





Reply to the attention of:

JAN 12 2017

MEMORANDUM FOR: REGIONAL ADMINISTRATORS  
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH:   
DOROTHY DOUCHERTY  
Deputy Assistant Secretary

FROM:   
MaryAnn Garrahan, Director  
Directorate of Whistleblower Protection Programs

SUBJECT: Clarification of Streamlined Procedures to Close Cases that OSHA  
Lacks Authority to Investigate

This memorandum serves to address the appropriate procedures for closing complaints that are not subject to a full field investigation because the complaint is either docketed and dismissed or administratively closed.

## I. BACKGROUND

OSHA receives an increasingly large number of whistleblower complaints—3,307 whistleblower complaints were docketed in the Fiscal Year ending in 2016. To be “docketed,” a complaint is entered into OSHA’s data system and receives a case number. In addition to these docketed complaints, there are thousands of complaints every year that are not docketed; these are referred to as “administrative closures” or “screen outs.” Administratively closed complaints may be in the form of inquiries, complaints in which the complainant decides not to file after learning that his or her employer will be notified of the complaint, or complaints that fall outside of OSHA’s authority, to provide only a few examples.

OSHA’s approach to closing cases that do not raise a claim of retaliation appropriate for investigation varies by statute. Section 11(c) of the Occupational Safety and Health Act of 1970 (“Section 11(c)”), the Asbestos Hazard Emergency Response Act (“AHERA”), and the International Safe Container Act (“ISCA”) have very generalized statutory language governing the receipt and investigation of complaints. For example, Section 11(c) simply states that “the Secretary shall cause such investigation to be made as he deems appropriate.” 29 U.S.C. § 660(c)(2). Pursuant to the Whistleblower Investigations Manual (WIM), complaints filed under these statutes that do not set forth a prima facie allegation, or are not filed within the statutory time limits, may be closed administratively, provided the complainant accepts this outcome. WIM at 2-16. In that instance, the investigator must draft a letter to the complainant explaining the reason(s) the complaint is not going to be investigated and send it to the supervisor for

concurrence before sending the letter to the complainant. *Id.* If, however, the complainant does not accept administrative closure of the complaint, “the case must be docketed and dismissed with appeal rights.” *Id.*

Complaints filed under the ALJ statutes<sup>1</sup> that are either untimely or do not set forth a prima facie allegation may not be “screened out” or closed administratively. Rather, these complaints must be docketed and dismissed with appeal rights. Thus, the WIM provides that complaints filed under the ALJ statutes must be docketed and a written determination issued, unless the complainant, having received an explanation of the situation, withdraws the complaint. WIM at 2-17. The option to withdraw a complaint before docketing is especially important for situations in which the complainant determines that he does not wish to have his complaint forwarded to his employer or to another federal agency.

In its 2015 Report, the OIG noted that docketing, investigation, and dismissal are normally distinct investigative steps, and recommended that OSHA “[p]rovide complete and unified guidance to ensure appropriate methods are used to close investigations.” *OSHA Needs to Continue to Strengthen Its Whistleblower Protection Programs*, U.S. Department of Labor Office of Inspector General, p.11 (Sept. 30, 2015). In addition, the OIG noted seven “exceptions” in which the supervisor was the investigator and, thus, investigative results were not reviewed. *Id.* at 14. These were cases that had been either administratively closed or ‘docketed and dismissed’ without an investigation.

## II. INSTRUCTION

- A. Procedure for docketed and dismissed cases. To avoid potential confusion for the parties, docketing and dismissing the complaint should occur in the same letter for complaints filed under all ALJ statutes, and for complaints under Section 11(c), AHERA, and ISCA for which the complainant does not agree with administrative closure. This single correspondence should inform complainant and respondent that (1) the case will not be investigated, and (2) that complainant may seek review of OSHA’s decision through the applicable procedures, i.e. the complainant may file objections and request a hearing under the ALJ statutes or seek OSHA national office review of a dismissal decision under Section 11(c), AHERA or ISCA.

Note: Where a complainant elects to withdraw the complaint before docketing, the complaint should not be forwarded to the named respondent. OSHA will follow the applicable guidance on forwarding the complaint to other government agencies. Currently, based on OSHA’s October 12, 2016 *Updated Guidelines on Sharing Complaints and Findings with Partner Agencies*, OSHA should request permission from the complainant to forward the complaint to the relevant partner agency(s). If the complainant does not give consent to forward the complaint, then the regional whistleblower manager should review the underlying substantive allegation (e.g. defective wings on an aircraft) and consider the gravity of the impact to the

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<sup>1</sup> *i.e.* STAA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA, ERA, AIR21, SOX, PSIA, NTSSA, FRSA, CPSIA, ACA, SPA, CFPA, FSMA or MAP-21.

workforce and the public. Should the manager believe that serious harm would result if the complaint goes unaddressed, the regional manager has the discretion to notify the relevant partner agency(s) of the substance of the allegation without revealing the identity of the complainant. The regional manager will notify the complainant of such action.

The withdrawal should be signed by the complainant if possible, and must be confirmed in writing by a withdrawal confirmation e-mail or letter to the complainant.

- B. Supervisory review of administratively closed complaints.** The WIM states that both administrative closures and determinations in docketed cases must be reviewed by the supervisor. Thus, two staff persons, including at least one supervisor, must review OSHA's decision to administratively close or to docket and dismiss a complaint before the complainant is notified in a letter of the reasons that the complaint will not be investigated.