

U.S. DEPARTMENT OF LABOR

Whistleblower Protection Advisory Committee Meeting

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Department of Labor
200 Constitution Avenue, NW
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APPEARANCES

Name	Affiliation
Anthony Rosa	DWPP
Mary Ann Garrahan	DWPP
David Michaels	OSHA
Eric Frumin	Change to Win
Gregory Keating	Choate Hall & Stewart
Ava Barbour	International Union, UAW
Kenneth Wengert	Retired: Kraft Foods
Marcia Narine	University of St. Thomas, School of Law
Nancy Lessin	United Steelworkers
Jennifer Rosenbaum	National Guestworker Alliance
David Eherts	Allergan Pharmaceuticals
Adam Miles	Office of Special Counsel
Christine Dougherty	OSHA - Minnesota
Rob Swick	DWPP
Jason Zuckerman	Counsel for Plaintiffs
Eric Lahaie	Directorate of Corporate and State Programs
Louise Betts	Hoshizaki America, Inc.
Doug Kalinowski	Directorate of Corporate and State Programs
Jonathan Brock	Retired; University of Washington

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1 **WELCOME**

2 MR. ROSA: I would like to get this meeting
3 started and get it in order. My name is Anthony Rosa.
4 I am the Deputy Director for the Directorate of
5 Whistleblower Protection Programs, and today I'll be
6 wearing a number of hats. One is then is obviously,
7 I'm the Designated Federal Officer for the
8 Whistleblower Protection Advisory Committee. Emily
9 Spieler, our Chair, is absent today, and therefore, I
10 will be chairing this meeting as well.

11 Before we proceed, I wanted to pass the
12 microphone to Rob Swick, who is going to give us our
13 safety briefing.

14 MR. SWICK: Good morning, everyone. Thank you
15 for joining us today. It looks like most of you are
16 old school to this, but just a friendly reminder of the
17 procedures and the safety here.

18 There are two kinds of safety events that
19 could happen in the Department of Labor, the shelter in
20 place or an exit situation. In a shelter in place
21 situation, this is exactly where you want to be. In
22 the event that there was an evacuation, you will follow

1 the staff out of the building to the nearest stairway
2 and we will congregate outside.

3 The bathrooms are pretty much on every corner
4 of the building, to the left and the right out of here.
5 There is a five-star cafeteria on the sixth floor to
6 have your lunch if you don't wish to go out. There is
7 a café around the corner on the fourth floor, coffee
8 and things like that, I believe, little blizzards.

9 Should you have any questions or need for any
10 assistance, you can contact Meghan Smith over there, or
11 any member of DWPP for assistance. And lastly, I want
12 to throw my two cents in for advice. Remember that the
13 meeting is on the transcript, so if we can only have
14 one person talking at a time, that would be great.

15 MR. ROSA: Thank you, Rob. Before we proceed
16 with introductions, I just wanted to bring as our first
17 exhibit for this meeting our agenda. So I would like
18 to call everyone to look at the agenda in your
19 handouts.

20 We're going to do brief introductions,
21 followed by a welcome speech by Dr. David Michaels,
22 Assistant Secretary, followed by an update from the

1 directorate, by Director Mary Ann Garrahan. We will go
2 to a break and after that we will have a data
3 discussion and then we will have a public comment
4 period.

5 After lunch, we will have a presentation from
6 our Office of State Programs that is going to talk
7 about Section 11(C) and the state plans, and that
8 follows to our discussion on the Best Practices Work
9 Group that we spent time yesterday discussing, and then
10 we'll have a meeting wrap up. So I want to bring that
11 in as Exhibit No. 1.

12 And then now, I just want to do some further
13 introductions. First, I would like to get
14 introductions from the committee members and then
15 followed by DOL staff and then the general public.

16 Eric?

17 INTRODUCTION

18 MR. FRUMIN: Eric Frumin, Change to Win.

19 MS. LESSIN: Nancy Lessin, United
20 Steelworkers, Tony Mazzocchi Center.

21 MS. NARINE: Marcia Narine, St. Thomas
22 University, School of Law.

1 MR. ROSENBAUM: JJ Rosenbaum, National
2 Guestworker Alliance.

3 MR. EHERTS: Dave Eherts, Allergan
4 Pharmaceuticals.

5 MR. MILES: Adam Miles, Office of Special
6 Counsel.

7 MR. BROCK: Jon Brock, public member.
8 Retired; University of Washington.

9 MR. KEATING: Greg Keating, Choate, Hall &
10 Stewart.

11 MS. BARBOUR: Ava Barbour, International Union
12 UAW.

13 MR. WENGERT: Ken Wengert, retired from Kraft
14 Foods.

15 MR. SWICK: Christine Dougherty.

16 MR. ROSA: Oh, Christine.

17 MS. DOUGHERTY: Hi. Christine Dougherty,
18 Minnesota OSHA, representing State Plans States.

19 MR. ROSA: Welcome, Christine.

20 DR. MICHAELS: I'm David Michaels of the
21 Office of the Assistant Secretary at OSHA.

22 MR. WATSON: Bruce Watson of Bloomberg Media,

1 and I am a reporter.

2 MS. GARRAHAN: Mary Ann Garrahan, Director,
3 Directorate of Whistleblower Protection Programs.

4 MS. STEWART: Christine Stewart, Division
5 Chief for Policy, Directorate of the Whistleblower
6 Protection Programs.

7 MS. SMITH: Meghan Smith, Directorate of
8 Whistleblower Protection Programs, WPAC liaison.

9 MS. JOHNSON: Marisa Johnson, DWPP.

10 MS. JAMINSON: Greta Jamison, Office of
11 Communications.

12 MS. GROSS: Josie Gross, DWPP.

13 MS. SWANN: Gail Swann, DWPP.

14 MR. HOLCOMB: Sid Holcomb, OSHA
15 Communications.

16 MS. CAUDRELIER: Sarah Caudrelier. I'm on
17 detail here at DWPP.

18 MS. GIVENS: Laura Givens, DWPP.

19 MR. BARRETT: Otis Barrett, DWPP.

20 MR. FAIRCHILD: And Cleveland Fairchild, DWPP.

21 MR. SWICK: I'm Rob Swick.

22 MR. ROSA: And last but not least?

1 MS. BETTS: Louise Betts, Office of the
2 Solicitor.

3 MR. ROSA: Thank you, everyone. I want to
4 proceed now with our agenda. It is a great honor that
5 I want to introduce someone that I enjoyed working
6 with; someone who is very passionate for workplace
7 safety and health, and worker rights and is going to
8 have a conversation about how the agency is moving
9 forward. And with that, I want to bring this over to
10 Dr. David Michaels.

11 **DWPP UPDATE**

12 DR. MICHAELS: Thank you so much, Anthony.
13 And really, the honor is mine. It's great to be here
14 today with you, to see all of you and to be here to
15 thank you in person for the really important work that
16 you've done. I know you all put time into this. It's
17 not remunerated; from all of you, it's clear it comes
18 from the heart and we are grateful to have your wisdom
19 and expertise in helping us move forward with our
20 mission, which is to make sure, among other things that
21 workers have a voice and that they can raise concerns
22 about health and safety issues that affect them or

1 their co-workers or the health safety or well-being of
2 people in the general public, and you play a very
3 important role in that.

4 I want to especially thank your Chair, who
5 can't be here today, Emily Spieler, who has done a
6 really remarkable job moving this forward. And Jon
7 Brock, who has chaired the Best Practices in Corporate
8 Culture Work Group, which I think has its great name,
9 but more importantly, the product that you produced and
10 the direction you're going, I think has been
11 phenomenally helpful.

12 So all of you who are on that committee, we're
13 grateful for that. I want to thank Anthony for taking
14 on chairing today and being our designated federal
15 official, and to thank Mary Ann, and Anthony, and Rob,
16 the entire staff of the Whistleblower Protection
17 Directorate, who is working very hard. It's a small,
18 but mighty group. We should many times more the staff,
19 given our challenge, but they do a really fabulous job.

20 And also let me thank Louise Betts. The
21 Solicitor's Office really are a partner in all of this
22 and I'm grateful for all that you contribute to the

1 effort here today, but also, all of what you do.

2 I spoke very briefly with some of you
3 yesterday at the work group meeting. I heard you had a
4 very productive meeting. I can't wait to hear more
5 about where you think we should go, the materials you
6 think we should be disseminating, and how we should be
7 getting our message out. I really do look forward to
8 hearing that because I think your input has made a huge
9 difference and will continue to do so.

10 My readings of the best practice documents are
11 that it really is a unique document. We have never
12 produced anything like that from the OSHA point of
13 view. We've been waiving into this area of how to tell
14 employers the best way to approach issues of
15 whistleblower protection to ensure retaliation doesn't
16 occur. And this is the first time we've really done
17 anything like this and I'm very excited about it. I
18 think you've really launched us in a good direction.
19 We opened the document where we're asking the public
20 for comments.

21 So please, any encouragement you can make to
22 others to put in their comments, if they're useful

1 ones, we'd like to see that. I'll certainly spend some
2 resources and time over the next couple of months,
3 also, encouraging people to tell us what they think.
4 That process alone of getting people to read it and
5 comment I think will be useful, even if they have
6 nothing to say, it spreads the message. So we'll be
7 doing that as much as we can.

8 The public comment period, as you know, will
9 be open until January 19th. This is not a regulatory
10 docket, so if someone doesn't make that deadline but
11 still has something to say to us, we certainly can
12 receive that information, but it won't necessarily be
13 useful to us in putting together the final document.

14 Just to touch on a couple of other topics I
15 think of interest to everyone. As you know, for the
16 last probably nine or ten years, there have been a
17 series of reports looking at the functioning of our
18 whistleblower protection activities. The Government
19 Accountability Office has done a couple of studies.

20 The Office of the Inspector General, here at
21 DOL, has done a couple of studies and we can really see
22 the progress that we've made. The most recent report

1 came from the OIG's office, looking at the improvements
2 we've made since 2010, and I think the results were
3 very positive.

4 We've reduced the error rate dramatically.
5 Before we made our changes, we brought on Mary Ann and
6 Anthony, we didn't have a directorate. The Inspector
7 General estimated -- there were errors in about 80
8 percent of the cases. Now we're down to -- we think
9 we're really far, far below that; somewhere less than
10 one in five. Less than 20 percent. I think we're even
11 better than that. And you're going to hear more about
12 that from Mary Ann Garrahan's presentation, but I think
13 we've made some great progress and it's a statement to
14 the dedication of the staff and the new structures that
15 we've brought in.

16 Not surprisingly, we get more and more cases.
17 We have a big backlog and I think we've been very
18 successful in tackling that backlog, but as long as
19 more and more cases come in, it's going to be very hard
20 to get rid of that backlog. We have new statutes and
21 we do a better job telling workers that they can file
22 with us, especially now that we have an online filing

1 form. So we get more cases filed with us than ever and
2 it keeps our field staff very busy, but I think we've
3 been able to keep pace.

4 In Fiscal Year 2015, you know, it just ended,
5 we received 3,288 new complaints and we completed
6 3,273. Now, that doesn't mean we still don't have a
7 large backlog, and obviously, some of the cases we
8 completed were some of the easier cases, but I think
9 we've done a really great job in keeping up. We
10 awarded nearly \$25 million to whistleblower
11 complainants and we reinstated 75 workers through
12 merited terminations and settlement agreements.

13 We've also, I think, made some real progress
14 in the functioning of our activities. We issued a
15 revised chapter of our Whistleblowers Investigation
16 Manual, which addresses remedies and settlement
17 agreements. We'd like to promote alternative dispute
18 resolution. We published a directive on that and we
19 think that will be very helpful in some cases. We have
20 a new quality review tool that we utilize during our
21 audits and we're doing more audits in the field now as
22 well.

1 We're also very much focused on training. We
2 have a lot of new staff. One of the things that we've
3 successfully gotten in our budgets over the last few
4 years when there has been a new federal budget is the
5 increase in staff and that has required more training
6 for investigators because we want them to be highly
7 trained. We want them to understand the different
8 statutes that they're working on, the different
9 investigative techniques, the interview techniques.
10 It's a full set of skills and knowledge that our
11 investigators have to have. So I think we've made big
12 strides in approving our training.

13 Last month, we issued our first training
14 directive for whistleblower investigators. I know our
15 staff really worked very hard on that. And that
16 directive provides guidance on our policies and
17 procedures for training. We outlined, for the first
18 time, minimum training requirements for our
19 investigators, including all the recommended training
20 that will help them prepare them for the professional
21 certification exams, and that's very important to keep
22 our people certified. They will more likely stay with

1 the government. They will be recognized for the
2 quality of their work.

3 We've also tried to identify training paths
4 that provide assistance to the regions in managing
5 their training programs. So every region will have to
6 manage their programs. Our objective, obviously, is to
7 make sure we have the highest quality, highest caliber
8 investigators who work with a very high level of
9 professional expertise and I think we're getting there.

10 But this is an area that we'd like you to help
11 us on. I always like to come and ask you for something
12 and I think you've really given us so much help on the
13 materials on recommended practices. So we've really
14 worked out the general direction or the general scope
15 of the training, but there are still some pieces that
16 we really need help on. What I'd like to do is ask you
17 to create a new training work group to help us with
18 this area, to focus on training topics or the issues
19 that we haven't yet addressed in our recently published
20 directive. I don't know if it's been provided yet or
21 we will provide it. We have this directive mandatory
22 training program for OSHA whistleblower investigators.

1 So I'd like for you to identify existing
2 training outlets. Are there other materials? Are
3 their venues? Whether there are opportunities out
4 there to assist in our training. We're interested in a
5 lot of issues and I think there is a tremendous amount
6 of training out there and other government agencies in
7 the private sector in academia around interpersonal
8 issues. You know, we deal with labor management
9 relations on a regular basis and our folks could use
10 some training on that; industry-specific topics around
11 the 22 statutes that we administer. I mean, there are
12 lots and lots of very tough issues. And so you all
13 have an expertise in many of these areas and we'd love
14 your help on that. And I'm grateful for any help you
15 can give us on that and I know that will be a subject
16 of discussion later today.

17 Just to let you know where our budget is,
18 which is where we think our budget is, we are hoping to
19 have a budget by December 11th. That's the deadline
20 for the current continuing resolution. As of last
21 year, we had a budget. The year before, we had a
22 continuing resolution. In the president's proposed

1 budget for 2016, it reflected our commitment and the
2 Obama Administration's commitment to build this
3 program.

4 We requested \$22.6 million, and that would
5 support 157 full time employees. Right now, we're at
6 135. So if we get that, it would be a big increase.
7 As I think we've all seen, the whistleblower program
8 has gotten very good bipartisan support. So we are
9 ever hopeful that even in these areas of budget cuts or
10 flat budgets that we'll get an increase. So we'll see.
11 We hope to know that. We don't know yet, but I think
12 we'll have some idea in the next week or two as to what
13 our budget will be.

14 So that's really my update. You'll hear a lot
15 more about some specific cases, about some of the
16 numbers from Mary Ann and others over the next few
17 hours, but I'm here really just to thank you and to see
18 if there are any questions you have for me or anything
19 you think I should know while I'm here.

20 Let me turn it back to you.

21 MR. ROSA: Thank you, Dr. Michaels. Anyone in
22 the Committee for Dr. Michaels?

1 Yes, Nancy?

2 MS. LESSIN: Good morning.

3 DR. MICHAELS: Good morning.

4 MS. LESSIN: I just want to -- I mean,
5 hopefully, we're going to discuss this some later, but
6 in your response to the OIG report, there are a number
7 of things, but I'm just going to pick up on one of them
8 and that's the decision to implement alternative
9 dispute resolution across all regions. And
10 specifically, what you wrote here was that OSHA
11 believes -- okay. So, "The ADR process for
12 whistleblower cases that OSHA believes will continue to
13 reduce investigation times and improve outcomes for
14 complainants."

15 Then you say, "The ADR process was piloted in
16 two regions, which resulted in a significant increase
17 in the settlement rate for both regions, as well as
18 providing significant savings and time and cost. In
19 light of the positive results, we're expanding it."

20 It doesn't say anything about outcomes for
21 complainants and there is a huge body of literature --
22 this is just a little bit of it -- that talks about ADR

1 when they are significant power disparities between a
2 worker, for example, and a corporation. We can look at
3 vulnerable workers. We can look at any worker, but
4 when you're up against a big corporation in a situation
5 where the bad outcome for the employer is rarely,
6 rarely, rarely punitive damages, it's just
7 reinstatement. So there is not big pressure on one
8 party and there are power disparities.

9 I am really concerned about this kind of well,
10 "It was cheaper and faster," without looking at what's
11 happening with complainants. You know, are they
12 getting the same or better outcomes from ADR. And this
13 paragraph did not suggest that that was the case. So I
14 just want to express a concern and perhaps, you can say
15 oh, yes, the outcomes are much better for complainants.

16 DR. MICHAELS: We believe they are. I mean,
17 obviously, this wasn't a report about the ADR. This
18 was a paragraph just saying why we're doing it. But
19 when we looked at getting people back to work more
20 quickly if they lost their job, for example, or making
21 a settlement with their employer, at a level that the
22 complainant was happy with it, we thought it really was

1 a big success. It's not perfect and we certainly know
2 there are many cases where we shouldn't even go into
3 it. You know, it's an ADR that we supervise. It's not
4 an ADR where just some outside arbitrator was brought
5 in. So it's very different than a lot of the ADR
6 programs where there is a lot of literature about, you
7 know, which says essentially, you're forced into this.
8 this is a voluntary relationship. It's not compulsory,
9 which is the other issue around some of these issues.

10 We can certainly talk more about that, but our
11 feeling was for the people who went into that program,
12 it was successful and it's not compulsory. I mean, if
13 people weren't happy with it, they can get out of it.
14 So if we could solve people's problems quickly and get
15 the employer and the complainant to the table quickly
16 and say let's solve this. Let's deal with it, we think
17 that's a success if everybody leave happy.

18 Yes?

19 MR. MILES: So I'd just like to say --

20 DR. MICHAELS: Identify yourself.

21 MR. MILES: I'm sorry. Adam Miles with the
22 Office of Special Counsel. Our experience at OSC with

1 mediation has been overwhelmingly positive. So we'd be
2 very supportive of efforts at OSHA to increase
3 utilization of mediation. And just responding to the
4 particular comment that breaking down that power
5 dynamic is one of the things that we've that mediation
6 does.

7 And when it's an individual employee going
8 against the big employer like the Defense Department,
9 when two people can sit down under voluntary
10 circumstances and have a neutral from OSC helping them
11 to understand the relationship between the employee and
12 the employer, a lot of times it's leading to we're
13 seeing not just better outcomes for complainants, but
14 longer lasting outcomes.

15 So we're able to come up with settlement
16 agreements that really fix a relationship problem
17 versus just providing legal relief. Our experience has
18 been just overwhelmingly positive. So we'd be very
19 supportive of OSHA and would like to help in any we
20 can.

21 DR. MICHAELS: That's great. I'd love to see
22 more about your program as well. I know we've talked

1 with your office quite a bit about this.

2 MS. NARINE: Marcia Narine. I'm sorry, my
3 voice is not too strong today, which might make this a
4 much shorter meeting today.

5 Do you or any of the agencies do any follow-up
6 with the complainants afterwards, maybe three months
7 later or four months later to say how is it going with
8 the reinstatement? Have you had any issues?

9 And I know that's not common. And this might
10 be an uber best practice. I'm not necessarily
11 recommending that, but I'm just curious.

12 DR. MICHAELS: Mary Ann tells me that in the
13 pilot, we actually surveyed the complainants -- the
14 parties, three months later.

15 MR. ROSA: Yes. Yes, we did.

16 DR. MICHAELS: We can provide you with that
17 information.

18 MR. ROSA: Yes. In fact, we did survey and we
19 were able to get -- and even now, even in these regions
20 that have a full time ADR person, we are getting
21 feedback from both parties.

22 MS. NARINE: Okay.

1 MR. ROSA: And we're getting a lot of positive
2 responses that this was a very good, easy, non-
3 confrontational approach to resolve the matter.

4 MS. NARINE: Okay. Great.

5 DR. MICHAELS: It's not going to work in every
6 case, but we certainly think there are plenty of
7 examples where if we can move that quickly, you know,
8 make them whole, it's better for everybody.

9 MS. NARINE: Okay. Thank you.

10 MR. ROSA: Yes. Eric?

11 MR. FRUMIN: So we have an agenda item coming
12 up on the question of data for the program. And so we
13 can talk about this more then, but I wanted to ask,
14 when you did the evaluation of the program in the
15 regions and made a decision about its strengths and
16 weaknesses and then decided to roll it out.

17 Presumably, you use specific criteria for
18 determining success or failure or something in between.
19 So it would be helpful if you could share with us both
20 the criteria that you used, the key metrics, as well as
21 the results. What were the results of the evaluation
22 that you did from your program data that allowed to

1 conclude that the program was worth expanding.

2 I raise it now, in part because it's relevant
3 to your comments, but also because when we get to that
4 part of the agenda, we're be interested in discussing
5 virtually the same questions about the program overall.
6 So just sort of a marker. And then the other related
7 aspect is whether you saw in your evaluation that you
8 did any differences by statute because clearly, the
9 strength or the power that complainants bring to the
10 table vary greatly by statute; likewise, from the
11 employer side.

12 The advantages and disadvantages of ADR, you
13 know, upfront, vary greatly by statute. So putting
14 aside the data question, did you see any difference, by
15 statute, when you did this evaluation?

16 DR. MICHAELS: Yeah. We'll have to look at
17 the data to get back to you. I don't have any of that
18 with me now.

19 MR. ROSA: Sure. We will look at the data,
20 but as a preliminary -- because I was involved in the
21 actual approval of the -- on the evaluation of the two
22 pilot regions before we launched it. The process was

1 very similar to what we've done non-ADR. The only
2 thing is that it allowed us to stay the investigation
3 while the negotiations were going on.

4 So the results were as good, or even better
5 than if we would've just done regular settlement
6 negotiations. Because of the fact that we already
7 removed the enforcement part of it, maybe we can get
8 the parties together in a more amicable way to discuss.
9 We did not experience any -- there were not
10 shortcomings. There were no ways of trying to find a
11 quicker way to resolve; we were just trying to get the
12 parties together in a more amicable way.

13 MS. NARINE: Do you know off the top of your
14 head if any of those were SOX investigations?

15 MR. ROSA: There was one that I know of that
16 was a case out in Region 9 that was a SOX case. Most
17 of the other ones, there were a myriad of different
18 statutes.

19 MS. NARINE: Okay.

20 MR. ROSA: But there was one particular SOX
21 case that had a significant settlement, but all the
22 other ones had basic settlement. And we've had

1 instances where a non-ADR case was settled for \$2,000,
2 for example, versus an ADR case that was settled for
3 \$4,000.

4 And again, it all depends on the circumstances
5 in the case, but we didn't see that an ADR was less
6 favorable to the complainant than if you would not have
7 gone through ADR. All we did was remove the
8 enforcement part of it to make it easier to negotiate.

9 MS. NARINE: Okay.

10 MR. ROSA: But we will definitely look into
11 more data. And whatever we are collecting right now,
12 not only are we collecting data in the pilot, but
13 whatever we are collecting now, as the program is
14 moving forward, we have been collecting this
15 information and we're constantly monitoring it. And
16 that is part of the things that we are doing in the
17 data that we're going to talk about later, how we're
18 going to try to get some additional fields in the
19 system to capture this information and track it better.

20 MS. NARINE: Because I think Eric and Nancy's
21 points about the power differential and the difference
22 by statute would be really relevant. And I'm not sure

1 of how I conceptualize it in my head, but I think a SOX
2 case can be different than some of the other cases, you
3 know, for a variety of reasons.

4 MR. ROSA: Sure. Sure.

5 MS. NARINE: The numbers are going to be
6 different in a SOX case. The concern about
7 reinstatement may be different in a SOX case.

8 MR. ROSA: Exactly. Right. Right.

9 MS. NARINE: So I'd be interested to see how
10 that works.

11 MR. ROSA: Absolutely.

12 MS. NARINE: And the employers might have
13 different concerns about reinstatement in some of these
14 cases.

15 MR. ROSA: Right. And we also want to look at
16 -- so far, the data that we have seen did not show any
17 difference between a represented employee and a non-
18 represented employee, but those are the things we are
19 also looking at.

20 MS. NARINE: I know we need to move on, but
21 I'll just say that I was on a panel -- and I don't see
22 Jason here, Jason Zukerman and some others at the ABA

1 Labor and Employment, and we did an actual hypo on
2 whistleblowers and it was SOX and others. It was about
3 40 or 50 lawyers in the room and they talked very
4 specifically, strategically, about how they bring some
5 of these whistleblower cases and talked about are we
6 going to bring a SOX or are we going to bring a regular
7 employment and they talked very strategically about how
8 they're going to file, what they're going to file, et
9 cetera.

10 So there's lots of discussion about whether
11 we're going to go through OSHA or whether we're going
12 to go through here or whether or not it's easier and
13 how we're thinking about reinstatement. So from a real
14 world practical, you know, how this going on in the
15 plaintiff and defense bar, this kind of issue about
16 where ADR is being used and how we'll have a lot of
17 practical significance.

18 So I think it's important that this messaging
19 get out because it's going to have a big impact, I
20 think, on how plaintiffs are bringing the cases and how
21 employers start thinking through what they do because
22 the issue of reinstatement obviously is a big deal for

1 the employer community.

2 MR. ROSA: Yes. Absolutely. And before we
3 proceed, I just wanted to add, since the reference of
4 our response to the ID report was raised as Exhibit No.
5 2. So I just wanted to make that note.

6 MR. FRUMIN: Can I? I just have one other
7 question.

8 MR. ROSA: Sure.

9 MR. FRUMIN: David, or Mary Ann or anybody, do
10 you know, roughly, offhand, the total number of ADR
11 cases that were covered by your evaluation? Just
12 roughly.

13 DR. MICHAELS: Why don't we try to just get
14 the numbers rather than --

15 MR. FRUMIN: Okay. That's fine. I got it.

16 MS. NARINE: My follow-up is in the data
17 discussion, do you have data that you can give us?

18 MR. ROSA: Yes.

19 MS. NARINE: Great. On this issue?

20 MR. ROSA: Yes, we do.

21 MS. NARINE: Fabulous.

22 MR. ROSA: In fact, just to give you another

1 fact, once we did our evaluation, we also looked at
2 another agency that has done ADR to see how we stack
3 up. We did it with EEOC and we were fairly close in
4 percentage of success as the EEOC has. So we wanted to
5 make sure that we were not just going off on our own.
6 That we were actually comparing ourselves to another
7 agency that had an established program in place.

8 Yes, Greg?

9 MR. KEATING: Dr. Michaels, I'm sure we'll
10 hear more about this later today, but I'm just
11 intrigued by this concept of training and assistance
12 that you're looking for from the WPAC. And my question
13 is, is this intended to be training to continue for
14 your investigators or substantive training for
15 employers and employees in the workforce?

16 DR. MICHAELS: No. We're very much focused on
17 our investigators. Obviously, any suggestions that we
18 can encourage others to get training would be great
19 too, but we're very much interested in making sure our
20 investigators are properly training to do their job as
21 well as they can.

22 We've looked at other programs, for example,

1 there is a federal program that provides training on
2 interviewing techniques in criminal cases. We don't
3 have criminal cases, but we've sent some of our
4 investigators to get interview training at other
5 agencies, for example. So what are the skills they
6 need and more places we can get that training is what
7 we'd like you to think about with us.

8 MR. KEATING: Okay.

9 MR. EHERTS: I've got a comment. Maybe it's a
10 unique business perspective, but I think there's two
11 ways to decrease the backlog and one is through ADR and
12 more OSHA people. The second way is to have fewer
13 claims. And so I want to put a plug in for Jon's group
14 in that what they're focused on is teaching businesses
15 on how to put anti-retaliation programs in place and I
16 think there are three big advantages to getting these
17 things early.

18 The first is competitive advantage for the
19 business because if they can get this information
20 internally quickly, if it's an unsafe workplace, it's
21 easy to fix it when you get the information early. And
22 if somebody is stealing money, that's information that

1 the companies desperately really want to know. So it
2 makes no sense to retaliate against somebody giving
3 information that's really important to the business.

4 And also, I think it keeps you on the right
5 side of the law. So there are a lot of reasons
6 businesses should be investing in the things that Jon
7 is bringing forward and I just want to point out that
8 that's going to reduce the backlog quite a bit also.

9 MR. ROSA: I certainly hope so. Yes, JJ?

10 MS. ROSENBAUM: I just wanted to flag two
11 additional fields that I think would be relevant and
12 where they may be a disparate outcome with ADR. The
13 first is language.

14 MR. ROSA: Yes.

15 MS. ROSENBAUM: So a cross statute -- how are
16 those outcomes measured? And the second is where has
17 the agency invoked the Miranda of understanding with
18 the Department of Homeland Security? Because when
19 there are additional immigration-related threats on the
20 table, that may also impact the pressures around ADR.

21 DR. MICHAELS: Thank you.

22 MR. ROSA: Thank you. Yes, Eric?

1 MR. FRUMIN: What were the professional
2 certifications that you referred to? Any idea or can
3 you tell us about it or can you tell us about it
4 another time?

5 MR. ROSA: Well, I do know that there are some
6 members that have the CFE, Criminal Fraud Examiner
7 (sic), for example. That's one. I don't know of any
8 others, but similar to what we have in our training
9 directive for our compliance staff, where we have the
10 Certified Industrial Hygienist, Certified Safety
11 Professionals and the like. We're also looking to
12 expand our whistleblower staff would also have some
13 professional certification that we can encourage them
14 to get involved in.

15 MR. FRUMIN: And they're mentioned our
16 directive.

17 MR. ROSA: Right. Any additional questions
18 for Dr. Michaels?

19 (No response.)

20 Well, thank you very much.

21 DR. MICHAELS: No, thank you. And I look
22 forward to continuing to work with you.

1 MR. ROSA: Thank you. And now I have the
2 esteemed pleasure to introduce my boss, Mary Ann
3 Garrahan, the director of the Directorate of
4 Whistleblower Protection Programs that will be doing an
5 update of the directorate and together, I will be
6 helping her in answering any questions you may have
7 afterwards.

8 Mary Ann?

9 MS. GARRAHAN: Great. Oh, thank you, Anthony.
10 And good morning to everyone. It's my pleasure to be
11 here. And I really wanted to thank Dr. Michaels for
12 his powerful message about whistleblower protection. I
13 would like to echo his thanks to the Committee.

14 You know, after attending the last committee
15 meeting and I reviewed the Best Practice document
16 several times, I also read the previous Committee
17 minutes. I am so impressed with your hard work,
18 enthusiasm, and your dedication to helping OSHA improve
19 its Whistleblower Protection Program.

20 So just as a little background, I assumed my
21 role as the director of the Whistleblower Directorate
22 shortly after your last committee meeting. Before that

1 I was the regional administer in Philadelphia for OSHA.
2 And because I believe so strongly in the mission,
3 working for OSHA has really been a career for me.

