliance program that will not allow
18 retaliation. And I'm really enthused to get an update,
19 MaryAnn, that it -- you're methodically going through
20 all the comments. It takes time, and you're -- from
21 what I hear, you're looking at a fall kind of potential
22 dissemination.

1 My specific observation is, looking to our
2 fall meeting, which I imagine will dovetail -- may
3 dovetail around this time, can we at least in the
4 outreach work group, which will include member of
5 your -- you know, Anthony or Meghan or whoever -- can
6 we at least work to try to think about effective splash
7 with this announcement? You know, effective outreach
8 with when the guidelines go out?

9 Because I think there is a lot of potential
10 there. And you know, and I mean this completely
11 respectfully, but I think the initial draft guidelines
12 didn't get a lot of splash. And I think -- you know, I
13 think they got -- at the end there was a lot of
14 comments, and many of them well thought out. But I
15 think this is an enormous opportunity, and I hope that
16 we can work with the whistleblower directorate in the
17 outreach group so that when we finally press the send
18 button -- "we," being you -- it really gets the --

19 (Laughter.)

20 MR. KEATING: It gets the attention it
21 deserves from employers across America, workers across
22 America, et cetera, et cetera.

1 MS. SPIELER: Nancy?

2 MS. LESSIN: Kind of pondering how to continue
3 the dialogue about problems on rail, and whistleblower
4 protection, and the issue of is -- you know, is the
5 accord the way to go, or if it isn't working, what
6 needs to happen?

7 And we don't have a work group, and we -- so
8 I'm just -- I would like to at least have some thought
9 about how to continue that piece of our discussion kind
10 of aimed at can anything be done to make the situation
11 better in whatever arena?

12 MS. SPIELER: Maybe the best we can do
13 for -- between now and the next meeting, I think, might
14 be to ask DWPP to follow up on some of the issues that
15 have been raised and report back on them, and their
16 report -- and then maybe at the next meeting we can
17 figure out what would be the appropriate next step. Is
18 that fair?

19 MR. KEATING: I think so, yes.

20 MS. SPIELER: Anything else?

21 (No response.)

22 MS. SPIELER: And Greg, I think your

1 suggestion is a good one, and I have no idea how the
2 timing could be managed, which is, I think, why it led
3 to silence, that --

4 MR. KEATING: No, I --

5 MS. SPIELER: But certainly the minute
6 the -- you hit send there ought to be something ready.
7 And so certainly, all -- even if the outreach
8 committee doesn't know exactly when you're going to hit
9 that button, they can be engaged in a conversation
10 about what should happen when you do.

11 MR. KEATING: Or just to be a little more
12 specific about what -- what I'm talking about, you
13 know, we -- I remember -- I think it was the last
14 meeting, Dr. Michaels himself sort of spoke that he'd
15 like to be sort of active in raising awareness, or
16 speaking, or whatever it is that -- and we -- as you
17 referenced earlier, we gave you a list of a lot of
18 organizations.

19 I mean just -- I think it would be -- if
20 possible, it would be very effective to communicate
21 through the outreach group about, you know, which ones
22 are you thinking about working with, and you know, how

1 is that going to play out, and all that other stuff.
2 That's specifically what I'm talking about.

3 MS. SPIELER: Eric?

4 MR. FRUMIN: Do we have a handle on how the
5 work groups will be functioning in the interim?

6 MS. SPIELER: So I can give a partial answer
7 to that. I -- clearly, by telephone conference call.
8 There was some discussion during the ethics training
9 yesterday about what kind of notice was required for
10 activities of the subcommittees, and we were
11 instructed, actually, that full public notice is not
12 required for all subcommittee meetings.

13 So, I would ask the chairs of the
14 subcommittees to figure out which of the meetings would
15 be most appropriately publicly noticed. But my
16 suggestion would be that -- I assume you have a staff
17 person assigned to each from your office?

