

MEETING  
OF  
WHISTLEBLOWER PROTECTION PROGRAM ADVISORY COMMITTEE

Chaired by Emily Spieler

Tuesday, January 29, 2013

10:30 a.m.

Occupational Safety and Health Administration

Department of Labor

Frances Perkins Building

200 Constitution Avenue NW

Washington, D.C. 20210

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1 SPEAKERS

2 David Michaels, Assistant Secretary  
3 of Labor, OSHA

4

5 Rob Swain, Counsel for Legal Advice, OSHA  
6 Division, Solicitor's Office

7

8 Patricia Smith, Solicitor of Labor

9

10 PUBLIC COMMENTS SPEAKERS

11 Richard Renner, Attorney, Private Practice

12

13 Bill Kojola, AFL-CIO

14

15 Rick Inclima, Director of Safety,  
16 Brotherhood of Maintenance of Way  
17 Employees Division in the Teamsters  
18 Rail Conference

19

20 Vince Verna, Director of Regulatory Affairs  
21 for the Brotherhood of Locomotive Engineers  
22 and Trainmen

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1 DISCUSSION OF STATUTE 11(c) SPEAKERS

2 Michael Mabee, Supervisory Investigator

3 Region 1, New England States

4

5 David Baskin, Regional Solicitor's Office

6

7 IDEAS DISCUSSION

8 Patricia Smith, Solicitor

9

10 OBSERVERS

11 Bruce Rolfsen

12 Christopher Cole

13 Cassandra Lewis

14 Susan Lindhorst

15 Kathleen Hughes

16 Ron Johnson

17 John Risch

18 Mark Lerner

19 Debbie Berkowitz

20 Richard Miller

21 Ed Watt

22 Jeff Kurtz

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1 Gary Visscher  
2 Paul Tanner  
3 George Chartier  
4 Roy Maurer  
5 Charlie Lord  
6 Sherrill Benjamin  
7 Brian Broker  
8 Carla Marcellus  
9 Sabina Khadka  
10 Katelyn Wendell  
11 Anna Laura Bennett  
12 Sarah Marcus  
13 Megan Guenther  
14 Jacquelyn  
15 Cori Hutcheson  
16 Josie Gross  
17 Nicole Vitale  
18 Paul James  
19 Katie Weatherford  
20 Randy (illegible)  
21  
22

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

2 MS. SPIELER: Good morning. My name is Emily  
3 Spieler. I'm honored to be the Chair of this new  
4 Advisory Committee, to OSHA and the Department of  
5 Labor, that focuses on the Whistleblower laws. There  
6 are a number of logistical and housekeeping matters  
7 that we need to take care of first, so bear with us.  
8 I'm going to turn this over to Beth Slavet, who will  
9 run us through some of those things.

10 MS. SLAVET: Good morning, everybody. Given  
11 the fact, particularly the fact that we're OSHA, we  
12 need to do just some basic housekeeping facility  
13 issues. Our restrooms, in this hallway, down here  
14 behind me. Okay? Go to the left and the right, as you  
15 exit the doors. During the breaks, you're welcome to  
16 go up to the sixth floor and use the cafeteria  
17 facilities. There's both a gift shop, and you can  
18 purchase sodas and snacks. You'll see that upstairs,  
19 on the sixth floor. The sixth floor does have a  
20 cafeteria. It has coffee, that both includes regular  
21 coffee and Starbucks, and obviously, you're welcome to  
22 sit up there during the lunch period. There are

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1 several restaurants behind the building, on Second  
2 Street.

3           Finally, in the case of an emergency, there  
4 will be an audible sound, that we'll all hear, and  
5 you'll be notified that this event is a shelter in  
6 place, which means we stay right here, during that  
7 period. If we're asked to evacuate the building, our  
8 meeting location is in front of the Metropolitan Police  
9 Department, at D Street, between Third and Fourth. If  
10 we do have to evacuate, there are staff here, who will  
11 help you find your place to the exits and help you get  
12 out to the street. Okay? But hopefully, that won't be  
13 a problem.

14           MS. SPIELER: That's it?

15           MS. SLAVET: That's it.

16           MS. SPIELER: Okay. Just a word for those of  
17 us who are at the mics, and later for anyone else who's  
18 speaking, the sound from the fans in the back of the  
19 room is very loud. I know that it makes it difficult  
20 to hear us, and it also makes it difficult for the  
21 people who have to do the transcription of the meeting.  
22 I'm going to ask everyone, when you speak, to get your

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1 face pretty much up to the mic, so people can really  
2 hear the sound of your voice.

3           As you know, what we're doing here today, is  
4 to figure out how, within the limits of resources, we  
5 can help OSHA improve the Whistleblower work that they  
6 do. Our job is to assist the Secretary and the  
7 Assistant Secretary to improve their handling of  
8 Whistleblower complaints. So that in the end, we can  
9 improve the situation for people who come forward with  
10 safety and other concerns, covered by the Whistleblower  
11 laws. Our role is to help OSHA's commitment, that has  
12 already been made, to continuously improve this  
13 program, by bringing us and other stakeholders formally  
14 into the conversation, with ideas that will help the  
15 agency achieve its goals.

16           What I'd like to do actually, is have  
17 everyone in the room introduce themselves. I'm going  
18 to ask, first, that the Committee Members introduce  
19 yourselves. When you introduce yourselves, if you could  
20 also give your affiliation, indicate whether you're a  
21 labor or a management representative, public, or come  
22 from another agency. As I think everyone in the room

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1 knows, the representatives from the other agencies are  
2 members of the Committee, but they are nonvoting  
3 members, as we go forward. We'll start there, and then  
4 representatives from OSHA will introduce themselves.  
5 Then I'd like to ask everyone in the room to just,  
6 quickly, tell us your name and your affiliation, and  
7 why you're here, so that we all know who's in the room,  
8 together. Greg, if you could start?

9 COMMITTEE MEMBER INTRODUCTIONS

10 MR. KEATING: Sure. My name is Greg Keating.  
11 I'm a Management Representative. I'm with the firm of  
12 Littler Mendelson. I chair the firm's Whistleblower  
13 Practice Group, and I'm from Boston. I'm delighted to  
14 be here.

15 MR. FRUMIN: Good morning. My name is Eric  
16 Frumin. I'm the Health and Safety Director for Change  
17 To Win. It's a Labor Union Federation of four National  
18 Unions, representing about four-and-a-half million  
19 workers. I'm from New York City. I'm happy to be  
20 here.

21 MS. DOUGHERTY: I'm Christine Dougherty. I'm  
22 from the State of Minnesota. I'm the Representative

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1 for the State Plan States. I am a Discrimination  
2 Investigator.

3 Ms. LESSIN: I'm Nancy Lessin. I'm a Labor  
4 Representative. I work for the Steelworkers'  
5 Charitable and Educational Organization, which is the  
6 nonprofit educational organization affiliated with the  
7 United Steelworkers International Union.

8 MR. MOBERLY: Good morning. I'm Richard  
9 Moberly. I'm a Professor at the University of Nebraska  
10 College of Law, in Lincoln, and I represent the public.

11 MR. ZUCKERMAN: Good morning. My name is  
12 Jason Zuckerman. I'm with the U.S. Office of Special  
13 Counsel. We're an agency that helps individuals who  
14 blow the whistle in the U.S. government.

15 MR. WENGERT: Good morning. I'm Ken Wengert.  
16 I am a Management Representative. I am Director of  
17 Safety and Environmental for Kraft Foods Group, based  
18 outside of Chicago, Illinois.

19 MR. EHERTS: I'm Dave Eherts. I'm a  
20 Management Representative. I'm Vice President and  
21 Chief of Safety at Sikorsky Aircraft, a division of  
22 United Technologies.

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1 MS. NARINE: Marcia Narine. I'm a Management  
2 Representative from the University of Missouri-Kansas  
3 City. I'm Former Deputy General Counsel and Compliance  
4 and Ethics Officer of Ryder.

5 MS. TUCKER HARRIS: Good morning. I'm Rina  
6 Tucker Harris. I'm a Federal Employee Representative.  
7 I am currently working at the Consumer Financial  
8 Protection Bureau.

9 MS. BARBOUR: Good morning. I'm Ava Barbour.  
10 I'm a Labor Representative. I'm in the Legal Department  
11 of the International Union, UAW, in Detroit.

12 MS. SPIELER: Great. We have three members  
13 of the Committee -- I think it's three -- who are  
14 absent today. I just want people to know that Billie  
15 Garde, who is a Labor Representative; John Brock, who  
16 is a Public Representative. Both of them could not  
17 attend the meeting today. Jack Van Steenburg, who's a  
18 Federal Agency Representative, from the Federal Motor  
19 Carrier Safety Administration, could not come as well.

20 Now, I'm going to ask the Assistant Secretary  
21 and the others, up here, to introduce themselves, and  
22 then we'll go to the people in the audience.

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1 OSHA REPRESENTATIVES INTRODUCTIONS

2 MS. SLAVET: I'm Beth Slavet. I'm the  
3 Director of the new Directorate of Whistleblower  
4 Protection Programs, and good morning.

5 MR. MICHAELS: Good morning. I'm David  
6 Michaels, Assistant Secretary of Labor, for OSHA.

7 MR. BAIRD: Good morning. My name is Ed  
8 Baird. I'm an attorney in the Office of the Solicitor,  
9 the Department of Labor, and I'm the Counsel for the  
10 Committee.

11 MR. MABEE: Good morning. I'm Michael Mabee.  
12 I'm a Supervisory Investigator with OSHA's  
13 Whistleblower Program, in the New England States,  
14 Region 1.

15 MR. BASKIN: I'm David Baskin. I'm the  
16 Counsel for Whistleblower Litigation in the  
17 Department's Regional Solicitor's Office, in Boston,  
18 Massachusetts.

19 MR. SWAIN: I'm Rob Swain. I'm the Counsel  
20 for Legal Advice, in the Occupational Safety and Health  
21 Division of the Solicitor's Office.

22 MS. SPIELER: Okay. If we could just, very

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1 quickly, have the mic passed around the room, and have  
2 those people sitting in the audience, just tell us who  
3 you are and what you're doing here.

4 AUDIENCE INTRODUCTIONS

5 MR. ROLFSEN: I'm Bruce Rolfsen. I'm a  
6 writer with BA Bloomberg's Occupational Safety and  
7 Health Reporter, and I'm covering this meeting.

8 MR. RENNER: I'm Richard Renner. I'm an  
9 attorney in Silver Spring, Maryland.

10 MR. INCLIMA: Good morning. Rick Inclima,  
11 Director of Safety, Brotherhood of Maintenance of Way  
12 Employees Division, in the Teamsters Rail Conference.

13 MR. VERNA: Good morning. My name is Vincent  
14 Verna. I'm the Director of Regulatory Affairs for the  
15 Brotherhood of Locomotive Engineers, a Trainmen  
16 Division of the Teamsters.

17 MR. COLE: Hi. I'm Chris Cole. I'm a  
18 Reporter with Inside OSHA.

19 MS. LEWIS: Hi. I'm Cass Lewis. I work at a  
20 management firm in DC.

21 MS. LINDHORST: Susan Lindhorst. I'm a  
22 member of the Whistleblower Team for Union Pacific

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1 Railroad.

2 MS. HUGHES: Kathleen Hughes. I'm Senior  
3 Counsel at Union Pacific, and I head the Whistleblower  
4 Team.

5 MR. JOHNSON: Ron Johnson, and I'm here for  
6 the Association of American Railroads.

7 Mr. RISCH: John Risch. I work in the  
8 Legislative Office for the United Transportation Union,  
9 here in DC.

10 MR. LERNER: Mark Lerner. I'm an attorney in  
11 the Solicitor's Office, Division of Occupational Safety  
12 and Health.

13 MS. BERKOWITZ: Debbie Berkowitz, Chief of  
14 Staff, OSHA.

15 MR. MILLER: Richard Miller, Democratic Staff  
16 Committee on Education. I work for the House of  
17 Representatives.

18 MR. WATT: Ed Watt. I'm the Director of  
19 Health and Safety for the Transport Workers Union.

20 MR. KURTZ: Jeff Kurtz. I was Legislative  
21 Board Chairman for the Brotherhood of Locomotive  
22 Engineers and Trainmen, part of the Teamsters Rail

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1 Conference.

2 MR. VISSCHER: I'm Gary Visscher, with the  
3 Law Office of Adele Abrams.

4 MR. TANNER: Paul Tanner, OSHA's Office of  
5 State Programs.

6 MS. CHARTIER: George Chartier, OSHA Office  
7 of Communications.

8 MR. MAURER: Roy Maurer. I cover  
9 Occupational Safety for HR News, SHRM.

10 MR. LORD: I'm Charlie Lord. I'm an attorney  
11 with the Solicitor's Office in the Mine Safety and  
12 Health Division.

13 MR. BLANCATO: Philippe Blancato. I am an  
14 Investigative and Compliance Specialist with OSHA's  
15 Whistleblower Program.

16 MR. BENJAMIN: I'm Sherrill Benjamin. I'm  
17 with the Whistleblower Program, out of Region 5,  
18 Chicago. I'm currently on detail, working with Beth  
19 here, for the next couple of months.

20 MR. BROKER: I'm Brian Broker. I'm a  
21 Presidential Management Fellow, here at OSHA's  
22 Whistleblower Program.

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1 MS. MARCELLUS: Hi. I'm Clara Marcellus. I'm  
2 a Program Analyst, with OSHA's Whistleblower Program.

3 MS. SEEMAN: Hi. Laura Seeman. I'm the  
4 Division Chief, for Field Operations, for the  
5 Whistleblower Program.

6 MS. KHADKA: Hi. I'm Sabina Khadka, with  
7 OSHA's Office of the Assistant Secretary.

8 MS. WENDELL: I'm Katelyn Wendell. I'm also  
9 a Presidential Management Fellow, with the  
10 Whistleblower Program.

11 MS. BENNETT: I'm Anna Laura Bennett. I'm in  
12 the Solicitor's Office, here in the Honors Program.

13 MS. MARCUS: Sarah Marcus. I'm an attorney  
14 in the Fair Labor Standards Division, of the Office of  
15 the Solicitor, here in the Department.

16 MS. GUENTHER: Megan Guenther. I'm the  
17 Counsel for Whistleblower Programs, in the Fair Labor  
18 Standards Division, in the Solicitor's Office.

19 MS. THOMPSON: Jacquelyn Thompson. I'm an  
20 attorney with the Law Office of Keller and Heckman.

21 MS. HUTCHESON: I'm Cori Hutcheson, Office of  
22 Whistleblower Protection Programs.

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1 MS. CHATMON: Veneta Chatmon, with the OSHA  
2 Office of Communications.

3 MS. GROSS: Josie Gross, Director of  
4 Whistleblower Protection Program.

5 MS. VITALE: Nicole Vitale. I'm also a  
6 Presidential Management Fellow, with the Whistleblower  
7 Program.

8 INTRODUCTORY COMMENTS

9 EMILY SPIELER, CHAIR

10 Thank you so much. I always do think it's incredibly  
11 important, not only because this should be as inclusive  
12 a process as possible, but also because we should know  
13 who we're talking to, when we're talking about people.  
14 I'm particularly delighted at the breadth of the people  
15 who are here, both representing employers, and unions,  
16 and employees in Whistleblower cases, but also the  
17 other parts of the Labor Department, that I think are  
18 working on some very similar issues, particularly from  
19 wage an hour and from MSHA. A particular welcome to  
20 you, as well.

21 I think that the Committee, at least, has  
22 reviewed the charter any number of times, but I just

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1 want to remind people a few things about the charter.  
2 This Advisory Committee is a new Advisory Committee,  
3 for OSHA. This is its very first meeting. We will be  
4 learning how to do this, in the course of today, and  
5 perhaps in our next meeting. It's our responsibility  
6 to advise the Secretary and the Assistant Secretary on  
7 ways to improve what the charter says is the fairness,  
8 efficiency and transparency of OSHA's Whistleblower  
9 investigations. There are additional things  
10 enumerated, but all of them, essentially, come under  
11 that goal of fairness, efficiency and transparency.