4 Many years ago, I started with OSHA as a
5 compliance safety and health officer. So as the new
6 director, I would like to review our goals under the
7 Whistleblower Program and highlight some of things we
8 are doing to reach them. But before I do that, I want
9 to thank the DWPP staff, particularly Meghan Smith and
10 Marisa Johnson, Francis Owen, and Greta Jamison from
11 our Office of Communication. It's really due to their
12 logistical and programmatic work that makes this
13 meeting happen.

14 Also, I would like to introduce to you
15 Christine Stewart. Christine is the new division chief
16 of Policy, Planning, and Program Development. And she
17 is an alternative DFO for this Committee. We are
18 delighted to have her as part of our directorate team.
19 She was a manager over the whistleblower investigators
20 in our Kansas City Regional Office.

21 So as you know, Dr. Michaels has talked about
22 that this directorate is a standalone, similar to our

1 directorates of enforcement programs in construction.
2 Our directorate develops policy, procedures, and
3 outreach materials and we provide support to our
4 regions. In addition, we write regulations for the
5 statutes we enforce. We conduct administrative reviews
6 of appealed 11(c), the Asbestos Hazard Emergency
7 Response Act (AHER), and the International Safe
8 Containers Act cases. And we participate in the
9 national office audits of the region's Whistleblower
10 Protection Program.

11 We do all of this and much more with a staff
12 of 16. And I am really extremely honored to be working
13 with such a smart, dedicated staff and some of them
14 waved to you this morning, but they introduced
15 themselves.

16 Now, to get to our strategic goals. Each
17 fiscal year, the agency develops program goals. So for
18 FY 2016, the agency has three whistleblower protection
19 performance goals that are qualitative. They are meant
20 to ensure improvements in our efficiency. We have a
21 goal for a number of investigations we complete and we
22 have a goal for measuring the timeliness of

1 whistleblower investigations and that is the average
2 age of pending whistleblower investigations. And we
3 also measure the timeliness of customer service to new
4 whistleblower complaint filers by measuring the average
5 number of days to complete a new complaint screening
6 process.

7 So those are our three goals, and we also have
8 four agency whistleblower protection milestones for
9 2016. So this fiscal year, we plan to conduct a
10 quality review of a specific subset of completed
11 whistleblower cases, and this will be accomplished by
12 focused audits conducted by our regions and by national
13 office audits of a subset of the regional whistleblower
14 programs. Each year, the national office conducts to
15 three regional audits per year. And I mentioned that
16 DWPP participates in those national office audits.

17 So for the whistleblower portion of the
18 regional and the national office audits, DWPP developed
19 an access database called the quality review tool. Dr.
20 Michaels had just mentioned that this morning. The
21 purpose of this tool is to improve the consistency,
22 uniformity and quality of our whistleblower

1 investigations.

2 The items that are identified the tool are
3 taken from key investigative steps in our whistleblower
4 investigation manual. This tool, not only is being
5 used by federal OSHA, but we're also using this tool to
6 monitor the whistleblower programs in state plan
7 states. It also can be used proactively by our
8 regional and state managers when reviewing open cases.
9 It provides an excellent checklist to ensure all
10 pertinent investigative steps are completed.

11 Another agency milestone is that we will
12 consider developing a customer service measure related
13 to Web traffic on OSHA's whistleblower website. We
14 plan to use Google Analytics for this. We plan to look
15 at our website and determine whether reviewers to our
16 site are, for example, entering through our partner
17 agency websites that link to our websites. And also
18 what they're looking and maybe what they're not looking
19 at on our website.

20 We also have two agency training milestones.
21 In FY 2016, the agency plans to develop a new legal
22 concepts course and a complaint resolution and

1 settlement negotiation course for our whistleblower
2 investigators. So in addition to our agency goals, we
3 have other strategies for improving our effectiveness
4 and efficiency.

5 In our directorate, we run case reports
6 quarterly. We analyze the data and we share the data
7 and any trends with our regions. Some of the data
8 points we find most important are the number of
9 complaints filed, the number of closed, the outcome of
10 the complaints. For example, did we find merit? Was
11 the case settled?

12 We also track progress for meeting our annual
13 strategic goals, such as the 2016 goals that I just
14 mentioned. And also, yearly, our directorate updates
15 the data that we provide on the public website. We do
16 this approximately one month after the end of our
17 fiscal year. So that's right around this time, a year.

18 So in your packet, you have a copy of the most
19 recent data for 2015. Let me show it to you. So one
20 thing I'm pretty sure of -- and there is going to be
21 the data discussion later on, but I'm pretty sure
22 you're aware that our database for the whistleblower

1 program is old, it's clunky to use, and due to its age,
2 it is very difficult to make enhancements.

3 We have not been given enough adequate funding
4 for needed improvements and this is certainly a huge
5 challenge for us. You know, I really can't stress that
6 enough. So as we mentioned, Anthony will be giving you
7 an update and seek your thoughts on data issues, you
8 know, after our break this morning.

9 Moving on to other ways of improving the
10 efficiency of our program, some of our regions have
11 been piloting the use of electronic case files. I know
12 this morning we discussed the whole program that we
13 implanted as optional through our regions, and that's
14 the alternative dispute resolution method. I just
15 wanted to mention that under the Administrative Dispute
16 Resolution Act, it requires federal agencies to really
17 look to consider ADR programs. So it's out there in an
18 Act.

19 As we mentioned, you know, you're very
20 interested in the outcome of our results and we'd like
21 to share that with you. And also, I think what's
22 important is we are closely monitoring, as we're moving

1 forward. Right now, we have three regions that have
2 regional ADR coordinators and that's Regions 8, 9, and
3 10.

4 I mentioned that an important function of DWPP
5 is conducting administrative reviews and I mentioned
6 there's actually three statutes, but we only get really
7 requests under 11(c). So as many of you know, the
8 reason that we're doing these reviews is because the
9 OSHA Act does not allow for complainants to appeal
10 their determinations. So we take this task very
11 seriously and we are continuing to make improvements to
12 our process.

13 We recently enhanced our responses to
14 complainants to better explain our rationale for our
15 determinations. And these reviews or case files
16 provide the opportunity for us to find areas to improve
17 quality. We are in the process of improving the way we
18 collect data on areas that need improvement that we
19 discovered during these reviews, but we are analyzing
20 the data. We're looking for trends for systemic
21 issues. We are trying to determine the root causes and
22 take action in order to improve the qualities of our

1 investigations across the regions. You know, examples
2 include what types of action we take, developing new
3 policy, clarifying a distinct policy, and training. It
4 might be retraining. It might be actually adding
5 additional training.

6 So just to let you know, in FY 2015, we had
7 140 requests for reviews. And during this same period,
8 we had final determinations of 127 cases and
9 approximately 25 percent of our reviews involve going
10 back to our regions with questions or asking them to
11 reopen the cases.

12 So speaking about policy updates, last fiscal
13 year, we updated Chapter 6 of our Whistleblower
14 Investigative Manual, and we are almost finishing
15 revising Chapter 3, the conduct of the investigations.
16 We're updating that to include the reasonable cause
17 memorandum. I know your last meeting, you had a
18 discussion on the reasonable cause memorandum.

19 In our plan, moving forward with our manual is
20 to really update at least two chapters each year. And
21 each year, we're planning on incorporating any new
22 policy memoranda into the manual. So anything that

1 we've issued by memos to our field, really, since this
2 Administration, we plan to catch up and incorporate
3 into our manual.

4 Another way to improve our program is through
5 audits conducted by the Department of Labor's Office of
6 Inspector General. We mentioned that a little bit that
7 in December, the OIG issued an audit report, and this
8 was more than a year of reviewing case files in three
9 of our regional offices and conducting interviews with
10 staff and managers within the regions and here at the
11 national office.

12 As Dr. Michaels mentioned, the good news is
13 that the OIG reported noted improvements in the
14 programs since 2010. Specifically, as Dr. Michaels
15 mentioned, we went from an error rate of 80 percent
16 when they looked at the case file of finding at least
17 one error that they considered an error, and reducing
18 that in their latest report to 18 percent of the cases.

19 So we consider this a considerable
20 improvement; however, you know, we still have a ways to
21 go and the OIG made some recommendations and you have a
22 copy of this. It's the same recommendations in their

1 draft. And you have a copy of a draft that is in the
2 report. And the good news is that we have been working
3 on those same recommendations and we will continue to
4 work in those areas, such as continuing to address
5 improving the training of our investigators.

6 One thing we have been doing, and Dr. Michaels
7 mentioned this as well, the OIG actually looked at this
8 as well, although we had sort of like a disagreement
9 with the OIG in terms of what data they were looking
10 at.

11 They were looking at our partner federal
12 agency's data versus the data that we submitted to our
13 partner agencies. But we believe we've made great
14 strides in our efforts for increased coordination, in
15 collaboration with partner agencies, which enforce the
16 underlying worker public and safety protections behind
17 our regulations.

18 Working closely with our partner agencies is
19 very important because it allows us to reach workers
20 that we normally don't reach. DWPP has met with each
21 partner agency at least once in the last 12 months to
22 discuss better ways to share information. We're also

1 making progress towards creating reciprocal Web links
2 between OSHA and our partner agencies. And this
3 improves customer service and helps demonstrate a
4 strong working relationship between the federal
5 agencies.

6 Right now, we have EPA, the FAA, and HHS, all
7 have placed links to OSHA's whistleblower pages on
8 their webpage and have explained to employees who may
9 have whistleblower protections under statutes that OSHA
10 enforces and we think this is very important. And I
11 told you we're going to use that kind of data, the
12 analytics to see whether or not they're actually using
13 those links.

14 Now, regarding the Affordable Care Act, we
15 anticipate -- oh, I wanted to mention one more thing
16 we're doing with federal agencies, too, that they have
17 hotlines. We're actually working with our hotlines
18 too. And also looking at, you know, in terms of OIG,
19 we just want to make sure that everyone who might hear
20 something about a whistleblower complaint, if it
21 happens to fall under one of our 22 statutes, they know
22 where to send these folks.

1 Regarding the Affordable Care Act, we
2 anticipate that whistleblower claims may increase in
3 the near future due to an upcoming change in the Act.
4 Beginning in 2016, medium-size employers and those with
5 50 to 99 full time employees must offer adequate health
6 insurance to their employees. If their employees go to
7 the healthcare exchanges and receive cost-sharing
8 subsidies for adequate health insurance, which is a
9 protected activity under the Affordable Care Act, the
10 employers will be subject to fines of \$2,000 per
11 employee. So consequently, some employers may believe
12 that there is an incentive to terminate employees who
13 are seeking to find affordable health insurance
14 coverage for their families under the law.

15 So in addition to reaching out to our partner
16 agencies that enforce our underlying worker public and
17 safety protections behind our regulations, we're also
18 reaching out to federal agencies that enforce
19 whistleblower statutes. So what we think that this is
20 a great way to not only improve our effectiveness and
21 efficiency, it also is a way of helping other agencies
22 as well, by sharing some of our best practices.

1 Some topics that we are interested in are how
2 they train their investigators, their investigative
3 processes and procedures and their investigative case
4 load. Our investigators carry an average caseload of
5 23 pending cases. And you all may recall that in 2012,
6 an OIG report states that ideally, the average should
7 be between six to eight cases. And from some our other
8 federal agencies we've been talking to, they have much
9 lower caseloads.

10 On to regulations. I mentioned that we're
11 responsible for promulgating regulations, specifying
12 the procedures for handling of retaliation complaints
13 filed under the 22 statutes that OSHA administers. I'm
14 pleased to report that as of just a few days ago,
15 November 9, the regulations for the National Transit
16 System Security Act and the Federal Railroad Safety Act
17 became effective.

18 And as my final update, I am just going to
19 highlight a few significant cases from our last six
20 months. In the DeFrancesco vs. Union Railroad Company,
21 the Administrative Review Board explicitly adopted the
22 analysis in OSHA's Fairfax memo on injury reporting and

1 retaliation as the standard for evaluating whether a
2 railroad can escape liability in whistleblower case by
3 referencing its record for disciplining employees for
4 safety violations, regardless if the employee reported
5 an injury. So we consider that significant.

6 Earlier this year, the regional solicitor in
7 our Region 9, the San Francisco regional office, filed
8 a claim in the U.S. District Court against Skyway
9 Trucking, enforcing the terms of a settlement agreement
10 that was brokered in FY '13. And the solicitor is
11 seeking back wages and reinstatement. And this is
12 significant because it is the first time a regional
13 solicitor has sought to enforce the terms of an OSHA
14 settlement agreement in U.S. District Court.

15 In July of this year, OSHA ordered Oak Harbor
16 Freight Lines to pay \$20,000 in punitive damages, after
17 Oak Harbor suspended a 25-year commercial truck
18 operator without pay at its Portland, Oregon terminal,
19 after he did not feel well enough to drive. OSHA's
20 investigators found the company's attendance policy
21 encouraged drivers to operate trucks while sick or
22 exhausted. And drivers absent due to illnesses or

1 exhaustion had negative notes placed in their personal
2 records and faced possible discipline or termination.

3 OSHA has repeatedly asked Oak Harbor to change
4 the attendance policy, but the company has not
5 complied. This is the second time the agency has found
6 Oak Harbor retaliated against a truck driver who
7 invoked federal safety rules.

8 In one more case, in the spring, OSHA
9 investigators determined that Union Pacific disciplined
10 a 35-year employee after a freight engineer reported
11 injury sustained in a December 2013 collision, where
12 the employee received medical attention. The conductor
13 who was working with the engineer on the worksite was
14 not injured because he jumped from the locomotive
15 before the impact occurred and was issued significantly
16 less discipline. Union Pacific was ordered to pay the
17 engineer close to \$363,000, including punitive damages.

18 So despite the success we've seen of these
19 cases, we still have a lot of work ahead and us and I
20 appreciate all the work you are doing to help us.
21 Thank you.

22 MR. ROSA: Thank you, Mary Ann. Any

1 questions? Yes, Marcia?

2 MS. NARINE: Good morning. Thanks for the
3 reports. I have three questions. First, you mentioned
4 a legal concept course that your employees are taking
5 or are being designed. I was wondering if you could
6 explain that. And I can either tell you the other two
7 questions and you can pick the order to answer them or
8 --

9 MS. GARRAHAN: Okay. No, we'll start with
10 that one.

11 MS. NARINE: Okay.

12 MS. GARRAHAN: Because we have a legal concept
13 course that we do for our safety and health inspectors,
14 you know, as well. But I'm going to turn to Anthony
15 because he was on the committee that has really made
16 the recommendations for the improvement to our
17 training.

18 MR. ROSA: Sure. And before, I just want to
19 give you a little background about how we came about
20 with the enhancements to the training program. Before
21 we got into the work group, there were two courses;
22 there was what we call the 1420 and the 1460. One is

1 the basic course, primarily, Section 11(c), and the
2 second course was the federal statutes course, which
3 covers all the ALJ statutes.

4 So the two courses, for many years, were
5 statute-based. It was specific on what the statute was
6 about. What we decided to do is first, we needed to
7 revise the course competencies for what investigators
8 would have following the model that has been used for
9 compliance officers on the safety and health side.
10 Once we develop that and what the competencies we
11 needed for investigators, we decided to take the
12 courses and either enhance or eliminate and start
13 fresh.

14 So the 1420 course has remained, but it has
15 been enhanced and now we call it the basic fundamentals
16 course because that gives you sort of a cradle-to-grave
17 process. The other four courses, and one of them is
18 the legal concepts course, are processed-based rather
19 than statute-based. So specifically, on the legal
20 concepts, we're looking at specifics with regard to
21 what legal issues. It may involve a lot more of the
22 ALJ statutes; it may involve a lot more of scenarios

1 like retaliation by association, leeway doctrine.
2 Those kinds of things that have a lot more legal weight
3 that we need to do further analysis. For example, the
4 other course that we mentioned earlier is the complaint
5 resolution course. We're trying to get some techniques
6 out there to help investigators find ways to resolve
7 cases to get to negotiation techniques.

8 Another course that we're working on that has
9 been completed and will be launched very soon is
10 interviewing techniques. We have a lot these courses
11 already on the safety and health side. We're trying to
12 bring them into the whistleblower scenario.

13 MS. NARINE: Great. Thank you.

14 MR. ROSA: You're welcome.

15 MS. NARINE: The second question was that you
16 indicated that in 25 percent of the cases you had sent
17 them back for additional questions. What happened in
18 those situations where decisions changed, reversed? If
19 you know.

20 MS. GARRAHAN: We're trying to get a better
21 data system that is going to really keep track of that.

22 MR. ROSA: Yes.

1 MS. GARRAHAN: That's one thing Anthony is
2 going to be talking about.

3 MR. ROSA: There have been some cases. And
4 even from my former region, when I was in Region 4,
5 that one particular case we sent back, that resulted in
6 a settlement.

7 MS. NARINE: Okay.

8 MR. ROSA: We have a case that we sent back to
9 another region and it actually was filed in District
10 Court recently.

11 MS. NARINE: Okay.

12 MR. ROSA: So there have been a number of
13 cases. The majority have come back and they still have
14 been, you know, we have still the appeal or the review.

15 MS. NARINE: Okay.

16 MR. ROSA: But the process allowed us to look
17 at it from not being investigator, being on the outside
18 looking in.

19 MS. NARINE: So fresh eyes.

20 MR. ROSA: As a fresh eye. Right. And to see
21 if there was something else that we probably could have
22 done, gathering other pieces of information; done

1 another couple of additional interviews that we
2 should've done, but there have been a number of cases
3 that the outcome has changed.

4 MS. NARINE: Okay. Thank you. And then the
5 last question is you indicated that you're working
6 with, I guess, the other agencies have hotlines. Are
7 those hotlines run by outside vendors?

8 MS. GARRAHAN: Yes.

9 MS. NARINE: Okay. So do the outside vendors
10 indicate Mr. Anonymous Caller, did you know that you
11 could also file a claim through OSHA, or do those
12 outside vendors forward complaints directly to OSHA for
13 handling?

14 How is that linkage with OSHA actually
15 occurring?

16 MS. GARRAHAN: Yeah. Well, my understanding
17 is that we have certain text --

18 MR. ROSA: Correct.

19 MS. GARRAHAN: -- that we have given the
20 hotline to use --

21 MS. NARINE: Okay.

22 MS. GARRAHAN: -- that actually gives

1 information on how to contact us.

2 MR. ROSA: Right. We have some specific
3 scripts, scripted language --

4 MS. NARINE: So they have a script. Okay.
5 Perfect.

6 MR. ROSA: -- that when the call comes in,
7 we'll tell them these are the different avenues that
8 you have to file your complaint. You can call our 800
9 line. You can go online. You can call our local
10 office. These are avenues that you have to reach us.

11 MS. NARINE: So at some point -- I'm sorry.

12 MS. GARRAHAN: I was going to say, even in our
13 electronic complaint form, we've been modifying that
14 because we want to screen out complaints that need to
15 go to other federal agencies.

16 MS. NARINE: Right.

17 MS. GARRAHAN: And so wouldn't it be nice to
18 have one kind of electronic complaint form for the
19 federal government where, you know, somebody could go
20 and then it would be sent to the correct agency.

21 MS. NARINE: Okay. Thank you.

22 MR. ROSA: Thank you. Nancy, please?

1 MS. LESSIN: Good morning. Nancy Lessin,
2 United Steel Workers. I have two questions. The first
3 one is I know this predates your time, but there have
4 been employers that OSHA has developed accords with and
5 one of them was BNSF in, I believe, 2012. I'm
6 interested in understanding when that accord was
7 developed and that relationship. Has there been a
8 difference in the case numbers coming in, the
9 retaliation claims?

10 This would be, in particular, under FRSA,
11 since the accord from before -- are these accords
12 making any difference is the question? And it's
13 partially a data question, but it's partially
14 qualitative. So that's my first question.

15 MS. GARRAHAN: Okay. And Anthony, you want to
16 -- I know we looked at the data and we have seen
17 improvements, but a lot of it are some old cases.

18 MR. ROSA: That's correct.

19 MS. GARRAHAN: But go ahead, Anthony.

20 MR. ROSA: Yeah. A lot of it is still --
21 because our cases are taking a while, we're probably
22 still working on cases pre-accord and we do have cases

1 after the accord, but we have seen some positive --
2 it's like, positive change in the outcome and we're
3 still trying to gather all the data. But currently,
4 we're still working on cases that were pre-accord.

5 MS. LESSIN: What I would like to see, in
6 terms of data for this, would be in 2012, how many FRSA
7 cases came in from BNSF in 2013 and 2014, and 2015?

8 MS. GARRAHAN: And we have all that.

9 MS. LESSIN: And we will be asking for that
10 when we do the --

11 MR. ROSA: Sure. And one of the things that I
12 believe we have been working on is we're still getting
13 complaints that are the same complaints regarding
14 injury reporting.

15 MS. LESSIN: Yes.

16 MR. ROSA: What we're not seeing as part of
17 the accord was the application of the point system. So
18 we believe that that has been corrected. That that
19 point system has been somewhat addressed through the
20 accord. That was a part of the accord. But the
21 complaints coming in with regard to injury reporting
22 are still --

1 MS. LESSIN: Are still there. People may not
2 be getting points, but they're still getting retaliated
3 against.

4 MR. ROSA: Some other type of action.

5 MS. LESSIN: The second question has do to
6 with you just mentioned the situation with the rail
7 carrier, UP and a fine that included punitive damages.
8 Do you then end your relationship or do you track
9 whether or not an employer or rail carrier, you know,
10 under FRSA they can now take that to the court system.
11 Do you know if they took this case to the court system
12 to appeal it or they paid?

13 MR. ROSA: I believe they appealed it. You
14 may know about the UPKs, Christine. I'm sure. Did
15 they appeal?

16 MS. DOUGHERTY: It's been appealed.

17 MR. ROSA: It's been appealed, yeah.

18 MS. LESSIN: I mean, one of the questions that
19 I have, you know, is when OSHA does something like
20 this, what percentage are appealed and do we know what
21 ultimately happened? And does it make a difference
22 that OSHA, you know, found not only a merit finding,

1 but punitive damages?

2 In terms of what actually happens to the rail,
3 to the worker, has this made a difference or when it
4 goes into the court system and it's a de novo case, is
5 it like, irrelevant?

6 So I would, you know, I think a piece of this
7 is, you know, from our perspective is, you know, seeing
8 that, you know, giving advice to OSHA to do what you
9 can do, but I'd also love to be able to look at what
10 actually happens in all of this.

11 MS. GARRAHAN: And I think Nancy, I think
12 you're making something that's going to be discussed in
13 our data card. Right.

14 MR. ROSA: And that's a very good point that
15 we want to look at, once we issue an Order, what
16 happens afterwards.

17 MS. GARRAHAN: Absolutely.

18 MR. EHERTS: You know what? Just to comment,
19 I think Nancy is on the right track, but if you look at
20 the data, it seems like the investigators have four
21 times too many cases. I mean, they've got an average
22 of 23 per investigator and it needs to be six to eight.

1 MS. GARRAHAN: Right.

2 MR. EHERTS: So I think a very important
3 metric is how many cases are coming in and what you can
4 do to decrease that number. So outreach and
5 collaboration I think is critically important. Without
6 that, I think we're going to be looking at ADRs and
7 things like that forever.

8 MS. GARRAHAN: When you say "outreach," you're
9 talking about outreach to the employers on an anti-
10 retaliation program --

11 MR. ROSA: Absolutely.

12 MS. GARRAHAN: -- and not outreach on their --
13 right because we're getting outreach and getting more
14 complaints.

15 MR. ROSA: Exactly.

16 MR. EHERTS: Well, because the employees
17 understand they've got a process to do it. And I think
18 that's important because the more cases brought, the
19 more likely industry is going to see that they're going
20 the wrong direction and they need to do something
21 internally.

22 MS. GARRAHAN: Right.

1 MR. EHERTS: And I think it's just incredibly
2 clear to me, being from business, that this is
3 information that the company desperately needs. So to
4 retaliate against an employee from bringing this
5 information forward is crazy. And I think we just have
6 to get the employers educated.

7 MR. ROSA: Right. And if you see the data,
8 you'd see that the number of complaints coming keeps
9 going up. This year compared to last year, '15 to '14,
10 it was 190 more cases. And if you see the number of
11 cases that we closed, even though we closed a record
12 number of cases at 3,273, we barely broke even because
13 1,388 came in.

14 MR. EHERTS: Those are --

15 MR. ROSA: So we're barely breaking even in
16 just responding to those that are coming in.

17 MR. EHERTS: It reminds me of the old adage
18 about buy more ambulances for the bottom of the hill
19 and putting a fence at the top.

20 MS. LESSIN: Yes.

21 MR. EHERTS: And I think we need to stop
22 buying more ambulances and finally put a fence at the

1 top.

2 MR. ROSA: And that's why this best practices
3 discussion we'll have later on this afternoon is vital
4 to our program.

5 MS. GARRAHAN: Yes.

6 MR. EHERTS: Critically important.

7 MS. GARRAHAN: Dissemination is critical.

8 MR. ROSA: Yes, JJ?

9 MS. ROSENBAUM: Thanks. So you mentioned in
10 Region 9 that the Solicitor's Office had brought one
11 case for the failure to buy by settlement agreement to
12 District Court. And I was curious why that was
13 happening, whether that was being seen as a test case
14 within the subtler protectorate, whether that's
15 something that the solicitor's -- a decision the
16 Solicitor's Office takes on their own or whether that's
17 just how you're seeing it internally.

18 MR. ROSA: Well, in that particular case, I
19 mean, a lot of times we have been -- well, most of the
20 time, we have been successful in getting the parties to
21 agree to the terms of the settlement. Probably in this
22 case for the company side, the respondent's side.

1 In this particular case, it was clear that
2 that didn't happen and there are a number of factors,
3 and I'm not going to speak for the Office of the
4 Solicitor, but there are a number of factors as to why
5 the solicitor will or will not take the particular
6 case.

7 In this case, the evidence was strong enough
8 to say we have a very strong matter here. The company
9 didn't come up with their end of the bargain and we
10 decided to go ahead and proceed with that enforcement.
11 So there are a number of reasons why a settlement may
12 not be enforced in the core system.

13 Eric and then Greg.

14 MR. FRUMIN: So Mary Ann, you mentioned a
15 number of important cases recently, and some of those
16 you publicized. I wondered whether you had any
17 particular criteria or indicators to tell you which
18 sorts of cases are worth publicizing to demonstrate
19 that the agency flexes its muscles and tell people
20 about that.

21 Obviously, some of them show up because
22 they're kind of off the chart cases and we see them on

1 OSHA's website, but I'm sure there are many times more
2 cases that are settled or prosecuted favorably, which
3 don't.

4 So what's in your thinking or have you given
5 much thought to how you decide which cases you want to
6 put out there and let the public know, employers,
7 workers, or whoever that you're being aggressive in
8 pursuing these cases and finding merit, et cetera?

9 MS. NARINE: Can I just follow-up on that? I
10 don't want to go out to turn, but it actually goes to
11 my question because when you were saying -- I don't
12 know if it was Oak Ridge, something -- the name of the
13 company that you had to tell them a second time.

14 My concern was, you know, Dave was talking
15 about, you know, employers need to be educated. At
16 some point, this company already knew that it had did
17 something wrong and you had to tell them a second time.
18 And so for some companies, it's a cost of doing
19 business. And I'm a management representative. All
20 right.

21 For some companies, they already know what
22 they're supposed to do and what they're not supposed to

1 do. So this is company already knew that. So do they
2 need to hear about the multi-million-dollar fine? Do
3 they need to have penalties that are much more
4 significant? Do they need to hear -- do companies need
5 to be fined more severely or do they need to have more
6 incentives to comply?

7 So it's kind of more of a macro question is --

8 MR. ROSA: It is.

9 MS. NARINE: -- because I'm not sure that --
10 that company knew it was doing something wrong. And
11 I'm not speaking for this company, but I'm just
12 assuming; they already knew. They were already
13 educated.

14 MR. ROSA: That's right.

15 MS. NARINE: The big companies already know
16 what they're supposed to do, so I'm not sure that
17 outreach to the big companies, you know, the Union
18 Pacific, they know what they're supposed to do.

19 MR. ROSA: Right.

20 MR. FRUMIN: I think it's a two-pronged
21 approach. I think it's got to be a strong compliance,
22 but along with that has to be outreach.

1 MR. ROSA: Right. No, I agree, but I'm just
2 worried about -- so that company really struck me as
3 why is this the second time? They already knew. So is
4 that fine big enough? And do you need to really do
5 something to make the smaller and the midsize companies
6 know this can happen to you so that you really get them
7 in line so that you don't have to come to them. And
8 maybe that's what helps bring the numbers down so that
9 your workers have the six to eight that they're
10 supposed to have and not the 23.

11 MS. GARRADAN: And I think what you're saying
12 is very much in line with how Dr. Michaels sees things
13 as well.

14 MR. ROSA: Yes.

15 MS. GARRADAN: And how we --

16 MS. NARINE: I think companies respond to
17 penalties and incentives.

18 MR. ROSA: Right. And companies also respond
19 to the media coverage. So we've had some experiences
20 with that and that's one of the reasons why -- UPKs,
21 for example, that is \$363,000; it includes the maximum
22 punitive damages of \$250,000. So the same thing we did

1 earlier in the year with Metro North that we discussed
2 in our April meeting.

3 One of the things that we look at, in the
4 statutes that do have punitive damage, is that we look
5 at the history. We look at the history of the company.
6 We actually look at the egregiousness of the act, but
7 we also look at the history. If you go back to cases
8 that we've had with Norfolk Southern, you will notice
9 that some of the punitive damages were a lower amount,
10 and as we had more and more cases, the punitive damages
11 went up because the history was building. Same thing
12 with UP.

13 If you look back now, you will see that there
14 hasn't been a case against Norfolk Southern because
15 they have worked with us in trying to get those issues
16 resolved. Some of the other companies it hasn't
17 happened and that's why in some instances they may not
18 have been a press release, but maybe on the second, now
19 the penalty, if it's allowed by the statute, it's
20 higher and it will allow for a press release.

21 And by the way, to answer your question, Eric,
22 we do have a criteria, similar to what we have on the

1 safety and health side that we have a SIC case memo, a
2 policy memo about when the area director is going to
3 issue a fine that is over \$100,000 or whatever it is.
4 It becomes SIC case. We have also a criteria of what
5 is considered a significant case on the whistleblower
6 side, depending on what the total dollar amount, or if
7 it's a novel issue. It may be a jurisdictional issue.
8 It may be a particular activity issue that may be of
9 novel -- something very interesting that will raise it
10 to the level of being significant, and then it goes
11 through the clearance process with the press release.

12 MS. NARINE: When I used to train people
13 around the world, the most important thing was a let me
14 tell you what just happened to the people in our
15 industry. This company got this fine. This company,
16 the Department of Justice is looking at them. That is
17 what got the attention of our operations people, is
18 seeing what happened to everybody else in our industry
19 because otherwise, it was like, well, that's
20 pharmaceuticals, that's not us. That's not us. And
21 when they saw it was other people in the industry,
22 that's when all of a sudden my training was relevant.