18 MR. ROSA: Yes, we actually do.

19 MS. SPIELER: It's -- actually, thank you.

20 MR. ROSA: Actually, we do. We do have a
21 staff person. Actually, we have also subject matter
22 experts from --

1 MS. SPIELER: Yeah, but I want to know --

2 MR. ROSA: -- a training institute --

3 MS. SPIELER: We're on the logistics now. So
4 we need a staff person in the DWPP --

5 MR. ROSA: Yeah, we do have a staff person in
6 each one.

7 MS. SPIELER: Okay --

8 MR. ROSA: And one thing I just want to point
9 out. It was --

10 MS. SPIELER: Wait, wait, wait, wait. Who is
11 assigned to which --

12 MR. ROSA: Well, we have -- Marisa was at the
13 training work group --

14 MS. SPIELER: Okay. And Marisa, you'll be
15 working with the training group on an ongoing basis?

16 MR. ROSA: At the present time, because Meghan
17 is going -- yes, and Christine currently until Meghan
18 returns.

19 MS. SPIELER: Okay, so -- wait. So is
20 Christine, are you handling the logistics for outreach,
21 or is Marisa handling the logistics for both?

22 MR. ROSA: Marisa is going to do the training.

1 Christine will handle the logistics for the outreach.

2 MS. SPIELER: Okay.

3 MR. ROSA: Or she will delegate it over to
4 Marisa until Meghan returns.

5 MS. SPIELER: Okay. So my suggestion is that
6 the chairs of the committees be in touch with the staff
7 people who are the -- assign logistics people to set up
8 the -- an initial conference call, and then develop the
9 schedule as you agree at that initial conference call.
10 Is that -- okay, thank you. As we did before, really.

11 MR. FRUMIN: Yeah, that's pretty much the way
12 we did it with the --

13 MS. SPIELER: Before we -- I think we were
14 publicly noticing everything, and --

15 MR. FRUMIN: Right. Well, we had --

16 MS. SPIELER: And that changed the -- some of
17 the dynamics, because that triggered some requirements.

18 MR. FRUMIN: Right.

19 MS. SPIELER: And if we don't publicly notice
20 everything, then it may be somewhat more efficient for
21 the subcommittees to meet, especially in the initial
22 framing conversations and so on.

1 As you get closer to actual recommendations,
2 having public -- noticing the public so that people can
3 engage in the conversation I think would be important.

4 Fair enough, Eric?

5 So, what I -- right now, in terms of the next
6 meeting, I will anticipate an ADR report, perhaps a
7 fairly extensive one with data, if that's possible. I
8 had a conversation with the person from the wage and
9 hour division, and will be in touch with you because
10 she said -- we agreed it would be helpful if we would
11 articulate some of the issues that particularly we
12 would like her to address. And she or they will come
13 back.

14 We will try to address the sort of set of
15 issues that you have raised, Eric, about whistleblower
16 and enforcement, and the relationship to settlement
17 agreements, as well as more generally. And the two
18 work groups, presumably, will have more time on our
19 agenda.

20 So, right there I think we have a pretty full
21 meeting in six months, and undoubtedly there will be
22 other issues that will arise. Is there anything I

1 missed?

2 (No response.)

3 MS. SPIELER: Any last comments or concerns?

4 (No response.)

5 MS. SPIELER: So before we adjourn, I would
6 like to join the various people who have thanked the
7 various staff members who both put together the meeting
8 logistics, but also do the hard work of trying to
9 develop the program, with special thanks to MaryAnn and
10 Anthony, who have -- really took on a big job, not that
11 long ago, as a team and have really pushed ahead on a
12 number of the most critical issues.

13 And all of the staff, I want to say around
14 logistics and all the other issues have really been
15 terrific. So thank you all. I will forget someone if
16 I try to name everyone, so I'm not going to even try.

17 But thank you very much, and thanks to the
18 committee members for your hard work. And see you in
19 about six months. Adjourned.

20 (Applause.)

21 (Whereupon, at 3:47 p.m., the meeting was
22 adjourned.) * * * * *