12 We'll be meeting two or three times a year,  
13 as a full Committee, but we're also authorized to  
14 establish working groups, if they are appointed by the  
15 Assistant Secretary or subcommittees, that will then  
16 come back to this Committee, and bring forward issues  
17 to us. There may be work done between Committee  
18 meetings, but that will also be transparent. I  
19 believe, although I don't think it's required by  
20 Federal Advisory Committee Act, I do believe that at  
21 least OSHA, generally, has a transparency that  
22 accompanies this Committee's work into those

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1 subcommittees and working groups. There will be public  
2 notifications about when those occur.

3           In fact, I think there's a very high  
4 commitment on the part of the Department, and certainly  
5 on my part, to high levels of transparency in this  
6 process. Really, I think what we can bring to this  
7 commitment, that the Department of Labor and OSHA has  
8 already made to improvement of the Whistleblower  
9 Programs, is outside perspectives and creative ideas,  
10 that may not have occurred to people who are right in  
11 the mix of the day-to-day work. I want to say, at the  
12 get-go, that it is my impression that the agency has  
13 been working very hard, in the last couple of years, to  
14 really improve the Whistleblower Program and the  
15 creation of the Directorate, that Beth Slavet heads, is  
16 really evidence of that. She and I have had a series  
17 of conversations about both the challenges and the  
18 opportunities as they go forward. I really look  
19 forward to the Committee being able to be extremely  
20 helpful in this process. We're all delighted to be  
21 here, and honored to be able to be of assistance in  
22 something that I think all of us agree is critically

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1 important for how the laws of Congress, the passes get  
2 enforced, which is the people who work in places, who  
3 know what's going on, have the opportunity to come  
4 forward and raise concerns without fearing retaliation.

5 I'm going to turn this part of the meeting  
6 over the Assistant Secretary and to the Director of the  
7 Program. After they complete their remarks, we will  
8 also have an opportunity for questions from the  
9 Committee, and discussion of their remarks, before  
10 lunch.

11 INTRODUCTORY REMARKS

12 DAVID MICHAELS

13 ASSISTANT SECRETARY OF LABOR FOR OSHA

14 Thank you. Welcome, all of you, and let me begin also,  
15 by thanking every one of you, the first members of this  
16 Whistleblower Protection Advisory Committee. We've  
17 asked you to join us because you have both knowledge  
18 and experience and can help OSHA ensure that our  
19 Whistleblower investigations are done thoroughly,  
20 efficiently and effectively.

21 I have even higher hopes and expectations of  
22 you, and I'll return to that. You've all agreed to

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1 take on this task without remuneration. It's your  
2 commitment to public service, to helping this  
3 government agency fulfill its very important charge, a  
4 charge given to us by the Congress of the United  
5 States. I particularly want to thank Emily Spieler,  
6 our Chair, who really has already put in many hours of  
7 work to support this committee. I know her work is  
8 vital to the functioning of this committee. Thanks are  
9 also due to many others and the OSHA staff. Debbie  
10 Berkowitz, my Chief of Staff, is in the room, here.

11           You'll eventually meet Jordan Barab and Rich  
12 Fairfax, our Deputy Assistant Secretaries. Beth Slavet  
13 and the staff, and Laura Seeman, the Deputy. We have a  
14 small group and a high large percentage of them are  
15 here. The Director of the Whistleblower Protection  
16 Programs has taken on this committee, in addition to a  
17 tremendous number of other tasks they do. They've done  
18 a really great job putting this together. I want to  
19 thank them for their work, and equally, I want to thank  
20 the Representatives and the people from the Solicitor's  
21 Office. Ed Baird, you met; and Rob Swain; Megan  
22 Guenther and the staff of lawyers, many of whom are

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1 Presidential Management Fellows. We look at this, our  
2 Whistleblower Protection activities, as a true  
3 collaboration between OSHA and the Office of the  
4 Solicitor of Labor. I really appreciate the nature of  
5 this collaboration, how we've been able to work so  
6 closely together.

7           Finally, our field staff. Much of our work  
8 is done outside of Washington. The Regional OSHA staff  
9 and the Regional Solicitor staff do a fabulous job.  
10 You'll meet a couple of representatives of that group,  
11 this afternoon, to talk about how the things that we  
12 talk about, here in Washington, really occur in the  
13 field and where we need some of our help.

14           I want to talk about the story, in terms of  
15 putting Whistleblower Protection in the context. April  
16 20, 2010, a crew, working on the offshore oil rig,  
17 called the Deepwater Horizon, saw fire. Shortly  
18 afterwards, the rig exploded. I don't need to tell you  
19 how catastrophic that was. Eleven workers were killed.  
20 It was the largest oil spill in American history;  
21 billions of dollars in damage to the economy, of the  
22 Gulf States. The environmental damage, it's still

1 being addressed. A horrific impact on those States,  
2 that still are paying for those costs. When the  
3 Presidential Commission, investigating the Deepwater  
4 Horizon, went back and interviewed workers, they  
5 learned that there was a confidential survey of workers  
6 on the Deepwater Horizon, several weeks before the  
7 explosion, that showed that many workers had safety and  
8 health concerns, but they felt they couldn't bring them  
9 forward. The environment just didn't allow it. The  
10 workplace culture on the Deepwater Horizon did not  
11 support workers exercising their right to voice safety  
12 and health concerns. If that culture had been  
13 different, perhaps many lives could have been saved and  
14 an environmental catastrophe could have been averted.  
15 There are many stories like this. This is just one  
16 that's particularly well known.

17           There are equal tales that come out of the  
18 financial securities industry as well. In some ways,  
19 the one that's told most involves the Enron  
20 Corporation, which is a Houston-based energy company.  
21 It's no longer exists. But Fortune Magazine called it,  
22 "America's Most Innovative Company," for six

1 consecutive years. I probably don't need to remind you  
2 exactly what it was innovative in doing. Enron  
3 employed more than 20,000 people, and reported annual  
4 revenues of \$101 billion dollars, in the year 2000.

5 In 2001, shares dropped by \$1.2 billion. The  
6 company announced massive losses, and shortly after  
7 that went bankrupt. Congressional Investigators  
8 discovered that an Enron employee, Sherron Watkins, had  
9 approached company founder, Kenneth Lay, two months  
10 prior to the public announcement. Sherron was employed  
11 as Vice President of Accounting, did not share her  
12 concerns outside of Enron. Eventually, she cooperated  
13 with Congressional Investigators, to paint a picture of  
14 corruptive practices, so deeply impacted on Enron's  
15 employees and shareholders, but it didn't get to the  
16 regulators. It wasn't made public. Again, the results  
17 are very clear.

18 We can do better. We have to ensure that the  
19 culture of corporations is such, that workers can raise  
20 concerns without fear of retaliation. You might ask  
21 why OSHA is conducting investigations into retaliation  
22 against workers who raise concerns about, for example,

1 fraudulent behavior in the world of financial  
2 securities. We are a Safety and Health Agency. OSHA  
3 had one of the first, if not the first, nationwide  
4 anti-retaliation provisions, provisions that protected  
5 workers who raised their voices. That's Section 11(c)  
6 of the OSHA Act passed in 1970. It said -- I'll read  
7 it to you -- "No person shall discharge or in any  
8 manner discriminate against any employee because such  
9 employee has filed any complaint; or instituted or  
10 caused to be instituted, any proceeding under or  
11 related to this Act; or has testified, or is about to  
12 testify, in any such proceeding; or because of the  
13 exercise by such employee, on behalf of himself or  
14 others, of any right afforded by the Act."

15           Now, when we read this, we essentially  
16 explain it saying, first of all, "You can't fire an  
17 employee, or discriminate against them, or retaliate  
18 against them, in any way, if they file a complaint with  
19 their employer or with OSHA; if they participate in an  
20 inspection; if they testify about safety and health  
21 issues; or in any other way, exercise their right under  
22 the OSHA Act, or represent another employee in doing

1 so."

2           This is a very logical component of the OSHA  
3 Act, and the authors of the OSHA Act understood this.  
4 The law says employers must provide a safe workplace  
5 and OSHA's job is to encourage them to do that, but  
6 within that context, workers were given the right to  
7 call OSHA, and OSHA has to respond when they call. So  
8 if a worker was retaliated against for calling OSHA or  
9 for raising a concern with their employer, it would  
10 defeat the purpose of the law, and that's very clear.  
11 Workers have to have the ability to protect the health  
12 and safety of themselves, and also of their coworkers.  
13 Of course, that means more than just calling OSHA.

14           Ideally, when the worker identifies a safety  
15 and health hazard, OSHA is never called. Ideally,  
16 again, there's a process in every workplace, through  
17 which workers raise their concerns with their  
18 supervisors and workers feel they can raise their  
19 concerns without fear of retaliation.

20           I think we see that workers complain to OSHA,  
21 in many cases, when they have raised concerns, but  
22 their concerns haven't been addressed; or they're

1 afraid to raise their concerns, because of fear of  
2 retaliation. So it's in our interest. It's in  
3 everyone's interest to have a system in place, a  
4 process in which workers can raise their concerns,  
5 without having to go to OSHA. But sadly, there are too  
6 many employers, where workers don't feel they can do  
7 this.

8           Now, under our 11(c) Statute, OSHA receives  
9 more than 1,700 complaints. We received more than  
10 1,700 complaints last year, the most of any of the  
11 statutes that we investigate. That number, of the  
12 11(c) complaints, is increasing every year.

13           Under the OSHA Act, complainants under 11(c)  
14 have only 30 days to file complaint after the adverse  
15 action occurs. In many cases, workers don't even learn  
16 their rights until well after 30 days has passed. I  
17 shutter to think of the number of complaints OSHA would  
18 receive, if workers had longer to file, or if all  
19 workers, across the United States, were informed of  
20 their rights.

21           Frankly, it's a poorly written statute and  
22 doesn't provide workers with an adequate level of

1 protection. We really need your help thinking about  
2 that. That'll be some discussion, that we'll have  
3 later on today.

4           The OSHA law also says that employers must  
5 keep track of injuries. February is coming very soon,  
6 and I think many people on this panel know that that  
7 will be the time for posting the OSHA Log. Why the  
8 OSHA Act, and why does OSHA require employers to keep  
9 track of injuries? Because tracking injuries is the  
10 basis for preventing injuries. If injuries aren't  
11 identified, if they're not kept track of, it's very  
12 difficult to prevent future injuries from occurring.

13           I go to many meetings, and I'm asked, "What  
14 does OSHA do with all the OSHA Logs it gets?" Of  
15 course, OSHA doesn't get OSHA Logs, except from a small  
16 percentage of employers. The OSHA Log is a tool for  
17 employers and for employees to know what's going on at  
18 their workplace.

19           I think everybody in the Occupational Safety  
20 and Health world, everyone in public health, would like  
21 to see low injury rates, at all employers. Low injury  
22 rates generally means fewer people are being injured.

1 That's something we all want. It's better for workers.  
2 It's better for the employers. It's better for the  
3 bottom line. But even in the true absence of fewer  
4 injuries, lower injury rates are a value to some  
5 employers. We recognize that this is an important  
6 issue, that we have to grapple with.

7           For certain construction contractors, for  
8 example, a high rate bars you from getting certain  
9 jobs, certain contracts. OSHA is more likely to  
10 inspect an employer with more injuries on their Log. We  
11 actually have a program that focuses on employers who  
12 do have high injury numbers and high injury rates on  
13 their Log. There's even contests out there -- or there  
14 were. For years, the railroad industry had the  
15 Harriman Award, that provided a prize, essentially, to  
16 the railroad with the lowest injury rate in the  
17 country. So there's lots of incentives to keep injury  
18 rates down, beyond just simply the safety of workers.

19           Another one, which we see quite commonly  
20 around the country, is that manager bonuses are often  
21 pegged to various metrics, including, of course, injury  
22 rates. All of this makes sense, on one level, that

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1 it's reasonable to want low injury rates. There's some  
2 not so good reasons as well, to have low injury rates.  
3 We're quite concerned about this.

4 We've particularly seen this problem in the  
5 railroad industry. I'm very pleased that there are a  
6 lot of representatives from both Management and Labor,  
7 in the railroad industry here, sitting in the audience.  
8 Because we've been, very much, focused on the railroad  
9 industry, in recent months.

10 One of the 22 Statutes that we enforce is the  
11 Federal Railway Safety Act. I believe it's the second  
12 or third -- Yes. After 11(c), the largest number of  
13 our complaints come under FRSA, and we had 353  
14 complaints last year, from railroad employees, alone.  
15 More than 60 percent of the complaints filed with OSHA,  
16 under the Federal Railway Safety Act, involve an  
17 allegation that a worker has been retaliated against  
18 for reporting an on-the-job injury. So OSHA is taking  
19 a corporate-wide approach to our FRSA enforcement.

20 We get complaints from workers at virtually  
21 all the railroad companies. The largest number of  
22 complaints have come from the BNSF Railway, and we

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1 currently have 94 pending FRSA complaints against BNSF,  
2 more than against any other railroad. OSHA has worked  
3 very closely, with the Office of the Solicitor, here at  
4 Labor, to identify BNSF personnel policies that we  
5 believe violate the statute, the Federal Railway Safety  
6 Act, and we developed a list of cases that involved  
7 those policies. We looked at these, and we said, "We  
8 have to figure out a way to take these cases on, not  
9 individually, but on the policy level, and affect  
10 policy change."

11           The result was a voluntary revision of  
12 company policy by BNSF, an offer to settle 36 of these  
13 cases. Needless to say, we are very pleased with this  
14 development. We think the offer, by BNSF, to change  
15 their policies is a very progressive development, and  
16 one that we see as a model for other employers to  
17 follow. I think we'll be discussing that, not  
18 necessarily today, but over the course of the next  
19 meetings of this Advisory Committee.

20           On the flip side of this, we're not pleased  
21 by a very different development, which is the  
22 widespread use of programs that provide a benefit to

1 workers who don't report an injury. Some people call  
2 these rate-based incentive programs. On the face of  
3 it, it makes sense. I mean, sure. It could be said  
4 you're providing an incentive, or a reward, for people  
5 not being injured. How could that be problematic?

6 Well, it is.

7           The first reason, I believe, it essentially  
8 says that changing worker behavior is the key to  
9 preventing injuries. We know that's simply not true.  
10 There have been many, many studies, that look at injury  
11 causation, and simply focusing on behavior can't be the  
12 primary component of any sort of injury prevention  
13 program. The primary component has to be abatement of  
14 hazards. That's why people are injured. The goal of  
15 safety programs has to be to eliminate hazards, not  
16 simply to change behavior. Incentivizing an outcome,  
17 no injury, rather than an activity, finding and  
18 eliminating hazards, will simply not work most of the  
19 time.

20           I've looked at the literature. I've read  
21 many, many articles on this. I've yet to see an  
22 explanation of how this mechanism works, other than it

1 rewards people for not reporting injuries. I've  
2 actually never seen any empirical evidence that it  
3 reduces injuries. Even if people do have evidence of  
4 this, I'm eager to see it. I hope we'll have an  
5 interesting discussion of this, down the line.

6           Of course, there's a larger problem. When  
7 there's a disincentive to actually reporting real  
8 injuries, there are many unfortunate consequences. One,  
9 obviously, relates to the individual, and their  
10 inability to get Workers' Compensation. The second is  
11 that injuries aren't identified, and therefore can't be  
12 investigated, and can't be prevented. If you don't  
13 know it occurred, or if it's never been recorded, then  
14 there's no incident investigation.

15           This has been raised to us by at least one  
16 GAO Report, which told us that these malevolent  
17 incentives result in distorted data. We've been  
18 pursuing this. We try to make it very clear that  
19 certain types of disincentives are not allowable.