1 MS. NARINE: Okay. Eric. And then Greg has a
2 question.

3 MR. FRUMIN: So is this policy on, for lack of
4 a better word, significant cases? Is this in the
5 manual or is it somewhere else?

6 MR. ROSA: It's not in the manual. It's a
7 separate directive. It's a memo. It should be on our
8 website. Whether it's on a website or the OSHA
9 website, it is on the website.

10 MR. FRUMIN: All right. So if you could share
11 that with the Committee --

12 MR. ROSA: Absolutely.

13 MR. FRUMIN: -- that would be great. And I
14 think it would be worth us discussing it at a future
15 time.

16 MR. ROSA: And we're in the process of doing
17 some revisions to it as well. So we've been working on
18 it. Greg?

19 MR. KEATING: Thank you, Anthony. Mary Ann, I
20 just had a question. A comment and a question. I'll
21 start with the question, which is very excited that
22 OSHA issued these recommended practices and has a

1 schedule in place for public comment.

2 One of the things that occurred to me, though,
3 is you took what the best practices work group and then
4 the full committee unanimously approved and you shaped
5 and molded it a little bit. Is there going to be an
6 opportunity for either the work group or the committee
7 to give you any feedback in this time period when the
8 public is to comment? I don't imagine it would be, you
9 know, extensive, but I would think there might be some
10 interest in hearing some minor feedback from the
11 Committee on what you did with the recommendations.

12 MS. GARRAHAN: Yeah. And I understand that
13 this afternoon, if there is time after the
14 dissemination discussion that Anthony was going to turn
15 it over to you all to give us feedback on the document.
16 Now, from a timing standpoint, if it's turned back to
17 the work group to talk about and then, you know, it
18 just wouldn't work from schedule-wise if the best
19 interest is getting something out that we can start
20 sharing with employers because a work group would have
21 to go through the Committee to make recommendations to
22 us.

1 So certainly, I believe it's been mentioned
2 that anyone on the Committee can use our regulation.gov
3 site to comment individually. And certainly, if you've
4 had an opportunity to look at what we've done and you
5 want to make some discussion from the Committee this
6 afternoon, if there's time, we would certainly be open
7 to that.

8 MR. KEATING: Okay. And sort of related to
9 that -- and this is an individual comment, but you said
10 a moment ago dissemination is key. And I think what
11 Dave was talking about is really trying to get
12 businesses to buy into this so that we can create a
13 transparent culture and avoid retaliation to begin
14 with, it's critical. And I've said this since the
15 first meeting. And I'm very, very pleased and
16 appreciative of the efforts of Jon and the work group
17 to put this together.

18 I do have a comment, though, which is that I
19 think to get the buy-in and attention of business so
20 that they will cease on this and implement this, it is
21 going to be important to get them to understand that
22 this isn't just a recommended practice to protect

1 whistleblowers. Okay. It's also a recommended
2 practice to improve compliance and transparency in the
3 workplace; therefore, enhancing productivity and making
4 it a much better workplace.

5 So if we focus only on recommended practices
6 to stop retaliation, I don't think we're going to get
7 as much attention of the chief compliance officers of
8 the world, of the CEOs of the world, as we weave in
9 words like "compliance." "Transparency." And that's
10 my comment.

11 MS. GARRADAN: Okay.

12 MS. NARINE: Thank you for enhancing an
13 effective compliance program.

14 MR. ROSA: Right.

15 MS. NARINE: He put that in the title,
16 actually.

17 MR. KEATING: Absolutely.

18 MS. NARINE: That gets the compliance officers
19 to want to use it. It gets the boards to like it.

20 MR. FRUMIN: You know what else gets their
21 attention? Competitive advantage. That has the key
22 words too.

1 MS. GARRADAN: Okay. Good. You know, we
2 tried to put in some words into the document we picked
3 up from the recommended practices in terms of the
4 business case for it. And certainly, what your
5 thoughts are, we certainly will consider --

6 MR. KEATING: I hear that and I agree. I just
7 think that the title alone could really grab attention
8 if we weave in a few words around compliance,
9 transparency.

10 MR. ROSA: Good.

11 MS. NARINE: Especially as we discussed with
12 Dr. Michaels, possibly trying to promote this at
13 compliance conferences and that kind of stuff, if
14 compliance is in the title or in the main body. That
15 will get compliance officers to say okay, this is for
16 us too, it's not just for the plaintiff's bar or
17 something like that.

18 MR. ROSA: Right. Right.

19 MS. NARINE: And board members will then say
20 is this something we're looking at and you're get audit
21 committees to look at it. And I think you want this
22 elevated, especially because there is talk of having

1 board members, especially at bigger companies, trained
2 on it.

3 MR. ROSA: Sure. Very good point. Thank you.
4 Any additional questions or comments?

5 (No response.)

6 Okay. Thank you, Mary Ann.

7 MS. GARRADAN: Okay.

8 MR. ROSA: Let me just look at our --

9 MR. FRUMIN: Sorry. I just had one other
10 question.

11 MR. ROSA: Yes, Eric?

12 MR. FRUMIN: The training program that you are
13 working on for the staff, who do you envision providing
14 the additional training?

15 Are we still through OTI?

16 MS. GARRADAN: Yeah. We're working through
17 our OTI. And also, the good news is that we have hired
18 a full time whistleblower trainer at our training
19 institute recently, which is good because we've been
20 pulling resources from our field and that takes away
21 from our field, you know, doing their work. And so
22 this was a person who was a regional supervisory

1 investigator. First line manager of the investigator.
2 So that's good news. And they plan to hire at least
3 one other, if not two other trainers as well, depending
4 on how the budget goes this year.

5 MR. ROSA: Yeah. And one of the things we
6 looked at is, when we worked on the work group, is we
7 wanted -- currently, OTI, OSHA Training Institute, has
8 three tracks. They have a safety track, a health
9 track, and a construction track. Now, they have a
10 parallel whistleblower track.

11 So it's not just a standalone office, it's
12 actually a track that is going to have its own office,
13 its own leadership, its own curriculum, its own
14 development of materials, research, evaluations.
15 Everything else that is included in the training
16 program is going to have its own dedicated team.

17 MS. GARRAHAN: And the new intro course is
18 being provided the first week of December. So we're
19 very excited about that.

20 MR. ROSA: Right.

21 MR. FRUMIN: Who is the person who is the head
22 of that now? The person she was talking about who --

1 MR. ROSA: He was a regional supervisory
2 investigator in Region 2 and now he has taken the role
3 as the first instructor. He reports to a higher
4 command. OSHA Training Institute is still working on
5 getting additional people to complete that particular
6 track group, but he was a subject matter expert that is
7 an investigator; was a regional supervisory
8 investigator for that region and now he is going to be
9 heading up the training team.

10 MS. GARRAHAN: And we're working very closely,
11 by the way, with our training group too. So we want to
12 make sure that they are providing the right --

13 MR. ROSA: Because all the materials are
14 coming to us for our review and approval to make sure
15 that both DWPP and our directorate of training and
16 education are working together and the approval of the
17 materials. Make sure that they're falling in line with
18 our instructions.

19 MR. FRUMIN: So are there any particular
20 federal agencies who handle retaliation cases who you
21 think are most likely -- I mean, like, the highest
22 priority agencies for you to partner with in enhancing

1 and revising this curriculum?

2 I mean, I can think of the usual ones that
3 employment lawyers think about that come off the tip of
4 your tongue right away, but I'm just wondering from
5 your standpoint, which are the ones who you think have
6 the best wealth of knowledge and experience in training
7 anti-retaliation investigators as compared to, you
8 know, the people who agencies will do training on
9 safety issues or healthcare, blah, blah, blah.
10 Whatever. So I'm wondering if there are any particular
11 agencies who stand out as the people you want to
12 partner with.

13 MR. ROSA: Agencies, meaning our partner
14 agencies that are giving us training?

15 MR. FRUMIN: No, the agencies who you want to
16 partner with to develop better training for your staff.
17 Like, LORB, EEOC.

18 MR. ROSA: Right.

19 MR. FRUMIN: Not necessarily people you are
20 partners with, but which are the ones that roll off the
21 top of your tongue.

22 MR. ROSA: We are actually engaging ourselves

1 with offices like Office of Special Counsel and EEOC,
2 and MSHA --

3 MS. GARRAHAN: And DoD and MSHA. Right.

4 MR. ROSA: DoD. We recently did a
5 presentation together with DoD. So we are working with
6 all the other -- we are working very diligently in
7 contacting all of our other agencies that have a
8 whistleblower provision to also gain some insight as to
9 how their process works and if there is some technique
10 that they have that is actually a good idea that we
11 could probably implement on our own, or vice-versa.

12 MR. FRUMIN: So where does the Board, the Labor
13 Board fit into that panoramic? You didn't mention
14 them, I did. I was wondering whether they're an
15 important source for you or whether it's just one of
16 the other agencies out there.

17 MS. GARRAHAN: Yeah. No, certainly. The
18 National Labor Relation Board?

19 MR. FRUMIN: Yes, NRLB.

20 MS. GARRAHAN: We have visited them recently.

21 MR. ROSA: That's right. One of the things we
22 actually do with the Labor Board, and I don't know if

1 you've -- we've mentioned this in past meetings, but
2 our Section 11(c) statute is very limited in the 30-day
3 timeframe.

4 MR. FRUMIN: We talked about that problem
5 here.

6 MR. ROSA: Right. And the NRLB has six months
7 to file a complaint. So when we get an untimely
8 complaint, we encourage the complainant to contact the
9 NRLB and we actually share all of our complaints that
10 had been dismissed as untimely with the NRLB so that
11 they can at least get an idea of how much traffic is
12 going to them and how they can address those issues.

13 MS. NARINE: Is that a formal arrangement is
14 or that just kind of an informal --

15 MS. GARRADAN: We have a formal arrangement.

16 MR. ROSA: We have a formal memo. Yes. We
17 have a formal process that we did last year.

18 MS. GARRAHAN: I mean, we're learning a lot
19 from -- and we have a lot more to learn, but even the
20 U.S. Postal Service --

21 MR. ROSA: Yes.

22 MS. GARRAHAN: -- you know, we've met with the

1 Postal Service, but we've also met with the OIG of the
2 Postal Service, and what we found out is that, for
3 example, under 11(c), if it's filed -- if it's not
4 filed timely, we can refer those to the OIG and the OIG
5 will handle the discrimination complaints --

6 MR. ROSA: Exactly.

7 MS. GARRAHAN: -- that are untimely on our
8 part. Untimely filed with us.

9 MR. ROSA: Okay. Any additional questions? I
10 thought there were other hands.

11 (No response.)

12 All right. Well, thank you very much, Mary
13 Ann. I just wanted to make note that since we talked
14 about we would put this as an exhibit, our charts. I
15 just want to let you know, as of today, it may or may
16 not have been on the page, but we have asked our IT
17 folks to put this.

18 This is always on our webpage, but it may not
19 have this FY '15 yet. We just submitted that, so it
20 should be up momentarily. But this is now going to
21 Exhibit No. 3. And with that, it's 10:31. So we'll
22 have a 15-minute break and come back at 10:46.

1 Thank you.

2 **(Brief recess.)**

3 **DATA DISCUSSION**

4 MR. ROSA: Okay. We want to reconvene.

5 Before we proceed with the next topic on the agenda, I
6 just wanted to ask those that have not introduced
7 themselves earlier to do so now.

8 MR. ZUCKERMAN: Hi. Good morning. My name is
9 Jason Zuckerman. I work on the plaintiff's side of
10 these cases.

11 MR. CHARTIER: George Chartier OSHA
12 Communications.

13 MR. ROSA: Okay. Thank you. All right. The
14 next topic is a group discussion on data. I know the
15 Committee has been very interested in getting to
16 understand a bit more about our data and we want to
17 hear from you as to what other types of data issues you
18 would want us to share with you. I wanted to give you
19 a quick, I guess, overview the data as we have done in
20 the past. Just give you a quick outline.

21 In September of 2014, when we had our meeting
22 in September, we talked about database and we did a

1 presentation that included a handout of screenshots and
2 we talked about the sort of cradle-to-grave process of
3 how we have our fields; what we do when we collect
4 information. And what we do when a complaint comes in,
5 what information we gather and how do we proceed to the
6 determination type and even after that.

7 During that discussion, we also talked about
8 the limitations that we have to our database. One of
9 those, specifically, that are working with our IT
10 department is regarding our inability to select more
11 than one case type. So I'll give you an example. We
12 have a trucking case that falls under STA, Surface
13 Transportation Act. But it's also a worker protection
14 issue that may fall under Section 11(c), and our
15 database only allows us to check one case type. And it
16 has another section called statutory implications. And
17 there, we can checkbox anything else; any other statute
18 that applies. That's implied or that that applies to
19 that particular case.

20 The problem with the system is that it doesn't
21 track both cases; it's only tracking one case. And if
22 the complaint, for example, becomes whatever the

1 determination is -- let's say it becomes a dismissal, a
2 non-merit case, the 11(c) portion, if it's appealed,
3 comes to the directorate, as Mary Ann had mentioned
4 earlier, while the STA case goes to the administrative
5 law judge, but there's no way for us to track both.
6 The only one that the system is going to allow us to
7 track is the one that's called case type.

8 So for the most part, we usually select the
9 STA case or the AR-21 case or the SOX case or whatever
10 the other case is because that may have a much longer
11 appeal process because it goes to AOJ, ARB, Court of
12 Appeals. It may be run backwards and back and forth,
13 so we usually use that as a case type and use 11(c) as
14 statutory implication.

15 Same thing applies with an EPA statute, where
16 you may have a case that may apply to a number of EPA
17 statutes. We have six. So which one of those six is
18 the case type and which one of those is the statutory
19 implication or a lesser statute, for lack of a better
20 term.

21 So those are some of the limitations to the
22 system and we have been working with our IT department.

1 We have two members of our IT department that are here
2 in case there are any questions that come up,
3 technical. I brought the folks here to help us out.

4 MR. FRUMIN: If we have questions as we go or
5 do you want to finish first?

6 MR. ROSA: Well, I just want to give a quick
7 overview of what we did in the last presentation. We
8 have been working on doing some updates. We have a
9 whole slur of fields that we want to add to the system.
10 We have a whole slur of reports that we want to create
11 and we have been working very hard. Our IT folks have
12 been working very diligently with us.

13 Earlier this year we did a launch and we added
14 some additional fields or we actually made some fields
15 mandatory that were not mandatory and then we ended up
16 having to roll it back because we were losing data. So
17 we didn't want that to happen. So there were also some
18 technical issues with the system as well. You know, on
19 the safety and health side, we mentioned that they had
20 moved over to the OSHA Information System (OIS).

21 I mentioned back in September of 2014, all of
22 our systems back in the day used to be on the old NCR

1 system. Some programs, including the whistleblower
2 program, was moved over to what we call the WebIMIS
3 system. So there were a period of time that
4 whistleblower was far more advanced than safety and
5 health. Now, safety and health has kind of taken the
6 lead and they are on OIS and we are on WebIMIS. Is
7 there a possibility that we would move to OIS?

8 We're hoping that we will be able to do that,
9 but in the meantime, while we're in a WebIMIS, we have
10 been working with the IT folks to do some enhancements
11 to the system. One of the things that we're working on
12 is we have our North American Industrial Classification
13 codes, NAICS codes. We have it in our system, just
14 like it's in the safety and health system. The only
15 issue was that we never had it mandatory.

16 So one of the things, as we move over to doing
17 some outreach, especially on Section 11(c), if we do
18 outreach to railroads, we know the companies. We know
19 the airlines. We know the banks. We know what some of
20 these industries are, but on 11(c), it can be a
21 manufacturing plant; it could be poultry facility; it
22 could be a construction site; it can be a number of

1 things. And without having that NAICS code, we do not
2 know where the complaint is coming from and whether we
3 should be getting more complaints or whether we're
4 getting too many complaints and what type of outreach
5 are we going to do to either engage employees to raise
6 concerns or engage employers to have systems in place
7 so that they can address these issues in-house. So we
8 made that now fixed, and as of October 13 of now,
9 recently, our IT folks worked on this data loss issue
10 that was going on. Basically, we repopulated the
11 information that we've lost and now we've relaunched
12 that software.

13 So now, as of a month ago, we are now having
14 this mandatory NAICS code. Obviously, it's too
15 premature for us to do any data analysis at this time,
16 but now the user is required to put a NAICS code for
17 every single case. In a year or two years from now,
18 we'll be able to get this data and have a better feel
19 as to what we're going to do to target and what
20 information we can also put out in the public because
21 one of the things we want to do, currently, as we
22 mentioned as the exhibit, this is all we have, the data

1 that is out in the public. All of these charts that we
2 put out every year. But definitely, we want to put
3 more information out in the public.

4 Some of the challenges that we have is unlike
5 the safety and health data, whistleblower data is
6 protected by -- it's covered by the Privacy Act. So
7 safety and health data, you can go onto OIS and you can
8 find out if you call a particular company ABC
9 Construction, you would know how many complaints they
10 had; how many inspections were conducted; what type of
11 inspections they were; how many inspections are
12 ongoing.

13 On whistleblower side, you don't have that
14 because the Privacy Act prevents us to give that
15 information out. But there is information that we
16 could put out, provided that we do some redaction to
17 some of that data. So those are the things that we are
18 working on, but first we need to get the system up and
19 running with the fields that we need to get the fields,
20 and then we can take that information and put into a
21 website that is available to the public.

22 So some of the things that we recently added

1 also was we work with our state plan partners and we
2 get a lot of complaints, especially the online
3 complaint form, which, by the way, we received over
4 7,000 online complaints since December of 2013. So
5 that has increased the number of cases that we are
6 working on. But a number of these cases go to our
7 state plan partners and we are documenting those in the
8 system, but we didn't have a simple checkbox to show
9 state plan referral. So now we added that in the
10 system. So as we move along with additional revisions
11 to the system, we are trying to capture specific
12 actions that we're taking.

13 So if we did an administrative closure case,
14 for example, because we referred that to the state
15 plan, we would check the box to say refer to state
16 plan. What that does, it helps us, later on, when the
17 complainant, after exhausting all the administrative
18 remedies afforded by that state, wants federal OSHA to
19 get involved. It allows us, because we have the
20 record, to do a federal review because we would
21 consider that a duly filed complaint versus doing a
22 CFPA, which is when it is not duly filed.

1 So those are some of things that we've added
2 to the system. Some of the things that we are working
3 on adding to the system, we have to add ADR codes. We
4 want to have a date that the ADR was started; a date
5 that the ADR ended, and what was the outcome of the
6 ADR. Was it settled? Was it not settled?

7 We're also looking to see, similar to safety
8 and health, where they have initial penalty and current
9 penalty. We only have one box that says what the
10 relief is. If the relief changes, it erases the
11 history. So if we ordered \$300,000 and it was settled
12 for \$200,000, we don't know that because we have to
13 change the \$300,000 to \$200,000, and the \$300,000 is no
14 longer in the history.

15 So it's hard for us, even when Dr. Michaels,
16 you know, mentioned earlier, we had ordered \$25
17 million. That's including any revisions that we did to
18 the system. We may have ordered 26 or 27 million and
19 collected 25 million, but those are the things we're
20 working on with the system. Safety and health has that
21 on the OIS system. We don't have that in our system.
22 So we're trying to add some additional fields to our

1 relief page or the determination page. So how much is
2 it that we ordered and much was actually collected?

3 We're also looking at other types of codes,
4 similar to what was mentioned on the OIG report about
5 docket dismiss. You may have seen, and we're working
6 on doing some clarifications to our manual about what
7 we consider the docket dismiss case.

8 And I just want to clarify to let you know
9 what that means. Section 11(c), the Asbestos in the
10 Schools, AHERA, and the International Safe Containers.
11 Those three cases, we can do an administrative closure
12 with the complainant's consent, which means it doesn't
13 get docketed. All the other 19 statutes need to be
14 docketed. It's required that they are docketed, even
15 if we don't investigate.

16 So if we get a SOX complaint that's a year
17 old, we have to call it -- we have to docket that case,
18 but we have to dismiss it because unless there is any
19 equitable tolling that will apply, it's untimely
20 because it's beyond 180 days from the alleged action.
21 But right now, when I run this report and it will show
22 the number of -- if you look in the report and it gives

1 you like, determinations, it will show as a dismissal.

2 You would think that we actually investigated
3 and we found non-merit, when, in fact, we never
4 investigated. It was an administrative dismissal
5 because it was untimely, but there's no way to capture
6 that because we don't have a field in the system that
7 checks docket dismiss and why? Was it untimely? Was
8 it lack of jurisdiction? Was it extra territorial?
9 What were the issues that required to not proceed with
10 that case? The gatekeeper provisions.

11 So the system is very limited to that. So
12 when you see the number of dismissals and you see that,
13 a high percentage of those are cases that we didn't
14 even get to. So we're looking at putting that
15 particular field in the system to help us track the
16 docket dismiss.

17 Another thing we're looking at in the system
18 is equitable tolling. Sometimes a complaint does come
19 in late, but there are certain principles that we look
20 at, you know, did the employer try to shade or cover up
21 the issue so that the employee would be untimely?

22 Did the employee file in the wrong venue?

1 Whether there other extenuating circumstances that the
2 employee could not file timely, like, having, you know,
3 we've had cases where the employee had a head injury
4 and was in the hospital for several months.

5 Well, of course, they're not going to file in
6 30 days. So we look at those issues, but we don't have
7 a way to capture that either. So we're adding a field
8 in the system that's going to say, "Was equitable
9 tolling applied and what was it?"

10 So again, there's a lot of things we have in
11 the system that we can't track. Adverse action fields.
12 Right now, we only have one field for adverse action.
13 But what if a complainant was demoted, suspended, and
14 then terminated? You have three adverse actions. We
15 can only capture one. Which one do we put in there,
16 the closest one to the 180-day time period, or should
17 we put all three? Because technically, when we do our
18 report and we do our investigation, we're looking at
19 all the adverse actions.

20 The other problem that we have is the system
21 allows us to put multiple complainants, but it only
22 allows us to put one adverse action.

1 We must've lost Christine.

2 So what if we get three complainants scenario
3 and each one had an adverse action on a different day?
4 Which day do you put in the system?

5 There she goes. There she is.

6 Another thing that we're looking at in our
7 system is we currently have two methods; administrative
8 closure, if 11(c) has gotten AHERA and the complainant
9 consents, I don't proceed. I understand that I'm late
10 or it's an EEOC matter and not a whistleblower matter.
11 But we don't have a way to capture inquiries.

12 We get many calls from complainants or from
13 individuals in general that just want to get
14 information from us and we have no way of capturing a
15 lot of this technical assistance that we are providing
16 to the public. Similar to the safety and health side
17 where they do have a form to capture it. We don't have
18 anything to capture. So because that is man-hours.
19 That is a lot of time that we're taking, providing this
20 technical assistance. So we're working on trying to do
21 that.

22 I mentioned about the damages section. In

1 addition to monetary relief, what other relief did we
2 order? Did we order them to provide a neutral
3 reference or a non-disparaging clause? That should be
4 an item to be recorded in the system. Did we ask the
5 employer to clean the record and clean any disciplinary
6 records? We don't have any way of capturing that. Or
7 any training requirements that we did as part of a
8 settlement or any posting requirements. So there are a
9 lot of other things we're trying to gather. And I'm
10 giving you all these ideas because I wanted you to know
11 where we're heading so you can give us --

12 MS. NARINE: You want to ask all these
13 questions. What about this?

14 MR. ROSA: You're right. And there may be
15 other things that we should be capturing.

16 MS. NARINE: I anticipated you, Nancy.

17 MR. ROSA: As Mary Ann mentioned, we're moving
18 into more of an electronic system. We have a field
19 called additional tabs -- additional information tab.
20 We want to convert that into a diary sheet. If I get a
21 call from a congressional office with regard to a
22 constituent in Dallas, Texas or in Chicago and they

1 want to know what's the status of this case, I have to
2 call the region -- and I look in the system, I don't
3 know what happened. But if all the diary entries are
4 done to the system, I can easily pull it up and we can
5 say this is what's going on with the case. And so
6 we're working on trying to create an electronic system
7 so that when the investigators are entering this
8 information, any contact they made with the parties,
9 anybody that's in that system can see that data. We
10 may not have the ability to modify the data because
11 they are the owners of that record, but we will have
12 the ability to see what's going on and to be better
13 responsive to any inquiries that come in.

14 I mentioned about the statutory implications
15 and the case types. We're looking for, you know,
16 information regarding attorneys. We have complainant
17 information, but we don't have information of whether
18 this was an attorney for the complainant or not. Same
19 thing with respondents. We can promote respondents,
20 but the system now has a problem that it doesn't allow
21 us to put this is a company versus this is a person
22 because many of our statutes, we can actually name an

1 individual, rather than just a company. The system,
2 you have to check one of the two. So if I say ABC
3 Construction and that's a company and I wanted to say
4 that Anthony Rosa is the president and he's also named,
5 I can't make him a person, he's still a company.

6 So there are little things that we're trying
7 to work with the system to try to get working.
8 Differences in like, preliminary reinstatement. When
9 is the reinstatement ordered? When is preliminary
10 ordered? Again, did we order reinstatement? Did it
11 actually occur?

12 The number of cases that we mentioned earlier
13 today about number of reinstatements are those that we
14 either got the reinstatement or we ordered the
15 reinstatement because would mark that in when we do a
16 merit case. But did it actually occur?

17 MS. NARINE: Settlement.

18 MR. ROSA: Right. At the settlement, many
19 times it doesn't get to reinstatement. So the before
20 and after is very critical for us to be able to say --
21 and it goes back to the question that Nancy had
22 mentioned earlier -- I think it was Nancy earlier,

1 about when we go to through court system of what
2 happens afterwards. Because when we do this, what does
3 the ALJ say and what does the ARB say and what happens
4 afterwards? And we're not able to capture that because
5 we only have one set of fields and we should be able to
6 have multiple set of fields for the different stages of
7 that investigation.

8 And two last things we're trying to work on is
9 we want to try to automate the system. All of our
10 letters are done manually. So we don't have any kind
11 of correlation to take I want to do a notification
12 letter; I'm going to type 4 dash blah, blah, blah,
13 blah, the case number and it's automatically going to
14 populate the information on the letter. We have to
15 manually type all that in.

16 Same thing with the findings. Everything is
17 done manually. The report of investigation is done
18 manually. We don't have the ability to put certain
19 information and have template letters. They can be
20 modified or tweaked afterwards, tailored, but
21 currently, we don't have the ability to do that.

22 So we want to try to automate the system so

1 that there is also consistency throughout the regions
2 as using the same type of letter. That's one of the
3 big challenges that we have is trying to create this
4 consistency, especially in administrative disclosure
5 letters and notification docket and dismiss letters,
6 secretary's findings, settlement withdrawals. All
7 different types of letters.

8 So we're trying to work on that. Maybe a long
9 wish list, but there are a lot of things that we're
10 working on with the system. And the last thing that
11 we're also working on is a tickler reminder in our
12 reporting mechanisms. So if an employer is due a
13 response in 20 days for a position statement, then in
14 like, 15 days, it'll show up on your screen and it says
15 ABC Construction owes you a position statement in five
16 days.

17 When you have an investigator that has an
18 average of 23 cases, and many of them with 30 or 40
19 cases, it's hard to keep track of what cases are coming
20 up due or what are past due. So we're trying to see if
21 we can develop a tickler system that would remind us
22 ahead of time. And we have that on the safety and

1 health side. I used to do all of those tracking
2 reports on upcoming abatements and we would contact the
3 employer and say you have five days from your last, you
4 know, abatement date. What are you doing about it?
5 Rather than going after the fact and saying you're past
6 due.

7 So again, those are a lot of things that we're
8 working on. Online complaint form; we get a lot of
9 these complaints. We placed in what we call a holding
10 tank, but that data is not automatically transferred to
11 the OSHA-87 or the whistleblower form. So we're
12 working on how we can get that data automatically
13 transferred once we know that the case is going to be
14 investigated and not referred elsewhere.

15 So it's a lot of -- sometimes there's a lot of
16 duplicate entry in some of our fields. And even on the
17 appeals, WebIMIS database on the appeals side has a
18 missing -- doesn't have all the fields that we are
19 using to track our appeal process or our request for
20 review process that we have an access database for. So
21 we're trying to find a way to reconcile these systems
22 so that everything is in the same place.

1 So that kind of thing gives you an idea of
2 where we are and where we're heading. But like I said
3 earlier, we're trying to look for the trends, where the
4 complaints are coming in my industry, by the NAICS
5 codes. What agencies are we referring cases to? You
6 know, we're going to be able to track. Is this going
7 to a state plan? Is this going to EEOC? Is this going
8 to OSC? Where is this complaint going to, to determine
9 trends to see if maybe we need to modify our reporting
10 systems?

11 Mary Ann mentioned, we're working very hard on
12 our online complaint form and we have a prototype that
13 we're working on that it's user-activated. So if the
14 person clicks that they believe that they're retaliated
15 because they're Hispanic, a window pops up that says
16 you may want to contact the EEOC. And it directs the
17 user directly there, rather than going through our
18 process because we're eventually going to send them
19 there anywhere.

20 MS. NARINE: Right.

21 MR. ROSA: So we're trying to work on being
22 very user friendly to bring that person, that

1 individual to the appropriate agency automatically.

2 Let me see, what else? Again, I mentioned
3 about we're working on the appeal process and what
4 we're doing on settlements, pre and post. So some of
5 the things that we wanted to ask you is what data does
6 the whistleblower program not currently collect that
7 you think we can collect. And what data could be
8 useful to the public and why? Again, within the
9 confines of the Privacy Act. What we can or cannot
10 disclose based on the Privacy Act.

11 I know some of you had questions, so please
12 feel free. Nancy?

13 MS. LESSIN: All right. So I have several.
14 I'll start with in October an online publication called
15 *Fair Warning* published an article about whistleblower
16 cases focusing on rail. They displayed, for some
17 period of time, the employers that have had the largest
18 number of whistleblower complaints. I believe number
19 one was the United States Postal Service. Eight of the
20 top ten were rail carriers. I am assuming that that
21 information came from an FOIA that came to
22 whistleblower. Am I making that correct assumption?

1 MR. ROSA: I don't recall if it came through
2 an FOIA or it just came directly from the media.

3 MS. LESSIN: Okay.

4 MR. ROSA: It may have come -- I believe it
5 may have come from an FOIA.

6 MS. LESSIN: And then two questions related
7 to this. One is can we, on this committee, get the
8 dataset that went to *Fair Warning*, now that it's been
9 put out into the public? And second, related to this
10 question, when you get an FOIA and it goes to the
11 public, is there a website that you then publish that
12 data on because now it is in the public domain?

13 MR. ROSA: That's an interesting question.
14 That's something I will look into because under the
15 Freedom of Information Act, or the E-FOIA, any FOIA
16 request that is made three times or more, it becomes
17 what they call a hot FOIA and it has to be in a general
18 location available to the public. But you're asking
19 me, even if it is ones that has gone out.

20 MS. LESSIN: Yes.

21 MR. ROSA: So that's something that I will
22 look into to see if we can make that publically

1 available. But I do know that, for example, any
2 request for records, once it triggers three different
3 requests, it has to be made publically available under
4 the E-FOIA of 1996, the amendments of E-FOIA. But I
5 will look to see that it can be made available.

6 MS. LESSIN: Great. Okay. Second question is
7 about the ADR from the pilot cases. Can we get the
8 specific data that you've looked at that says gee, this
9 is working, we should expand it, including, you know,
10 by statute, how it's worked, including what the
11 complainant got compared to a dataset that shows what
12 complainants got if they didn't use ADR. So that would
13 be very useful to look at.

14 The third thing that I'd like to see is a
15 dataset that breaks down some of this information,
16 specifically OSHA 11(c) and FRSA by how many complaints
17 were related to workers being retaliated against for
18 reporting an injury or injury reporting issues versus
19 how many complaints are coming in for workers being
20 retaliated against because they raised a health and
21 safety issue. And I know we've seen some of that in
22 the past. I would love to see the current data broken

1 down by that and that may have, you know, I'm not sure
2 if STAA would have that as well, but anything that
3 would have kind of those being retaliated against, in
4 the injury reporting arena versus raising a health and
5 safety complaint.

6 And then the last question, at this point, is
7 you talked at the beginning about if a case is put in
8 under this then they can only track it under STAA and
9 not under -- what percentage of cases that you have,
10 have this dual or possibly, you know, triple -- what
11 percentage of cases fall into that problematic category
12 where you can only track?

13 MR. ROSA: It's a very small percentage of
14 cases.

15 MS. LESSIN: Okay. All right.

16 MR. ROSA: Very small. I don't even want to
17 give a figure, if it's two, three, or four percent. It
18 may not be a lot, but it does happen. And it happens
19 primarily with STAA in 11(c), and it happens with the
20 EPA statutes. Sometimes it could be a water treatment
21 plant that has toxic substances.

22 MS. LESSIN: Right.

1 MR. ROSA: That's two statutes right there.
2 And it happens sometimes 11(c) and EPA. I remember a
3 case that I worked on in South Carolina that was
4 asbestos. So it's asbestos to the public and it's
5 asbestos to the worker. So it could be that scenario
6 too.

7 MS. LESSIN: Okay. All right. And then what
8 is the timeframe for all of these changes? And maybe
9 this is for your IT people, but what's the timeframe
10 for turning over an old clunky system into the nimble
11 system that you're looking for?

12 I mean, should we expect this by, you know, by
13 the end of the year or by five years from now?

14 MR. ROSA: There is no timeline. There are a
15 lot of priorities that we're working on. There are a
16 lot of limitations, especially in the resource arena
17 for us to work on this. We don't have, I mean, we've
18 been working -- again, a lot of times it depends on
19 just the system itself. If we didn't have this data
20 loss issue, we probably would've been a couple of steps
21 ahead, but we had to take a step back to try to fix the
22 problem with the data. So we don't have any particular

1 timelines, but we have at least put together a
2 comprehensive list of the things that we want the
3 system to look like.

4 I think there is -- I'm sure if there is a FY
5 '17 budget proposal, but I think there is in the budget
6 proposal some additional money, potentially, for some
7 IT improvement but I'm not familiar with how that's
8 going to work. I don't know the specifics of that.

9 But yeah, we don't have a particular timeline
10 at this time, but we have worked on a list and we call
11 them like, 3.3., 3.4, 3.5. So we have already certain
12 versions that we had categorized. And based on the
13 complexity -- 'cause we worked with our IT folks and
14 some items need a lot more programming than others. So
15 those may need to be tabled. Some of the easier
16 things, the low hanging fruits, we can work on those
17 and some of the more complex things, we need to wait.

18 MS. LESSIN: Okay.

19 MR. EHERTS: Yes. I want to comment. I think
20 this is very important and if you want a recommendation
21 from the Committee, it ought to be to make this a very
22 high priority because I could write down 20

1 inefficiencies that are occurring because you don't
2 have the data you need to focus on the right things.

3 So maybe one of the reasons that you don't
4 have resources to do this is because of inefficiencies
5 that are caused by exactly this problem. So it's a
6 circular type issue. But I think it's very, very
7 important. And then you ask what information would be
8 interesting from the database, and that would be what
9 programs employers have in place when these complaints
10 occur. Do they have a policy published? Do they have
11 training in place? What kind of anti-retaliation
12 program --

13 MR. ROSA: Okay.

14 MR. EHERTS: Because I want to know is that
15 the right answer? I'm kind of working under the
16 premise that the answer to 23 cases per inspector and
17 the way to get that down to four to six is by focusing
18 on programs at the employer so that they don't
19 retaliate, so that they encourage employees to bring
20 these issues forward so they recognize it as a learning
21 organization.

22 This is data; you need to be more competitive,

1 right. But if complaints are coming in from companies
2 that are already doing that, well, then we ought to
3 turn our attention someplace else. And so I think
4 we're working blind in many areas because you don't
5 have the information. So that's why I'd encourage you
6 to really to put all resources into that first and then
7 I think the answers will be clear and you'll be able to
8 refocus in areas that will actually make a difference.

9 MR. ROSA: Absolutely. I appreciate that.
10 And that's one of the things that we are, especially
11 Mary Ann and I are consistently talking with our front
12 office and always engaged with IT folks and always
13 trying to find ways to get the process moving. Again,
14 at this particular time, since the last meeting, we
15 needed to work on addressing the data loss problem.

16 Now that that's been taken care of and we just
17 recently launched our upgrade, we're now moving to the
18 next phase and we have a list of items and we hope to
19 continue that process. We've been working very hard
20 with our front office and with the budget office to
21 make sure that we had the resources to get this going.

22 Eric?

1 MR. FRUMIN: So you've mentioned several times
2 the parallel data systems that OSHA has, the
3 whistleblower program on the one hand and the
4 compliance enforcement on the other. Is there any
5 linkage between them?

6 Is there any way in which either a
7 whistleblower investigator or a CSHO can note the fact
8 that in the course of their investigation, a related
9 inspection or investigation is going on with the same
10 employer?

11 MR. ROSA: Very, very good question. I'm glad
12 you raised that because we just talked about that the
13 other day. Because we are in two different systems,
14 it's difficult for us -- it's impossible for us to do
15 an establishment search.

16 I come from the safety background. I spent
17 most of my time on the safety and health side and I was
18 IT -- I did a lot of IT databases back when the old NCR
19 was around and there are a lot of things that you can
20 do by doing an establishment search and you type in ABC
21 construction --

22 MR. FRUMIN: Right.

1 MR. ROSA: -- and it would show complaints,
2 referrals, accidents, fatalities, inspections. And it
3 would show, at the time, whistleblower, when it was
4 part of the system. But now, because whistleblower,
5 for years, has been in a different system and OIS now
6 is still in a separate system, there's no way for doing
7 that correlation.

8 One of our goals is to have the ability that a
9 compliance officer, before they go out in the field,
10 they can do an establishment search as they do to do
11 their pre-inspection research and say oh, there's a
12 whistleblower complaint going on. Let me contact the
13 investigator and find out what's going on. Or vice-
14 versa. Have the investigator -- because what we need
15 to do on the investigative side is to make sure that we
16 are not preempting the advance notice. So we're not
17 giving advance notice.

18 So we want to make sure that before we go and
19 visit the site or issue a notification letter to the
20 company that the compliance officer had already
21 initiated their inspection. How do we know that? We
22 need to go to OIS. We can't just go in our own system

1 because it's two different systems. The idea of
2 consolidating them together will be helpful for them.

3 MR. EHERTS: Yeah. I wasn't -- that's way
4 ahead of where I was going. I was just asking whether
5 there was any linkage at all. For instance, if you
6 look at the WebIMIS screens that you gave us in the
7 past, it gives a case number, which I assume is a
8 whistleblower number.

9 MR. ROSA: Correct.

10 MR. EHERTS: And then it gives under the
11 respondent name, activity number. So the activity
12 number sounds suspiciously like an inspection number in
13 OSHA compliance. Is that not --

14 MR. ROSA: No. The activity number is a
15 system automated number.

16 MR. EHERTS: Okay.

17 MR. ROSA: Yeah. There's no linkage. And
18 even if we put a linkage, because of the way this
19 system, the WebIMIS works, it would be difficult to
20 export both and then try to merge. Let's say that we
21 create an additional tab field and put the inspection
22 number in there and then take the OIS data and take the

1 whistleblower data and put them into a spreadsheet and
2 try to make the link, it would be difficult because of
3 the way that the systems work to try to make that
4 happen.

5 So I see what you're trying to find the link
6 between the two, but it's very difficult to pull -- and
7 it takes a lot of -- the system, currently, I mean, we
8 don't have a report system, a standardized report that
9 would allow us to do this. We would have to go and do
10 ad hoc reports to export the data from WebIMIS --

11 MR. EHERTS: Right.

12 MR. ROSA: -- and export the data from OIS and
13 then find a way to merge them into a separate system.

14 MR. EHERTS: So without having too big an
15 appetite here, is it possible to add a field for any
16 OSHA inspection numbers that are known to the
17 whistleblower investigators?

18 Some cases come up through where it's known,
19 as you've pointed out, in regards to advance notice,
20 where it's known that there is an inspection number.
21 It is possible to at least, without even linking the
22 two systems and all the possibilities that might add at

1 least that to it?

2 MR. ROSA: Sure. Sure. That's a very good
3 idea. Thank you.

4 MR. EHERTS: Okay. So then we'd be able to,
5 at least for the cases that are in the system, find out
6 what are the inspection numbers and then you could get
7 all the inspection data for the State of Georgia and
8 see which of those involve the whistleblower case.

9 MR. ROSA: Exactly.

10 MR. EHERTS: Stuff like that. So that could
11 be an incremental change without a whole lot of hassle.
12 I think that's worth considering.

13 MR. ROSA: Sure. And that would apply to
14 11(c) cases because we wouldn't necessarily have this
15 information for railroad cases because the FRSA is
16 doing the --

17 MR. EHERTS: Not necessarily. And you might
18 not necessarily even have it for an 11(c) case. There
19 will be some 11(c) cases where there isn't a referral
20 to a compliance.

21 MR. ROSA: That's correct. That's correct.

22 MR. EHERTS: But at least if you have a field

1 for it, you'll be able to capture it and it might help
2 to install some of your advance notice issues or at
3 least promote the communication within the regions or
4 the area offices, right?

5 MR. ROSA: Absolutely.

6 MR. EHERTS: Okay. What do we have, two
7 minutes left? Yeah. So I looked at the data that you
8 gave us for the 10-year period or 11-year period, the
9 stuff that he handed out earlier. And it seems that
10 this big increase in cases is really accounted for by
11 FRSA over the period of time. It's pretty self-
12 evident. If you -- what I did was I looked at three-
13 year rolling averages. Three-year average from the
14 first three years and the last three years in this
15 table. And if you take out the FRSA cases, 11(c) for
16 the first three years, 2005 to 2007, accounted for 64
17 percent of the cases, cases received.

18 This is the very first table under the colored
19 pie chart. And if you take out the FRSA cases in the
20 last three years, 11(c) is 64 percent of the cases.
21 STAA is virtually the same. SOX went down from 13
22 percent of the cases to 6 percent of the cases. So

1 what we're seeing is with this expansion in the number
2 of cases received, a continuation of the outside role
3 of 11(c) in the program. A diminution, substantial in
4 the SOX cases and, of course, a growth in both FRSA and
5 STAA. I didn't even bother with the other ones.

6 AIR21, you know, it was 3 percent of the
7 cases, including FRSA in the last three years. So to
8 me, take on a lesson the last 15 seconds is that the --
9 if the past is a prediction of the future, we need to
10 continue to focus attention, particularly on the needs
11 of the 11(c) program in order to try to get the backlog
12 and other caseload issues under control.

13 The 11(c) cases are not dropping off as a
14 proportion and they are going to continue to account
15 for the oversized burden and there are obviously many
16 aspects to the program that are not reflected
17 adequately in the data, as you've just clearly
18 convinced me of about all the problems with what the
19 data is not capturing.

20 So this is not really a data issue; it's more
21 of a program issue, but I think that's a really
22 important lesson that leaps off the page if you just do

1 some quick numbers on the back of an envelope here. So
2 I just wanted to just mention to the group before we
3 finish the data discussion.

4 MR. ROSA: And I'm glad you raised that. As I
5 mentioned earlier, making the NAICS code mandatory can
6 help us target the 11(c) better and to analyze it and
7 say why is it still 60, 64 percent?

8 Where are they coming from? Has there been a
9 change? It is moving between one industry to the other
10 or is the same industries that are -- what can we do
11 about that? Just getting the 2,000 11(c) cases is not
12 going to solve the problem, but finding out if a
13 percentage of those is coming from certain industries
14 will give us a better feel that okay, we need to target
15 those particular -- we need to do a lot more outreach
16 and not -- before you start out, I know Adam wanted to
17 say something.

18 MR. MILES: Oh, it's all right. We have an
19 awful, clunky database too. So I just have a
20 suggestion for ways around it, but I can do it offline.
21 Go ahead.

22 MS. NARINE: In addition to "by industry," do

1 you have the information by employer size?

2 MR. ROSA: We have that information in the
3 system, yes.

4 MS. NARINE: Okay. So that would data that
5 would be interesting for me to know because I'm curious
6 as to where these cases are coming from. Are they
7 coming from very large companies? Are they coming from
8 small mom and pop shops? Because in terms of what the
9 outreach and what the education is and what the
10 messaging is, again, some smaller companies may not
11 care so much about competitive advantage. Some of
12 them, you know, so I think the messaging and how we get
13 to them is going to matter, depending on what their
14 sweet spot is.

15 MR. ROSA: And I'm glad you raised that
16 because one of the things that I just had here to
17 follow-up on that is not that we just have a field for
18 the employer side, that we want to make that field
19 mandatory.

20 MS. NARINE: Right.

21 MR. ROSA: Because I'm not sure if it's
22 mandatory or not. I will check, but we want to be able

1 to make that mandatory.

2 MS. NARINE: Because I think the industries
3 are particularly important. That's what I wanted to
4 know also, but is the biggest problem coming from mid-
5 size? Is it coming from certain regions? I know you
6 guys know where the regions are as well, but to really
7 target because you might need different "marketing
8 campaigns" for different regions.

9 MR. ROSA: Exactly. Very good point.

10 MS. NARINE: Different industries. Different
11 employer sizes.

12 MR. ROSA: I'm being confirmed that is it not
13 mandatory right now.

14 MS. SMITH: It's not.

15 MR. ROSA: Yeah. So that's something we can
16 do a quick fix and make it mandatory. Even if the
17 investigator doesn't know the exact count, they can get
18 a good estimate about whether it's 300, 500, or 25. At
19 least we get a better feel as to that's the size of the
20 employer. That's a very good valid point. Thank you.

21 MS. NARINE: Okay.

22 MR. ROSA: Nancy?

1 MS. LESSIN: I just wanted to quickly pick up
2 on something that Dave was talking about. I think if
3 we look at the data that was collected in this *Fair*
4 *Warning* report and they did the Top 10 list. The Top
5 10 list are large employers who are getting retaliation
6 complaints against them over, and over, and over, and
7 over, and over, and over again.

8 So the issue about what's going to change that
9 because there have been penalties. There have been,
10 you know, and the cared of here's how to do this well
11 and the stick that I think that there is some issues
12 that say none of this is working, what will work? And
13 I think that's, perhaps, a discussion --

14 MR. ROSA: A new approach.

15 MS. LESSIN: -- that we could have at some
16 point.

17 MR. ROSA: Absolutely. Yes, Greg?

18 MR. KEATING: Just one thing.

19 MR. ROSA: Sure.

20 MR. KEATING: So in response to what Eric
21 said, you know, I note that the number of SOX cases
22 filed last year jumped back up from the year before. I

1 noted that the number of FRSA cases dropped
2 dramatically. But I don't think it -- I don't know
3 where we're going with this, you know, what's more
4 important, safety cases or business retaliation cases.
5 I think they're both important. I think they're both
6 very important. And I think they're also both very
7 different. And one of the things that in the best
8 practice group that I worked with Jon on that we really
9 struggled with and Nancy and I had a lot of discussion
10 about this, was, you know, these are animals that share
11 certain things, but also have very different angles to
12 them. And I think that something to at least consider
13 going forward in the directorate is whether there is to
14 be a kind of a distinct focus on what I'd call, I
15 guess, the business retaliation cases and the safety
16 retaliation cases.

17 And one more thing to note is that I'm not
18 that surprised that the SOX cases have gone down a bit
19 over a last 10 years because there are a whole raft of
20 new remedies that have been created in other statutes.
21 So for example, Dodd-Frank.

22 Unlike SOX, which has 180-day statute of

1 limitation, has a three-year statute of limitations.
2 And there are new state whistleblower remedies.
3 There's the false claims act that has been amended
4 dramatically to make it much more employee friendly.
5 So I'm not surprised.

6 And I also am not surprised it jumped up and I
7 think it will jump up in future years in the wake of
8 the Lawson decision, which held that SOX applies not
9 just to public companies, but to all of the contractors
10 and subcontractors of those companies.

11 MR. ROSA: Okay. Good point. JJ?

12 MS. ROSENBAUM: Yeah. I just wanted to go
13 back. This feels like a smaller issue in a way, given
14 the difficulties of adding one field, and at the same
15 time, I think it is data that the agency needs. So
16 questions around primary language of the complainant
17 and whether interpreters are being used, I think is
18 important.

19 I think the question of whether they are guest
20 workers that are being used, which is, you know,
21 programs that are being certified by the Department of
22 Labor in another arm, but there is data to suggest that

1 there is a higher incidence of health and safety
2 violations. Is that also the case in the whistleblower
3 arena or not?

4 Potentially questions about the structure and
5 whether there is a temporary staffing agency, for
6 instance, in the workplace, where, again, on the health
7 and safety side, there is data increasingly showing
8 that that leads to a higher level of violations. And
9 these are structures which I think in the field, we
10 hear that they limit complaint in ways and I think it
11 would be helpful to see the data about whether that's
12 true and it would help with outreach.

13 MR. ROSA: I'm glad you raised that also
14 because one of the things we have been looking at, and
15 I think it was in my notes, but it's something I didn't
16 mention, is that we're also looking, similar, again,
17 going back to the safety and health side and all the
18 experience I've had working on that database is
19 emphasis programs, special emphasis programs.

20 You look at immigrant workers. You look at
21 temporary workers. You look at, you know, these
22 staffing agencies. You're looking at language issues.

1 So you want to be able to look to see is there a trend
2 of those type of workers experiencing greater
3 retaliation than workers that don't fall within those
4 categories.

5 Eric, and then Dave, and then Ken. It's
6 11:39. I'm not sure if there is any public comment,
7 but we're kind of getting into that.

8 MS. NARINE: I'd like to make a comment in the
9 public comment section, at least to what Greg said.

10 MR. ROSA: Right. Go ahead, Eric.

11 MR. FRUMIN: Just on the employer size, as
12 with OSHA, there are a number of employees at the
13 establishment and then the number for the employer
14 overall. So you don't want to forget the two
15 indicators.

16 MR. ROSA: Okay.

17 MR. EHERTS: I just want to bring up a point
18 is that I think it's way too premature to make any
19 decision based on this data. I just don't think
20 there's enough information here.

21 A quick example is I joined a company a few
22 years ago who told me that there were very, very few

1 injuries in their fleet sales force. And I said is it
2 because you've got a fantastic defensive driver program
3 or is it because the employees don't know they're
4 supposed to report. And it was the latter.

5 MR. ROSA: Right.

6 MR. EHERTS: And I think in these cases, we
7 don't whether the numbers are going down because people
8 don't understand that you can file SOX claims or it's
9 because they've got better programs in place driving
10 the numbers lower. So I think there is a basic piece
11 of information missing here and it's that, what's the
12 reason for low numbers in certain cases and high
13 numbers in others.

14 MR. ROSA: Right. One thing I wanted to point
15 out, we recently met -- like, Mary Ann had mentioned,
16 we met -- I'm going to get to you again -- when you
17 raised about the number of complaints. We met with
18 every single one of our partner agencies. This is a
19 big undertaking we did in FY '15.

20 We have at least directly involved to deal
21 with the underlying issues of the complaints, 15
22 partner agencies that we have to work with, plus other

1 agencies like NRLB and others that we don't have a
2 direct relationship because of the statutes. But we
3 have 15 agencies and we've met with every single one of
4 them this past year.

5 So it's a huge undertaking the first time we
6 were able to get that and now we have contacts to
7 continue this. One of the things that came to light,
8 to my surprise, is you would see in here the ISCA, the
9 International Safe Container, and you pretty much see
10 zero all the way across. When we met with the Coast
11 Guard, the first thing that the gentleman from the
12 Coast Guard said was well, I know for sure that there's
13 retaliation in the ports. And I said okay, now we
14 obviously have a gap. We have something going on. Is
15 it outreach?

16 So on one hand, we were saying our number of
17 cases are going up and our backlog is going up because
18 we need resources. On the other hand, we're not
19 necessarily given the protections to workers because
20 we're not reaching out to them.

21 MR. EHERTS: Right.

22 MR. ROSA: So lowering the number of

1 complaints is not necessarily the solution. The
2 solution can be, you know, it's a combination of the
3 two. Are you increasing the number of complaints?
4 That means that you're actually getting the message
5 across.

6 So our charge now is to go to the labor unions
7 and to the associations dealing with the intermodal
8 containers to make the call that these workers do have
9 these rights.

10 MR. EHERTS: Yes. My caution is these are
11 incredibly interrelated, though, because as we reach
12 out, the claims are going to go up.

13 MR. ROSA: Right.

14 MR. EHERTS: So as employees understand they
15 have these rights, the claims are going to go up. It
16 doesn't mean that industry is getting more demonic.

17 MR. ROSA: Exactly.

18 MR. EHERTS: It means that now employees know.
19 But as employees know they can file claims, they'll be
20 more claims, so employers will start to act.

21 MR. ROSA: Right.

22 MR. EHERTS: And so I think these things are

1 interrelated. You have to drive both ends of that --

2 MR. ROSA: Absolutely.

3 MR. EHERTS: -- employee and employer
4 outreach.

5 MR. ROSA: And by getting all of these
6 complaints or these continuous complaints for the
7 different, especially the railroad as the rate is
8 growing, it doesn't necessarily mean that the message
9 is not getting across. You got to look at the outcome.
10 Has the case really resolved in the settlement?

11 Has it probably been a very good dismissal?
12 It could be that the company has been doing better at
13 documenting whatever actions they have taken. Or it
14 could be that if there is still a lot more merit cases,
15 then maybe there's a potential that the message is not
16 getting across. And again, when we issue a merit case,
17 it's because we have not been able to get a settlement.

18 So a lot of times people say the difference
19 between settlement and merit. Honestly, the best
20 course of action would be to get the case settled
21 because the matter is resolved. Issuing a merit
22 finding doesn't give the complainant the relief that

1 they are seeking. It just makes the case that yes, we
2 did find that there's reasonable cause to believe that
3 a violation existed, but the complainant still doesn't
4 get any type of relief.

5 So when we look at this data, having a
6 consistent trend or having an increase doesn't
7 necessarily mean that the program is going backwards.

8 MR. EHERTS: Exactly. That's my point. In
9 fact, I cautioned leadership to my companies. As we
10 shine light on things, the numbers are going to go up.

11 MR. ROSA: Right.

12 MR. EHERTS: That doesn't mean the drivers are
13 getting worse.

14 MR. ROSA: That's right.

15 MR. EHERTS: Right. But you have to get it up
16 before you can get it down.

17 MR. ROSA: Exactly. Ken?

18 MR. WENGERT: Yes. Just kind of a comment.
19 I've heard a lot of one-offs. It would be interesting
20 if we had that data. It would be interesting if we had
21 that data. We'd like to have that data. I haven't
22 heard a strategic plan around data. All right.

1 So to me, data is a supporting element to
2 reach your strategic plans. How does it support? And
3 if you started with that strategic plan instead of what
4 data do we actually need to move that peanut forward, I
5 think is a more interesting question than what data do
6 you want to see because everybody sitting around this
7 table is going to come up with a laundry list of data
8 that we want to see.

9 Does that add any value to your program, your
10 process, your trying to move this forward? I don't
11 know, but I think if we continue to do this data thing,
12 kind of this on-off piece, we're just going to spin. I
13 think Dave hit it early on. This is critical to make
14 this program more effective and more efficient. But
15 let's take a more strategic look at this --

16 MR. ROSA: Sure.

17 MR. EHERTS: Than just this one-off, we add a
18 field here; we add a field there. What's the strategy
19 behind this? That would be my suggestion.

20 MR. ROSA: And I truly appreciate that. Thank
21 you. Thank you. I mean we have worked with a list of
22 things that -- we have a vision of what we want the

1 system to look like and now we're trying to find --
2 we're working on the mechanism to get to that vision.
3 So yeah, it's a point well taken.

4 Now, I know you wanted to make a comment.

5 MS. NARINE: So I wanted to pick up of what
6 Greg said and I'm not going to ask Jason Zukerman, who
7 is in the room, to say anything, but it goes off of
8 something that I had mentioned earlier. We were on our
9 panel this weekend at the ABA Labor Employment meeting
10 and we used a case study on whistleblowers and it was a
11 SOX claim and it was Dodd-Frank and it was other kinds
12 of things. And it goes, again, to a more macro-concern
13 about what Greg was mentioning and how to get this
14 document that we're going to put out disseminated and
15 how to get OSHA's work out there.

16 As a former compliance officer, I had to think
17 about compliance for the entire company, so it wasn't
18 just 11(c). It wasn't just our drivers, it was the
19 finance people. It was everybody. So if I'm thinking
20 about how strategically we want OSHA's message to get
21 out, I had to worry about if we were going to have a
22 Dodd-Frank violation, a SOX violation and an 11(c)

1 violation an everything.

2 So whether we change the title of that and add
3 compliance in there, I also think we want to think
4 about whether SOX claims are going down or up,
5 marginally or not. How can we get more people to think
6 about this? I do think there is a benefit to having
7 some more work in this committee on a going forward
8 basis, even if it's a small, very short timeline,
9 business retaliation subgroup maybe that meets twice or
10 something like that, that can give guidance to
11 employers and to plaintiffs whereas about how SOX
12 relates to the other business retaliation because one
13 of the things that we were talking about is, again, not
14 to use your name is vain, Jason, but I think it was
15 very important when he was talking strategically about
16 I bring SOX and I think about Dodd-Frank and I think
17 about this, and there are people out there who think
18 the claims are the same. And so they are not bringing
19 Sox as much anymore and they're bringing this, but they
20 don't realize it was an advantage to bringing SOX.

21 So I think Jason has single-handedly educated
22 a whole bunch of plaintiff's lawyers and you may see a

1 number of more SOX claims coming up because I think
2 there is confusion out there about when you might bring
3 certain claims and how the other people are saying and
4 the SCC and OSHA are often working together on some of
5 these.

6 And so I think Greg is right; you will start
7 to see more SOX, especially because of Lawson. You
8 know, I'm not saying that the financial community is
9 going to have more recessions coming forth, but it
10 could happen. And I think at some point, even though
11 it's not a large proportion of the caseload now, I
12 think our committee does a disservice if we don't put
13 out some guidance to the world about where SOX fits in
14 with OSHA and how it fits in with other agencies.

15 So if there is just a small working paper
16 guidance, something about the interrelationship between
17 SOX and Dodd-Frank and the other whistleblower lawyers,
18 I think there will be some help, whether it's an FAQ,
19 et cetera.

20 MR. KEATING: Just to piggyback on that,
21 Marcia, I was talking to Jason at the break and he
22 wrote a --

1 MS. NARINE: He has fantastic materials out
2 there.

3 MR. KEATING: Yeah. He wrote a very nice
4 article on this topic, which just last week I published
5 an article in *Corporate Counsel* magazine, which really
6 flushes out in detail why I think plaintiffs who think
7 that going into court for Dodd-Frank are ignoring the
8 many advantages to the Department of Labor and OSHA as
9 a far more friendly field.

10 I think that there is a growing wave of people
11 realizing that the best place to go and file a claim
12 from the plaintiff's side is here at OSHA. And I think
13 you're going to see more claims coming down the pipe.

14 MR. ROSA: Absolutely. All right. Thank you.
15 That will kind of bring us into the public comment
16 period. I understand that Jason Zuckerman wants to
17 have a moment.

18 MS. NARINE: This was not planned and I didn't
19 mean to put you on the spot.

20 MR. ZUCKERMAN: This will be very quick,
21 actually, and I just want to say something on the
22 program. Overall, really about the OIG report really

1 quickly. And when you ask why some of the complaints
2 have actually gone down, I think it's because of your
3 excellent work.

4 I've handled a lot of these claims. I was
5 handling them when we had a whole other ARB when we had
6 other people who were heading up OSHA, who I'm sure
7 also worked hard in order to build the program. But I
8 have to say from my own experience, and I've handled a
9 lot of these claims at OSHA from about 2001 until about
10 now. It is night and day. It's a whole other world
11 now when you're at either OSHA, the ALJ or ARB.

12 And because of all the hard work of OSHA and
13 where the law has gone with the ARB, it's been my
14 experience that more and more employers are actually
15 open to trying to get these claims resolved early. If
16 you went back to the holdings of the ARB, let's say,
17 prior to 2009, at least my view is they add a lot of
18 loopholes to these laws that made it very easy for
19 employers to prevail.

20 Where the law is now, it's much easier to get
21 these claims all the way to a hearing. And I think
22 that OSHA is far more active. Years ago, I and I

1 thought that this was utterly absurd and I advocated on
2 the issue again and again, and I'm glad to see where
3 OSHA is now, but OSHA would not require the employer to
4 provide its answer to the complainant, to the employee.

5 So OSHA would make all these allegations about
6 my client and I didn't even know what they were. I
7 certainly did not have an opportunity to respond to
8 them. That's not how it is any more. I felt that
9 prior to 2009, when I would ask OSHA to interview
10 people, that really did not go anywhere.

11 Now, it's been my experience that OSHA is very
12 active. I mean, if I asked them to interview certain
13 people, I think they will. I find, and again, I don't
14 want to badmouth any hardworking people at OSHA; I have
15 a lot of respect for all of the staff, but I think
16 prior to 2008, there were a lot of people at OSHA.
17 Again, not all. There were some very hardworking
18 people who I think went out of their way to build
19 claims, but there were, I thought, a lot of people at
20 OSHA who would look at the employer's answer, see what
21 was there, and of course, it's the employer who has
22 access to all of the documents, all of the witnesses

1 and just say well, that's probably what happened.
2 That's the end of the matter. It's not like that at
3 all now. It's been my experience that OSHA will
4 actually go out there, will interview people; will make
5 the employer hand over documents. It's really a whole
6 other world and that's why I believe that that OIG
7 report was not really accurate because it honed in on
8 just a few issues. But if you look at the big picture
9 and speak with people, whether it's on the employee
10 side or on the employer side, you'll see that OSHA now,
11 is just in a whole other place. There's always room
12 for OSHA or for any other agency to improve, but I
13 mean, it's my view that it's a whole new world.