20           Let me talk about one extreme example. I  
21 heard this Report from our State Consultation Program  
22 in New Mexico, of a gas-drilling operation, that

1 provided a month's bonus, if no worker was injured for  
2 three months. So you had contractor, subcontractor,  
3 sub-subcontractors, dozens of workers working on this  
4 one rig, and the owner of the whole rig, said, "If no  
5 one's injured, over three months, everybody will get  
6 one month's bonus."

7           Now, let's say, two-and-a-half months into  
8 this, you injure yourself. You're injured. You have a  
9 laceration. What's the likelihood that you're going to  
10 report that laceration, if it's going to mean not just  
11 you, but all your coworkers are going to lose a month's  
12 salary? Now, that's an extreme example, but it's a  
13 real one. Equally, and commonly, we see pizza parties  
14 at the end of the week. I find it hard to believe  
15 someone's going to work differently on Tuesday, for a  
16 slice of pizza on Friday. But at the same time, if you  
17 have situation where there's peer pressure on workers  
18 not to report, because someone's not going to get a  
19 reward, we think that's problematic, and it can be an  
20 11(c) violation.

21           We hope that with this scenario, we get some  
22 assistance in thinking about, from this Committee, and

1 ways we can address it and encourage programs that  
2 incentivize hazard abatement, training, and things that  
3 really do make a difference, and reduce injuries.

4 I think Congress understood, and continues to  
5 understand, that workers play a very important role,  
6 not just in protecting themselves, but in protecting  
7 the public. Incidents, like what happened at Enron, or  
8 Deepwater Horizon, led Congress to including anti-  
9 retaliation provisions in many pieces of legislation.  
10 It's important, and it's been included in legislation  
11 on Environmental Protection. There are anti-  
12 retaliation provisions in the Clean Air Act and the  
13 Clean Water Act, the Pipeline Safety Act.

14 It's important to protecting the integrity of  
15 the financial system. Sarbanes-Oxley, and the new  
16 Dodd-Frank bill, have very clear anti-retaliation  
17 provisions. It's important in protecting  
18 transportation safety. The laws protect truck drivers,  
19 locomotive engineers, airline pilots, and many other  
20 transportation workers, if they raise concerns that  
21 impact the safety of themselves or the traveling  
22 public. It's important in food safety, protecting

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1 workers who report adulterated food, that could be  
2 eaten by our kids.

3           We now have 22 Statutes. In fiscal year  
4 2012, we received almost 2,800 complaints, which is a  
5 44 percent increase in 2005, and every reason to expect  
6 it will go up, every year. We get new statues and some  
7 of the statutes become increasingly important. After  
8 11(c), as I told you, the largest number of complaints  
9 come from FRSA, where we had 350, approximately,  
10 complaints last year. Sarbanes-Oxley is our third-  
11 largest Statute, in terms of complaints, where we  
12 received 164 complaints in fiscal year 2012.

13           I think everybody knows that we're a  
14 relatively small agency, and our Whistleblower  
15 Protection staff is a small, but mighty fraction, of  
16 our staff. We do our Whistleblower Protection work  
17 jointly with our Solicitor's Office, and the Solicitor  
18 of Labor also covers not just OSHA and Whistleblower,  
19 but all the other statutes and responsibilities of the  
20 Department of Labor. The Solicitor's Office, I think,  
21 is equally small and overburdened. Together, we have  
22 to select our cases. We have to select our

1 investigations strategically, to have the biggest  
2 impact we can, given our very limited resources. That  
3 will become a particular challenge as new regulations  
4 including the Affordable Care Act, come onboard, and we  
5 can expect more and more cases to investigate.

6           So we have a big mission here. Congress has  
7 given us a tremendous responsibility, to help protect  
8 the health, safety and welfare of the people of the  
9 United States. I've said this publicly in the past, I  
10 believe we haven't done this job as well as we should  
11 have done. Our Whistleblower program has come under  
12 scrutiny from both the General Accounting Office and  
13 the Office of the Inspector General. In January, 2009,  
14 the GAO issued a Report with eight recommendations,  
15 focusing on improved data integrity, use of an audit  
16 system, to ensure program quality, provisions to the  
17 field manual, to ensure consistency, increased  
18 training.

19           Our Inspector General also issued a Report  
20 that concluded that OSHA was not adequately managing  
21 the Whistleblower Program, specifically looking at  
22 field supervisory controls and the management of case

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1 file assignments. Despite the addition of several new  
2 Statutes since 2005, OSHA has not increased staffing  
3 fully enough to handle the additional burden. So all  
4 these reports noted a number of our field staff had not  
5 received initial Whistleblower training. As of last  
6 month, we have provided training to all field  
7 Whistleblower Investigators. We have made training of  
8 the Whistleblowers one of our highest priorities. We're  
9 very pleased with how far we've gotten with that.

10 That's really part of a larger initiative of  
11 the Obama Administration, to revitalize this  
12 Whistleblower Protection Program. We've made this a  
13 very high priority. I think we made some progress. I  
14 think we still have far to go, and we really do need  
15 your help doing this. A program of this importance  
16 must happen to the best thinkers in the country, and I  
17 think we've assembled a sizeable number of you here,  
18 who really do fit that description.

19 The importance of this program, our  
20 dedication to this program, it's not the flavor of the  
21 month. OSHA has strong support on this issue from both  
22 Democrats and Republicans. I think, in this era of

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1 partisanship, this is a program that is unusually  
2 bipartisan.

3           In September, 2011, as we were planning a  
4 nationwide training program for Whistleblower staff, I  
5 received a letter written by Senator Patrick Leahy and  
6 Charles Grassley, which is in your handouts here. Both  
7 still serve on the Senates Committee on Judiciary. At  
8 the time, Leahy was the Chairman. He still is, and  
9 Grassley was the ranking member. The Senators praised  
10 OSHA's efforts in the area of protecting  
11 Whistleblowers. Very clearly, what they said was,  
12 "Strengthening Whistleblower protections is not a  
13 bipartisan issue, but simply the right thing to do." I  
14 recommend you read this letter. It's a lovely letter,  
15 pointing out why this is important, and directions we  
16 should go with it.

17           We're looking for your help. What I hope to  
18 get from this committee, we want you to look at our  
19 work, to help us improve it. What can we learn from  
20 the experience of other agencies? How can we work most  
21 effectively with other agencies, whose laws we enforce?  
22 I'd like you to help us understand how we can best work

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1 with workers who have alleged retaliation, and with  
2 employers who have alleged and retaliated against a  
3 whistleblower. How can we best work with them to  
4 resolve these despites quickly and fairly? If  
5 retaliatory firing has occurred, how do we get that  
6 worker back to work and make that person whole, as  
7 quickly as possible?

8 Today, I'd like to start the discussion about  
9 11(c), which is one of our most important statutes, and  
10 in many ways, the most frustrating and difficult one.  
11 Christine Dougherty, from the State of Minnesota is  
12 here. The State OSHA Plans enforce 11(c) in 21 States,  
13 and it's very important that, as we think about this,  
14 we include thinking about how State Plans can take on  
15 11(c) as well. That's why the charter of this  
16 committee includes a Representative of the State Plans  
17 as a permanent member. I believe you're a voting  
18 member, not an ex-officio member. Though, frankly, I  
19 don't imagine you have many votes on this committee.

20 MS. DOUGHERTY: Right.

21 DR. MICHAELS: But symbolically, it says that  
22 that you're a full member of this committee. This

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1 afternoon, we have two guests, who will join us. One  
2 of our top Supervisory Investigators, and a very  
3 dedicated member of the Solicitor staff, who can begin  
4 to detail some of the concerns about which we need your  
5 help.

6           But even more importantly, than any  
7 individual statute, we need your help on the big  
8 picture. One of the primary objectives of this  
9 committee is to help us bring about a change in culture  
10 among employers across the country. I'd like our  
11 Whistleblower Protection Program to play an important  
12 role in preventing the next Deepwater Horizon and  
13 avoiding the next Enron. I'd like to see employers  
14 adopt systems that embrace whistleblowers and listen to  
15 them. In some cases, their concerns may not be well-  
16 founded, but that's fine. Workers should feel free to  
17 be able to raise their concerns, and they should feel  
18 that they won't be retaliated against for doing that.  
19 So I'm asking you, how do we change that culture? How  
20 can we get OSHA out of the business of Whistleblower  
21 investigations?

22           Again, thanking you, welcoming you into the

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1 OSHA family, and I'll turn this over to Beth Slavet,  
2 the new Director of our Directorate of Whistleblower  
3 Protection Programs.

4 BETH SLAVET, DIRECTOR

5 DIRECTORATE OF WHISTLEBLOWER PROTECTION  
6 PROGRAMS

7 Thank you, Dr. Michaels, and Chair Spieler. I  
8 appreciate it. Both my staff and I are honored to host  
9 this first meeting of the Whistleblower Protection  
10 Advisory Committee. You've heard from Dr. Michaels,  
11 the challenges of your charge as an Advisory Committee,  
12 at least the initial challenges. First, to focus on  
13 the original Act and our stable of laws, 11(c) of the  
14 1970 Occupational Health and Safety Act. That is, to  
15 protect workers from safety and health, dangers and  
16 threats in the workplace, and to do so by focusing on  
17 their first line of defense. That is by being able to  
18 express their concerns, if they aren't safe and that  
19 there is a problem in the workplace. The second, to  
20 change the corporate culture and the attitudes of  
21 employers towards whistleblowers.

22 The fact of the matter is that there has been

1 a sea change in society's attitude towards  
2 Whistleblowers. I need only point to Time Magazine's  
3 cover story of 2002, in the naming of three  
4 Whistleblowers: Coleen Rowley, of the FBI;  
5 Cynthia Cooper, of WorldCom; and as Dr. Michaels  
6 mentioned, Sherron Watkins, of Enron, as "Persons of  
7 the Year," to point out that the public looks at  
8 Whistleblowers and admires them. Why is that? Because  
9 Whistleblowers constitute our societies', and our  
10 agencies', first line of defense in keeping workers and  
11 the public free of workplace injuries or illnesses.  
12 From the railroad crews, on the Union Pacific, to the  
13 sanitation workers in New Jersey, to the auto industry  
14 in Detroit or Georgia, to the workers in the  
15 entertainment, food and health services industries,  
16 it's Whistleblowers who are societies' first line of  
17 defense against both everyday, in unanticipated dangers  
18 to our societies' health and safety.

19 While OSHA's mandate is to ensure workers'  
20 safety and health, OSHA simply doesn't have the  
21 resources or the personnel to be everywhere, at all  
22 times, and to ensure statutory and regulatory

1 protection for all workers, all the time. The  
2 Whistleblower Protection laws over the years, have  
3 expanded and supplemented the resources and  
4 capabilities of OSHA, as well as a myriad of other  
5 regulatory agencies. Whistleblowers are our eyes and  
6 ears in the workplace. They are in places where we do  
7 not have the resources to focus on, at all times, and  
8 when we are unable to be present. Whistleblowers are  
9 committed and, indeed, they are sometimes passionate.  
10 By bringing to the Department's attention, retaliation  
11 from their employers, 11(c) Whistleblowers are  
12 protecting not only themselves, but also their fellow  
13 workers, their employers, and frequently, the public.

14           According to a variety of studies,  
15 Whistleblowers don't want money. They don't want  
16 recognition. What they do want is their bosses'  
17 appreciation and recognition of the safety problem, not  
18 the bosses sweep it under the rug, or otherwise ignore  
19 it.

20           So I want to, in the past few years,  
21 recognize that not only have we gotten more  
22 responsibilities, but in the past few years, we've

1 actually been able to identify recent accomplishments  
2 of this OSHA leadership. We are currently working on,  
3 and anticipating doing, in the next six months, in the  
4 next year. I cannot emphasize how important the  
5 visions and accomplishments of Dr. David Michaels, and  
6 his staff, have been in the past few years. It just  
7 can't be overestimated. OSHA has revamped its 11(c)  
8 Appeals Program. We've eliminated three-years appeal  
9 backlog.

10           In September of 2011, OSHA had a three-day  
11 conference for both Federal and Safety Whistleblower  
12 professionals. At that conference, there were  
13 approximately 150 attendees, who participated in  
14 workshops, for training, enforcement, with a myriad of  
15 topics involving OSHA's enforcement in their  
16 Whistleblower Protections. In addition to Federal OSHA  
17 Whistleblower Programs, managers and investigators were  
18 there from every region, as well as from several State  
19 Plans, and participated in conference events.

20           The Whistleblower Program has worked closely,  
21 and gotten closer ties with the Department of Labor's  
22 Office of the Solicitor, to both teach and discuss

1 recent developments in whistleblower protection and the  
2 appropriate handling of Whistleblower investigations.

3           Nongovernmental participants also contributed  
4 to the conference, as the representations three  
5 stakeholder groups, regarding their role in the  
6 Whistleblower Protection community. So as Dr. Michaels  
7 mentioned, OSHA has now completed providing basic 11(c)  
8 training to all its Whistleblower Investigators. As we  
9 speak, in Chicago, we are providing that training to  
10 State employees who have similar whistleblower  
11 responsibilities and investigatory responsibilities in  
12 their States.

13           OSHA has provided specific guidance to the  
14 field regarding employer incentive and disincentive  
15 programs, which Dr. Michaels referred to. We've  
16 substantially updated, and we are continuing to update,  
17 our Whistleblower Investigations Manual. Dr. Michaels  
18 has worked with the Solicitor's Office, the Solicitor  
19 of Labor, to enhance the cooperation between OSHA and  
20 the Regional Solicitors, and that's resulted in a  
21 definable increase of 11(c) cases being filed in  
22 District Court. You'll hear, this afternoon, from

1 Region 1, about the close relationship the Solicitor's  
2 Office and the Investigators have.

3 OSHA, under Dr. Michaels' leadership, has  
4 added over 35 FTE's positions, for Whistleblower field  
5 staff nationwide, and added new Whistleblower  
6 Supervisors, to more effectively manage resources and  
7 investigators.

8 In mid-December of 2012, the Office of the  
9 Whistleblower Protection Program was reorganized into  
10 the Directorate of Whistleblower Protection Programs,  
11 fondly christened, "Do-Wop, Do-Wop." This new  
12 Directorate has its own budget and is dedicated to  
13 providing technical advice in support to the field, as  
14 well as working to ensure consistency across OSHA's ten  
15 regions.

16 I asked Jordan Barab, when I got this notice,  
17 that we are now a Doctorate, Deputy Assistant  
18 Secretary, "What does this mean, as a practical  
19 matter?" He responded by sending me a scene from Walt  
20 Disney's, "Pinocchio," where it's the very end of the  
21 movie and Geppetto thinks he's dead, and he crying over  
22 his boy and suddenly, Pinocchio wakes up, and he says,

1 "Father, I'm a real boy!" That was Jordan's way of  
2 trying to telling me what being a Directorate meant,  
3 and it was quite effective.

4 But the fact of the matter is, that the  
5 status of being a Directorate does eliminate some of  
6 the bureaucracy that's been imposed on our everyday  
7 workday functions and our ability to get things done.  
8 So making that change is significant.

9 Lastly, of course, it was Dr. Michaels, that  
10 ensured that this Advisory Committee be established, so  
11 that we could continue to improve the program. I'm  
12 looking forward to working with you and listening to  
13 your recommendations. Now, I'm not going to use my  
14 introductory time to talk about our statistics. You've  
15 got that in your package, and that's also available to  
16 the public. I want to make sure that you have a chance  
17 to take a look at that.

18 But sufficient it is to note, that with the  
19 additional new Whistleblower Protection Statutes added  
20 in recent years, Section 11(c) still makes up the  
21 majority of the complaints in the programs we  
22 investigate. So I want to read you some of the more

1 recent milestones, and expected milestones of our  
2 Directorate. Maybe while I'm talking, you can have a  
3 chance to look at our statistics.