14 One other thing; prior to 2008, it was very
15 rare that OSHA would order an employer to reinstate an
16 employee. Now there are orders out of OSHA all of the
17 time and it's just a huge, a huge improvement for
18 employees. It's also just to note that. And the ARB
19 has just been very helpful. I mean, the law is a lot
20 better for employees and I think that's having a big
21 impact and that might help explain why more of these
22 claims get resolved early and there are not as many of

1 these claims now at OSHA.

2 MR. KEATING: So can I just follow-up?

3 MR. ZUCKERMAN: Yes.

4 MR. KEATING: Am I hearing you correctly, and
5 I would agree with you, by the way, that because of the
6 draconian expansion of what is a cognizable claim under
7 SOX, under the current ARB, we've got a lot more demand
8 letters that are resulting in a settlement before a
9 charge is filed?

10 MR. ZUCKERMAN: Oh, yes. Absolutely. That's
11 my experience.

12 MR. KEATING: Okay. And just as a comment
13 from the employer side, you know, I have to say that I
14 believe strongly in the concept of stare decisis. In
15 other words, the rule of law is the rule of law. And I
16 think it's very dangerous when we have abrupt 180-
17 degree changes in the law just because a new
18 administration comes in and an ARB is staffed with
19 people who tend to feel that the law is too narrow.
20 And I don't think anybody can dispute that the law,
21 under SOX, in certain key areas, has flipped 180-
22 degrees in the last five years.

1 So just from a standpoint of having fairness
2 out there, I could even accept the argument that from
3 2002 to 2008, when SOX was first passed, I mean, there
4 are statistics. There is a proven study that shows out
5 of the first 1,000 SOX charges, 17 were found at
6 (2:31:16). And I'll acknowledge, that's crazy and it's
7 crazy because the statute had a 90-day statute of
8 limitation and there was a very narrow pinhole that
9 whistleblowers had to jump through in order to get in
10 the gate.

11 But I think it's equally dangerous when we
12 start relaxing so dramatically the standards and
13 creating a 180-degree shift because employers deserve
14 to know what's the landscape and rely on that.

15 MR. ROSA: Thank you. Thank you, Mr.
16 Zuckerman. Any other comments or questions? It's
17 11:56, so we will break for lunch.

18 **(Whereupon, at 11:56 a.m., a luncheon recess**
19 **was taken.)**

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21

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

(1:05 p.m.)

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MR. ROSA: We're going to get started. All right.

MR. EHERTS: Hit that thing. Come on, like you mean it.

(Bang the gavel.)

MR. EHERTS: There you go.

MR. ROSA: Okay. Good afternoon. We're going to get started. I just wanted to do a quick roundup on any new individuals that have joined us this afternoon to introduce yourselves.

MR. SWICK: It doesn't appear that we have any members of the public that are here. If they were, they would need to sign in. We're going to pass the mic around to our guests here.

MR. KALINOWSKI: Good afternoon. I'm Doug Kalinowski, the Director of the Directorate of Cooperative and State Programs.

MR. LAHAIE: And I'm Eric Lahaie. I'm the Deputy Director for the Directorate of Cooperative and State Programs.

MS. SMITH: Hi. I'm Suzanne Smith. I'm the

1 Acting Director of the Office of State Programs.

2 MS. YOUNG: And Rebecca Young. I'm a project
3 officer in the Office of State Programs.

4 MS. STRATTON: I'm Melanie Stratton. I'm with
5 the Solicitor's Office.

6 **PRESENTATION ON OSHA'S STATE PLANS**

7 MR. ROSA: Okay. Thank you. According to our
8 agenda, we are now moving into a presentation on OSHA's
9 state plans. And with that we have, as we mentioned
10 earlier, they have introduced themselves, Doug
11 Kalinowski, who is the Director for the Directorate of
12 State Programs. And beside him is the Eric Lahaie, who
13 is the Deputy Director. So I pass the floor onto Doug.

14 MR. KALINOWSKI: Well, once again, good
15 afternoon. I should speak into this, correct?

16 So I kind of want to have a conversation.
17 I'll give you an overview, but I know you have heard
18 that you've had concerns before and we'd like to hear
19 what you have to say of what your concerns are.
20 Whistleblower is only one part of the overall state
21 plan monitoring we do.

22 We had a state plan meeting. We meet with the

1 state plan three times a year with OSHA and all the
2 state plans in different parts of the country. Dr.
3 Michaels spoke a couple of weeks ago. We met in
4 Maryland and what he said was, you know, we could talk
5 about as effective as, which we should, but he said we
6 should also talk about how can we be the best we can
7 be.

8 A number of the state plans are beyond "at
9 least as effective," but how do we keep pushing them
10 forward? And for some states, it's kind of operating
11 in a continuous improvement mode and for some of the
12 state plans, whether it's a whistleblower issue or
13 whether it's a penalty issue or a program inspection
14 issue, just getting to at least as effective as would
15 be continuous improvement. And every state is unique.
16 Every state is unique.

17 Dr. Michaels asked me that question at one
18 point too. He said, "What are you going to do to move
19 them all forward?" And it's like, well, you know,
20 everyone is unique. They all have different issues,
21 different perspectives and different political types
22 that they report to as well. So we have to deal with

1 them each on a kind of an individual basis, in general,
2 and that's what we do.

3 You know, they are required to have the
4 whistleblower under the OSHA Act that is required to
5 establish and include as part of their state plan is an
6 11(c) program that is at least as effective as OSHA's.

7 And as you know, she still has the authority
8 to investigate whistleblower complaints, 11(c)
9 complaints in those states that also already have their
10 own requirements. In fact, states are expected,
11 required to tell a complainant when they call in, if
12 you don't know this, that they had that right and give
13 them an option to do a file. So they have that right
14 going in.

15 There are currently 28 state plans. There was
16 a new state plan added in August of this year, Maine.
17 It is a state and local government program, but they're
18 also required to have an 11(c) program as well. Most
19 to the states process their 11(c) complaints.

20 As a primary agency, they have their own staff
21 to do it. Some of them have, actually, whistleblower
22 investigators. Some of them use their own safety and

1 health people if they are all specially trained to do
2 that as well. I think it depends on the state and the
3 size.

4 Obviously, the larger states are more likely
5 to have specialized people to deal with whistleblower
6 issues. And a handful of states also designated
7 another agency to actually do those whistleblower, you
8 know, investigations. OSHA investigates things beyond
9 11(c), so they have other agencies that do that for the
10 whole state. Every year, you know, we evaluate the
11 state programs and we do a comprehensive evaluation
12 every other year through the Federal Annual Monitoring
13 Evaluation.

14 And every other year, it's more comprehensive,
15 it's case file reviews. When it comes to like,
16 whistleblower, they look at the cases. They look at a
17 lot of the metrics around those cases and they actually
18 do hands-on case file reviews. They sometimes talk to
19 the investigators themselves. We used to do it every
20 year.

21 The problem is by the time the evaluation came
22 out, it's already probably more than halfway through

1 the following fiscal year and if they have things they
2 need to correct, they have like, two or three months
3 before they get those corrected.

4 So it really just didn't make sense to keep
5 doing that and try to do a full evaluation. So we
6 changed that to an every other year full evaluation.
7 So the in between years, the less comprehensive years,
8 we're looking at issues that were expected to be
9 corrected because when we do the full evaluation, the
10 state creates a corrective action plan. And some
11 states may have one or two items in their corrective
12 action plan and other states may have 12 or 13 and we
13 monitor those in the off years more closely. But that
14 doesn't mean other issues can't come up because while
15 you're monitoring as people raise issues, other things
16 could get included as well. We still don't do as
17 comprehensive of an evaluation every year.

18 You know, we worked hard to try find
19 consistency. You know, because really, the monitoring
20 happens and even though the national office kind of
21 sets up policy and probably provides direction, you
22 know, the monitoring happens in each of the 10 regions

1 for the state plans. And obviously, you probably know,
2 if you look at Region 9, that is, for the most part,
3 all state plans. Region 8 and Region 7 is one state
4 plan. So we try to find consistency across. So keep
5 that in mind when we try to do that.

6 I think in recent years, we've kind of
7 improved not just a FAME process, the evaluation
8 process, but how we specifically look at whistleblower
9 cases as well too. We've maintained a database and
10 tried to find consistency across the -- and working
11 with the Directorate of Whistleblower Protection
12 Program as well, trying to find consistency so that
13 when we're looking at Iowa versus looking at Michigan,
14 we can have a consistent evaluation. So we work
15 towards that as well.

16 And I think a lot of states have made, since
17 we've been doing that, improvements have been made.
18 Some of the issues that have come up are like, data
19 entry and how they enter data. How timely they enter
20 data. So those are -- they seem like minor issues, but
21 when you're trying to evaluate a program, it's key that
22 the data is entered so that you can evaluate those

1 things and so that they can evaluate it themselves as
2 well too. And I think that we've also improved the
3 quality of their investigations because some of the
4 things that came up are, you know, acceptable
5 investigative training, et cetera.

6 And I think that all the states, at this
7 point, for the most part, are onboard with making sure
8 they go to the whistleblower training. They also go to
9 other types of training to help them determine or to
10 help them better improve how they do their
11 whistleblower investigations.

12 And of course, just like OSHA, state plans
13 have a certain level of turnover as well. And so
14 that's a challenge they always have. Some of the
15 things that came up, if you're not aware, maybe you
16 already are aware, there are a couple of key issues
17 that arose in recent years.

18 South Carolina, a couple of years ago,
19 basically eliminated a provision to do whistleblower
20 11(c) investigations. So we worked with them. And
21 that was actually a legislative change. So we worked
22 with them to get those provisions put back in their

1 legislation.

2 At one point, Nevada had a state law that
3 required the complainants to inform their employers of
4 their intent to file a complaint before they filed one,
5 you know. These aren't necessarily the program people
6 that are stimulating these type of legislative or
7 regulatory changes. It's the state legislators and
8 other interest groups that do that. So we worked with
9 Nevada to give that change as well.

10 Maryland recently revised their regulations to
11 accept oral whistleblower complaints. There was a
12 point a few years ago where there was probably a
13 handful, six or eight states that would not oral, they
14 would only accept written complaints and we worked with
15 them.

16 For the most part, I think all of them are
17 onboard now to accept oral complaints or that's when it
18 starts the tolling. They may, when they meet with the
19 person, ask them to sign something as part of the
20 process, but they may do that anyway as an interview
21 statement. So we've gotten to that point. Because
22 there was a point where six or eight of them would say

1 if we didn't have a written complaint, they would not
2 respond to something and we worked very hard to make
3 that happen.

4 New York was in the same boat. They were not
5 accepting oral complaints for whistleblower complaints.
6 At this point in time, they now do. They changed their
7 operations manual, their policies and procedures manual
8 to do that.

9 And some of the states do have, as many of you
10 are already of, too, they do have extra provisions or
11 different provisions that actually probably make it
12 more effective in terms of whistleblower. A number of
13 the states have, you know, in lieu of a 30-day period
14 to file a complaint. Some have longer periods. If you
15 look at California, Connecticut, New Jersey, North
16 Carolina. They all have 180 days. Obviously, I think
17 a number of other people would like to change the
18 federally as well too. Hawaii is 60 days. Kentucky is
19 120 days; Oregon 90 days; and Virginia 60 days. So
20 that is a benefit.

21 Another example is, you know, some of the
22 state plans allow a right to sue the employer over

1 these issues: California, Hawaii, Minnesota, North
2 Carolina and Oregon. If you look at those, a lot of
3 those are the larger, outside of Hawaii, the larger,
4 probably most longstanding states as well too. And the
5 other thing you have to keep in mind when it comes to
6 state plans is that, you know, OSHA has received some
7 increased funding for whistleblowers, okay. State
8 plans have not.

9 In fact, the overall budgets, I think over the
10 last 17 years, the total increase has been around 10
11 percent. Not each year; over 17 years, 10 percent.
12 And so the state plans are actually, when it comes to
13 inflation, you know, and the increased cost of health
14 benefits and other things, they're actually losing
15 ground. I think outside of just whistleblower, if you
16 look at their inspection numbers, the inspection
17 numbers are going down. Why are their inspection
18 numbers going down? Because their staffing is going
19 down.

20 I think the other pressures the states have as
21 well is many of the states overmatch, in terms of total
22 budgets. It's usually, roughly \$100 million in federal

1 money and \$180 million in state overmatch. Okay.
2 There has been lots of pressure in recent years, I
3 think by the states, to decrease some of that overmatch
4 and that doesn't just apply to OSHA. I think that
5 applies to a lot of other programs -- federal programs
6 that are funded. A lot of the states have budget
7 issues, so they cut back on their overmatch funding.
8 So it further puts pressure on the administrators of
9 those programs to try to maintain the staffing they
10 had.

11 So overall, staffing in state programs has
12 gone down, I think, over the last five or six years.
13 Two years ago, most state plans did 50,000 or more
14 inspections, historically, as far back as we can
15 remember and it went below that two years ago for the
16 first time. And I guess it all revolves around
17 staffing.

18 Like I said, OSHA has gotten some increases
19 for whistleblower staffing and administration and state
20 plans have not, even though I think in the president's
21 2016 budget -- I don't think, I know that in the
22 president's 2016 budget, I think right around \$1.3

1 million was recommended for whistleblower programs.
2 That's a little over 1 percent, but it can be a
3 significant amount of money.

4 Do we have these handouts? Are they out
5 there?

6 MR. LAHAIE: That's the one we got. The data
7 handouts they're supposed to have, yeah.

8 MR. KALINOWSKI: Okay.

9 MR. ROSA: I think you all should have this.
10 Yes?

11 MS. BETTS: Should we put that in the record?

12 MR. ROSA: Yes, we want to put that in the
13 record. You have a series of slides that says state
14 plan data on the second slide. That would be Exhibit
15 No. 4. Exhibit No. 4.

16 MR. KALINOWSKI: I was just going to walk
17 through this data real quick. It reveals the number of
18 11(c) cases in Slide 3, state plan versus federal. And
19 this doesn't include, for the federal, this does not
20 include all the other statutes that are covered by
21 OSHA.

22 MR. EHERTS: Question. How many state plans?

1 MR. KALINOWSKI: Twenty-eight state plans.

2 And you have the number of cases completed in 2015. I
3 think it depends on how you count them.

4 And we actually look at three metrics related
5 to whistleblower. They're actually right around 26,
6 Eric? Total metrics we look at for state plans that
7 were worked on between a group of -- really, the State
8 Plan Association board members, as well as a team of
9 federal people. Looked at 20-some measures, beginning
10 about --

11 MR. LAHAIE: Eighteen.

12 MR. KALINOWSKI: Pardon?

13 MR. LAHAIE: Eighteen.

14 MR. KALINOWSKI: Eighteen. Eighteen measures.
15 Sorry. I want to measure about more things. So when
16 we started, I think about eight years ago or six years
17 ago, somewhere in that range, instead of looking at,
18 okay, what are we measuring here? And it's not
19 necessarily a pass/fail system. It's really more of an
20 indicator. It's kind of like doing a blood test and
21 something looks a little funky, then you dig deeper,
22 right?

1 I mean, some blood tests are pretty clear, but
2 you might have some type of bloodwork into the loft and
3 you do a little bit of deeper digging to figure out
4 what the issue might be, and the same thing with kind
5 of some of these measures. It's not necessarily a
6 pass/fail, but if you're outside of some range of a
7 national average, it just says, well, maybe we should
8 look a little deeper into things. And so these were
9 negotiated and so have these three. We basically
10 started with all the measures that have been used over
11 the years.

12 Back 25 years ago, there was like, 60
13 different measures that state plans were evaluated at.
14 So we worked on looking at these measures again. We
15 actually had a public meeting in 2012 to get input on
16 these measures, not just the whistleblower, but the
17 other metrics as well, too. Things we look at are
18 like, number of inspections they do, which is really a
19 negotiated measure. You know, how quickly they respond
20 to complaints. We look at what their penalty levels
21 are and the different size of employers and these are
22 the three whistleblower measures that were discussed.

1 I say negotiated, when OSHA really could say
2 you have to this, but I think these are the ones we all
3 agree were probably important. And if you look at the
4 range, you look at the next slide, it shows you the
5 range from Connecticut to -- and Maine and Illinois.
6 Maine is a new state in which we don't have any data on
7 them yet as well. I think Illinois hasn't had any
8 whistleblower -- Illinois is also a state and local
9 government state plan as well.

10 MS. LESSIN: Can I just ask a question?

11 MR. KALINOWSKI: Yes. Don't hesitate to ask.

12 MS. LESSIN: This one slide, the percent of
13 11(c) investigations completed within 90 days, it seems
14 that if a state had three complaints that they could
15 all be completed within 90 days. And if a state had
16 300 complaints, it would be a very different story.
17 And so this graph isn't telling that picture. It
18 doesn't say how many complaints came into Connecticut.

19 Now, when I look at this other data, there's
20 something about pending cases in Connecticut. It's
21 very, very small, but it doesn't tell me, you know,
22 just this idea of what was completed in 90 days. You

1 know, if you have 300 complaints, if you have three
2 complaints, it's going to be different. So is there a
3 graph that says how many complaints?

4 MR. KALINOWSKI: We do have those data, but
5 these are not the things we necessarily publish in
6 their FAME, but if their expectation is that the
7 monitors will evaluate them and look at much more data
8 which is actually in the mandated measures. Does that
9 make sense?

10 And we can get that data for you as well.

11 MS. LESSIN: Yeah, it would be -- it's just --
12 you know, you look at Connecticut and 100 percent get
13 done within 90 days and here is California third from
14 the bottom, but then over here you kind of get a
15 glimpse that there's something else going on because it
16 says number of pending cases, and California is way up
17 there in the 500 range and Connecticut in down there --
18 oh, I can't tell what that is. Maybe 10. You know,
19 whatever.

20 So it's just -- it's not really -- this isn't
21 a good picture of what's really going on, right. It
22 kind of skews it and it doesn't, you know, I'd like to

1 see some other things so that I can put it together
2 better.

3 MR. KALINOWSKI: Because you're absolutely
4 right. I think California, the reason their number is
5 so high is because they have such a backlog. And I
6 think when the monitors go in, they look at all those
7 things. They look at all that data as a picture.

8 Now, if we wanted to look and evaluate each
9 state in this room, we have to spend two or three days
10 looking at lots of data. The expectation is that
11 monitors do that. So let's just say there's a huge
12 backlog in a state, then the monitors try to work in
13 the states to figure out okay, what are you going to do
14 to get rid of this backlog. And I'm not sure if
15 meritorious is a great example. Don't we have a slide
16 on -- average number of calendars days to completion,
17 which is the third one in, I believe, on the bar
18 charts. And that kind of gives you a feel as to who
19 long it has taken to do that.

20 But you're absolutely right; this does not
21 give the entire picture of a state, but I didn't think
22 that we were in the position today to actually -- maybe

1 that's what we should've done and we can do that in the
2 future is actually take one or two states and have a
3 discussion, a more detailed discussion on one or two
4 states, but that would still take quite some time.

5 MS. ROSENBAUM: I guess we reviewed earlier
6 these metrics for OSHA federal and it's also hard to
7 figure out if they're just as effective when we don't
8 have the same metrics for the state plan. So what
9 would be interesting to me would be to have this data,
10 taking off everything except OSHA 11(c), and then
11 adding the states and then we could compare. We might
12 find some states have better metrics and we want to
13 know why. Some are worse, but it feels a little bit
14 hard to assess whether they're at the standard when we
15 don't have the data that we were using to assess 11(c).

16 MR. ROSA: So what you're suggesting that for
17 the state plan data to use similar to what we discussed
18 earlier for our type of determination that we have in
19 our data?

20 MS. ROSENBAUM: Yes.

21 MR. ROSA: Okay. Because what Doug is
22 mentioning are the three different measures that they

1 have specifically under the state activity mandated
2 measures, or the SAM measures. But we can work with
3 Doug's office and see how the data compares with each
4 other.

5 MR. KALINOWSKI: And Mary Ann Garrahan did
6 speak to the state plans two weeks as well and shared
7 some of the federal metrics being used. Like I said,
8 they were negotiated -- if all of a sudden we started
9 measuring the states out of the blue on some different
10 metrics, I think we have a challenge in dealing with
11 them because we're changing what we would do. I think
12 we have to have a discussion. Mary Ann did speak with
13 them. They seemed really receptive and I think it is
14 probably time to relook at that.

15 MR. ROSA: Right.

16 MR. EHERTS: So how many total standard
17 measures do you have? SAM 16. Does that mean you have
18 16 of them?

19 MR. KALINOWSKI: Eighteen total.

20 MR. EHERTS: Eighteen total. Is one of them
21 cases per inspector?

22 MR. KALINOWSKI: No. They negotiate every

1 year how many inspections they will do as a state. We
2 don't try to do cases per inspector. But that metric
3 is not for 11(c), that's for safety and health
4 inspections.

5 MR. EHERTS: I see.

6 MR. KALINOWSKI: We don't look at -- try to
7 say you have to do 100 cases. Because the expectation
8 would be, I think, if all of a sudden there was a huge
9 rise in whistleblower complaints, they would try to
10 find some way to either increase staffing or modify
11 some things to make sure they got to those complaints
12 is some reasonable timeframe. You know, I came from
13 the State of Michigan and we had an issue with a
14 supervisor and two investigators and at some point, the
15 complainants got where I could never keep up with them.

16 So we actually took and borrowed a CSHO that
17 was already trained in whistleblower investigation and
18 that person ultimately had three so that we could keep
19 up. For some reason, it still seemed like it took a
20 lot longer than it should've, but we did it to keep up
21 with those --

22 MR. EHERTS: I just think there's this

1 incredible potential to answer a lot of questions based
2 on the stated data. For instance, OIG just came out
3 with a report that said that the optimum number is six
4 to eight cases per investigator. The federal is now at
5 23 per investigator. But if you could look at how many
6 cases per investigator with different states and look
7 at the outcomes, you'd be able to tell us what's the
8 best number of cases for an inspector.

9 MR. KALINOWSKI: I don't have those details in
10 my head, obviously, but I do know that 23 probably
11 sounds typical for some of these large -- if they do
12 that many in the course of a year, like, 23 is probably
13 typical for the large states as well.

14 MR. EHERTS: Right.

15 MS. LESSIN: I have a non-metrics question.
16 Can I ask that about whistleblower and state plan
17 states?

18 MR. KALINOWSKI: Sure. We'll do the best to
19 answer it.

20 MS. LESSIN: Okay. I was in California a year
21 ago and was meeting with some folks and at that time,
22 it looked that if there was a whistleblower complaint

1 related to someone being retaliated against when they
2 reported an injury, something that would be covered
3 under what we call the Fairfax Memo, that, in fact, was
4 shunted to California's workers' compensation system.
5 It was not dealt with at all under Cal OSHA or under
6 the whistleblower complaints that come in through
7 health and safety. It went straight to workers'
8 compensation, a completely different system with
9 completely different ways of looking at things.

10 I know a number of us raised issues at that
11 time a year ago. So I was just wondering if you could
12 give me an update on how that is handled in California
13 now. Has that been adjusted so that the Fairfax Memo-
14 related injury retaliation cases now go through the Cal
15 OSHA whistleblower, or are they still shunted off,
16 which would have us question whether things are at
17 least as effective as?

18 MR. KALINOWSKI: Well, that issue was raised
19 like, a year ago or more than a year ago and the region
20 is actually working with the state to say look, you
21 need to put them, you know, so that Cal OSHA is
22 handling them or make sure they're handling it in an

1 appropriate manner, just as the same way OSHA would.
2 So we are actually working with Cal OSHA to get that
3 rectified.

4 MS. LESSIN: So it's been a year. Is it
5 rectified?

6 MR. KALINOWSKI: I don't believe it has been
7 totally, yet. No.

8 MS. LESSIN: And what's the problem?

9 MR. KALINOWSKI: I think that changing
10 regulatory process to policies in a large state like
11 California is a great challenge for them. It's a
12 challenge for them as well.

13 MS. LESSIN: I'm concerned about the workers
14 who are being retaliated against and whether they are
15 getting any kind of justice. I guess I would like an
16 update on where things are at exactly and what the
17 problem are.

18 MR. ROSA: And you raise a point. I just
19 wanted to reiterate, as Doug is mentioning, that the
20 importance is not who is handling the particular
21 complaint, but how it's being handled. And it goes
22 back to the "at least as effective" status.

1 I know that when I was doing state plans in
2 Region 2, and it's probably still the case in New
3 Jersey, where a portion goes to the health department.
4 So your designee is your labor department, but a
5 portion goes to the health department. So it gets,
6 sometimes, you can call contracted or subcontracted or
7 given to another agency.

8 Particularly, the concern is not what is given
9 to the other agency; the issue is, is it being handled
10 at least as effective as. And as Doug mentioned, I
11 think they're working very hard with the folks in
12 California to ensure that those complaints are being
13 handled at least as effective as. And it's an ongoing
14 discussion and dialogue they've been having in
15 California.

16 MR. KALINOWSKI: And I can follow-up with
17 Anthony and get you a more detailed status.

18 MS. LESSIN: Thank you.

19 MR. EHERTS: I have real basic question. If
20 28 of the states have state plans and two of the larger
21 states, New York and California do, then you'd think
22 that 22 states don't. They're in the federal program.

1 So you would think the majority of the cases coming in
2 would be coming from state plan, wouldn't you?

3 MR. KALINOWSKI: Well, New York and California
4 are state and local government only.

5 MR. EHERTS: Okay.

6 MS. LESSIN: California is --

7 MR. KALINOWSKI: No, no. I said New York and
8 New Jersey. I'm sorry. New York and New Jersey are
9 state and local government.

10 MR. EHERTS: So is that difference based on
11 population or number of businesses?

12 MR. KALINOWSKI: Well, you know, I don't know
13 the answer to that because I thought that same thing.
14 Is it because people aren't aware they should be filing
15 or the opportunity to file complaints? That's
16 something we need to look at because that's --

17 MR. EHERTS: I think we should.

18 MR. KALINOWSKI: Yes, yes, yes. That's the
19 other question is what do their websites look like? Is
20 it pretty obvious that -- Jordan Barab and I had this
21 conversation in the last couple of weeks about what do
22 their websites look like.

1 Should we be looking at those to make sure
2 that -- it's obvious that they have rights --

3 MR. EHERTS: A place to know they have them.

4 MR. KALINOWSKI: Right. Yeah. And I think we
5 need to look at those kinds of things too. And
6 obviously, if they filed something online on OSHA's
7 website, that would get transferred to them
8 automatically.

9 MR. EHERTS: That might explain some of it.

10 MR. ROSA: Okay. Any additional questions
11 from members of the committee?

12 Yes, Eric?

13 MR. FRUMIN: So can you give an impression?
14 I'm not asking you to remember all the numbers of 28 or
15 27 different annual FAME reports, the last time you did
16 an evaluation of the discrimination function, but can
17 you give a general impression of how well the state
18 annual retaliation efforts are working on their own
19 steam and also in comparison to the metrics that are
20 used by this directorate?

21 Maybe not. I'm just asking.

22 MR. KALINOWSKI: Oh, no, I can give an

1 impression. I think most -- I think all the states and
2 the investigators, they're committed to do it to the
3 best they can and that's clear. And I think many of
4 the states, you know, probably do as good or better
5 than OSHA does, depending on which state you are. And
6 then you even have the states that are doing the best
7 they can.

8 If they don't have enough staff, then they
9 can't get to them quick enough and that is an issue if
10 it's going to take two or three years to resolve one of
11 these. So I think the impression is that is a wide
12 variety of effectiveness, I think. Some are very
13 effective and then some are less effective and the goal
14 is to get them all moving towards the more
15 effectiveness.

16 And then like I said, the other issue is if
17 you only get two or three complaints here, why is that?
18 I don't have that answer; I wish I did, but you got to
19 ask the question if you only have two or three a year
20 in a state, typically a small state, you just have to
21 ask the questions because employees are afraid because
22 when they do file, they don't get any results or

1 because probably the likely answer, and this is my wild
2 guess is because they don't know they have the right to
3 do so.

4 MR. FRUMIN: The other question is that one of
5 the things we've discussed here a lot is the
6 relationship between OSHA's jurisdiction under one of
7 the -- OSHA's jurisdiction to investigate a complaint
8 in transportation. Let's use the trucking and rail,
9 for instance.

10 OSHA jurisdiction to investigate those under
11 the 11(c) authority, as compared to which jurisdiction
12 to investigate them under the other federal laws: FRSA
13 and STAA. It's clear that in probably not an
14 insignificant number of cases, maybe not a majority,
15 but in some number, the complaint could go either way.
16 The investigator could take it in and say oh, well, you
17 know, this could be one or the other. Could be a FRSA
18 case or an OSHA case, a STAA case or sometimes both.

19 So what opportunity is there for the state
20 agency folks to have that relationship with federal
21 transportation at DOT, FRA, or FMCSA, whatever.
22 Because we now have a referral system back and forth

1 between the Labor Department and DOT agencies on these
2 underlying issues. The same way that whistleblower
3 investigators and compliance inspectors have a referral
4 system back and forth. Have you explored that at all?

5 Is that a policy question for the state
6 monitoring or for DWPP to make sure that if a rail
7 worker or a truck driver in South Carolina files a
8 discrimination complaint and it turns out that there's
9 all sorts of STAA related violations there that that
10 South Carolina whistleblower investigator isn't blind
11 to the opportunity to get the DOT help.

12 MR. KALINOWSKI: And Anthony, you can chime in
13 as well.

14 MR. ROSA: Absolutely.

15 MR. KALINOWSKI: I think that's one of the
16 things we need to be -- that's a very good question.
17 That's a very good observation or concern because I
18 think we've talked about that internally as well, to
19 make sure that if you have an 11(c) investigator in
20 South Carolina, do they realize there are 23 other
21 statutes that may apply, in lieu of saying no, there's
22 nothing we can do. Our goal is to make sure those

1 investigators understand that there are other statutes
2 that they refer to OSHA --

3 MR. ROSA: Right.

4 MR. KALINOWSKI: -- and work with the OHSA
5 team. And they oftentimes do.

6 MR. ROSA: Right. And I just wanted to add
7 into that -- and I want to come back specifically to
8 South Carolina because that was a specific issue. But
9 in general, and we've done this with any other states,
10 specifically if there is a private sector, 11(c)
11 program like Kentucky or Tennessee that I've handled
12 back in Region 4, if there is a STAA and an 11(c), we
13 would have a dialogue with that particular state. And
14 most likely, the 11(c) portion is handled by the state
15 and the STAA portion is handled by the federal
16 investigator, but they work together in a team and they
17 would work things together.

18 Now, we do that to the best that we can that
19 we're both working the federal investigator and the
20 state investigators working on a particular case. In
21 some instances, federal OSHA will take the complaint in
22 whole and do both the STAA and the 11(c) case. In

1 fact, that was the agreement we reached with South
2 Carolina. When South Carolina put the legislation back
3 in --

4 MR. FRUMIN: Well, that's a special case,
5 anyway.

6 MR. ROSA: Right. But we're done that in
7 other cases. I've had instances in another state where
8 the state will call me and say I have a case and I
9 don't have subpoena authority outside of my state
10 boundaries. So if I want to collect information that
11 is from headquarters that is in Missouri or in another
12 state, I can't go outside my state boundaries, can you
13 take the case?

14 And most likely, federal OSHA will take the
15 case because we have subpoena authority nationwide. So
16 there are certain circumstances that we would take the
17 entire complaint or that we would work together with
18 the state on the particular investigation. And to the
19 extent that we can, I mean, the state doesn't need to
20 be necessarily involved on the STAA portion of it, but
21 as much as we can get them involved, sure, they would
22 be involved as much as they need to be involved to

1 handle their portion of the complaint.

2 MR. FRUMIN: To me, it's a question of whether
3 the state investigators who have no authority outside
4 of their own 11(c) legislation, whether they are aware
5 an actively inclined to pursue those remedies, the
6 other available remedies under those transportation
7 laws or other laws for that matter.

8 Is that part of their day job? Do they know
9 that that's there? Okay, so you blew it. You're 31
10 days on 11(c). You're out. Wait a minute. You got
11 six months under STAA; you could've easily done this.
12 I can't handle it, but I'm going to help you do that.
13 Is that their default reaction or do they just like,
14 whup, 31 days, you know, in the trash?

15 MR. KALINOWSKI: That should not be because
16 referral mechanism are in our state plan policies and
17 procedures manual.

18 MR. FRUMIN: Okay. So we look at those and
19 that's the way it should be and I would think -- and I
20 know of experienced state plan investigators that know
21 this very well, right, but you get new people that --
22 can things fall through the cracks? Yes. And I think

1 some of that is developing a relationship with the
2 regional office as well too.

3 MR. FRUMIN: That's fine.

4 MR. KALINOWSKI: So they understand each
5 other. Because a lot of time they'll talk about even
6 11(c) issues to look at the legal issues, although they
7 interact with OSHA people to say okay, what am I
8 looking for? And I think the effective ones do that.

9 MR. FRUMIN: Right.

10 MR. ROSA: And to add to that, and Robert has
11 reminded me that we recently did in the past year or
12 so, we did a webinar for all of our whistleblower
13 investigators, both federal and state.

14 MR. EHERTS: And didn't you have a conference
15 also where you brought them all in a couple of years
16 ago?

17 MR. ROSA: That was several years ago we
18 brought them all in, but we recently did a webinar and
19 that also gave all the information and the tools to
20 both investigators on both sides to know, especially on
21 the state side, when a referral to the federal side is
22 warranted or vice-versa. So we always are in

1 collaboration in finding ways to bring the information
2 forward to the states about when a referral to the
3 federal side is warranted.

4 Any additional questions? I know we're kind
5 of taking a few minutes into the best practices, so I
6 just want to make sure that we have gotten questions.

7 (No response.)

8 Okay. I wanted to thank Doug and Eric for
9 coming to us and spending some time talking to us about
10 state plans and 11(c) programs. Thank you very much.

11 MR. KALINOWSKI: Okay. Thank you.

12 **BEST PRACTICES AND CORPORATE CULTURE**

13 **WORK GROUP PRESENTATION**

14 MR. ROSA: And now I want to pass this on to
15 Jon Brock and the Best Practices Work Group.
16 Yesterday, the group spent about three hours going over
17 the dissemination portion of the charge. I know there
18 was some initial discussion about the best practices
19 draft document of the recommended guidelines document
20 that OSHA just published for public comment late last
21 week. If there is opportunity to have further
22 discussion on that after the discussion on the

1 dissemination portion, we would entertain that.

2 I understand that maybe one or two people may
3 need to leave a little early, so hopefully, if we can
4 wrap up sooner, we can do the wrap-up portion sooner so
5 that nobody misses that portion.

6 And with that, I pass it on to Jon.

7 MR. BROCK: Okay. Thank you. There is a copy
8 of the Best Practices Group draft. Let me get this
9 straight. You'll find a copy of the draft that we've
10 brought forward, which is in your packets. It says,
11 "Working Group Draft Outline 11/9/2015. Dissemination
12 Ideas for WPAC Discussion."

13 I'll try to summarize this and point out what
14 the trend of what we're suggesting. I want very much
15 to invite my colleagues on the work group, whose ideas
16 I've collected here as the scribe, but there is a lot
17 of knowledge -- or the knowledge is within the work
18 group. So I want to encourage my colleagues to
19 interject and --

20 MS. BETTS: Can I interrupt for just a moment?

21 MR. BROCK: I'm sorry. Do you want to declare
22 this into the record?

1 MS. BETTS: Yes.

2 MR. BROCK: Please do. By all means.

3 MS. BETTS: It'll be Exhibit No. 5.

4 MR. ROSA: Yes.

5 MS. BETTS: Okay.

6 MR. BROCK: Ready?

7 MR. ROSA: Yes.

8 MR. BROCK: So this began with about a dozen
9 ideas that were in various meeting notes. I circulated
10 a list to the Committee. And very quickly, members of
11 the work group identified that there were some really
12 core aspects that we should pay attention to. We
13 quickly got to the idea that you see in those first two
14 bullet points, number one and number two that said
15 let's look for things that OSHA could do with internal
16 policies and programs that might encourage the
17 application of what we had called, initially, best
18 practice recommendations. I'll use the term in the
19 present draft, "recommended practices." At least I
20 will endeavor to do that for consistency.

21 And we also identified that there were many,
22 many people in the employer community, and among them,

1 in decision-making capacities, implementing capacities
2 and advocacy capacities, who could probably have the
3 most influence on bringing these programs and practices
4 in the recommended practices into the workplace in
5 order to create the various types of benefits and
6 advances, which I'll articulate in a moment.

7 We also pretty much simultaneously, with
8 identifying those two avenues, recognize that a
9 valuable service of our work would be to identify
10 places where you could reach those groups of decision-
11 makers, implementers and advocates. So I want to call
12 your attention to the pages at the back of this
13 document that is a chart that I roughly pulled together
14 to capture as best possible, at this stage of the work,
15 the various organizations, for the most part,
16 organization that were well known for disseminating
17 information or were regarded as important sources of
18 information for people in those three categories of
19 influence.

20 Much of what you'll hear me summarize here
21 relates to how these groups can be reached, made aware
22 and constructively influence to recognize what value

1 might exist in the recommended practices and to be able
2 to learn how to use them and where to get input about
3 how to use them in employers and different industries,
4 under different statutes, and of different sizes and
5 character.

6 So we began to pay attention then to the
7 audiences, and the middle part of page 1 further
8 describes our sense of the audiences and how, in our
9 notion, that we needed to find -- I apologize -- the
10 most direct ways for OSHA to be able to reach out,
11 recognizing, as we learn through the process, that
12 there were significant constraints on the committee
13 itself, as a committee, working in a coordinated or
14 active way, although there were some opportunities for
15 individuals to act.

16 So in trying to figure out how to reach out to
17 the audiences, we summarized the basic message into
18 three components, which you'll see here towards the
19 bottom of page 1, in thinking that different employers
20 would respond to the recommended practices for
21 different reasons, depending on where they were in
22 their own perceptions and actions in compliance and

1 protecting whistleblower rights and reading them in the
2 order that they're there, that there are business
3 benefits and competitive advantage in this and that it
4 wasn't strictly a compliance issue.

5 Those positive programs that encouraged
6 employees to come forward were beneficial to learning
7 things about your business that can make it better,
8 more efficient, more profitable, have a better
9 reputation, more competitive and so on.

10 We also identified that there would be firms
11 and non-profit organizations and other employers who
12 had the notion that they simply wanted to do the right
13 thing, it was the right thing to do to create workplace
14 fairness and justice to ensure employee rights and that
15 the third reason, these are not entirely distinct;
16 they're certainly interrelated that you would simply
17 reduce your liability and risk if you were more likely
18 to be in compliance.

19 And everyone heard some of the discussion this
20 morning where a number of the committee members talked
21 about the importance of using some of the terminology
22 that was now having a great deal of appeal: compliance,

1 transparency and those sorts of things.

2 So the reason that we stopped and we paused
3 for a moment to identify these messages is as OSHA
4 prepares ways of outreach and making employers and
5 others aware of the recommended practices that there
6 would be a clear recognition that these different
7 messages would appeal to different organization and to
8 different groups that might be important to creating
9 the awareness.

10 So we then tried to pull out of our
11 brainstorming activity, I suppose you could call it,
12 the types of efforts that we hoped OSHA could strongly
13 consider and hopefully, in most instances make, to have
14 an effective outreach. The first was that as a result
15 of some briefing that staff gave us, related to the way
16 in which they would normally roll out new requirements,
17 recognizing that this is not a requirement, but also
18 recognizing, as has been discussed in this committee
19 over the past year or so, particularly hearing from Dr.
20 Michaels, and we've heard a lot about it this morning,
21 that there could be very significant impact by the
22 voluntary adoption. This is a program about voluntary

1 adoption, voluntary movement. That there could be
2 quite a significant impact on improved workplace
3 protections for whistleblowers.

4 So without reading you this list, I'll
5 highlight a few, looking at the websites that the staff
6 made note of and in the briefings that we had from
7 staff, these were some of the most attractive aspects
8 of what OSHA seems to normally do when they roll out a
9 new regulatory requirement. Again, recognizing the
10 distinction here that seem to provide easy avenues for
11 information, attractive avenues for information.

12 I neglected to put the urls in this report.
13 I'll be happy to send them out to other members of the
14 committee. If you were to look at those, you'd find
15 that these features are actually quite attractive and
16 quite user friendly and really could be quite helpful
17 for those that pay attention to the requirements and
18 other resources that OSHA makes available.

19 So we wanted to encourage the broader outreach
20 that something more akin to new requirements would
21 require. I think the response yesterday was that the
22 idea of putting the recommended practices document, as

1 prepared by OSHA, out for comment, was a real positive
2 step in that direction to create a much greater
3 awareness, to invite input from a broad variety of
4 audiences. So certainly, going in the direction that
5 we had hoped by pointing to this larger list.

6 The one item that I would point out here in
7 particular is in that list of the open bullet points,
8 there's one that says OSHA reach or appear at
9 conferences. That's very much connected to this list
10 of organizations and you will hear, hopefully, from my
11 colleagues in the work group about some of the
12 organizations that are most prominent in the ways in
13 which they're looked to for information and guidance.

14 So a key thing is for the agency to be able to
15 get people out, to be able to speak at these places and
16 also to figure out how, in the instances where certain
17 of the newsletters, certain of the training conferences
18 were considered by the knowledgeable folks on this work
19 group to be very high leverage in having an impact on
20 the actions of employers.

21 And particularly, in those cases, and we can
22 probably do some more to prioritize or identify these -

1 - particularly in those cases to be sure that there is
2 some representation and articulation of the recommended
3 practices and their potential value.

4 Let me pause there and see if any of the work
5 group members might want to comment on any of these
6 outreach efforts or anything that I've touched on so
7 far.

8 MR. KEATING: I have a question. And I don't
9 want to put you on the spot, but on that exact point
10 about conferences, and there is this attached list, but
11 there's actually a whole additional reservoir of
12 conferences/big audiences of reaching many employer in
13 different industries, which, admittedly, I don't want
14 to say "for profit," but, you know, they're private
15 employers who might have a 1,000 person conference.

16 And it's my understanding that historically,
17 while -- this has always confused me a little because
18 where I used to be, a very large law firm that would
19 have these big conferences, they would sometimes have
20 NLRB, EEOC, SEC, various government agency officials
21 high up who would come and speak. And on a number of
22 occasions, I endeavored to try and see if I can get

1 someone from the whistleblower directorate and what I
2 heard was if it's any type of a private event where
3 there are people paying to go there or whatever, it's
4 out of bounds.

5 Do you have any idea whether those types of
6 restrictions could be relaxed to the extent that we're
7 trying to get a message out like this to a group of
8 people?

9 MS. BETTS: I'm not sure I'm really the best
10 person to answer the question. I'm not aware of legal
11 restrictions on OSHA providing folks to speak at events
12 like that. Do I think if there is policy to that
13 effect, that wouldn't be a question for me.

14 MS. SMITH: So this was actually a -- I think
15 that there's a little bit that's being left out. This
16 was really more of a -- what Greg was actually
17 proposing was that two of the members of the committee
18 were going to speak and we were concerned that it was
19 going to be perceived as a committee event. And if we
20 brought in OSHA, that was a problem. So it was having
21 a committee event that wasn't being advertised to the
22 public. And so that was what the issue was.

1 We never said that there was a problem having
2 some OSHA official come to speak. The problem was
3 making sure that there were proper FACA lines drawn.
4 When you are trying to advertise it as making it sound
5 like a WPAC event, that's when it was a problem, and
6 that's the only thing about it that was a problem.

7 MR. ROSA: Okay. Good. Nancy.

8 MS. LESSIN: In your global search and destroy
9 that you left --

10 MR. BROCK: I missed a few.

11 MS. LESSIN: -- you left out WBBP.

12 MR. BROCK: I know. I saw it.

13 MS. LESSIN: So if we can change that for the
14 final document, great. Thanks.

15 MR. BROCK: Yeah. I know. I searched, but
16 didn't full destroy.

17 MS. NARINE: Search and replace.

18 MS. LESSIN: Search and replace. Sorry.
19 Sorry.

20 MR. BROCK: It depends on your point of view.

21 MS. LESSIN: We're just now commenting on the
22 selected outreach efforts. We're going through chunk-

1 by-chunk, right?

2 MR. BROCK: I'm trying to do that, yeah.

3 MS. LESSIN: Okay. Go ahead. Read on.

4 MR. BROCK: Feel free to interject if I go
5 past something you want to talk about.

6 Moving on down the page, one idea that came up
7 that seem to have really potential for high leverage in
8 an area where it would be difficult for the agency to
9 go out and have an impact, but where a lot of employers
10 could be reached in a positive way would be through, at
11 least I commonly understand as a supply chain or value
12 chain conference or requirements. I'm going to say two
13 cents about it and then I'm going to turn it over to
14 somebody who actually knows something about it.

15 The notion is that large -- many large
16 companies, not all, but many large companies levy
17 requirements or advisory information or provide
18 advisory information to those that supply them so that
19 they don't have difficulties in the supply chain,
20 either reputational or business-wise, in terms of
21 interruptions or quality problems; and therefore, they
22 have an incentive to cause the suppliers to be

1 compliant with a variety of requirements.

2 Certainly, with the messages about
3 whistleblower protections, it could be a lot of value
4 in conveying that. So I want to ask Dave to initially
5 comment because he was very articulate about this, and
6 others, perhaps, would have something to say.

7 Can you help us understand this, Dave?

8 MR. EHERTS: I think the best way to explain
9 it is with an example. So when I was at Sikorsky
10 Aircraft, United Technologies, you know, we assembled
11 aircraft, but of course, our supply chain was
12 completely vertically integrated, so we had a lot of
13 suppliers selling us parts, selling us radios and gears
14 and wires and engines, and transmissions, and then we'd
15 assemble it all. And one big activity within the
16 parent organization was supply chain risk.

17 And I think the risk took a number of forms.
18 One is reputational. So one of our suppliers could
19 have an issue. I think this has happened in the
20 American industry over and over in the last decade,
21 where they do something wrong. They're identified in
22 the press as one of our major suppliers and that

1 splatters onto our reputation. So that was one area.

2 The second area was interruption of supply.

3 So they make a key part for us and a hurricane knocks
4 out their major plant. So it would be very interesting
5 in them having a hurricane preparedness plan. But also
6 what can happen is they can have a compliance issue
7 which could stymie them. And if they had a major
8 compliance issue, then they're distracted from
9 manufacturing for us.

10 And I think thirdly, and one of the things I
11 thought was most important was we could make their
12 businesses better. And an example of that would be
13 giving them an energy conservation program. So they
14 would implement the energy conservation program, reduce
15 the amount of energy they're using. They would save a
16 lot of money. Their profit margin would go up and
17 they'd be able to bid lower on future project with us,
18 win more business. We could both make a good profit.

19 So we were constantly looking back in our
20 supply chain. We had conferences every year and EHS,
21 my department, was always invited to come and speak.
22 And we talked about things like hurricane preparedness

1 and we talked about energy conservation and we talked
2 about OSHA compliance and EPA compliance and things
3 like that. I just saw a big opportunity there to talk
4 about whistleblower protection, anti-retaliation
5 programs.

6 And we explained to them that it makes their
7 business stronger because first what it does, it
8 encourages employees to come to you first. So if there
9 is an issue with your business that you desperately
10 need to know about, having an anti-retaliation program
11 would give you better odds of getting that raised
12 internally first so you could fix it at early stages
13 when it's easiest to fix. So that's the first thing
14 you could do.

15 Second, it would prevent a whistleblower, then
16 from going, you know, a filing an official
17 whistleblower complaint, which, of course, would
18 distract you from manufacturing products for us. So
19 it'd defensive in one, offensive in another. Your
20 business gets better because you get the information
21 you need to manufacture better and it's defensive from
22 the point of view that you're not going to have claims

1 brought against you which distract you from
2 manufacturing for us.

3 So one of the other issues we had, and I know
4 it's one of Dr. Michael's big things, is how do you
5 reach the small companies? How do you reach small,
6 middle-size businesses? One way is through chamber and
7 another way would be through large corporations for
8 that big supply chain. So if you gave us a message to
9 get out, we have a mechanism to reach out to small
10 middle-sized companies that are suppliers.

11 MR. BROCK: So that's where the leverage is,
12 is that you're dealing with a lot of companies who
13 wouldn't as easily get the word and you have resources
14 as a large company to say here's the stuff we research.
15 Here's the training stuff. Here's the compliance
16 information. Here it is.

17 MR. KEATING: And we have a shared call.
18 Taking risk out of their business and making them
19 better suppliers for us.

20 MR. BROCK: Okay. Any others want to comment
21 on this? This isn't sort of a well-known phenomenon.

22 MS. NARINE: The other areas that where it

1 helps reduce risk is labor risk. You reduce the risk
2 of strikes, and no for offense to -- you reduce the
3 risk of potential labor unrest for those companies
4 that, no offense, do not want to have unions or those
5 kinds of things.

6 To the extent that your employees are happy
7 and they believe that they have a free and open
8 workforce and they can get along with management and
9 they feel that they can make complaints, they don't
10 need anyone to come and help represent them. So if
11 they feel that they can go with their complaints and
12 they're going to be treated fairly, et cetera, it's a
13 better workforce that they need any outside
14 intervention to come and help them. So if we can say
15 we've got a better workforce; you've got a code of
16 conduct; you've got anti-retaliation policies. You can
17 come and make complaints without fear of reprisal, it's
18 also something that strengthens their workforce in
19 general.

20 So again, for small and medium-sized companies
21 that don't see the value in this, it's another thing
22 that the larger companies, the mid-sized companies can

1 help cascade down. Some companies will have vendor
2 codes of conduct. And again, we were talking about
3 yesterday, to address Greg's concerns, this is not a
4 requirement to keep business, to retain business.

5 Some companies may say this is something we
6 expect you to adopt. Some companies may say this is
7 just something you might want to think about, but it's
8 again, another tool to say this is something that we're
9 looking at and again, I remember as a compliance
10 officer, when we helped manage other company's supply
11 chains, I received certifications all the time. I was
12 asked, do you have a code of conduct? If not, we want
13 you to look at ours. And we'd say no, thank you; we
14 already have a code of conduct. But sometimes I was
15 asked to sign off on other people's codes of conduct.
16 And if it was less restrictive than ours, we were like,
17 that's fine. If it was more restrictive than ours, we
18 said no, thank you.

19 So this is something that companies are used to
20 already. And if they're not, again, it's a good -- an
21 additional tool in the arsenal for companies. And
22 again, as Dave was saying, it's another way to get the

1 message out because not every small or mid-sized
2 company is a member of a local chamber of commerce, et
3 cetera. But if they are supplying things, if they are
4 trying widgets and parts, they are dealing with other
5 companies as part of the ecosystem.

6 MR. EHERTS: And another thing I can say is
7 that I know that long-term labor contracts for
8 suppliers was a big deal to us because we didn't want
9 the interruption of a labor action for strike. And so
10 if we had two suppliers that were equal in every other
11 case and one had a long-term labor contract and the
12 other one had negotiations coming up very shortly, I
13 knew which one we'd pick as our supplier.

14 MS. NARINE: You could have slow-downs. You
15 can have all kinds of things. Sick-outs, you know, any
16 number of things can happen. Just keeping it real.

17 MR. EHERTS: Just theoretical.

18 MS. LESSIN: That's all right. I'm coming
19 back at you in a little bit.

20 MS. NARINE: That's okay. We're fine.

21 MR. BROCK: Okay. So for these kinds of
22 reasons, this seems like a really useful to get out the

1 word through a mechanism that is already taking place
2 that this would not be an unusual type of thing to talk
3 about. Now, we have potentially a document that we'd
4 provide a lot of explanation and guidance.

5 All right. So before going onto the other
6 topics, I want to engage my colleagues on the work
7 group in talking about some highlights of this chart
8 because I think when we start to talk about at least
9 some of the other things that are on this list,
10 understanding the reasons why and how to reach these
11 organizations helps to explain why some of the other
12 things are on the list.

13 So let me invite any of the work group members
14 to pick a couple of the examples off of this list that
15 you think are high leverage. You can a little bit
16 about why and how they do their outreach and what
17 organization and the kind of products or tools we can
18 maybe help provide could make a difference. Is anybody
19 willing to do that? I think it would be very
20 illustrative.

21 MR. EHERTS: Well, I would just like to start
22 the conversation. One of the issues that I see is a

1 problem for us is that a lot of these big companies
2 have best practices. How do we share those best
3 practices when OSHA is not allowed to point to us
4 directly?

5 One way to do it would be get presentations
6 given at some of these major conferences by some
7 companies that have best practices so that other
8 smaller companies could come and see them and gain
9 access to them. So I think that's one thing that's
10 really important on that list is that it gives us
11 places to go to present.

12 MR. BROCK: Good. What about the Compliance
13 Week activity? It seems like -- that and CHARM --

14 MR. KEATING: Yeah. I think, Jon -- and
15 Marcia can speak more to Compliance Week, but there are
16 two that seem to jump out as logical candidates to
17 reach a broad swath of large, medium, and small sized
18 employers. And conveniently, I think both are here in
19 Washington.

20 SHRM, which is the Society of Human Resource
21 Managers, I believe is what it's referred to --

22 MR. EHERTS: Top of page 7.

1 MR. KEATING: Yes, sir. Top of page -- no,
2 the bottom of six.

3 MS. LESSIN: Bottom of six.

4 MR. KEATING: This is probably the largest
5 organization that speaks to and provides extensive
6 advice for human resources professionals. And I know
7 that there would be -- well, I suspect there would be
8 genuine interest in having this topic be presented and
9 discussed, more visibility around it at their annual
10 conference, which, as I said, is in Washington and
11 typically is quite large. One of the largest out
12 there. And I think the benefit, as I said, is that is
13 not targeted just at large employers. It is targeted
14 at small, medium, large, you know, a huge variety of
15 industries. And I think, you know, human resources
16 professionals are going to be at least in the epicenter
17 of all this. So I think it would be a great way to get
18 the message out.

19 You want to talk about Compliance Week?

20 MS. NARINE: Yeah. Compliance Week, it is the
21 largest gathering of compliance professionals every
22 May. I think this year it's May 5th -- I mean, 11th.

1 It has auditors, compliance professionals. Lots of law
2 firms go. And the government agencies, NRLB is there,
3 SCC is there, the Department of Justice is there.
4 Other government agencies go. They typically have very
5 well-seasoned compliance officers going, but also kind
6 of the newbie compliance officers that go. So it's a
7 great way to get them there.

8 Part of the reason, again, not to beat a dead
9 horse, to add some more meat to the SOX bones there is
10 because a lot of compliance officers, that's where
11 their mind is right now is on the SOX/Dodd-Frank and
12 it's less on the OSHA stuff. So they need to get
13 educated on some of the OSHA stuff. They don't
14 necessarily know that. So if again, in the title
15 document, there's something about enhancing your
16 compliance program or something like that, that'll get
17 them teed into this and they'll start talking to the
18 safety people like, hey, what are we doing about this?
19 And you might learn a whole new world because in many
20 companies, there's a lot of silos and people aren't
21 really speaking to each other. So I think that's going
22 to be an important component.

1 But going back to the SHRM thing, I think
2 another thing to remember is that in a lot of
3 companies, a lot of people have outsources a lot their
4 human resources functions. And so there isn't always,
5 especially in small and medium-sized companies, there
6 is not a person that's really dealing with human
7 resources. Maybe there's somebody handling payroll and
8 that's it.

9 So the core human resources advice -- because
10 I do some consulting, there is a company that they even
11 have a whole lot of OSHA stuff, but they're calling an
12 outsource provider and getting their HR advice/legal
13 advice, should I put this person on FMLA? Is this is a
14 workers' comp issue, et cetera?

15 So I'm assuming some of those people are also
16 working with SHRM, but we should also make sure we're
17 getting to kind of those staffing agencies as well and
18 getting some of this information because many small
19 companies are getting their advice from people that
20 don't work for the companies themselves. So we want to
21 make sure that in this list of organizations, we're
22 hitting that group of people as well. I think SHRM

1 might capture it, but we should make sure.

2 MR. BROCK: Yeah. Jennifer had gave us some
3 to add to the list. You want to comment on that,
4 Jennifer?

5 MS. ROSENBAUM: Sure. Just to what Marcia is
6 saying, I think the American Staffing --

7 MS. NARINE: Staffing Association, yeah.

8 MS. ROSENBAUM: -- Association and the
9 National Staffing Association are important places.
10 And I think on the health and safety side, we've seen a
11 number of problems and so it suggests an area where
12 folks need more training and best practices experience.

13 I'd also emphasize the Mexican Consulate,
14 which has a particular relationship with the Department
15 of Labor and other consulates, which either may have
16 those relationships or may be reachable. I know Wage
17 and Hour actually reaches out to the consulates pretty
18 well when they do their outreach. The consulates
19 advise a lot small business folks from their countries.
20 And so I think they have a different reach than some of
21 the other groups on the list.

22 MR. BROCK: I don't remember who had raised

1 this, maybe several of you, besides the conference
2 dimension, a number of you raised the newsletter and
3 magazine dimensions. I think that's a little bit
4 different as a place to put things. Can anybody
5 address that?

6 Let me get Ken in first and I'll come back
7 over here.

8 MR. WENGERT: For an organization like the
9 American Society of Safety Engineers, it's 36,000
10 people. The conference is attended by about 2,000. So
11 if you present at the conference, you're going to touch
12 a portion of those 2,000. It depends on how you
13 (1:07:11) would be on the conference. It might be a
14 couple hundred, it might be 2,000, if they're not at
15 the bar.

16 If you did the articles in professional
17 safety, that goes to all members that is part of the
18 dues, so you get a much broader bang for the buck. Is
19 everybody going to read it? No, but it's another
20 avenue to get that message out through the membership
21 of some of this organizations as well.

22 MR. BROCK: Marcia.

1 MS. NARINE: Yeah, I think that's true. So
2 even Compliance Week, by the way, comes out weekly.
3 There's also a magazine called Compliance Week.

4 MR. BROCK: Every week?

5 MS. NARINE: Every week. It should be every
6 week. So even if Dr. Michaels couldn't present, I
7 still recommend he presents, but he could also -- the
8 editor, Matt Kelly, does interviews and he can actually
9 interview him. I think he also does webcasts, but he
10 also does interviews and that might be a nice way to
11 kind of introduce him to the community, either before
12 the Compliance Week conference or kind of just
13 interview him in a way that he knows it's going to
14 attract the attention of the readers.

15 The Association of Corporate Counsel, that's
16 kind of the Bar Association for in-house counsel. You
17 can only go to that meeting if you are in-house
18 counsel, but that is a great way to get to in-house
19 counsel of companies of all different sizes.

20 MR. BROCK: Through written means?

21 MS. NARINE: Huh?

22 MR. BROCK: Through written means, you mean?

1 MS. NARINE: Excuse me?

2 MR. BROCK: A good way to get to them is by
3 written means?

4 MS. NARINE: No, it's a meeting. You have an
5 annual meeting.

6 MR. BROCK: Oh, so a member would have to go?

7 MS. NARINE: Well, no. Dr. Michaels, he could
8 go and speak is what I'm saying.

9 MR. BROCK: Oh. Gotcha. Okay.

10 MS. NARINE: He would speak. You know, again,
11 SEC, DOJ they go, but it's in-house counsel that go.
12 And again, he could say -- you have in-house counsel
13 for a manufacturing companies and some people will be
14 directly interested in again, not just the SOX stuff,
15 but the 11(c) stuff because that's the stuff they're
16 going to be focused on as well. And ACC has a very
17 good website. They also have podcast. So again, they
18 have lots of written materials.

19 SECE, they have conferences, regional
20 conferences. They have national conferences. They
21 have certifications, but they also have a monthly
22 magazine. They're always wanting people to write

1 magazine articles. So somebody could go write
2 something for Dr. Michaels saying -- and even, I would
3 recommend somebody even putting something in there
4 saying we're looking for comments on the best practices
5 or what is it called, recommended guidelines?

6 MS. EHERTS: Recommended practices.

7 MS. NARINE: Recommended practices. It was
8 best practices for two years, we were calling it.

9 MR. BROCK: So you think it was easy to search
10 and destroy, huh?

11 MS. LESSIN: Like the baby at the christening.

12 MS. NARINE: You can call it New Scott for all
13 this time and now it's named something else.

14 MR. ROSA: That's good. That's a great one.

15 MR. BROCK: All right. So that gives everyone
16 else -- so this provides a flavor for how this list
17 came about and we hope that the agency will find it
18 useful for identifying priorities and so on.

19 So I want to come back then to page 3 of the
20 category called tools. Before I do this, anybody else
21 want to comment on this chart? I just want to give
22 some examples out there. Okay. So come back to page 3

1 in the category that's entitled tools.

2 MR. KEATING: Sorry, Jon.

3 MR. BROCK: Oh, go ahead, Greg.

4 MR. KEATING: I just need one last comment.

5 And it relates to the issue that I raised a moment ago,
6 and thank you for the clarification on that issue. I
7 guess I was mistaken, but in any event, there's a whole
8 host of private entities that hold very large
9 conferences. Whether they're law firms or they're
10 consulting -- big consulting companies or for profit
11 compliance solution companies that they're very aware
12 of this as a burgeoning area and I don't want to
13 suggest certain names, but I think there's an entry
14 sort of saying, you know, large private company
15 conferences or events might be something to consider.