4           We expect to promulgate seven Whistleblower  
5 Rules this fiscal year, that lay out the process for  
6 filing complaints. Those rules will establish  
7 procedures and time frames for processing employer  
8 whistleblower retaliation complaints. I'm happy to  
9 report that OMB has waived the requirements of the  
10 Seaman's Protection Act. We are on those regulations,  
11 so we are scheduled to go to publication on that, later  
12 this week.

13           We're also in the processing of finalizing  
14 interim rules for procedures for handling retaliation  
15 complaints, under the Food Safety Modernization Act.  
16 You may know, if you've been reading the press, that  
17 this month -- I guess it was this month -- the Food and  
18 Drug Administration published its own interim Final  
19 Rules, making far-reaching changes in the Food Safety  
20 industry. These rules include guidelines for Food  
21 Safety, covering all fruits and vegetables. It focuses  
22 on areas of risk, such as agricultural water,

1 biological soil amendments, health and hygiene,  
2 domesticated and wild animals, and equipment, tools and  
3 buildings. The FDA will soon issue its proposed rule  
4 on importer foreign supplier verification, and has  
5 future proposed rules addressing preventive controls  
6 for animal food and accreditation of third-party  
7 auditors.

8 I can assure you, with the expansion of these  
9 FDA rules, and with the recent deaths and illnesses,  
10 which have occurred in the U.S. and aboard, as the  
11 result of poor food mishandling procedures, we will be  
12 seeing -- there's no doubt in my mind -- an increase  
13 in whistleblower retaliation complaints brought with  
14 regard to food safety.

15 We also expect, as Dr. Michaels mentioned,  
16 for the handling of retaliation complaints to come  
17 under the Affordable Care Act, or the ACA, which  
18 provides protection to employees of health insurance  
19 insurers or other employers, and for those employees  
20 who may have been subjected to retaliation for  
21 reporting potential violations of the law's Consumers  
22 Protection's provisions. Prohibitions and denials on

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1 insurance coverage due to preexisting conditions, for  
2 example, and other things having to do with access to  
3 health insurance, premium tax credits, and other  
4 employee concerns.

5           We are also working on regulations for the  
6 handling of retaliation complaints against workers in  
7 the consumer financial services industry, under the  
8 Consumer Financial Protection Act. I am really  
9 thrilled to have a Representative here from that  
10 agency. We plan to publish final procedures for the  
11 handling of retaliation governing workers in the  
12 railroad industry; and NHTSA workers, in public  
13 transportation.

14           Now, there's been a lot of stuff happening  
15 recently, with regard to the Federal Railroad Safety  
16 Act (FRSA), and the National Office has had  
17 opportunities to provide additional guidance to  
18 regions, with regard to that. As we recognize the  
19 laws, that Congress is giving us, it's good to also  
20 recognize that some of those laws are giving us not  
21 only retaliation on anti-retaliation provisions, but  
22 also affirmative responsibilities. One of the

1 affirmative responsibilities under FRSA is actually  
2 making it unlawful to deny, delay or interfere with  
3 medical or first aide treatment of an employee who is  
4 injured during the course of employment. That actually  
5 is an additional responsibility, in addition to an  
6 anti-retaliation reprisal provision.

7           Since 2007, when OSHA was assigned  
8 responsibility for whistleblower complaints under FRSA  
9 -- On September 30th, of 2012 -- more than 60 percent  
10 of the FRSA complaints filed with OSHA have involved an  
11 allegation that a worker has been retaliated against  
12 fork, again, as Dr. Michaels said, reporting an on-the-  
13 job industry (sic).

14           We could refer to some of these policy  
15 programs as the ultimate disincentive and incentive  
16 programs. If you take a look at another item in your  
17 package, you'll see the March, 2012 Memo, that Dr.  
18 Michaels referenced, that deals directly with the  
19 disincentive and incentive programs. As Dr. Michaels  
20 mentioned, we've been coordinating with the regions to  
21 take a corporate-wide approach to FRSA enforcement, and  
22 most notably, as a result of the strong enforcement

1 effort, Burlington Northern Santa Fe (BNSF) has agreed  
2 to enter, in accord with OSHA, and agreed to change its  
3 policies.

4 In addition, I want to emphasize that part of  
5 that accord is an agreement to adopt training programs  
6 for managers, labor relations and human resource  
7 professionals, and other personnel, and to actually  
8 begin training those personnel within the first six  
9 months of 2013, and then thereafter, to incorporate  
10 training on FRSA, in its annual Supervisor  
11 Certification training.

12 We still have complaints pending against  
13 Burlington Northern -- we need to understand that -- as  
14 well as against other railroads. We tend to continue  
15 vigorous enforcement, but we take pleasure, pride and  
16 hope in the fact that we have a corporate-wide program  
17 in which the employer has adopted, voluntarily, this  
18 accord that directly addresses these issues.

19 As Dr. Michaels pointed out, what we've asked  
20 your assistance with, today particularly, is addressing  
21 the problem of corporate and employer culture. Because  
22 regardless of what employer or what corporation is

1 involved, it's the culture of retaliation that must  
2 change. So I ask you to think about that, and to think  
3 about how we can change that culture.

4           We are trying to change the culture, in  
5 making it easier for whistleblowers to file complaints  
6 in a number of different ways. We're creating an  
7 Online Complaint Form. There's a draft of that form.  
8 It's been submitted to OMB -- that's in your package --  
9 so that complaints can be filed more easily through the  
10 internet. Right now, with regard to complaints, we  
11 have a policy. Complaints do not have to be written.  
12 They can be oral. I think that's a pretty incredible  
13 provision, in terms of a whistleblower anti-retaliation  
14 reporting provision, that complaints can be filed  
15 orally.

16           We're piloting an alternative dispute  
17 resolution program in two regions. It's made up of two  
18 separate kinds of programs. The first is basically  
19 early resolution opportunity. That's making clear,  
20 that the opportunity to resolve quickly and at the very  
21 beginning of the process. It's there, if the parties  
22 want to take it. The second is a more FMCS-directed

1 participation, where the parties can participate with  
2 the Federal Mediation Conciliation Service, that we've  
3 contracted with, to try to mediate some of those  
4 disputes.

5           We had hoped to have some conclusions about  
6 this pilot program actually this month, but I just  
7 directed the two regions to extend it for another 120  
8 days, because we just didn't have enough experience to  
9 make any conclusive findings, mediations. We're really  
10 just beginning under the program. We're also looking  
11 at, in our programs, in order to develop a more  
12 comprehensive and better audit program.

13           Finally, I guess this is dear to my heart --  
14 actually, I guess, my brain, because it's what I  
15 consider one of the most important, if not the most  
16 important thing, that I've tried to address, since I've  
17 been here, which is working closely with the IT  
18 Department, our Technology Department of OSHA and an  
19 outside contractor, to try to ensure that our tracking  
20 of complaints is reliable, comprehensive, credible and  
21 accessible to anyone reading our statistical Reports.  
22 Anybody who reads our Reports should be able to

1 understand what exactly it is they are conveying,  
2 without having a team of experts explaining it to them.

3 I anticipate that by working with you, we'll  
4 improve the program even more. Both Dr. Michaels and I  
5 have indicated we're happy to answer any questions.

6 We'll be available throughout the day, as  
7 well as other people, that we've identified from the  
8 program, and some of whom are in the audience. I want  
9 to thank, again, my staff: Mike, David, Rob, Megan  
10 Guenther and the rest of the staff, as well as Emily  
11 and all of you, for helping to prepare and being so  
12 cooperative in what I hope will be an incredibly  
13 productive meeting. Thank you.

14 MS. SPIELER: Thank you very much. Before I  
15 open it up for questions, I'm going to ask Ed -- We  
16 have a number of documents that were referenced, both  
17 my David and Beth, in their remarks. Ed had suggested  
18 that we kind of formally indicate what's being included  
19 in the record. He's going to do that now, so that  
20 everyone here can understand what's included. I  
21 believe that copies of these are on the back table, if  
22 people in the audience are interested in seeing them.

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1 MS. SLAVET: Yes, everything is on the back.  
2 Everything should be on the back table.

3 DOCUMENT OVERVIEW

4 ED BAIRD, COMMITTEE COUNSEL

5 Members of the Committee have had the Federal Advisory  
6 Committee Act briefed this morning. Just for the  
7 public, that statute requires all the documents that  
8 are reviewed by the committee members, to be made  
9 public and put in a publicly-assessable docket. So  
10 this is just part of that process. These documents  
11 will be available at regs.gov, Docket No. OSHA-2012-  
12 0020. The documents are as follows:

13 Exhibit 1 is the Agenda for today's meeting.  
14 Exhibit 2 is a letter from Senators Leahy and Grassley,  
15 to David Michaels, dated September 20, 2011. Exhibit 3  
16 is a compilation, by OSHA, of the various Statues that  
17 it administers, a compilation and summary.

18 Exhibit 4 is the highlights page, the Summary  
19 page of a Report by the General Accountability Office,  
20 dated January, 2009, called, "The Whistleblower  
21 Protection Program, Better data and improve oversight  
22 would help ensure program quality and consistency."

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1           Exhibit 5 is a compilation of statistics on  
2 the Whistleblower Protection Program, from Fiscal Year  
3 2005 to 2012. Exhibit 6 is an Email from Edna Fordham,  
4 dated December 20, 2010, regarding Information for  
5 Public Members of the Whistleblower Advisory Committee.  
6 Exhibit 7 is the March 12, 2012 Memorandum from Richard  
7 Fairfax, to Regional Administrators and Whistleblower  
8 Program Managers, regarding Employee Safety, Incentive  
9 and Disincentive Policies and Practices.

10           Exhibit 8 is a Draft Whistleblower Complaint  
11 Form, subject to OMB approval. And Exhibit 9 is a BNA  
12 News Article, dated January 24, 2013, entitled, "Record  
13 Number of Whistleblower Cases Filed, Resolved by OSHA  
14 in Fiscal 2012." Thank you.

15           MS. SPIELER: Thank you, Ed. After lunch  
16 today, we're going to have a period for Public  
17 Comments, and then we're going to move into a focused  
18 conversation about what's going on under 11(c). I'd  
19 like to, now, invite committee members to ask any  
20 questions or make any comments you'd like to make, with  
21 regard to the sort of overall picture of the  
22 investigation of whistleblower complaints by OSHA, that

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1 have been addressed by the Assistant Secretary and  
2 Director, at this point. We'll be able to kind of hone  
3 in on 11(c) this afternoon.

4 MR. BAIRD: If I could? Just a reminder. If  
5 you could identify yourself before you speak, to help  
6 out the Court Reporter.

7 ERIC FRUMIN, H&S DIRECTOR

8 CHANGE TO WIN

9 Okay. I'll kick it off. Eric Frumin, with Change To  
10 Win. First, just to generally salute the Department  
11 for the effort that's been in the work for sometime.  
12 Obviously, to review carefully and reorganize the  
13 program. I thought the internal review, that was done  
14 by Mike Mabee and the others, from the different  
15 regions, was pretty remarkable for an internal  
16 organizational piece of self-criticism. You don't  
17 often see an organization able to give that sort of an  
18 unvarnished evaluation, and those recommendations were  
19 important. I just wanted to recognize the career  
20 staff, who've spend careers doing this, and making a  
21 huge contribution to trying to turn this program  
22 around.

1           In terms of two issues that had been  
2 mentioned already, by David and Beth, on the question  
3 of corporate culture. The culture question is pretty  
4 vague to me. I have a hard time sort of seeing it as a  
5 way to get a handle on how organizations behave,  
6 whether they're corporations, or labor unions, or  
7 government agencies, or anything else. So I tend to  
8 try to look for things that are more definitive.

9           From the standpoint of an enforcement agency,  
10 like OSHA, I think that the notion of carrots and  
11 sticks is sort of more credible, as an advantage point.  
12 I've been a big fan of deterrents, as a way of dealing  
13 with organizations that don't get it. That's true on  
14 the compliance side, for compliance with OSHA's  
15 standards, in general, as well as on the whistleblower  
16 side of things. I think that's an important aspect to  
17 any consideration of changing whatever you want to call  
18 it, the corporate culture and so forth, is to ask the  
19 question, "Well, as part of this, what's the potential  
20 for creating some real deterrents here?" That's not  
21 easy, when dealing with whistleblower issues,  
22 particularly for the 11(c) program. We'll talk about

1 that more later. So I think that's an important  
2 component.

3           Then the second thing I wanted to mention,  
4 briefly, was in response to David's point about the  
5 importance of State Plans, and I'm sitting next to  
6 Christine Dougherty from Minnesota, and to recognize  
7 that that needs to be an important focus of what  
8 happens in any evaluation of how the workers, who  
9 complain about problems are protected from retaliation.  
10 Because there's a lot of States doing it. Some are  
11 doing a better job than others. We need to, both, find  
12 out where the problems are. It was good that the State  
13 Plan reviews, last year, focused on that. In some  
14 great detail, some of those States got, shall we say,  
15 some help. But we can't let the legitimate focus on  
16 the internal reorganization that the U.S. Labor  
17 Department allow us to lose sight of the need to help  
18 the States, who do need a lot of help with that problem  
19 as well. Thank you.

20           DR. MICHAELS: Can I respond? Thanks very  
21 much for your comments. This is David Michaels. I  
22 certainly agree that deterrents plays a big role,

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1 certainly in OSHA's Safety and Health activities. We  
2 look at deterrents as one of our strategies, but again,  
3 it's one of many strategies. We recognize that there's  
4 a really range of employer commitments to safety and  
5 health, and also a commitment to encouraging worker  
6 voice. While for some employers, fear of a large fine  
7 may be effective, I think there are other employers who  
8 would like to do the right thing but need assistance in  
9 getting there. I think we can learn from the  
10 experienced employers who have implemented programs.

11           For example, in the Sarbanes-Oxley law,  
12 there's requirements for Compliance Committees, where  
13 corporations actually set up systems to accept  
14 anonymous reports, anonymous concerns. I'm hoping that  
15 this can help us evaluate those thing, and think about  
16 how can they be implemented in other areas? Should  
17 they be implemented in other areas? I really do think  
18 that we have to look at all sorts of different  
19 approaches to address this problem. While deterrents  
20 will always be very important, we spend a lot of time  
21 doing these investigations. We're not going to change  
22 what goes on in every employer across the country, just

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1 by issuing a small number of large fines. We have to  
2 think about how to balance that.

3 MS. SPIELER: Nancy?

4 NANCY LESSIN, STEELWORKERS

5 Nancy Lessin, Steelworkers. I want to just echo what  
6 Eric said about the progress that is being made here,  
7 at this agency, looking at the issue of whistleblower.  
8 And in particular, I'll throw in how thrilled many of  
9 us were with what's been called the Fairfax Memo, the  
10 March, 2012 Memo, about employer practices, that  
11 discouraged the reporting of injuries and illnesses.

12 I have a list of many, many things, but I'm  
13 going to just focus now on a couple things, based on  
14 what you were talking about and what we heard earlier.  
15 The issue of performance measurement, I think is really  
16 important, and looking over some of these statistics,  
17 trying to get a sense of what's been happening and what  
18 do we want to see. But I want to raise the caution of  
19 kind of the law of unintended consequences. For  
20 example, if a goal is to get rid of backlog, one way is  
21 to have more resources actually working through the  
22 cases; and the other would be to dismiss it. Both ways

1 may get rid of a backlog, but one is very problematic,  
2 if things are done that way. At some point, I want to  
3 get into the story behind the data and the statistics.

4           The other issue that I'll bring up here, is  
5 trying to understand some of the changes that have been  
6 made with some of the pilots that you've tried in  
7 various regions. I know that they've been going on for  
8 some time, and this has to do with just the regional  
9 structure and how things are managed. I would love to  
10 get a report back on the analysis of the pilots that  
11 have been going on and what you've learned from them,  
12 and therefore, what you think might work other places.  
13 I think there's a lot that goes on at the national  
14 level, but I think the Whistleblower Program is really  
15 a regional program. It's what's happening in the  
16 regions. How are the Investigators able to do what  
17 they do? Do they have the resources that they need? Do  
18 they have the equipment? Do they have the training? It  
19 was certainly wonderful to hear about his big  
20 conference in 2011. Is that an annual conference? Are  
21 folks continuing what they need? When you get these  
22 new statutes, what's the protocol? How is that

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1 working? So I'll just leave it there.

2 MS. SPIELER: I wonder if it would be  
3 possible. I know that the evaluations on most of these  
4 pilot programs have not yet been done. Some of them,  
5 as Beth indicated, have been extended. I wonder if we  
6 could put this, at the appropriate time, on a committee  
7 agenda, to really take a look at the evaluations of the  
8 pilot programs, and have a conversation about how  
9 effective they've been.

10 Also, I think it would be helpful for the  
11 Committee to understand what the performance metrics  
12 are, that are being established for the Whistleblower  
13 Program, and how those data will be kept. I understand  
14 there are many challenges on the data front. So having  
15 performance measures, when you don't have a  
16 particularly good data source is a little problematic  
17 as well. But I understand this is an ongoing process,  
18 as this Committee will be an ongoing Committee. It  
19 would be useful, I think, for us, in the future, to  
20 have some conversation about these issues, as more  
21 information becomes available to the Directorate.

22 BETH SLAVET, DIRECTOR

1                                   DIRECTORATE OF WHISTLEBLOWER PROTECTION  
2 PROGRAMS

3 I'm only going to really respond to one thing, which I  
4 think was very -- I think everything you said was  
5 valuable, but I think your point about numbers and  
6 dismissals is something I am very conscious of. It was  
7 something that was an issue in my prior life, when I  
8 was at the Merit Systems Protection Board. Because  
9 when I got there, everything was timeliness,  
10 timeliness, timeliness. And if you are not making sure  
11 that you properly investigate the case, and if it  
12 processes up through the region, and what ends up  
13 happening, in terms of performance requirements, is  
14 basically someone gets the performance measures, but  
15 then you end up remanding back to the region, that  
16 there was something wrong. That's one of the things  
17 that's been addressed and we will be doing, through the  
18 Appeals Committee. We have been doing, but it's  
19 something I'm very, very conscious and concerned about.  
20 It'll certainly not happen on my watch.

21                                   MS. SPIELER: Yeah, Greg.

22                                   GREGORY KEATING, SHAREHOLDER

1 LITTLER MENDELSON

2 Not to beat a drum, but I, too, also have to  
3 acknowledge that the tangible, concrete improvements  
4 that we have seen, that have happened in the last 18  
5 months, Dr. Michaels, under your watch, and with the  
6 support of a lot of other people, is really palpable.  
7 The fact that there's this energy and there's this  
8 momentum in this room is a terrific thing. I'm very  
9 honored and glad to be here and to be able to be a part  
10 of it.

11 I want to just seize upon some words, that  
12 you used, Dr. Michaels, because my perspective,  
13 obviously, is as a representative of management, I'm at  
14 the largest law firm in the country, representing only  
15 employers. I, literally, every day, work with all  
16 different size employers. You mentioned, I think the  
17 quote was, "You'd love to effectuate a change in the  
18 culture among employers across the country." I would  
19 just like to say, having spent the last -- I focused 10  
20 years of my life working with employers in this area.  
21 There is a desire and a willingness, and an eagerness  
22 to change, among many employers. There are some, who

1 unfortunately, may taint the well for a lot of others.  
2 But there are a lot of employers, be it Fortune 100  
3 companies, all the way down to much smaller, who are  
4 yearning for concrete tools and guidance on how can  
5 they become a more ethical and compliant organization,  
6 which embraces people speaking up and letting them know  
7 what's going on.

8           Eric mentioned, a moment ago, a system of  
9 carrots and sticks. I would just hope that among your  
10 many policies and ways of trying to foster development  
11 and change in this area, there would be some thought  
12 given to the carrots; and how employers, which do  
13 embrace an ethical and compliant landscape, that will  
14 be not only taken into consideration, but more  
15 importantly, there may be ways to get word out to  
16 employers about what concrete things can they be doing  
17 now, in this day and age. Because there's a lot of new  
18 revolutionary tools out there. There's a lot of the  
19 compliance world, that I'm aware of, way beyond  
20 anonymous complaint procedures, now becoming more  
21 integrated. It is an exciting time. But employers  
22 need to know what is out there and that their role is

1 an important shared responsibility.

2 DR. MICHAELS: Greg, thank you for those  
3 comments. In fact, that's exactly how we see this  
4 dynamic working. I think we can play a very useful  
5 role in disseminating some of that material and those  
6 guidance products, but frankly, we don't have the  
7 experience that you do, in identifying them and  
8 evaluating them. In the world of safety and hazard  
9 abatement, we do have that.

10 In Whistleblower, this is quite a complex  
11 world, with many sorts of employers, dealing with very  
12 different sorts of situations. We really look to you  
13 to identify and help us pick out the materials, or  
14 develop the materials, if they're not there, and  
15 suggest ways that we can use our resources to  
16 disseminate those materials. We welcome that.

17 MS. SPIELER: David?

18 DAVID EHERTS, VP & CSO

19 SIKORSKY AIRCRAFT CORPORATION

20 David Eherts, from Sikorsky Aircraft. To add on to  
21 what Nancy was talking about with metrics, we pay a lot  
22 of attention to this in aviation. I wanted to pass

1 along a lesson learned. We put in programs, like Near  
2 Miss Reporting, and you encourage pilots to come  
3 forward with near misses. What you see, the initial  
4 measure of success is that the numbers go way up. I  
5 would point out to you guys, I hope that the number of  
6 Whistleblower complaints go way up. But long-term  
7 success comes over time, with burning those numbers  
8 down, as employers understand, like airlines did, that  
9 this is important data to have, and they make changes  
10 to make the workplace safer, make aviation safer. Then  
11 employees don't feel they need to report anymore,  
12 because things have gotten better. I just wanted to  
13 pass that along.

14 MS. SLAVET: Beth Slavet. When Dr. Michaels  
15 and I were talking about some of these performance  
16 metrics, etcetera, and I actually talked to him about  
17 what I call the "Gawandi List." The actual Gawandi  
18 List, which is based on the pilot's check-off list. I  
19 think that is very important. And relating that back  
20 to what Greg said and changing corporate culture, I  
21 think when you look at some of the changes that have  
22 come, at least sea changes that have come, in

1 recognizing different Ethics Codes, etcetera, that  
2 corporations, companies have been adopting over the  
3 last 15 years, with regard to workers, whether it's  
4 overseas or here.

5           That's something that employers could do and  
6 help us with, in this field. There's lots of different  
7 ways to encourage culture change. You obviously don't  
8 want to have a program in place that is a sham or not  
9 working. So I think that's one of the things that  
10 we're talking about, in terms of creating corporate and  
11 employer cultures, where employers get used to and  
12 understand, and implement what the problems are.

13           MS. SPIELER: I sometimes think about this,  
14 that the employers' responsibility, ultimately, if this  
15 is going to work, it's a matter of driving fear out. It  
16 seems to me that the Enron story, or the BP story, or  
17 for that matter, the story about Upper Big Branch,  
18 which is an MSHA responsibility, not an OSHA  
19 responsibility. Are all stories about how afraid  
20 people must be, because they did not come forward in  
21 situations in which there were life -- well, BP and  
22 Upper Big Branch, there were life-threatening

1 situations that they were to report. That was even  
2 true in the case where there were anonymous ways to  
3 make complaints. Yet, they did not come forward, for  
4 fear of somebody finding out they had been raising the  
5 complaints. So it seems to me, that at the end of the  
6 day, part of this conversation is about driving fear  
7 out.

8           And as we move forward, in a conversation  
9 about corporate culture, what that means, looking at it  
10 from the bottom up, as well as looking at it from the  
11 top down, becomes very critical. I hope that we'll be  
12 able to explore some of those issues, at least begin to  
13 explore them, later today. So that we can think a  
14 little bit about how to carry them forward, as a  
15 committee. Because it seems like an area that's  
16 tremendously important, ultimately, for the long-term  
17 success of the program.

18           MS. SLAVET: that would be great. Fear and  
19 frustration is what I think is the most.

20           MS. SPIELER: Yeah. Well, fear, first, and  
21 then frustration. Okay. Is there anyone else who  
22 wants to ask a question? Christine?

1 CHRISTINE DOUGHERTY

2 PRINCIPAL DISCRIMINATION INVESTIGATOR,

3 STATE OF MN

4 Christine Dougherty, the State of Minnesota. In  
5 representing the State Plan States, our focus is 11(c),  
6 but we're very concerned about the other Acts that OSHA  
7 covers, because we refer people. We're often the first  
8 line of contact with the worker, who may have one of  
9 these other areas. So we try to keep ourselves  
10 updated, on a regular basis, on your Acts and cover  
11 everything, so that we can then refer them to the  
12 proper place. But then we also are concerned about how  
13 that's being handled by the regions and how the regions  
14 are actually processing these complaints. Because we  
15 do hear back from people, about what's happening.

16 A lot of times, they're call us, because  
17 we're the friendly voice. When people call and do an  
18 intake with me, they get my direct phone line, and they  
19 call me back, even if I referred them over to the  
20 Federal OSHA. They'll call me, and say, "What's going  
21 on? Can you tell me?" Then I have to refer them back,  
22 but at least I'm a person that they can talk to about

1 what's happened, and will often call over there, and  
2 say, "We haven't heard. This person says they haven't  
3 heard; or this happened to them," and we funnel them  
4 through. We are, as a State Plans State, not only  
5 concerned with 11(c), but with the other Acts as well.

6 MS. SPIELER: I think a really important  
7 point. Thanks for bringing it forward. Okay.

8 ROB SWAIN

9 COUNSEL FOR LEGAL ADVICE

10 OSHA DIVISION, SOLICITOR'S OFFICE

11 I'm Rob Swain. I just, since Christine was just  
12 speaking, the incentive programs, obviously, has been a  
13 concern of OSHA's for quite sometime. We now have  
14 available to us, the first piece of incentive program  
15 litigation. It was very, very successful for the  
16 agency. A case involving AT&T, in your neighboring  
17 state of Michigan. I'm pleased that the first  
18 successful incentive program's 11(c) prosecution was in  
19 a State Plans State. So kudos to you, guys.

20 MS. SPIELER: Thank you. Anything else?

21 Nancy, go ahead.

22 MS. LESSIN: The discussion of culture, I

1 want to register a concern here. I do hear what people  
2 are saying about how to move something without the  
3 stick, that Eric was talking about. But being from  
4 Massachusetts, the cautionary tale is from the "Mill  
5 Girls," as they were called, in 1845, when they became  
6 ill from the cotton dust, or they just saw the dust and  
7 the long hours. They came before the Massachusetts  
8 legislature, and said, "You've got do something to  
9 improve our conditions." The Massachusetts  
10 legislature, in 1845, had a discussion among themselves  
11 and said, "Well, if we regulate the mills in  
12 Massachusetts, they're just going to move to  
13 Connecticut or Rhode Island." So they said, "We don't  
14 think the answer lies in regulation. We think the  
15 answer lies in the wider spread of Christian principles  
16 among mill owners." 1845. It wasn't until 1978, that  
17 thing changed with cotton dust, when OSHA came in, with  
18 the Cotton Dust Standard, and regulated and enforced.

19 I think that, when thinking about why our  
20 whistleblower is going to get a fair shake, when the  
21 most that can happen to them -- at least under some of  
22 the statutes -- is they get made whole. There's no

1 punishment. There's no punitive nature to this. It is  
2 of concern. And I think from the standpoint of where  
3 I've seen things, there are so many workers, today,  
4 that are afraid to raise their voice. And even with  
5 the cards that OSHA has put together, about, "You have  
6 11(c) rights," or "You have this," or "You have that,"  
7 I don't think that there's a big trust, that there is  
8 something backing up that voice. What backs up that  
9 voice, I think, is something that we need to grapple  
10 with.

11           Even with the groundbreaking accord with  
12 BNSF, I think we're going to have to wait to really see  
13 what's really changing. A lot of rail carriers, I  
14 think, once they get big fines to begin with, they  
15 appeal it to the court system. So it's not that their  
16 culture is changing, in how they deal with these  
17 things. I think really thinking through, you know,  
18 carrots and sticks, but understanding if there's not a  
19 stick, what's backing up voice, when if I raise my  
20 voice, I can lose my job? I can lose my ability to  
21 feed my family. I think those things are really front  
22 and center.

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1 MS. SPIELER: I'm wondering if we could break  
2 for lunch and continue this conversation, probably  
3 after we've had the 11(c) introduction. We'll have  
4 about an hour and a half for the Committee Discussion.  
5 I think these are incredibly important issues, that  
6 we're not going to resolve in the next five minutes.  
7 I'd like to ask the Committee to stay for a minute.  
8 There's a request for a formal photograph. Otherwise,  
9 we will reconvene at 1:00, at which time we will have a  
10 portion of the meeting to hear public comments. Thank  
11 you.

12 (11:59 a.m., break for lunch)

13 MS. SPIELER: Is there anyone in the room,  
14 who wasn't here this morning? Because I'd like to have  
15 you introduce yourself, if you weren't here during the  
16 introductory period, this morning.

17 PUBLIC COMMENTS

18 MS. SPIELER: We've had, as I think you all  
19 know, the announcement of this meeting included an  
20 invitation for people to give comments on the website  
21 and a number of people did that, and also an invitation  
22 for people to come and address the Committee. Four

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1 different people have asked for five minutes or so, to  
2 address the Committee. I'm going to call upon you,  
3 each in turn. If you could just come up to the table,  
4 when I call you. Introduce yourself, and then give us  
5 the comments you would like.

6 I would just like to caution you about one  
7 thing, which is, obviously, this Committee does not  
8 consider and make any determinations at all, about  
9 individual complaints. Although, obviously, individual  
10 stories can be quite illustrative of systemic problems.  
11 To the extent, that's the purpose of your story, that's  
12 fine. But please do be aware, that we are not in a  
13 position to do, other than refer you to the  
14 Whistleblower Program, if you have an individual  
15 concern.

16 A number of the people, who posted issues on  
17 the website, in fact, do have individual concerns, and  
18 the Department will be following up with those people.  
19 Is Bill Kojola here? No. Okay. Richard Renner?

20 RICHARD RENNER

21 ATTORNEY, PRIVATE PRACTICE

22 Thank you. Richard Renner here. I'm an attorney in

1 private practice, in Silver Spring, Maryland. I  
2 submitted written comments, but the discussion today  
3 has generated a few more thoughts I wanted to share.  
4 It was pretty clear that, this morning, concern was  
5 raised about problems with OSHA 11(c), one of the  
6 oldest, and at this point, most antiquated  
7 Whistleblower Protections. One of the key problems of  
8 OSHA 11(c) is that workers do not own their own  
9 whistleblower claim. They make a complaint to OSHA,  
10 but OSHA makes the decision about whether or not it  
11 will exercise its rights to bring the claim to court  
12 and to enforce those rights. So that's meant that very  
13 few of the many thousands of 11(c) complaints that come  
14 in actually get to court and get adjudicated. That  
15 would change, if Congress would pass the Protecting  
16 American Workers Act (PAWA). This has been introduced  
17 many times, and it's introduced again now.

18 Under this law, you would give whistleblowers  
19 their own claim. If OSHA decided not to pursue it,  
20 they would have a right to a hearing before an  
21 Administrative Law Judge. If the whistleblower  
22 prevailed, the whistleblower's attorney would recover

1 attorney's fees. With that provision then, private  
2 attorneys could take on the role of enforcing OSHA  
3 11(c). This is a provision that's made a significant  
4 difference in the environmental area, where I got my  
5 start. It's been used effectively in Sarbanes-Oxley,  
6 and of course, in the other more modern Whistleblower  
7 Protections.