16 MR. BROCK: Okay. I've been making notes for
17 adding useful information. That's down there.

18 MS. NARINE: Yeah, because big law firms will
19 have conferences for their clients to attend. So maybe
20 he's not trying to pitch his firm, but I used to go
21 them when I was a client and they would often have
22 speakers. I know that, as a client, I would always

1 flock to wherever a government person was going to
2 speak because I don't want here from the horse's mouth
3 what was important to them.

4 So it would be a natural audience where the
5 in-house counsel or the HR people would flock to hear
6 Dr. Michaels say these are our enforcement priorities
7 is what we're looking for, et cetera. So you would
8 only get the clients from that law firm, but that might
9 be 400 people.

10 MR. BROCK: It might be a very large impact
11 employers.

12 MS. NARINE: It would be a large captive
13 audience.

14 MR. BROCK: Just like "as effective as," it's
15 --

16 MS. NARINE: So it's not an open meeting, per
17 se, but it doesn't have to, from a FACA perspective, it
18 wouldn't be a problem; is that correct?

19 MS. SMITH: If it's just Dr. Michaels, no.

20 MS. NARINE: Right.

21 MR. KEATING: And just for the record, I'm not
22 suggesting my current law firm because we don't even do

1 this, nor my former.

2 MS. NARINE: Correct.

3 MR. KEATING: But I'm just saying there's
4 probably, you'd agree with me I think, five or six --

5 MS. NARINE: Yes.

6 MR. KEATING: -- logical candidates that have
7 close to 1,000 people who come to these conferences --

8 MS. NARINE: Yes.

9 MR. KEATING -- and they are, like Marcia said,
10 people will flock to the session where the government
11 is going to speak, and I think it can be really
12 helpful.

13 MS. NARINE: Yeah.

14 MR. BROCK: Duly noted. Good. All right. So
15 let's go over to the tools portion. And again, not to
16 read all the things in the list, but we tried to
17 identify after making up this chart, I tried to take a
18 sweep through it and said well, what are the things
19 that are coming up commonly where there would be things
20 that would be important to have prepared as templates
21 and --

22 MS. NARINE: I don't know if there are

1 conferences that advocates go to that should be on this
2 list. Are they --

3 MR. FRUMIN: We do it in secret.

4 MS. NARINE: Is it like, a secret handshake?
5 It is where a crow flies a midnight and then you get in
6 and --

7 MR. FRUMIN: It was at the table when these
8 guys were sitting there. We do, but they're not --

9 MS. NARINE: But you don't want the government
10 to come; is that it?

11 MR. FRUMIN: No, no. The steelworkers hold a
12 big conference and half of OSHA shows up.

13 MS. LESSIN: This says on here, "Union Safety
14 Organizations."

15 MS. NARINE: Exactly.

16 MS. LESSIN: It's really union organizations,
17 and we do a health and safety conference every 18
18 months. We have over 1,500 delegates show up. Part of
19 the conference invites management in. So we have
20 management counterparts coming to a part of that
21 meeting. So it brings it up to 1,800. And I believe
22 that Dr. Michaels has been at every single one of these

1 conferences, as have other government folks.

2 MS. NARINE: But I guess this says union
3 safety and labor centers, but I don't know if it needed
4 to be more broken down more specifically or is that
5 something we're going to do at another go around. I'm
6 assuming, is that the universe of advocacy
7 organizations?

8 MS. LESSIN: There's probably, you know,
9 within labor organizations or union organizations, and
10 again, I'd probably take out the word "safety" so that
11 --

12 MR. BROCK: So union conferences.

13 MS. LESSIN: You know, union conferences,
14 union organizations that there are specific ones within
15 that. There are a number of unions that hold
16 conferences and such and I think in the worker center
17 world, there's, you know, possible kinds of
18 conferences. There's a big COSH conference, the
19 Coalition or Committees for Occupational Safety and
20 Health is in here. They do a conference every year-
21 ish. You know, so I think the broad outlines are
22 covered and whatever specifics, you know, any of us can

1 give to, like you did, the conference for Compliance
2 Week is coming up on May 5, 2016, you know, we can
3 provide that as needed.

4 MR. BROCK: Okay. So for now, hopefully it's
5 in a helpful state for staff and we can add details or
6 you can come back to people who have specific knowledge
7 of the organizations for contact information. I think
8 it seems useful. Okay. We hope this will be useful.

9 So back to the tools for a moment. Again,
10 without reading down the list, as you heard in the
11 description of some of these groups, conferences,
12 journals and so on, there's potential for use of some
13 sort of a template for articles that might appear that
14 could be adapted to the audience and to the author.
15 There's potential value in FAQs that could be maybe
16 used on some of the websites. We had some conversation
17 about whether members could have input. It needed to
18 be, you know, OSHA has to write and bless FAQs that go
19 on their site. Could we provide input, possibly?

20 Maybe some basic PowerPoint material and other
21 things that are on here, obviously, to try to arrange
22 for Dr. Michaels to show up. I'll come to that in a

1 second. We had a useful, but not entirely conclusive
2 conversation, which has FACA implications.

3 So that would have to be worked out, about the
4 extent to which OSHA could call upon, either
5 individuals on this Committee or in ways that the
6 Committee might be able to produce material that you
7 could consider for use. So we would obviously want to
8 be compliant and useful.

9 So we identified that there were tools. We
10 identified that we could be helpful in preparing them
11 and hope that you'll be able to obtain what you need
12 and put it where it needs to be.

13 So going down the list, then, senior
14 leadership involvement. Dr. Michaels' name was taken
15 in vain but usefully here, a number of times. He
16 volunteered yesterday, quite expansively to be
17 available in the remaining 430 or so days that he
18 expects to be in office, according to him. Not my
19 prediction; according to him. And obviously, his
20 visibility, perhaps that of others, in agency
21 leadership within the directorate or elsewhere could
22 generate important visibility. And you've had some of

1 the particularly useful places to show up.

2 We also identified and don't have anything
3 especially concrete to recommend about it, but it does
4 have implications, I think, for the product. The value
5 of the unanimous consensus that produced what was
6 called, at that time, the best practices document, the
7 fact that that was enthusiastically, unanimously
8 produced out of here, gives it an enormous credibility
9 in these kinds of organizations among the professionals
10 on all sides of the aisle, all sides of the labor
11 management table. And that, combined with an
12 endorsement by the agency, through the document that
13 gets put out, creates, in some ways, the foundation for
14 why anyone should pay attention to this.

15 So we wanted to make that point. You've
16 already gone a nice distance in the draft that you
17 produced in making note of what it's based on and that
18 creates a real value. But recognizing that value, I'm
19 going to make an editorial comment here; this was not
20 discussed in the Committee that finding a way for us to
21 be able to provide comment of a substantive,
22 constructive, valuable nature to you on the document, I

1 believe there will be some comments on it.

2 First, to be able to do that beyond reacting
3 today to a document that we got two days ago,
4 recognizing you have lots of other stuff to do in order
5 to produce it, even as quickly as you did. It would be
6 very important so that when that comes out, everybody
7 here is standing behind it as enthusiastically as they
8 were at the time. So we want to work with you.

9 My stance is we want to work with you as
10 effectively as possible to make sure those kinds of
11 comments come through, consistent with FACA
12 opportunities and restrictions, and hopefully that can
13 be chatted about here before the day is over.

14 We also raised the issue here about acting in
15 individual capacities. Everyone almost certainly wants
16 to be active in helping to create the awareness. And
17 it seems everybody in this group can be active as
18 individual professionals in areas where they have
19 access and influence to call attention to the best
20 practices. And as long as that doesn't becoming
21 committee meetings, there's wide opportunities as
22 individual professionals.

1 We also identified, but didn't have a great
2 deal of discussion about it that in private advising
3 work that probably everyone around this table does with
4 employers or unions or workers or others, to try to
5 encourage attention to the best practices. There may
6 be ways that the agency can do that, but more likely
7 that comes from members. Those are places where
8 employers and employees turn to in deciding what
9 actions they'll take in getting an employer to use best
10 practices in the future. It seems like a good idea.

11 Moving on, we're fortunate to get some
12 briefings from people that are close to the SHARP
13 program and the VPP program. VPP being the Voluntary
14 Protection Program where employers can seek a kind of
15 certification for the value of their safety and health
16 programs. And SHARP being a roughly similar
17 certification or recognition that's done through the
18 onsite consultation programs. We had a very
19 constructive conversation with the individuals
20 representing those, recognizing they may not be the
21 final decision makers, and came up with the statement
22 here, which I'll read.

1 "The OSHA SHARP and VPP programs should
2 strongly consider the explicit addition of
3 whistleblower protections and include references to the
4 recommended practices." It became our understanding
5 after those briefings that is it not required for VPP
6 or SHARP certification, which is this sort of high
7 level voluntary recognition that companies seek, which,
8 perhaps conveys some competitive advantages or
9 communicates to employees something about safety
10 consciousness that neither of them required
11 whistleblower protections to be part of what gets
12 certified. So they seemed amenable to considering that
13 and also to providing other kinds of guidance and
14 materials.

15 So we've made an explicit reference in here,
16 hoping that that will become the case. And I want to
17 emphasize that these are voluntary programs. It's not
18 a new requirement that gets let in all companies to
19 follow the recommended guidelines. So it's not a nose
20 under the camel's tent, it's just to take these
21 important, well-recognized voluntary programs and say
22 this is important too; you should be talking about it.

1 We got a positive response and hope that that that
2 might carry into the decision-making phase.

3 And then a similar recommendation that the
4 onsite consultation program, apart from the SHARP
5 certification aspect, different than what seems to be
6 the current practice, be explicit about the review of
7 the whistleblower protections in employers, where
8 they're asked to consult and to review that and provide
9 advice and information about available sources when
10 they do that. Again, it's a voluntary activity that
11 employer engage in.

12 We did have a look at the OSHA Inspector's
13 Manual and found that there is an opportunity for
14 considering mitigating factors when looking at
15 penalties and settlements and that there was room to
16 consider the state of the programs in the employer
17 organization.

18 The last one, we're a little bit at a
19 disadvantage. This was something that our
20 distinguished Chair, Emily Spieler suggested on one of
21 our calls that seemed like quite a useful idea, but
22 I've been waiting for her to have the opportunity to

1 speak about it. So we have not had a more substantial
2 discussion about it and hopefully, when she gets back
3 to the regular activities, she can suggest whether that
4 still seems timely or potentially valuable and we can
5 consider it at the time.

6 So that's the summary, and I'd like to invite
7 the rest of the Committee to comment or otherwise, and
8 then see what other thoughts there may be from others?

9 Does anybody else on the Committee want to --

10 MR. FRUMIN: Yes.

11 MR. BROCK: Eric, let me just see if anybody
12 else wants to say something. You're good with that
13 summary for now?

14 MR. ROSA: Very good.

15 MR. BROCK: Okay. Eric, please.

16 MR. FRUMIN: So on the last page of it, it
17 talks about the new Executive Order for federal
18 contractors --

19 MR. BROCK: Yes, sir.

20 MR. FRUMIN: -- on the top of page 4. And it
21 discusses here, it quotes from the proposed DOL
22 Guidance that's been out for public comment, which is

1 linked, of course, to the proposed regulation by the
2 Federal Acquisition Regulation (FAR), regarding the
3 minimum requirements for settlement agreements to
4 remedy labor violations when federal contractors with
5 labor violations -- when companies with labor violation
6 are bidding on federal contracts.

7 So your possible or existing contractor, a
8 contract is put out for bid and you want to bid on it
9 and you've got labor law violations, including
10 prominently OSHA violations. So this mentions in the
11 text here, this quote from the DOL Guidance, which is
12 effectively a binding regulation that contractor will
13 need to have a health and safety program as a
14 mitigating factor to allow them to be properly
15 considered as a bidder if they have labor law
16 violations, especially if they have the kind of serious
17 labor law violations like repeat and willfuls that
18 would raise a flag. This talks about the need for a
19 safety and health program.

20 So what this doesn't mention in what comes
21 from the same section of the Guidance is the specific
22 requirement for programs that promote worker reporting

1 the violations in the following language. So I think
2 we need to add this language to this document. So it's
3 just a continuation of the section you quoted from.

4 "An enhanced settlement agreement or other
5 compliance programs to foster a corporate culture in
6 which workers are encouraged to raise legitimate
7 concerns that would, under other circumstances, go
8 unreported." Excuse me. "Raise legitimate concerns
9 about labor law violations without fear of
10 repercussions. Such programs and procedures made
11 proper is to report violations that would, under other
12 circumstances, go unreported. Therefore, the
13 implementation of such programs and procedures will be
14 considered a mitigating factor, particularly as to
15 violations that might otherwise be deemed repeated or
16 pervasive."

17 So there's now a kind of joined at the hip
18 intention from the -- starting with the Executive Order
19 because this all flows from the Executive Order. The
20 Executive Order is a specific mandate to promote open
21 environments for workers to report violations, down
22 through the DOL guidance. Down through the proposed

1 FAR regulation.

2 For settlement agreements in OSHA compliance
3 cases, not whistleblower cases, necessarily, but OSHA
4 compliance cases to have detailed provisions on
5 protection of workers from retaliation, which never
6 goddamn happens in existing OSHA practice, much to our
7 dismay, over the many years. If you'll allow the
8 motion that accompanies my comment, which we've been
9 complaining about for a long time.

10 Why have the anti-retaliation provisions have
11 not been included in settlement agreements on a regular
12 basis, escapes me. But now the Executive Order from
13 the President, as reflected in the proposed DOL
14 Guidance, mandates that in order for a settlement
15 agreement to be considered a mitigating factor, to
16 allow Lockheed Martin to bid on a \$20 billion weapon
17 system in the presence of serious OSHA violations, they
18 have to have an anti-retaliation program in their
19 settlement agreement to correct the serious OSHA
20 violations.

21 So I think it's incumbent upon this group to
22 make it very clear to the rest of the agency, including

1 the people in enforcement who work on this DOL Guidance
2 that they need to take seriously the substance of a
3 real anti-retaliation program, since they have almost
4 no experience in doing that in settlement agreements.
5 Next to never.

6 And of course, to look at the anti-relation
7 provisions in whistleblower settlement agreements,
8 particularly the creative one, which have gone above
9 and beyond the normal back pay or whatever, and force
10 companies to cut the bullshit like at BNSF or Western
11 Truckers or the major innovative settlement agreements
12 that dealt with corporate wide problems, et cetera; not
13 just the run-of-the-mill back pay or even punitive
14 damages because this is really about promoting an
15 ongoing worker reporting the violations in companies
16 who are already out on the limb and promising to fix
17 everything so that going forward, Uncle Sam isn't
18 cutting checks by the billions to contractors who
19 continue to violate federal labor law, whether it's
20 OSHA or the Feds.

21 So if we can amend this italicized section to
22 include the rest of the provisions from that same

1 paragraph that I was reading from in the DOL Guidance.
2 That would be great. And more important, if the WB --
3 WB the directorate --

4 MS. LESSIN: DWPP.

5 MR. FRUMIN: If the directorate could report
6 back to us about its future contract with the people in
7 the agency and DOL who are working on implementing the
8 Guidance, that would be good. Is that clear?

9 MR. BROCK: Anthony, what's the appropriate
10 procedure? Can we just discuss that here? Do we need
11 a motion or can we discuss it and state the motion for
12 a directorate or --

13 MR. FRUMIN: No, it's not a motion. I'm just
14 offering it as a suggestion for revising the document.

15 MS. BETTS: Well, I think if it's going to be
16 an amended recommendation, I guess we want a motion to
17 amend the regulation and a second discussion --

18 MS. LESSIN: Second.

19 MS. BETTS: Okay.

20 MS. NARINE: Is it a recommendation or is it
21 an amendment to the draft --

22 MR. FRUMIN: It's an amendment to the draft

1 document.

2 MS. NARINE: -- dissemination idea?

3 MS. BETTS: Yeah. I mean, we're making a lot
4 of recommendations to change this document before it's
5 finalized, right? So what I hear Eric saying is that
6 this should be included just like we as we've been
7 discussing.

8 MS. NARINE: Just like the search and destroy.

9 MR. BROCK: I just asked for a protocol.
10 Okay. No, go ahead.

11 MS. LESSIN: They're figuring it out.

12 MR. BROCK: I'm not trying to interfere with
13 the discussion.

14 MR. ROSA: No, no, I know.

15 MR. BROCK: Okay. So we can just discuss this
16 as we've discussed everything else?

17 MR. FRUMIN: And when we ultimately have a lot
18 of revisions that we're going to vote to whether --
19 these are ideas. I mean, ultimately, we'll need a
20 motion to approve all the things that have been put in,
21 but I don't think we're there yet. I mean, I think --

22 MR. EHERTS: We're having the discussion. So

1 this is now part of the discussion.

2 MR. BROCK: But I would support that.

3 MS. ROSENBAUM: I want to echo, I just think
4 the point of this document on dissemination of the
5 underlying document is about building up best
6 practices. And in the low age workforce, that
7 particularly vulnerable workforce, where I have the
8 most experience, we often see whistleblower and safety
9 and health investigations going forward together.

10 In many cases, the whistleblower
11 investigations fall aside the health and safety
12 violations go forward, but everyone knows by the end of
13 the citations that these3 violations have been in place
14 a long time and workers had not come forward.

15 And as Dave said, you want people to come
16 forward early. And because the whistleblower
17 investigation isn't there, the whistleblower issues get
18 lost, but it's in everyone's interest when you're
19 having these compliance discussions to bring this in.
20 It doesn't feel to me like the employers or the workers
21 are at odds in that moment when you're trying to really
22 effect a culture shift and you have a very concrete

1 example, albeit in the health and safety citation. So
2 this is my first time to this conversation, but I would
3 really encourage it and I think it's very much in line
4 with the texture of the conversation that we're having.

5 MR. BROCK: Other comments.

6 MS. NARINE: I don't have an objection to the
7 language. I'm just curious as to why wasn't in there
8 in the first place. Do you know?

9 MR. BROCK: You mean in our document?

10 MS. NARINE: Yes.

11 MR. BROCK: Emily sent an email about this
12 about two calls ago, and she hasn't been able to join
13 for various reasons. So I kept waiting for her to,
14 perhaps, give the kind of explanation, perhaps, as what
15 Eric just did. I don't know the context. I get the
16 idea that if we're going to require this of contactors,

17 MS. NARINE: I think it's a requirement.

18 MR. BROCK: Huh?

19 MS. NARINE: Well, I think that this is just a

20 --

21 MR. BROCK: It's not us.

22 MR. ROSA: It's a recommendation.

1 MS. NARINE: It's a recommendation.

2 MR. ROSA: Recommendation. Right.

3 MR. BROCK: Yes.

4 MR. ROSA: So I guess the question that I have
5 is -- and I'm just looking at 2:29 p.m., we have about
6 'til 3:30. Is the plan of the full committee to go
7 through the document, make any revisions and vote on
8 the document before we adjourn for the meeting?
9 Because you may want to go ahead and make some of these
10 revisions if you want to include those.

11 Or is this just an ongoing conversation that
12 you plan on having further discussions on? I just want
13 to get a better gage as to where we're heading.

14 MS. ROSENBAUM: Just to piggyback on Anthony;
15 the reason I made the comment I made is just to the
16 extent that this is a document that you want to
17 transmit to the agency. As a committee, you would
18 either need to do it today or at the next meeting.

19 MR. ROSA: Right.

20 MS. ROSENBAUM: So if you wanted me to change
21 it to this document and submit it to the agency, you
22 know, we should be doing that as we go.

1 MR. BROCK: Yeah. What we did last time is we
2 took the input, clarified that that's what we were
3 going to do and those edits were put in, in typewritten
4 format --

5 MR. ROSA: Correct.

6 MR. BROCK: And gave it to you a day or two
7 later.

8 MR. ROSA: Right.

9 MR. BROCK: So we certainly could do that.
10 There were a couple of edits that were pointed out.
11 For example, on this couple of additions to the chart,
12 which I was intending to make and which we can review
13 before we close here and then as we did the last time,
14 we'd say does everybody support this document.

15 So what we have here is an additional comment
16 by committee members, which we had last time,
17 suggesting something be considered for addition. We
18 did that the last time. Some things made it in. Some
19 things go modified.

20 MS. NARINE: I should know this, but is Emily
21 a committee member?

22 MS. LESSIN: She's not a committee member.

1 MS. NARINE: She's not a committee member.

2 MR. ROSA: Yes, she is.

3 MR. BROCK: She's a public -- she's a public
4 member.

5 MS. NARINE: She's a public member. Is she
6 going to have time to vote?

7 MR. BROCK: Let me move these all down one.

8 MS. BETTS: I think Emily typically doesn't
9 vote.

10 MS. NARINE: Okay. That's why because she's
11 not a voting member. That's why I was confused.

12 MR. BROCK: She is, but she's opted marginally
13 to vote.

14 MS. NARINE: She never votes.

15 MS. LESSIN: She can break a tie.

16 MR. ROSA: She's opted not to, but she a
17 voting member.

18 MS. NARINE: Okay. That's why I was confused.

19 MR. ROSA: And currently, we have 10 members
20 because you have nine here and you have Christine on
21 the phone. So we have a total of 10 members right now.

22 MS. BETTS: So you have a quorum and could

1 vote.

2 MS. NARINE: Okay.

3 MS. BETTS: You know, my goals as counsel to
4 the Committee is just to make sure that's it's clear on
5 the record what the Committee is agreeing to. If we
6 need to type it up afterwards, that's fine, but we
7 shouldn't be having further discussions about do we
8 include this or do we include that on the substantive
9 issues outside of the meeting.

10 So if, for example, you wanted to add
11 language, we would want to be clear on the record what
12 language that was when there was a vote.

13 MR. ROSA: Right.

14 MR. BROCK: As we did last time.

15 MR. ROSA: We did it last time. Correct.

16 MR. BROCK: We did a good job. It was a
17 little complicated and hard to keep notes, but we --

18 MS. NARINE: So are you, Jon, going to be able
19 to -- do you have Emily's proxy to add language to her
20 section?

21 MR. BROCK: I didn't have any particular
22 discussion with her to gain her proxy. What she

1 described in the email in a brief conversation was that
2 she thought this was an appropriate vehicle for
3 potential comment by this Committee to encourage the
4 inclusion of the best practices or recommended
5 practices, along with the other requirements that are
6 summarized here. She thought it was worthy of
7 consideration.

8 She made a personal comment into the docket on
9 that and hoped that we would find an opportunity to
10 discuss it and proceed. It's not an issue that I'm
11 heavily familiar with, so I haven't -- I don't have
12 lots of texture to add to it, but that's --

13 MS. NARINE: So cutting to the chase, as a
14 practical matter, we have a lot of people. We have a
15 lot of passion, even if she was adamantly opposed to
16 Eric's passion, she either doesn't vote or she has one
17 vote. So we could proceed whether she was here or not.

18 MR. BROCK: And I think --

19 MS. NARINE: Not to be crude but --

20 MR. BROCK: I mean, I left it on here even
21 though it hadn't been discussed, substantively --

22 MS. NARINE: Okay.

1 MR. BROCK: -- out of respect for her views.
2 That we are discussing, it would not disturb her that
3 we're considering including -- something about it would
4 not disturb her.

5 MS. NARINE: Okay.

6 MR. BROCK: What she would say about any
7 specifics or specific words, I don't have any way of
8 telling.

9 MS. NARINE: Okay. Thank you.

10 MR. ROSA: And the reason I mentioned the time
11 is we have about 30 minutes of wrap up. And in that
12 discussion, I'm going to make some mention of some
13 decisions that Emily and I had made with regard to work
14 groups. So I think that's very important. And if we
15 can even do that sooner, in case somebody has to leave
16 early, I want to make sure that the information is not
17 going to presented to about where we are going forward
18 with these work groups. That everybody gets that
19 information.

20 Nancy?

21 MS. LESSIN: Okay. I just wanted to get clear
22 what exactly we're doing right now. I have something

1 that I want to raise when we're finished doing that is
2 related to this, but it's not language. It's not
3 anything like that; it's a question for the group. But
4 the first piece of this is what do we need to do now?

5 Can we get this document such that we can vote
6 on it? My issue is January 19 is when comments are
7 going to come in. OSHA is going to do whatever it's
8 comments --

9 MS. NARINE: Comments are due back.

10 MS. LESSIN: Right. -- are due by January 19.
11 OSHA will take them on their recommended practices and
12 will hopefully then be moving forward. I don't know
13 when our next meeting is. It could be April, it could
14 be May. It would be nice to have this crisp document
15 in OSHA's hands so that when they do finalize this,
16 they could meet the May 5 deadline for, you know,
17 whatever, of the Compliance Weekly. Whatever.

18 So I would like to --

19 MS. NARINE: There's other priorities.

20 MS. LESSIN: -- see what it is that we would
21 need to do to see if we can be finished. Be done.

22 MR. BROCK: Okay. Here's a way to maybe get

1 us where we all want to get quickly. The only edits
2 that I am contemplating, based on what I heard in the
3 last hour or two are to get the thing that I didn't
4 search and destroy out, the WBBP, which is the old
5 reference I was using, which is on the last page of the
6 text, page 4. And I'll say recommended practices
7 instead.

8 MR. ROSA: And it's on page 2 as well.

9 MR. BROCK: Oh, is it on page 2?

10 MS. NARINE: Yes.

11 MR. BROCK: Well, I better get busy with my
12 search and destroy on the top of page 2.

13 MR. ROSA: Third line.

14 MR. BROCK: Yes, I see it. Thank you. And
15 other than that, in terms of, as this document was
16 processed by the working group, I had a variety of
17 notes on the chart, Associations of Corporate Counsels
18 to include Dr. Michaels' notation in that newsletter
19 and Web, to include in Compliance Week, Dr. Michaels to
20 take out the words -- it's about the fifth one down on
21 the first page of the chart -- to take out "need good
22 product," which doesn't tell us much, but put in,

1 "article by Dr. Michaels webcast," and note that it's a
2 popular weekly magazine. To note under Compliance Week
3 that many agencies go on Society of Corporate
4 Compliance and Ethics to note that they have regional
5 events as well.

6 MS. NARINE: And the SCC attends those
7 regional events as well, by the way. Other government
8 agencies go.

9 MR. BROCK: Agencies attend to change the
10 reference to union safety organizations, to union
11 conferences. Going onto the next page, the National
12 Staffing and American Staffing Association to add in
13 the larger box towards the middle that they have
14 increasing impact, which I think references what we've
15 been talking about.

16 Mexican Consulate, to add "Mexican Consulate,
17 others," and note that there are agency alliances in
18 place. Down at the bottom, American Society of Safety
19 Engineers, to note that the safety journal is high
20 impact.

21 Next page, I was going to include the acronym
22 for SHRM, since that's more commonly the way it is

1 known.

2 MS. NARINE: SHRM.

3 MS. BETTS: S-H-R-M.

4 MR. BROCK: S-H-R-M? Okay. Thank you. Glad
5 I mentioned that. And then in the next column to say
6 that it's -- there are both large and small. It
7 includes contractors. And then to add a line just near
8 where it says "others," large private conferences, and
9 then in the middle column, "to send speakers and
10 materials." And that's what I picked up.

11 MS. NARINE: The only thing to add -- and I
12 don't know, again, whether -- if Dr. Michaels is
13 basically going to be a one-man show or whether you
14 could have regional people do stuff.

15 MR. BROCK: Or Mary Ann for that matter.

16 MS. NARINE: Right. So a two-person show.
17 But the National Association of Manufacturers and the
18 U.S. Chamber, they also, of course, have all their
19 state arms. So, you know, in Florida you have -- God,
20 I used to go to the thing every year and tell OSSE.
21 But they have their regional stuff every single -- in
22 every single state they have those and those are other

1 very powerful industry organizations where messaging
2 could get out. So they might not be huge, 500-person
3 meetings, but they are very powerful industry
4 organizations where -- Associated Industries of Florida
5 --

6 MR. BROCK: Sure.

7 MS. NARINE: -- is the one I'm thinking about.
8 So again, it might be maybe regional representatives
9 could go and speak if they're deputized.

10 MR. ROSA: And you're actually correct. A lot
11 of times -- and just to clarify, when you make
12 references about Dr. Michaels being the one to speak,
13 it would may be Dr. Michaels, it may the regional
14 administer in that particular region or the assistant
15 regional administer for whistleblower programs, or Mary
16 Ann or myself, or anyone within the directorate that
17 will be speaking on behalf of the agency, yes.

18 MR. BROCK: So to take account for that, why
19 don't I put on page 3, where it says senior leadership
20 involvement of visibility, why don't I say senior DOL
21 leadership involving visibility and what role in
22 outreach could Dr. Michaels or other --

1 MS. NARINE: The other officials are there, b
2 but I just want to make sure that -- the chart is not
3 clear, it's just Dr. Michaels going. Michael's
4 article. Because there might be other people that are
5 -- because it might make more sense in a regional
6 publication for the regional person to be the face of
7 it.

8 MR. ROSA: That's right.

9 MR. BROCK: All right. So I will put Michaels
10 or others, wherever that seems relevant.

11 Nancy, comment on that?

12 MS. LESSIN: No. I had two other things that
13 I'm not seeing here, but maybe they're here and I
14 missed them.

15 MR. BROCK: Okay. Let's see.

16 MS. LESSIN: One is, I think that there are
17 schools that taped HR. Is there an association of --

18 MS. NARINE: I think it was a university
19 program.

20 MR. ROSA: I think it's on there.

21 MR. EHERTS: University Labor program.

22 MR. ROSA: University programs.

1 MS. BETTS: University of programs that train
2 lawyers --

3 MS. LESSIN: -- professionals. Okay. Got it.
4 And then the other one -- is rail on here? Given that
5 they --

6 MR. BROCK: You know, I'm not sure it is. I'm
7 not sure it is.

8 MS. LESSIN: -- are the single largest --

9 MR. BROCK: What's the relevant industry --

10 MS. LESSIN: I don't know. What's the --
11 employer organization?

12 MR. FRUMIN: American Railroad --

13 MS. LESSIN: American Railroad Association?

14 MR. FRUMIN: Association of American
15 Railroads? It's double AR.

16 MS. LESSIN: So I would just sneak them on
17 there to see what happens.

18 MR. BROCK: Well, they certainly should be
19 reached out to. Okay. Duly done.

20 MS. ROSENBAUM: I have one other addition on
21 here. We have an ABA on here but --

22 MR. BROCK: ABA?

1 MS. ROSENBAUM: Well, that's on here, but
2 state bar associations might be another place to add.
3 I mean, I know, also, many state bar associations have
4 labor and employment law sections. I mean, from own
5 experience in Michigan, we have a quarterly newsletter
6 that comes out where it's widely disseminated.

7 MR. BROCK: Okay. So I'll add state bar,
8 labor and employment law next to the ABA meetings.

9 MS. ROSENBAUM: Yeah. I mean, it might be a
10 subset of that.

11 MR. BROCK: Okay. That's a good reminder.
12 Okay. So those are the changes. I suggest we
13 determine if we're adopting this and --

14 (Crosstalk.)