8           But another concern I have is that State  
9 Courts often provide employees a tort remedy for  
10 wrongful discharge. But many States have an exception  
11 to that tort claim, where State or Federal law provides  
12 an adequate remedy. Several States have reached a  
13 conclusion, that I think is incorrect, that the OSHA  
14 11(c) remedy is adequate. Because there is some  
15 possibility of relief.

16           But if OSHA, itself, were to declare that it  
17 believes the 11(c) remedy is not adequate, then those  
18 of us who practice in this area could cite the State  
19 Courts to that declaration and ask that they reconsider  
20 their decisions on the adequacy of 11(c), so that the  
21 employees would at least have the same remedies as  
22 other whistleblowers under State law, and would not be

1 denied relief, because of the existence of the  
2 ineffective 11(c) remedy.

3           Now, I want to get to some of the comments  
4 that I submitted in my written comments. I noticed  
5 that Director Slavet made a couple of points this  
6 morning, that I think are interrelated: (1) is that  
7 she wants to address the corporate culture; (2) she  
8 would like to see earlier resolution of whistleblower  
9 claims; (3) she would like the statistics to be  
10 understandable; and (4) she would like the program to  
11 have effective deterrents. To me, effective deterrents  
12 would be look into the mind of a manager, who's making  
13 a decision about whether or not to impose an adverse  
14 action. If that manager has the belief that he or she  
15 can get away with it; can suppress the violations that  
16 suppress the reporting, well then there's no deterrent  
17 effect. So key to that deterrent effect then are the  
18 statistics, and seeing that whistleblower remedies are  
19 effective.

20           In my review of the statistics that were  
21 published, and are available here in the back, I  
22 noticed there's a significant chunk for settlements.

1 And, unfortunately, it's difficult to assess the  
2 effectiveness of those settlements. If it's an  
3 employee saying, "I give up. I'll take whatever I can  
4 get," then that settlement does not reflect  
5 accomplishment of the enforcement purpose of  
6 encouraging whistleblowers to come forward.

7           So I think it would be more effective if  
8 those settlements were broken out into those that  
9 included reinstatement, or the employee staying on the  
10 job, and those that did not. That would be a measure  
11 of whether or not we are accomplishing the legislative  
12 purpose of seeing that whistleblowers who have the  
13 spine to speak truth to the power, whether or not we  
14 are keeping them on the job. That's what I think we  
15 can look at. The one statistic, that there can be no  
16 doubt about, is the comparison between the merit  
17 determinations and the dismissals. I noticed, that in  
18 the last four years, we picked up that rate from where  
19 it used to be, at 1.3 percent. Now, it's about 2.3  
20 percent. But even at 2 percent, I don't think that's  
21 much of a deterrence. I'd like to see some type of  
22 program that would make that a better number. Indeed,

1 when whistleblowers have a full due process remedy, in  
2 front of the Administrative Law Judges, we do see a  
3 better rate, with that type of process.

4           My suggestion, that I made in my written  
5 comment, is this. Let's transfer the final  
6 determination of whistleblower complaints from the  
7 Regional Directors to the National Directorate, here in  
8 Washington. That way, there'd be one office, with one  
9 Director, who was accountable; that put a public face  
10 on the program. The decisions would be made by a staff  
11 that was dedicated solely to enforcement of the  
12 Whistleblower Program. I would hope that that type of  
13 organization and accountability within the Department  
14 of Labor would see an improvement in that number, and  
15 an improvement in the deterrent effect of the  
16 Whistleblower Protection Program.

17           One other point I want make, here on the  
18 Fairfax Memo. I notice that in Point 2, he raises a  
19 concern about those employers that discipline employees  
20 for violating a company rule about the time or manner  
21 of reporting injuries. Of course, there's some  
22 notorious examples of whistleblowers, who came forward

1 and reported within hours after an incident, and then  
2 were disciplined for reporting too late, even on the  
3 same day as the incident.

4 I think, as Martin Luther King said, "The  
5 time is always right, to do what is right." And the  
6 Fairfax Memo indicates that those rules should be  
7 reasonable. I suggest that there is no reasonable time  
8 limit on reporting injuries. That even if an injury  
9 happened a long time ago, if the rule means that the  
10 employee's going to be disciplined for coming forward,  
11 because they're coming forward too late, then that rule  
12 is unlawful and it still deters reporting. Reporting  
13 should be protected at all times. Thank you very much.

14 MS. SPIELER: Thank you, Mr. Renner. I think  
15 Bill Kojola may have come into the room. Is that  
16 right? Come join us at the....

17 BILL KOJOLA

18 SAFETY AND HEALTH DEPARTMENT OF AFL-CIO  
19 Yeah. I apologize for not being here, when my name was  
20 called. I never want to be late for lunch, but in this  
21 case, I was at lunch. So at any rate, let me introduce  
22 myself. My name is Bill Kojola. I'm with the Safety

1 and Health Department of the AFL-CIO. I'm very pleased  
2 to be here, and we're pleased for a couple of reasons.  
3 One is, we're pleased because the agency has given the  
4 heightened focus on Whistleblower

5 Protection: the creation of this Advisory  
6 Committee; a more assertive defense of whistleblowers;  
7 recently, the creation of an office within OSHA, that  
8 will provide a focal point for addressing whistleblower  
9 cases, among the many statutes that the agency is  
10 responsible for.

11 And in the Health and Safety arena, which is  
12 where we've been, and our department has been, worker  
13 intimidation and discipline, or bribery through  
14 incentive programs has been going on for decades, for  
15 workers who report injuries, report hazards. It's only  
16 now, that this agency, I think, has really taken this  
17 issue seriously.

18 Until recently, 11(c) of the OSHA act, that's  
19 supposed to protect workers from discrimination for  
20 exercising their rights under the Act, has been, as I  
21 would say, pretty dismal. The 11(c) statute is weak,  
22 in itself. The recordkeeping requirements are weak as

1 well, under the Recordkeeping Rule, and OSHA has not  
2 done a very good job of ensuring that workers can come  
3 forward and make reports.

4           One of the things that we've been working on  
5 -- we, being the AFL-CIO, and the other Unions -- have  
6 been collecting examples of written policies and  
7 programs, and descriptions of events that have taken  
8 place, where workers have clearly been discriminated  
9 against for exercising their rights to either report  
10 injuries or to report hazards. We've been collecting  
11 these policies and we've been sharing it with the  
12 agency. We've been asking the agency to please move  
13 forward, to address what we consider to be a serious  
14 problem in defending workers who are exercising those  
15 rights.

16           So what do we want or need from OSHA and from  
17 this Advisory Committee? Well, we think, in general,  
18 we need an assertive defense of whistleblowers who  
19 report injuries, and hazards, and protect workers. And  
20 not only protect workers, but send a message to the  
21 affected employers, that these practices will no longer  
22 be tolerated, and have a deterrent effect on employers.

1           Secondly is, we think that the Committee  
2 needs to identify the impediments and recommend  
3 solutions to enhancing the Whistleblower Protection  
4 that the workers have. That's looking at all the  
5 various layers, that this Advisory Committee can look  
6 at. That being statutory, regulatory and policy. We  
7 think that it's critical, if true Whistleblower  
8 Protection is going to occur, that the Investigators  
9 who investigate allegations of discrimination, that  
10 those Investigators are well-trained, well-staffed.  
11 They can do their jobs well, and they, as  
12 Investigators, can feel that the agency has their  
13 backs. So that when they're taking on a tough  
14 employer, they know that they've got the weight of the  
15 agency behind them. I think this Committee can do a  
16 lot towards advocating that the Investigators be  
17 properly and fully trained.

18           I think it's important that OSHA develop a  
19 coordinated national strategy that encourages workers  
20 to report problems across all the statutes for which  
21 you have responsibility; and that there be uniform  
22 application of the Whistleblower Protections across the

1 U.S. We've had reports from some of our Unions, where  
2 some of the regions are doing a decent job of defending  
3 workers with 11(c) complaints; and other regions are  
4 not doing a very good job. We think that that uniform  
5 application is critical.

6 We also think that, and we're not certain of,  
7 how the management structure is going to work in the  
8 field, with this enhanced effort at Whistleblower  
9 Protection. So some coherence between the national  
10 effort and what's going on in the field is critical, as  
11 we see it.

12 In addition, assessing the effectiveness of  
13 whatever strategies are put in place to enhance  
14 Whistleblower Protection is important. I think it  
15 would be useful, not only for the agency to look at the  
16 effectiveness and what's working and what's not, but  
17 also for this Committee to take a look at that as well,  
18 to provide its own thoughts.

19 One of the things, in the creation of this  
20 Advisory Committee, is that not all sectors are  
21 represented on this Committee. Obviously, there are a  
22 lot of sectors, that given the size of the committee,

1 can't be represented. So we believe that there needs  
2 to be a mechanism for ensuring that all sectors have  
3 the ability to be heard by this Committee. You would  
4 take note that Transportation, I think, is a glaring  
5 omission, in terms of representation on the Committee,  
6 itself. Particularly, given the efforts that OSHA has  
7 recently made to defend workers in the Transportation  
8 industry, particularly those covered by the Federal  
9 Railroad Safety Act. To not have that voice on the  
10 Committee, I think, weakens it. So you need to find a  
11 mechanism to engage the other sectors. We suggest the  
12 use of work groups on other Advisory Committees, where  
13 they work groups that invite people from other sectors,  
14 who are not on the Committee. That's a very useful,  
15 and I think effective way of doing that.

16           Lastly, I just want to say something about  
17 OSHA's 11(c). It's really, in many ways, the biggest  
18 Whistleblower Program that the agency has. It's  
19 probably the weakest statute that you have to defend,  
20 and that workers can rely on. In our own advice to  
21 workers covered by the OSHA Act, we don't look to  
22 11(c), in many cases, as a really viable option for

1 confronting employers. In many ways, at least in  
2 unionized facilities, the grievance or arbitration  
3 procedure is much more effective.

4 We think 11(c) needs a lot of attention,  
5 particularly attention around what would this Committee  
6 recommend as changes to the statute, that Congress can  
7 address, so that the 11(c) provision of the Act is  
8 stronger?

9 Again, I want to thank you for the  
10 opportunity to speak. I wish you well in your future  
11 work here, on a really critical issue. The AFL-CIO and  
12 its Unions are ready, willing and able to help you in  
13 any way that we can, was you move forward on this  
14 issue. I want to thank you for your time.

15 MS. SPIELER: Thank you very much. Rick  
16 Inclima? Did I pronounce it right?

17 RICK INCLIMA

18 SAFETY DIRECTOR FOR BROTHERHOOD OF  
19 MAINTENANCE OF WAY EMPLOYEES

20 Inclima, yes. Hello. My name is Rick Inclima. I'm the  
21 Safety Director for the Brotherhood of Maintenance of  
22 Way Employees, the Division of the Teamsters Rail

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1 Conference. Our members build, maintain, inspect,  
2 repair the railroads, tracks, bridges, and related  
3 structures around the United States. You're going to  
4 hear, today, from another Rail Conference partner, with  
5 the Teamsters Brotherhood of Locomotive Engineers,  
6 today, as well. The two Rail Unions in the Teamsters  
7 Rail Conference (BMW and BLE), along with 10 other  
8 National Rail Unions collectively represent about  
9 165,000 rail workers covered by the Federal Rail Safety  
10 Act, Whistleblower Provisions of  
11 20109.

12           We first, certainly want to congratulate all  
13 of you, for your appointment to the Committee. I know  
14 there's going to be a lot of work to do, and it's going  
15 to be a rough slog. But I think you've got a good  
16 group here to do it, and that's a great thing. BMW  
17 and the Teamsters Rail Conference certainly looks  
18 forward to working with you to improve FRSA  
19 enforcement, and other Whistleblower Provision  
20 enforcements and to end the persistent pattern of  
21 management intimidation against railroad employees not  
22 to report unsafe conditions, accidents and on-the-job

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1 injuries.

2           I want to offer my help, to help you  
3 understand how the railroad industry is much outside  
4 the norm of most other commercial enterprises, that you  
5 might be familiar with. For example, few people know  
6 that the railroad industry has its own Labor laws.  
7 We're covered by the Railway Labor Act, not the  
8 National Labor Relations Act. We are not generally  
9 governed by the usual environmental laws or antitrust  
10 laws. We are not subject to the Workers' Compensation  
11 system. We are not covered by Social Security, and  
12 there are many other differences. For instance,  
13 virtually every single on-the-job injury is met with a  
14 formal investigation, where the railroad is judge, jury  
15 and jailer.

16           In over 99.9 percent of these investigations,  
17 the railroad employee is found guilty of nonferrous  
18 charges such as inattentiveness, not being careful or  
19 some other general charge. Lost time, up to and  
20 including dismissal is the penalty. Railroad workers  
21 know this, and they are often intimidated not to report  
22 an on-the-job injury, due to the certainty that they

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1 will be charged and disciplined, or dismissed, if they  
2 do report. This has been going on forever, and we  
3 appreciate OSHA's efforts to change the tide in this  
4 area.

5           It's been a genuine pleasure for me,  
6 personally, and for the BMW, as an organization, to  
7 work with Dr. Michaels and Richard Fairfax and the  
8 National Directors of the Whistleblower Office and  
9 staff; Area Director Solicitors, and even down to the  
10 level of Field Investigators. With the help of these  
11 abled and committed people, we've made some progress,  
12 but much more needs to be done. There is still  
13 substantial changes that need to be made in the rail  
14 industry, and it will be hard work against the well-  
15 financed and entrenched railroad managers, who truly  
16 believe, for whatever reason, that retaliation and  
17 intimidation are important tools for productivity,  
18 profitability and control of the workforce.

19           One hundred and fifty years of engrained  
20 culture will not be changed by a few Whistleblower  
21 merit findings. It will take continued effort and  
22 determination. The BMW and is willing and able to

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1 help OSHA and this Committee in this long overdue  
2 effort. Now, there has been progress with OSHA, and  
3 there has been progress at the bargaining table. We  
4 welcome the ability to work with the railroads, to  
5 change what's going on in most sectors of the railroad  
6 industry.

7           We have made an agreement. The BMWWE has a  
8 signed an agreement with the Union Pacific Railroad,  
9 and we hold this up as an example of some of the right  
10 ways to do business. We have an agreement that has  
11 greatly reduced whistleblower cases, discipline against  
12 BMWWE members for injuries, and it's added greatly to  
13 the labor management cooperation across the board.

14           On the Union Pacific Railroad today, and I  
15 speak only for BMWWE members, because we're the only  
16 ones that have this agreement. On the Union Pacific  
17 Railroad, BMWWE productivity is up; our injury rates are  
18 down; whistleblower cases are down; and a joint Labor  
19 Management Committee initiates a root cause analysis,  
20 and it results in hazard abatement. That's really the  
21 model that we would like to see spread across the rest  
22 of the industry. We think that would help OSHA in

1 their caseload, and it would certainly help the  
2 railroads, and the employees do the business of  
3 operating the railroad.

4           With that being said, I also want to say that  
5 OSHA's made great strides in helping us along, but  
6 there is obviously room for improvement, as there  
7 always is, both in policy-making and in the lower  
8 management of lower level employees. We need to guard  
9 against investigators deferring to railroad  
10 disciplinary investigations, where the carrier is  
11 always judge, jury and jailer. We must improve the  
12 training of OSHA Investigators -- and this has been  
13 said by others -- and give them the support and the  
14 resources required to do their jobs in a timely and  
15 thorough fashion. And we must find ways to improve  
16 uniformity in the application of the laws among the  
17 various OSHA regions.

18           The BMW and the Teamsters Rail Conference  
19 look forward to an open and honest dialogue with all of  
20 you. We remain at your disposal and will assist the  
21 Committee in any way possible, both formally and  
22 informally. When we, together, get it right, not only

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1 do rail workers get the protection, they so desperately  
2 need, the public and our communities are protected  
3 through prevention of catastrophic railroad accidents.

4 I want to thank you all, for your willingness  
5 to do all this hard work. I know it's not going to be  
6 easy. We offer our unique knowledge and expertise to  
7 assist the Committee in the critical role you will play  
8 in improving the fairness, efficiency and transparency  
9 of whistleblower investigations. Thank you.

10 MS. SPIELER: I'm sure we will be calling  
11 upon you and the others for your assistance. I  
12 wondered whether you would be willing to give the  
13 Committee a copy of the Union Pacific Agreement. It  
14 might be very helpful for us to see an example, like  
15 that. It could be made part of the record, if we keep  
16 the record open, and we could distribute it to the  
17 committee members, and post it as well.

18 MR. INCLIMA: I think we could certainly do  
19 that.

20 MS. SPIELER: If you send it to Beth Slavet,  
21 she'll make sure that that gets distributed to us.

22 MR. INCLIMA: Great.

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1 MS. SPIELER: Thank you very much.

2 MR. INCLIMA: Thank you very much. Thank  
3 you.

4 MS. SPIELER: Vince Verna?

5 VINCE VERNA

6 DIRECTOR OF REGULATORY AFFAIRS FOR  
7 THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS  
8 & TRAINMEN

9 Good afternoon. My name is Vince Verna. I'm the  
10 Director of Regulatory Affairs for the Brotherhood of  
11 Locomotive Engineers and Trainmen, which is also a  
12 division of the Teamsters Rail Conference. I guess I  
13 should explain to some of the people here, who may not  
14 know, we're not the type of engineers who design  
15 bridges. We're the type of engineers who used to wear  
16 the pinstripe overalls and drive trains through your  
17 cities. Some still do wear the pinstripe overalls,  
18 believe it or not.

19 Anyway, on behalf of the BLET, I welcome the  
20 opportunity to address the Committee, on your  
21 commencement of work, on issues relating to OSHA's  
22 Whistleblower laws, pursuant to the Federal Railroad

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1 Safety Act, at 49 USC Section 20109. Becoming a  
2 whistleblower is a hard decision for our members to  
3 make. A culture of harassment and intimidation by rail  
4 carrier management has continued, although it is being  
5 weakened daily, thanks to OSHA's enforcement measures.  
6 As a result, we can point to many examples where the  
7 law's protections have benefited our members, who have  
8 reported unsafe conditions or actions.

9           In accordance with Section 20109, an employee  
10 covered by the Federal Railroad Safety Act is protected  
11 from retaliation for engaging in certain protected  
12 activities, including refusing to violate or assist in  
13 the violation of any Federal Rule or regulation,  
14 related to railroad safety or security; filing or  
15 testifying in a proceeding, under one of these laws or  
16 regulations; notifying or attempting to notify the  
17 railroad, or Secretary of Transportation, of a work-  
18 related personal injury or illness; reporting hazardous  
19 safety or security conditions; refusing to work under  
20 certain conditions; or refusing to authorize the use of  
21 any safety or safety-related equipment, track or  
22 structures, under certain circumstances, when the

1 employee believes the equipment, track or structures  
2 are in a hazardous safety or security condition; and  
3 requesting medical or first aide treatment, or  
4 following orders of a treatment plan of a treating  
5 physician.

6           Despite these protections, whistleblowing  
7 remains an unknown option for far too many BLE team  
8 members. Our goal is to foster a railroad culture,  
9 where whistleblowing becomes a standard option in our  
10 safety toolkit. When one of our members is presented  
11 with an unsafe condition at work, they should never  
12 have to think twice about whether it's a good idea to  
13 report or not, due to a potential retaliation action by  
14 the railroad. In an effort to reduce unsafe  
15 conditions, railroad management should commend  
16 whistleblowers as early warning systems, who create a  
17 safer workplace. A robust system is needed, where the  
18 messenger is rewarded, rather than punished; and where  
19 reporting unsafe conditions or actions is seen as  
20 routine, rather than an act of courage, that puts your  
21 job on the line.

22           While we believe the law provides our members

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1 with excellent protections, the implementation and  
2 enforcement of the law, as well as education about the  
3 law's protections, remain a mystery to the BLET team  
4 members, who should share full enjoyment of its  
5 benefits. The BLET congratulates and applauds the  
6 members of this Committee and your willingness to work  
7 towards the same ends as I've described. The BLET is  
8 open to assist this Committee as well, in providing our  
9 members with the law's protections, whenever it is  
10 necessary or whenever we're called upon to do so, to  
11 help the Committee. I thank you for letting me speak.

12 MS. SPIELER: Thank you very much. Again, I  
13 expect we will be calling on all of you, at some point,  
14 in the course of this Committee's work, to help us out.

15 MR. VERNA: We're here to help. Thanks.

16 MS. SPIELER: Thank you. That concludes the  
17 Public Comment period of this agenda. There will  
18 similar comment periods during our future meetings, for  
19 anyone who would like to come forward and offer advice,  
20 counsel, criticism, or suggestions to the Committee.  
21 That will always be noted in the Federal Register of  
22 Notices regarding our Public Meetings. DISCUSSION OF

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1 STATUTE 11(c)

2 At this point, we're going to shift to a more focused  
3 discussion about 11(c), and I'd like to ask Mike and  
4 Beth, maybe if you could go sit at the other end of the  
5 table.

6 MR. FRUMIN: Emily? Could I just ask a  
7 procedural question? Is the docket number on  
8 regulations.gov, where people have signed up to speak  
9 and so forth; posted comments. I guess there's one  
10 that's included in our packet. Is that a vehicle for  
11 people, not at committee meetings, to bring things to  
12 the committee's attention? Do you know if that's the  
13 case?

14 MS. SPIELER: I defer to Ed or Beth on that  
15 question.

16 MR. BAIRD: Yeah. I'm not sure if it's open  
17 any longer, but certainly you can direct anything you  
18 want to Beth and we'll put it up there, so people can  
19 take a look at it.

20 MR. FRUMIN: I was thinking of us so much, as  
21 a broader public. Is there some particular way that  
22 people can do that or not? It just occurred to me,

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1 since we were inviting documents and comments.

2 MS. SLAVET: The docket number is closed.

3 The reason we provided that with the record, was that  
4 it had come during the time period. But now the docket  
5 number is closed.

6 MS. SPIELER: But people's contact  
7 information and so on, are public the including the  
8 Committee.

9 MR. FRUMIN: Right. So we can forward  
10 things.

11 MS. SPIELER: And so if things are sent to  
12 individual members of the Committee, as we discussed  
13 prior to the public meeting, you can forward those to  
14 Beth or to the full Committee, and we'll make sure they  
15 become part of the Committee's record in deliberations  
16 going forward. So at a future meeting, they will,  
17 again, move things into the Committee's Minutes, record  
18 and they will be considered. So I don't think we keep  
19 up a sort of a continuous place for comments, but there  
20 are lots of different access points.

21 MS. SLAVET: There may be a different docket  
22 number, is basically --

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1 MS. SPIELER: Well, in the future, there will  
2 be, but there's isn't -- in the interim, without a new  
3 Federal Registrar Notice up, I doubt there will be.  
4 Okay. I think the two of you should identify  
5 yourselves and perhaps tell us how you're going to do  
6 this presentation. Then I'll just leave it to you, and  
7 then will have Committee Questions and a Discussion.

8 MICHAEL MABEE

9 SUPERVISORY INVESTIGATOR

10 REGION 1, NEW ENGLAND STATES

11 Sure. My name is Michael Mabee. I'm the Supervisory  
12 Investigator with Region 1, which is the New England  
13 States; and then to my right, is David Baskin, who has  
14 a very long impressive title, two words of which are  
15 Whistleblower Counsel. In my mind, those are the two  
16 most important words. He works for the Regional  
17 Solicitor's Office, in Region 1, which is also the New  
18 England States. Together, we do the Whistleblower  
19 cases, in the New England area, along with some help of  
20 some investigators and other attorneys.

21 First of all, I'd like to thank Chairman  
22 Spieler for the opportunity to come here today. I'd

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1 like to thank the Committee, for your attention to this  
2 important matter, with Whistleblower. Also, I'd like  
3 to acknowledge the members of the public, who came here  
4 and who took time out of their busy schedules to come  
5 and listen in on a very, very important topic, which is  
6 Whistleblower Protections. Finally, Dr. Michaels and  
7 Beth Slavet, who made this all possible.

8 I've been the Whistleblower Program for 14  
9 years. I never envisioned that I would have the  
10 opportunity to talk about what I do on a day-to-day  
11 basis, with such a Committee of esteemed and  
12 accomplished people on many, many different  
13 perspectives in the Whistleblower arena. I became a  
14 Whistleblower Investigator in 1999. I know, Beth, I'm  
15 going to talk slower, with shorter sentences, I swear.  
16 I lived in New York for a long time, so you have to  
17 excuse me.

18 MS. SLAVET: I was just going to say, it's a  
19 Yankee.

20 MR. MABEE: That's right. I started with the  
21 Whistleblower Program in 1999, as an Investigator. I  
22 became a Supervisor in 2003. I've been a Supervisor in

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1 two different OSHA Regions. I've got a fairly good  
2 perspective on the program, I believe. Also, in terms  
3 of my past resume, I've been both on the Labor side and  
4 the Management side. I've been a Union Steward and a  
5 Local President; as well as on the Management side,  
6 I've supervised everywhere from three to 3,000 people,  
7 in various capacities with the government and military.  
8 So having had experience on both sides, I think really  
9 kind of puts me in a unique position, when I'm looking  
10 at Whistleblower cases. I don't believe anybody. I  
11 don't believe the complainant. I don't believe the  
12 respondent. I certainly don't believe the attorneys.  
13 What I believe are the facts, that we're able to  
14 uncover in our Whistleblower investigations.

15 I'm going to take the time today. Briefly,  
16 what Dave and I are going to do, I'm going to talk,  
17 very briefly, about the history of OSHA's Whistleblower  
18 Program. Dave and I are each going to talk about what  
19 we do and our various perspectives. Me, from the OSHA  
20 perspective, in doing and supervising the  
21 investigations; Dave, from the Regional Solicitor's  
22 perspective, in prosecuting these investigations. Then

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1 we're going to talk, briefly, about the challenges that  
2 11(c) poses. Then finally, some lessons learned from  
3 some of the other Statues we have. So 11(c) is clearly  
4 a focus here, but we also have 21 other Statutes that  
5 desperately need attention of the Committee. So we  
6 want to talk a little bit about the lessons learned.

7           Now, when the Occupational Safety and Health  
8 Act was enacted, in 1970, it received accolades from  
9 all sides, which you don't always get with a piece of  
10 legislation. But President Nixon lauded it as an  
11 important piece of social legislation. The Chamber of  
12 Commerce said that it was an important victory for  
13 those looking for an effective, yet fair law, for  
14 workplace health and safety. And the AFL-CIO  
15 President, George Meany, called it a long step towards  
16 a safe and healthy workplace.

17           Now, when the Act was first enacted, and it  
18 created OSHA, it contained this Whistleblower  
19 provision, which we called Section 11(c). Now,  
20 initially, the 11(c) discrimination complaints were  
21 investigated by OSHA Safety Inspectors, who are known  
22 as the Compliance Health and Safety Officers (or CSHOs)

1 in OSHA Departments. Over the first four years of the  
2 Act's existence, OSHA learned a lot of lessons about  
3 Whistleblower cases. One of the things that OSHA  
4 learned was that Whistleblower investigations require a  
5 different skill set than health and safety inspections,  
6 for example. There are additional skills needed to do  
7 Whistleblower investigations, such as having the  
8 ability to interpret laws. You know, very, very fast-  
9 moving Whistleblower case laws it develops, also  
10 drawing inferences from a set of circumstances.

11 Am I talking slow enough, Beth? Should I  
12 slow down a little bit more?

13 MS. SLAVET: You're doing great.

14 MR. MABEE: So in 1974, due to large spread  
15 criticism about the quality and timeliness of OSHA  
16 11(c) investigations, OSHA created the 11(c)  
17 Investigation Program, and gave it its own personnel  
18 and management team, in order to conduct this work. The  
19 Program, by 1976, had 25 full-time Investigators; and  
20 then by 1981, there were 61 full-time Investigators.  
21 By all accounts, this was highly successful and the  
22 OSHA 11(c) Program was able to reduce the backlog, or

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1 the number of days to complete cases, from 1,023 days,  
2 in 1975, down to 133 days, in  
3 1981.

4           Also, in 1981, the Program actually was  
5 decentralized and went out to the 10 different OSHA  
6 Regions. Now, in 1983, we got our second Statute,  
7 which was the Surface Transportation Assistance Act,  
8 and that was delegated to the Secretary of Labor, who  
9 delegated it to OSHA. Now the Surface Transportation  
10 Assistance Act, which provides Whistleblower  
11 Protections for truck drivers, mechanics and other  
12 employees in the trucking industry, was very, very  
13 different from 11(c), in several respects. One of them  
14 was, under the Surface Transportation and Assistance  
15 Act, an employee had 180 days to file a complaint.  
16 Whereas, under Section 11(c), they only have 30 days.

17           A second important difference was, under the  
18 Surface Transportation Assistance Act, once OSHA issued  
19 findings, either side could file an objection to those  
20 filings and have de novo hearing in front of an  
21 Administrative Law Judge. Whereas, with 11(c), if OSHA  
22 found merit to a case, that case could only be enforced

1 through the filing of a lawsuit in Federal District  
2 Courts, through the Solicitor of Labor and the Regional  
3 Solicitors. That was another important difference.

4           And another really, really interesting thing  
5 about STAA was it had this provision known as  
6 Preliminary Reinstatement. Preliminary Reinstatement  
7 means that if OSHA finds merit in a case, we can order  
8 the employer to put the employee back to work; and that  
9 is not stayed by an appeal, if the other side appeals  
10 to an Administrative Law Judge. That was a very, very  
11 powerful provision in the Surface Transportation  
12 Assistance Act.

13           With only a few exceptions, most of the  
14 modern Whistleblower Statutes that followed had some of  
15 these same provisions, that we saw initially in STAA.  
16 The two exceptions to that are the International Safe  
17 Container Act and the Asbestos Hazard Emergency  
18 Response Act, which both follow pretty much the same  
19 structure as 11(c), where they would have to be filed  
20 as lawsuits in Federal Court, in order to enforce them.  
21 But our other Whistleblower Statutes followed the model  
22 of STAA and go through an Administrative Law Judge

1 process.

2           By 1990, OSHA had four Whistleblower Statutes,  
3 which was 11(c), STAA, ISCA and AHERA. Isn't that just  
4 amazing, how I can rattle that off the top of my head?  
5 We had approximately 51 OSHA Whistleblower  
6 Investigators at the time. Now, in 1997, we received  
7 seven more Statutes. These Statutes were six  
8 Environmental Whistleblower Statutes, and then also the  
9 Energy Reorganization Act. I'm talking slower, Beth, I  
10 swear, shorter sentences. The Energy Reorganization  
11 Act, which covers employees of NRC licensees, employees  
12 in nuclear plants, some hospitals that are NRC  
13 licensees, etcetera. So that brought us up to 11  
14 Statutes, by 1997. But interestingly enough, even with  
15 11 Statutes, in 1997, OSHA was still able to conduct  
16 our investigations in an average of 100 days or less,  
17 at that time.

18           Now, since 2000, Congress has opened up the  
19 sky and it has been raining Whistleblower Statutes down  
20 upon us, and we have received numerous Whistleblower  
21 Statutes, since 2000, which you've heard a couple spoken  
22 about today. The Federal Railroad Safety Act, the

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1 Sarbanes-Oxley Act, AIR21, Pipeline, Consumer Product.  
2 I used to do this trick, where I would rattle off all  
3 17 Statutes and really, really impress a room full of  
4 people. Once we got to 18, I couldn't do it anymore.  
5 So I'm not going to embarrass myself today, by doing  
6 this. You have in your handouts, you have a list of  
7 all 22 of our Statutes and some of the pertinent  
8 information on those Statutes. I would really  
9 encourage you to take a look at that, at your leisure.  
10 Because all of these Statues do have some differences,  
11 but they all do have similarities also.