15 MR. BROCK: Then I want to come right to that
16 and see what the discussion is.

17 MS. BETTS: Just to note, the one problem with
18 just doing this all orally is that, you know, we're not
19 going to have a written document here reflecting the
20 vote. We're going to need to go back to the transcript
21 and we're going to trust, you know, we'll do some
22 checking and whatever. I'm sure Jon will get the oral

1 comments back into the record, but if you want to sort
2 of this now, take that, you know, just think about how
3 the best way it is to get it into the record.

4 MR. BROCK: What I was going to try to do is
5 parallel what we did the last time, which seemed to --

6 MS. BETTS: Yeah. Last time Emily wrote
7 everything down and --

8 MR. ROSA: Last time we actually had --

9 MS. BETTS: -- then we put that in the record.

10 MR. ROSA: -- written addendums that we put
11 into the record.

12 MS. BETTS: Yes. So this is a little bit
13 different than what we're done before, to the extent
14 that all of these amendments are oral and we can have a
15 motion to amend as orally described.

16 MR. BROCK: As spoken.

17 MS. BETTS: And then a second and a vote.
18 That's fine. It's a little messier, but it's all on
19 the record.

20 MR. BROCK: Let's do it properly.

21 MS. BETTS: Let's do our best to be clear
22 about if there's one thing you want to add or change.

1 So if it makes sense to vote on all of those changes
2 and then talk about Eric's change, whatever you all
3 think is the best way to accurately preserve what
4 you're voting on.

5 MR. ROSA: Unless you want to discuss Eric's
6 change and include that. That's up to you.

7 MR. EHERTS: Why don't we do that.

8 MR. BROCK: Fine. Fine with me. Okay. So
9 let's get a sense of how you react to that. Let's see
10 how complicated the discussion might be or might not be
11 and then we can see what specific language we might
12 want to consider if that's where people are headed.

13 MS. NARINE: I'm in favor of adding the
14 language directly as it's written in the statute to
15 avoid any confusion.

16 MR. FRUMIN: It'd be nice if I could see the
17 language. I don't even know what it says.

18 MS. NARINE: Oh, I'm sorry. The Executive
19 Order.

20 MR. FRUMIN: Well, it's the Draft DOL
21 Guidance. It's actually in the Executive Order, but
22 anyway it's the Labor Department's discussion --

1 MS. SMITH: Do you want me to make a copy? I
2 can quickly run a copy right now.

3 MS. LESSIN: Yes.

4 MR. FRUMIN: Okay. That's good.

5 MS. NARINE: Yes.

6 MR. BROCK: Okay. Well, then we'll introduce
7 that as an exhibit.

8 MS. SMITH: And if you could write down
9 everything that you can remember. That would be great.

10 MR. ROSA: If we can take every of the other
11 changes and put that on the exhibit record.

12 MS. BETTS: So I know Jon has done that. I
13 was not able to keep up, so I think we have it orally.
14 If we want to have a written exhibit in the record,
15 reflecting what people are voting on, we're going to
16 need to go through those again. I mean, you just had
17 more time last time. I think Emily went during a break
18 and wrote everything down and then came back, read it
19 all out as written and voted on it. That's a little
20 bit cleaner, a little bit safer, but we have everything
21 spoken, so we should be able to vote --

22 MR. KEATING: I would submit that so far, they

1 are semantic changes. They're just adding minor -- and
2 I have no problem trusting that Jon will implement
3 this. I don't think any of them are substantive.

4 I would note, however, that on the area that
5 Eric raised, I mean, something that regardless of the
6 rest of the language that I'd like to read, the bullet
7 says, "Comment by WPAC on implementation of EO. Should
8 WPAC comment on EO, re: labor violations and federal
9 contracting?" And I'm a little bit at a loss as to
10 sort of what are we voting on here? That we should
11 comment at some point? Should we comment now? Which
12 I'm not comfortable with at all.

13 So I don't really understand what this
14 language -- or the suggestion on the bullet is intended
15 for us to do.

16 MS. NARINE: I think if we're going to
17 comment, we have to comment on the language without an
18 ellipsis. We have to comment on the language as
19 written because I think my concern would be commenting
20 -- the ellipsis leaves out an important part. That's
21 what my concern is.

22 MR. FRUMIN: We'll have the whole document in

1 a second. Greg's pointing out that the way it reads
2 now, it's a question about whether we should comment on
3 either this excerpt or the whole language rather than,
4 you know, a specific recommendation, blah, blah, blah.
5 Right?

6 MR. KEATING: Yeah.

7 MR. FRUMIN: So that's a bit of a dilemma. So
8 if we want to change the thrust of what's on the paper,
9 to not only expand it to include the stuff I talked
10 about on anti-retaliation provisions, we also need to
11 change the thrust of this to say that we are offering a
12 comment, not should we.

13 MR. KEATING: And given, largely, the time
14 constraints, for one, and two, the purpose of this
15 document, which is dissemination ideas around the
16 directorate's new guidelines, I mean, I just think this
17 is branching into important, but completely separate
18 territory. That's my view.

19 MS. NARINE: I would also -- I could go either
20 way on it, however, I would rather have the discussion
21 with Emily here since it was her suggestion. And we
22 will also have, I guess at some point -- I think it's a

1 very important issue that deserves a lot of discussion,
2 especially since we will, at some point, have some
3 fresh people on the committee that might have fresh
4 ideas.

5 I would be interested in what Emily was
6 thinking when she proposed this. So think if one of us
7 had proposed it, we could kind of flush it out a little
8 bit more, and especially given the fact that Eric has
9 such strong feelings about it. Emily had very
10 different -- I mean, I can't image her feelings are
11 different. Who knows? But I can't speak for her.

12 So since she wrote about should we comment on
13 it, I don't know -- she didn't say we should recommend
14 that this be included. So I don't -- and she's pretty
15 precise.

16 MR. BROCK: I just copied her email onto here.

17 MS. NARINE: So that's why I'm concerned that
18 she might not have expected this to be a
19 recommendation, but more of a discussion point --

20 MS. LESSIN: That's a question.

21 MS. NARINE: -- which means that she should be
22 here to discuss it. So my recommendation would be to

1 table the discussion until she's here because it might
2 lead to a much bigger discussion of what our position
3 is on this and where this should go.

4 MR. ROSA: So do you suggest tabling the
5 discussion on the entire document?

6 MS. NARINE: No, no, no. On this --

7 MR. ROSA: Just this part.

8 MS. NARINE: Because she said should we
9 comment on it.

10 MR. ROSA: Okay. No, I just want to get
11 clarification. So you want to move forward with the
12 rest of the --

13 MS. NARINE: Yeah. I think these past two
14 days have been a complete --

15 MR. ROSA: -- documentation and move the rest
16 of the suggestions and recommendations forward and then
17 table this until later.

18 MR. FRUMIN: That's fine. Yeah. Okay. And
19 then we can have a robust discussion. We can review it
20 and see --

21 MR. NARINE: But only Eric can do that same
22 level of verve and passion again, right?

1 MR. EHERTS: I think he can.

2 MR. FRUMIN: My frustration won't have been
3 abated by then, I can assure you. I voice my cases
4 rife with anti-retaliation provisions.

5 MS. BETTS: Just to be clear for the record, I
6 think we would need a motion to remove this language
7 from the document. A second and a vote, if that's
8 where the Committee --

9 MR. KEATING: I'll make a motion to remove the
10 bullet, the second to last bullet of the document,
11 beginning with, "Comment by WPAC on implementation of
12 EO from --

13 MS. BRETT: I'm sorry. Was there --

14 MS. ROSENBAUM: I just has a procedural
15 question. We haven't yet voted to approve this
16 document as it --

17 MR. KEATING: That's the next vote.

18 MR. ROSENBAUM: So how are we voting to take
19 something out of it before we voted to approve it?

20 MS. BETTS: I think we typically treat a
21 working group document as a motion or a recommendation
22 and then what we've been doing in past meetings is that

1 if changes are made to the working group document,
2 they're made a motion to amend and then the vote would
3 take place after -- I mean, the vote would take place
4 on the document, as amended.

5 MS. ROSENBAUM: Okay. I don't understand the
6 procedure well enough, but we just orally proposed a
7 bunch of changes that we didn't vote on one-by-one.
8 Can we add this change to the list and then vote on
9 them in mass? That feels the clearest to me, in terms
10 of dealing with --

11 MR. ROSA: So you want one vote on all the
12 additions, as well as this recommendation --

13 MR. KEATING: On the addition to the
14 subtraction.

15 MS. BETTS: That's fine. Procedurally, the
16 only point of all this procedural mumbo-jumbo is just
17 to have it clear on the record what you're voting on.
18 So that was my intention. If it's clear to say all of
19 the oral changes that Jon noted, plus removing this and
20 just have one vote at the end of it, that's fine, as
21 long as everyone sort of collectively understands
22 they're voting on the same thing.

1 MR. BROCK: Is that comfortable?

2 MR. EHERTS: That's good.

3 MR. BROCK: Eric, comfortable to you?

4 MR. FRUMIN: Yeah, that's fine.

5 MR. BROCK: Okay. With my red pen, as
6 everything else, based on discussion, oral discussion,
7 we're going to take out that point. We are planning to
8 take it up again, assuming any of us are reappointed.
9 And crossing it out here doesn't mean we're not
10 interested in any longer, it just isn't part of this
11 document.

12 So is that --

13 MS. NARINE: And for the record, that point
14 being page 4 comment by WPAC on implementation of EO.

15 MR. BROCK: For the record. Nancy, what do
16 you have to say about this?

17 MS. LESSIN: It's not about this. It's about
18 the next dot that I think doesn't belong here.

19 MR. BROCK: It doesn't belong here either.
20 Then I don't get accused of the search and destroy
21 failure too, so that's good.

22 MS. LESSIN: So that's what I'm thinking.

1 Both of the bullet points on page 4, I think, you know,
2 then shouldn't --

3 MR. KEATING: All right. So can I make a
4 motion to remove the last two bullet points on page 4
5 and to incorporate all of the substantive changes Jon
6 went over orally and approve the document for awarding
7 OSHA as such.

8 MS. NARINE: Second.

9 MR. ROSA: Okay. All those in favor.

10 (Committee voted collectively voted "aye.")

11 MR. ROSA: Christine?

12 MS. DOUGHERTY: Aye.

13 MR. KEATING: Boy, talk about suspense.

14 Suspense.

15 MR. ROSA: Okay. The motion passes. Thank
16 you.

17 MR. BROCK: Okay. So Nancy, what thoughts do
18 you have to share?

19 MS. LESSIN: So this may be fitting into sort
20 of where we're going, but I want to -- we've just
21 talked about something for employers to get them to do
22 the right thing. We have also had a discussion that

1 some employers are not going to be swayed by this. And
2 I wanted to make the comment and actually get it right
3 this time. In the online journal, *Fair Warning*, their
4 October 21, 2015 article called, "For Big Railroads: A
5 Carload of Whistleblower Complaints," this is the
6 organization that got the -- I believe, FOIA data.
7 They went back eight years, from October 2007, through
8 June 30, 2015.

9 The companies that were the top 10 for
10 whistleblower complaints, three of them are not rail
11 carriers. The United States Postal Service, United
12 Parcel Service and AT & T, seven of them are rail
13 carriers. These folks have gotten many, many
14 complaints and have had, you know, fines and have had
15 penalties and court cases. We talk about here's
16 something to get employers to do the right thing. And
17 then we have sticks for those who aren't doing the
18 right thing.

19 We are the Whistleblower Advisory Committee
20 that is supposed to be advising OSHA on what is the
21 best way to protect workers. My question is I don't
22 think we have anything right now that's dealing with

1 this type of company that has gotten the sticks and is
2 ignoring them. Is ignoring the good guidance. And if
3 our role as the Whistleblower Protection Advisory
4 Committee is advising OSHA on how workers can best be
5 protected, there's a lot of workers out there that are,
6 you know, escaping the protections.

7 And what OSHA has it its trick back, you know,
8 good guidance. This is what you should do or here's
9 what's going to happen to you if you do it, is not
10 hitting this group of people, which for me means it's
11 not hitting thousands, and thousands, and thousands of
12 workers. So the question is what advice can we give
13 OSHA on situations like this where neither their
14 carrots nor their sticks, nor their guidance, nor their
15 advice, nor their penalties is working?

16 Is it well, there's nothing we can do; so sad,
17 too bad?

18 Or is there something that we can look at in
19 these very important situations? So that is what I'm
20 putting on the table. And if somebody wants to make a
21 copy of -- well, not mine because I've written it up,
22 it is, you know, that can circulated, electronically.

1 I think it's an important thing for us to fulfill our
2 role. What do you do about this situation?

3 MR. ROSA: And, you know, I just want to say
4 you are raising some very good points. We have been
5 discussing this. In fact, right after we had our
6 Advisory Committee the last time, had our assistant
7 regional administrators have our own meeting. You
8 remember that they attended the last meeting. And then
9 we had three additional days of having discussions and
10 strategizing as how do we address some of these issues.
11 And one of the things that we are kind of -- and we
12 would seek to your advice and guidance to any ideas
13 that you could bring to us.

14 One of the things that we are looking at is
15 similar, again to the safety and health side, where
16 they have the Severe Violator Enforcement Program, the
17 SVEP program. We're looking to see can we have an SVEP
18 program similar here on the whistleblower side. The
19 only issue that our program is pretty much reactive, a
20 complaint has to come in. But in the SVEP program, if
21 you find a worksite that has serious hazards and you
22 determine that these serious hazards could possibly be

1 existing in other plants or facilities within that
2 employer, you can expand and do programmed inspections.
3 Well, we can't do programmed investigations.

4 So how do we create a program that's going to
5 look at these serious violators when we depend on
6 getting complaints coming in?

7 Yes, Eric?

8 MR. FRUMIN: On the other hand, the ground is
9 shifting on this subject, on this very question because
10 OSHA has proposed an amendment to its recordkeeping
11 regulations to prohibit employer policies that result
12 in discriminatory treatment of workers. And the
13 enforcement of those regulations could be carried out
14 in the same way that other regulations are enforced.
15 And presumably, would be done, at least in cooperation
16 with the work of the directorate.

17 MR. ROSA: Correct.

18 MR. FRUMIN: I won't ask the question: Are you
19 guys involved in planning that regulation and
20 anticipating the enforcement issues? Don't answer
21 that.

22 But that could be, in effect, you know, within

1 a year or two.

2 MR. ROSA: Right.

3 MR. FRUMIN: So I think we have to think about
4 this now in a forward looking way, which anticipates
5 the enforcement side, the compliance enforcement side
6 and the directorate, working more closely on targeting
7 employers with regressive policies when it comes to a
8 worker reporting violations, or hazards or injuries.

9 MR. ROSA: Right. And that's similar to what
10 we've done with other agencies, DOE and NRC. They kind
11 of -- we piggyback on them or they piggyback on us.
12 When we find that there's been reasonable cause. That
13 there's a violation on the worker protection side and
14 they, on their end, can issue a fine against the
15 employer while we issue a relief against -- I believe,
16 for the employee, similar to what this proposal is in
17 the 1904 regulation.

18 So that's something that we are looking at,
19 once get the -- the comment period just ended recently,
20 so I'm sure the directorates that are working on this
21 are compiling all those comments and I may take some
22 time to get that through, but that's one avenue that we

1 have an opportunity to have somewhat of a deterrent
2 with employers.

3 Another thing that I'm even thinking, outside
4 the box, is you know, on the safety and health side,
5 depending on the egregiousness of the hazardous
6 conditions, an employer may be held liable, criminally.
7 So is that something that we can do? I don't know.
8 That's something we possibly can see if it's continuing
9 on the same basis and is ongoing and we can issue the
10 maximum punitive damages over, and over, and over again
11 and it's just a check out of an insurance plan. That
12 maybe we need to step it up. And that's part of the
13 things we're looking at on our Severe Violator's
14 Program to see if maybe we need to step this up a
15 little bit more.

16 MS. NARINE: I remember when I used to do
17 training on any number of things, whether it was the
18 Fair Labor Standards, where I would say and you can go
19 jail. The first thing that somebody would say is when
20 was the last time somebody went to jail?

21 I always get asked that question. And so
22 unfortunately, sometimes, you know, I will tell you, in

1 my old company, when we used to move settlements to the
2 P & L of the location, things very much changed. When
3 the law department took the settlement hit, it was no
4 big deal. When the locations took the settlement hit
5 to the P & L, all of a sudden, super compliance.

6 So it is what it is. I'm just saying, that's
7 the reality of the world. So I think when people are
8 worried that they might to go to jail when settlements
9 start to hit the location, it's just the way of the
10 world. So I think if people started -- it's not that
11 you're not being obviously excessively punitive, but if
12 there are tools in OSHA's arsenal that they could use
13 that is legitimate and warranted and proportionate that
14 aren't being used, I think that is how you will get
15 people's attention because I do worry -- and you'll
16 talk about the subgroups. I know we just bantered the
17 rail subgroup, but I do worry that seven out of ten are
18 rail. And I was part of that rail subgroup and it was
19 very difficult to get a lot to traction, you know, but
20 that was really important work that really needed to
21 get done. I don't know if that's one of the subgroups
22 that you say is going to be resuscitated, but I don't

1 know what to with that. But that's a huge problem and
2 I don't know what you can do to improve that, but maybe
3 somebody needs to go to jail. I don't know.

4 MR. ROSA: Right. Right.

5 MR. KEATING: I just think the key words in
6 what you just said are, to the extent they're in OSHA's
7 toolkit because, you know, one of the things that I
8 think -- I mentioned this yesterday and I'll say it
9 again that I have been personally very proud to be part
10 of a group that has been incredibly hardworking. A lot
11 of very diverse perspectives and we've been able to
12 come together and have unanimity on every occasion.
13 But I'm also cognizant, as a result of having read some
14 recent reports that there have been, on at least one
15 and I think two occasions where a group of U.S.
16 senators has written OSHA and blasted them for, you
17 know, issuing what was guidelines that really was
18 changing the rules. I think we should be very
19 circumspect about not going too far out on a diving
20 board to recommend stuff that there isn't statutory
21 authority to do.

22 MS. NARINE: So I think this would be a

1 combination of -- and this was talked about in the rail
2 group and why we got very little traction as well, a
3 combination of a lot more incentives and mitigation and
4 something that rewards good companies and mixed
5 companies want to do better. And possibly, again, the
6 use of the strongest possible penalties and criminal
7 sanctions; again, when already justified by existing
8 law, not going outside the bounds of the law and not
9 changing the rules of the game because employers do
10 need certainty and they need to know where the lines
11 are. And if they think the rules of the games are
12 going to shift with whoever is in charge, then either
13 they're going to game the system and say we'll outlast
14 this Administration, but they need to know what the
15 rules are.

16 MR. ROSA: But there is one issue that we did
17 -- and I'll get to your comments, but we talk about to
18 the extent of the law, we did that in one particular
19 case in Region 4, specifically with Gaines Motor Lines,
20 where there were four complainants, and instead of just
21 issuing the maximum punitive damage once, we did it per
22 person. So similar to what OSHA does when it does its

1 penalties per instance rather than just one time.

2 So there are ways that we can expand our order
3 without -- while still staying within the confines of
4 the statute.

5 MR. EHERTS: I just want to make one point.
6 There's a law for increasing financial penalties, but
7 the criminal side is very, very complicated. And I
8 know from investigating aviation accidents that if
9 there were never criminal sanctions a part of it, the
10 investigation stops prematurely. And I think you also
11 tend to keep very good people out of the field of VHS
12 if you start adding criminal sanctions to it. I mean,
13 you take the best minds to go into some other business,
14 go into law or something, but don't go in that safety.

15 So I just think it warrants a much longer
16 discussion.

17 MR. ROSA: Absolutely.

18 MS. LESSIN: So the hour is late. I don't
19 think that this should necessarily be work group at
20 this point, but I do want to put it on the table for
21 this discussion. And I think probably see criminal
22 sanctions different from you and I would love to have

1 that discussion, but it worries me that workers are out
2 there and they are not being protected.

3 MR. ROSA: Absolutely.

4 MR. EHERTS: I definitely think it warrants
5 more discussion.

6 MR. ROSA: Absolutely. And thank you for
7 that. I just wanted to check with Jon. Before we move
8 into the wrap-up, I just wanted to make sure that -- is
9 the group completed with the best practices discussion?

10 MR. BROCK: I think with the passage of the
11 motion, I just need to spend a half-an-hour making
12 those edits and provide them to you.

13 **WRAP-UP**

14 MR. ROSA: Okay. So I can move on to the wrap
15 up. I had some discussions with Emily and even with
16 Dr. Michaels. We actually had a conversation
17 yesterday, the three of us, in fact, Jordan Barab and
18 Mary Ann. So the five of us had a conversation
19 yesterday. And as we move forward from this point with
20 the work group, as Dr. Michaels mentioned yesterday, we
21 are creating a new work group, with the training work
22 group. And I know that some individuals here had made

1 mention in the past that they had some interest in
2 being part of a training work group. This is for in-
3 house training. And the charge, and I'm going to put
4 this as an exhibit for the record, it says, "OSHA is
5 revamping its training program for whistleblower
6 investigators. While we have figured out the general
7 scope of the training, there are still some pieces that
8 we would like to put into place. That's why we are
9 creating a new training work group."

10 Two bullets. 1) The focus of the work group's
11 activity should be to develop training topics or
12 suggestions that are not currently included in OSHA's
13 recently published directive. Mandatory training
14 programs for OSHA whistleblower investigators.

15 Second bullet: Specifically, I would like you
16 to identify existing training outlets, materials,
17 venues and opportunities that could assist our training
18 in such matters as interpersonal issues, labor
19 management relations, systemic issues and industry-
20 specific topics for the 22 statutes that OSHA
21 administers.

22 So I'm going to give this as Exhibit No. 6.

1 And again, in the coming weeks, Emily and I will have
2 discussions as to who we want to put into this group,
3 who will be chairing the group. Any interest that you
4 have, please let us know and hopefully we'll get that
5 started right away and we'll have something ready for
6 the next meeting.

7 In addition, as you mentioned, the
8 transportation group, we have decided to formally
9 sunset the transportation group. We've had a lot of
10 discussions. Emily, I think she came to D.C. about
11 three or four times in the summertime and we had a lot
12 of discussion about what to do with regard to the
13 railroads.

14 We don't want to totally table it; we're just
15 trying to find a way of how we can address the issue
16 with the railroads. But the transportation group, as
17 it currently stands, is being sunseted. And if we need
18 to, we will repurpose a new group that would be
19 targeted specifically to railroads. And that's
20 something we're going to have further discussions. Any
21 ideas that you have, please share them with Emily and
22 me because we want to be able to get that going.

1 On the 11(c) work group, that's a group that
2 we haven't had much activity in the past year, since
3 September of last year. We have decided that we want
4 to sunset the group, unless you have any specific
5 issues that you want us to consider. And I just wanted
6 to open that up to see if you have any specific issues
7 on 11(c) that you want us to consider that we may want
8 to keep having this dialogue and potentially, maybe
9 repurpose the group to something else.

10 Nancy?

11 MS. LESSIN: I will say I think 11(c) isn't
12 working. There's a lot of reasons that it isn't
13 working and some of them have to do with the statute
14 and some of them have to do with things that need to
15 change out there, but I do think that there are -- when
16 we look at cases and I talk to others who are, you
17 know, going through cases, I think that there are
18 problems. I'm not sure what all they are; cases that
19 should be settled are languishing for two plus years.
20 So I'm thinking that there may be some specific kinds
21 of things that are getting in the way of an imperfect
22 statute being more imperfect than it needs to be.

1 I don't think that there needs to be a work
2 group at this moment. I think there's some exploration
3 that needs to happen to look at what are those road
4 blocks and then a committee can come together, thinking
5 about, you know, what could happen to change that
6 picture, or there could be a work group right now
7 saying all right, let's hear from folks what are the
8 issues. But I do think that 11(c) should remain on the
9 table for their being a work group, but perhaps, maybe
10 some more thinking about what are those things that
11 recommendations from a group like this might help OSHA
12 make 11(c), as it's written now, more effective than it
13 is.

14 MS. NARINE: Is there a benefit to having
15 11(c), the work group, focus on training for employers
16 or do you think that there is enough information for
17 the employer community on what they should and
18 shouldn't do.

19 MR. EHERTS: Isn't that part of new working
20 group?

21 MS. NARINE: Well, the new working group is
22 focusing on OSHA training.

1 MR. ROSA: For internal training, yes.

2 MS. NARINE: Yeah.

3 MR. ROSA: And we have been discussing another
4 group that deals with more external activities, but we
5 haven't gotten to that point yet. That may be the
6 answer to what you're addressing.

7 MS. NARINE: Because that training group is
8 only internal training.

9 MR. EHERTS: I got it now. Okay.

10 MR. ROSA: Yeah. The training is for our
11 internal training.

12 MS. LESSIN: What I see is the recommended
13 practices document for employers covers 11(c) and the
14 other statutes. And that we just had a whole
15 conversation about getting out to employers all the
16 things that they should do.

17 MS. NARINE: Yeah, but it doesn't tell them
18 how to do it, it just tells them that they should do
19 it. So what I'm saying is if you are a big employer,
20 you can hire Greg to tell you how to do this training.
21 If you are -- and again, because the problem is that
22 you have to link to others --

1 MS. LESSIN: From my experience, I don't think
2 training of employers is -- I think employers have to
3 stop retaliating and training may be a piece of that in
4 some situations. I think the issue is within OSHA
5 processing cases, there are pitfalls.

6 MR. ROSA: And that may be addressed through
7 the training group, the in-house training group that we
8 may be able to use that. Because we're looking for
9 different avenues and different outlets, and other
10 materials, and other exercises or whatever it is that
11 we can try to get the investigators to look at this in
12 a different light.

13 MS. LESSIN: So I guess my recommendation at
14 this point is given that 11(c) is the biggest bulk of
15 problems that are coming into this agency and there are
16 problems out there, and there's problems on how those
17 cases get processed. Some of may be better training of
18 the whistleblower, you know, inspection folks, but some
19 of it may be other things that we don't decide right
20 now to have a work group, but we don't say we're done
21 with it. Let's leave it on the table. Could there be
22 a work group once we kind of, maybe get a better handle

1 on what's going wrong and what this group might be able
2 to provide advice on.

3 MR. EHERTS: We can open it up, but I felt
4 that there should've been sunseted after we made our
5 last set of recommendations. They were voted upon,
6 approved unanimously, the core groups would do it. I
7 thought at that point we were finished and we kept it
8 open for Nancy's purposes in case something else came
9 up, but unless we have a specific chart to work on
10 something, I think we should just sunset that and start
11 a new one later.

12 MR. LESSIN: And regroup when we're --

13 MR. ROSA: Similar to what we're doing with
14 the transportation. We can probably look at it that
15 way where we can officially sunset both groups and then
16 if we need to, we can repurpose them or resurrect them
17 in a different way with a different charge and
18 something more targeted.

19 MS. LESSIN: And I guess my other question is
20 didn't we just finish what we were supposed to do on
21 our best practices work group? Aren't we done?

22 MS. EHERTS: Yes.

1 MS. LESSIN: Was there anything else? So
2 we're done.

3 MR. KEATING: We're done, but we --

4 MS. NARINE: Not with best practices, we're
5 just recommending guidelines.

6 MS. LESSIN: Yes. Indeed. Thank you.

7 MS. NARINE: We're demoted.

8 MS. LESSIN: Or elevated.

9 MR. KEATING: Well, we're done, but you should
10 -- I mean, we need to individually, or otherwise,
11 consider how to get useful comments in because I've
12 heard informally that there's some things you'd like to
13 see reconsidered for addition.

14 We have some duties.

15 MS. LESSIN: But that's individuals.

16 MR. ROSA: Yeah. And on the best practices, I
17 wanted to have a further conversation with Emily to
18 make sure that we are both on target that we probably
19 can sunset that group. We have been talking about
20 another group that kind of takes this and takes it to
21 the next level, which is more of an outreach group that
22 goes beyond just dissemination of this document and

1 goes into a bigger picture, but we haven't gotten --
2 we're not ready to get to that point.

3 So Emily and I are going to have some further
4 discussions and possibly, by the next meeting, we may
5 have some solid charge with regard to taking this and
6 going to the next level and a more overarching
7 outreach, you know, work group that can help with some
8 of these tool because like you were saying, you know,
9 Marcia, it's the thing where sometimes the employers
10 don't know what to do. So maybe we can develop some
11 toolkits of what are the steps that you do. And that's
12 some of the things that we may ask the Committee to
13 help us develop.

14 MR. EHERTS: There was one thing that came up
15 this morning that maybe should be on the list as you
16 consider those things. Somebody else raised it, but I
17 thought it was really worthwhile, to do something more,
18 whether it's through a committee or otherwise.

19 Marcia, you may have said have a committee
20 that meets twice was kind of your framework to get us
21 educated, but have something that could potentially be
22 available for employers that weren't primarily engaged

1 in manufacturing or other things that had safety and
2 health whistleblower-related questions but that had the
3 SOX and financial --

4 MS. NARINE: But by the way, everybody can
5 have a safety and health thing, but they just might not
6 prioritize it. So it's not like everybody doesn't have
7 safety and health, but it might not be a big deal to
8 them.

9 MR. ROSA: Right.

10 MS. NARINE: But to think of kind of like, the
11 business retaliation and see how they intersect with
12 others. So how SOX, Dodd-Frank, Consumer Financial
13 Protection, how all that stuff intersects because even
14 though it's not a big part of OSHA's caseload, it's
15 more top of mind for some employers than others and
16 again, that's the hook to get them to read the document
17 because all the whistleblower stuff connects.

18 MR. ROSA: Right. JJ?

19 MS. ROSENBAUM: Yeah. I wanted to suggest
20 another potential committee that goes back to something
21 you said Marcia, and that I've been thinking about.
22 There has been a lot of work on this in other parts of

1 the Department of Labor. The question of the temporary
2 staffing agencies and the outsourcing of human resource
3 functions I think creates unique questions for
4 enforcement of the similar laws in that context. And I
5 think having a working group with public management and
6 labor to sort of make some recommendations on that
7 could be really useful.

8 MR. ROSA: Okay.

9 MR. NARINE: The joint employer issue as well,
10 at the joint employer outsourced, the contingent labor,
11 all that is different because at some point, people
12 will say that's not my employee, so I don't have to
13 deal with it. And I think that kind of guidance,
14 obviously, the Department of Labor looks -- other parts
15 of the Department of Labor are looking at that issue --

16 MR. ROSA: Right.

17 MS. NARINE: -- kind of who's responsible for
18 dealing with that issue.

19 MR. ROSA: Eric?

20 MR. FRUMIN: Great minds think alike. Ditto
21 of those two.

22 MR. ROSA: Okay. Thank you. Any other

1 comments as we move forward?

2 (No response.)

3 Well, wow. We are a half-an-hour early. I
4 call this meeting adjourned.

5 **(Whereupon, at 3:08 p.m., the meeting was**
6 **adjourned.)**

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