12           You've heard from a couple of people in the  
13 railroad industry. FRSA is one of the new Statutes. We  
14 got that in 2007. It was subsequently amended to add  
15 further protections. Now both Dr. Michaels and Ms.  
16 Slavet have referred to some of the problems and  
17 criticisms of OSHA's Whistleblower Program, along with  
18 OSHA's attempts to address these, both on a case-by-  
19 case basis, and also systemically. Among the  
20 improvements, that Dr. Michaels has implemented, since  
21 he's been here, has been the addition of resources to  
22 the Whistleblower Program.

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1           In the 2011 budget, we added 25 new  
2 Investigators; and then in 2012 budget, an additional  
3 10 Investigators. We presently have a total of 96 OSHA  
4 Whistleblower Investigators, excluding Supervisors.  
5 Now, to give you a little bit of a perspective on the  
6 caseload, in 1997, when OSHA had 11 Statutes, the  
7 average caseload was about seven cases per  
8 Investigator, and we were able to do the cases in a  
9 approximately 101 days. Now, fast-forward to 2012, the  
10 end of fiscal year 2012, we had an average caseload of  
11 25.8 cases per Investigator, and our average days to  
12 close cases was up to 286 days.

13           But OSHA is also beginning to see the effect  
14 of these new Investigators that have been added over  
15 the last couple of years. As you've seen, from the BNA  
16 Article that is in your handout materials, we had a 42  
17 percent increase in the number of closed cases in  
18 FY2012, compared to the year before. I believe largely  
19 due to the fact that we've had additional resources to  
20 do this.

21           Now, after over 40 years with OSHA's  
22 Whistleblower Program. Not me, personally, but OSHA's

1 Whistleblower Program's been around for over 40 years.  
2 11(c) still constitutes about 61 percent of the cases  
3 that we receive. So it's still the majority of cases  
4 we receive. It is now followed, in second place, by  
5 the Federal Railroad Safety Act, which has the second-  
6 most cases. That recently overtook the Surface  
7 Transportation Assistance Act, which had been the long-  
8 running second place to 11(c), in terms of the number  
9 of cases.

10 As Beth had pointed out, earlier this  
11 morning, some of our new Statutes that come up -- for  
12 example, the Food Safety Modernization Act can have a  
13 tremendous potential in the future, to generate quite a  
14 few cases. That could change.

15 What I'd like to do next -- That was kind of  
16 a brief whirlwind history of the Whistleblower Program  
17 and how we got to the point, where here we are, with 22  
18 Statutes. I'd like to talk, really quickly, about what  
19 we do in OSHA, and then have Dave talk a little bit  
20 about what he does in the Solicitor's Office. Then  
21 we'll talk about some of the challenges of 11(c) and  
22 some of our lessons learned, and we'll be happy to

1 answer any questions after that.

2 In the Regions, our main guidance is  
3 publically available on our website:

4 whistleblowers.gov, which is the  
5 Whistleblowers Investigations Manual. I saw that  
6 there's a couple of copies over on the back table. At  
7 the Regions, we do the intake of complaints, for the  
8 most part. Now, complaints can come in from a variety  
9 of sources. A lot of complaints come in, for example,  
10 an employee may call an OSHA Inspector, that he met on  
11 an inspection, and say, "Hey, I believe I was  
12 terminated because I spoke with you, or they think I  
13 filed the OSHA complaint."

14 Complaints can also come in via our National  
15 Office. Sometimes people will go the OSHA website and  
16 call the main number. Complaints can also come in,  
17 just via fax to an area office, and a whole variety of  
18 different manners.

19 As soon as we get these complaints, we do an  
20 intake interview with the complainant. We always  
21 interview every complainant, to the extent that we can  
22 get a hold of them. There are occasions where we'll

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1 get a complaint and we will not be able to ever get a  
2 hold of that complainant again. We'll try calling and  
3 sending letters. We have procedures, in our Manual,  
4 for what we do when we can't get a hold of a  
5 complainant. As a Supervisor, I consider that one of  
6 the most critical things, is interviewing the  
7 complainant, very thoroughly, and understanding their  
8 allegation.

9           Complaints under 11(c) have always been  
10 accepted verbally, not just in writing. Now, our  
11 policy in the new Manual, in 2011, changed. We now  
12 accept all complaints, under all Statutes, verbally, in  
13 whatever language that the complainant speaks. We will  
14 get a translator, if we need one. We will accept the  
15 complaints in any form and in any language, the  
16 complainant needs in order file their complaint.

17           We conduct the initial interview with the  
18 complainants, to determine whether their complaint  
19 falls under one of our Statutes. We will attempt to  
20 refer the complainants to the proper agency, if we  
21 aren't it. We do get a lot of complaints, where the  
22 government can be a big and confusing assortment of

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1 agencies and some people just don't know who to call.

2 We do have a great website:

3 [www.whistleblowers.gov](http://www.whistleblowers.gov), which is a phenomenal resource,

4 I believe, for both the public and people involved in

5 Whistleblower work. Sometimes, we'll get complaints

6 that don't necessarily fall under our Statute. We'll

7 attempt to get the people to the proper agency, where

8 that is. Where the complaint does fall under our

9 Statute, we will do a process known as docketing the

10 complaint, which is described in the Manual, which

11 means we enter it into our database and we notify the

12 parties that we're going to be investigating the

13 complaint.

14 We'll assign the complaint to an

15 Investigator, who conducts an investigation. Although

16 we have 22 different Statutes, and you may look at that

17 list and say, "Oh, my God!" All of the complaints have

18 a couple of things in common. What we're investigating

19 is whether the complainant engaged in protected

20 activity; whether management had knowledge of the

21 protected activity; whether there was an adverse action

22 visited upon the complainant; and finally, whether

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1 there's a nexus or a causal connection between the  
2 adverse action and the protected activity.

3           In that respect, all of our investigations  
4 are the same. In other respects, they're all  
5 different, because as you can see, there's different  
6 time limits; different protected activities, etcetera,  
7 involved in these complaints. OSHA writes detailed  
8 findings and reports on all the investigations that we  
9 do. These findings can be anywhere between two to 30  
10 pages, depending on the complaint. We issue findings  
11 in 19 of our Statutes, and the exceptions being 11(c)  
12 ISCA, AHERA and some STAA cases, where we find merit  
13 and refer them to the Solicitor's Office, which I will  
14 talk about in a second. Right now, as a matter of  
15 fact.

16           Where OSHA finds merit to certain case types,  
17 we would refer them to the Regional Solicitor's Office,  
18 and Dave will discuss that, in a second. We'll also  
19 refer cases to the Solicitor's Office involving  
20 preliminary reinstatement, where we may have to enforce  
21 that in Federal Court. Also, in other cases, where  
22 OSHA needs legal advice or Solicitor involvement. I

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1 talk to Mr. Baskin, on almost a daily basis. I would  
2 say that's a fairly fair assessment. I probably talk  
3 to him more than almost anybody else within the  
4 Department of Labor. So we work very closely with the  
5 Solicitors on those cases.

6           As you can see from the statistics you have,  
7 OSHA settles a good number of cases, also. Last year,  
8 we settled 21 percent of all of our cases, and actually  
9 22 percent of the 11(c) cases. Those will either arise  
10 from a settlement between the parties, that OSHA  
11 approves, in accordance with our Manual. Sometimes  
12 OSHA, we will actually facilitate the settlement  
13 between the parties, especially if some of the parties  
14 are not represented. We'll settle those cases.

15           Now, we intersect with the National Office,  
16 with Ms. Slavet's Directorate of the Whistleblower  
17 Protection Programs, in a couple of ways. One of them  
18 is the appeals of OSHA, ISCA, and AHERA cases would be  
19 appealed to the National Office. 11(c) did not have an  
20 appeals process actually built into the Statue, but in  
21 the early '70's, OSHA created an appeals process. So  
22 that when we do dismiss an 11(c) complaint, the

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1 complainant would have an avenue to get a review of the  
2 file. So the Appeals Committee in the National Office  
3 would facilitate that. Also, the Directorate of the  
4 Whistleblower Protection Programs gives us technical  
5 advice and support to the field on technical questions,  
6 and also handles significant case reviews of some of  
7 our cases. Now, I think I'll turn it over to Dave and  
8 have him talk a little bit about the perspective, from  
9 the Regional Solicitor's Office.

10 DAVID BASKIN

11 REGIONAL SOLICITOR'S OFFICE

12 Thanks, Mike. Thank you. I want to echo what Mike  
13 said. I want to thank all of you. It's a pleasure to  
14 be here, and I am hoping to tell you a little bit about  
15 the nuts and bolts of an 11(c) case, if I could,  
16 please.

17 I'll tell you about myself, just every  
18 briefly. I've been involved in the Whistleblower  
19 Program at the Department, since about 1982. I've  
20 tried four 11(c) cases in Federal Court, and I'll  
21 probably be trying a fifth, later this year. Of  
22 course, I've been involved in the settlement of any

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1 number of 11(c) cases and other Whistleblower cases.

2           This is, as we've all been saying, an  
3 exciting time for the Whistleblower Program, thanks to  
4 its new prominence. I can say, since it's been about  
5 30 years, this is great. This is really great. One of  
6 my fellow counsels in the region, referred to the 11(c)  
7 cases and the Whistleblower Program, itself, but I  
8 think she was talking about the 11(c), is the creme de  
9 la creme of the cases we do. These are so interesting,  
10 and unfortunately, they're so heartbreaking.

11 Obviously, it's horrible to be the victim of violent  
12 crime. It's horrible to be the victim of a horrible  
13 disease. But it's pretty horrible also to suffer the  
14 tremendous financial harm that comes from being the  
15 victim of a retaliatory discharge. Not being able to  
16 pay the mortgage; going on food stamps; losing your  
17 health insurance. It makes you sad for some of these  
18 folks. It really is quite sad.

19           Let me tell you how we handle 11(c) in our  
20 region. Mike's given you a little bit of a background.  
21 When cases are under investigation, we, in the Regional  
22 Solicitor's Office, learn of them, if they look like

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1 they're going to go somewhere, or simply if they pose  
2 interesting difficult issues, from Mike. And as he  
3 said, we do talk maybe daily, in certain weeks. Quite  
4 a bit. Let's just put it that way. Probably 19 days  
5 out of 20 workdays, something like that. We function  
6 under a regime, that I will call early involvement.  
7 That really is a function of Solicitor, Tricia Smith  
8 and her push to make sure that there is real hand-in-  
9 glove work between the agencies and the Solicitor's  
10 Office. I will use the term, "Grow up with a case." We  
11 will know about it, if it's going anywhere, virtually  
12 from its inception.

13           We'll consult. I will consult, or I and one  
14 of the other attorneys, who works on the Whistleblower  
15 cases, in our office, will consult with Mike or his co-  
16 Regional Supervisory Investigator, Carole Horowitz, and  
17 the actual Investigators, about the case, at various  
18 stages. We act as a sounding board. We come from a  
19 different perspective. We make suggestions. We look  
20 at the facts and the applicable law and try to help.  
21 You heard Mike talk about, obviously, the need to  
22 interview the employee; to interview other fact

1 witnesses. I'm going to ask you -- this is a test --  
2 who is one of the most important people you can  
3 interview? The clerical worker, the person who  
4 processed the pink slip. I can think of at least two  
5 cases that have turned on the testimony of the clerical  
6 worker, or former clerical worker, who processed the  
7 pink slip. You find out what really happens. That's  
8 the sort of thing we do when we make suggestions. We  
9 can come at it from different angles.

10           Now, we evaluate the facts. We evaluate the  
11 timeline. We talk about credibility; the employer's  
12 position; the applicable law. We're very interested in  
13 other legal proceedings. State Unemployment  
14 proceedings; or Workers' Comp. proceedings; or simply  
15 other State litigation, involving the employee and the  
16 employer, can give us valuable, valuable insights into  
17 the facts. They come in very, very handy, as you try  
18 to litigate the cases, and you try to settle the cases.

19           In addition, another aspect of the nuts and  
20 bolts is we consult with the National Office about the  
21 cases that we're dealing with. Because a lot of these  
22 issues are very interesting and complex issues. So if

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1 we're talking about an 11(c) case or a STAA case, I  
2 would find myself talking to Rob and his folks, Ed  
3 Baird, Mark Lerner. I cannot really overstate the  
4 value of these folks. Talking to our National Office  
5 has been, through the years, very, very, very helpful.

6           Likewise, if we're talking about the other  
7 types of Whistleblower cases, I find myself talking to  
8 Megan Guenther and some of her folks. Quite frankly,  
9 the same praise applies. We are very well-served in  
10 the regions, by the National Offices we deal with.

11           Another thing I'd like to tell you about, as  
12 I try to help you understand how it works in the  
13 regions, is the fact that we have quarterly meetings  
14 with the Regional Office. Once every quarter, Mike and  
15 I, Carole Horowitz, my boss (Mike Felsen, the Regional  
16 Solicitor), and Marthe Kent, the Regional  
17 Administrator, and her Deputy, Bob Hooper, will sit  
18 down for two, two-and-a-half hours, and talk about  
19 where we are; what's going on; statistics; what's  
20 happened; and where we're going. It's an exceedingly  
21 useful process, in trying to step back and getting an  
22 idea of where we really are. In our region, the

1 Investigators have a very, very heavy caseload, but I  
2 think we're blessed with some pretty good  
3 Investigators. From a lawyer's perspective, that's  
4 very, very helpful.

5           Now, subsequent to early involvement, and the  
6 evaluation that's inherent there, we'll actually write  
7 up a legal analysis of the case. That analysis will go  
8 through me, to the Regional Solicitor. We'll also show  
9 it to Mike and his subordinates, to make sure we got  
10 the facts right. Then, we may make the decision to  
11 file the case in Federal Court, in the U.S. District  
12 Court, in the appropriate State. Prior to doing that,  
13 we have to get clearance from the Justice Department.  
14 The Office of Federal Programs and the Justice  
15 Department has to be consulted. They've been pretty  
16 good. It's another hurdle, but I can't say that  
17 they've really thrown us any curveballs or been a  
18 problem. It's just something else you have to do.

19           Then you file in District Court, and you go  
20 through the regular legal procedures: a status  
21 conference, discovery and so forth. As I'm sure you  
22 can appreciate, Section 11(c) cases, like most

1 Whistleblower cases, are very fact-bound. They're very  
2 fact-intensive. It's like peeling an onion, because  
3 there are nuances within nuances and there are  
4 different versions of the truth. There are seven  
5 different versions of what happened. We really have an  
6 obligation to try and get it right.

7           Now, given the caseload that the  
8 Investigators carry, and given the -- just how hard it  
9 is to investigate any one case, I would like to tell  
10 you that, if OSHA doesn't hit its statutory deadline of  
11 concluding its investigation within 90 days, that will  
12 not kill the case. The investigation can go on. That  
13 90-day deadline is not for the benefit of the  
14 employers.

15           Now, I also want to talk about the relief  
16 that's available, under Section 11(c). The Statute  
17 says, "All appropriate relief," and "All appropriate  
18 relief," can mean exemplary damages, compensatory  
19 punitive damages. There was a case in the First  
20 Circuit Court of Appeals, called Cambridgeport Air  
21 Systems, which held that all appropriate relief means  
22 more than just back wages. That's what we often think

1 about when we think about what we can get for a  
2 Whistleblower.

3           Now, in our region, if we file the case, if  
4 we actually go into Federal Court and have to file the  
5 Complaint, we are looking for a consent judgment, as a  
6 way of resolving the case. Of course, if we try the  
7 case, there's going to be a judgment. I would like to  
8 say one other thing. Most of the employers -- at least  
9 the ones I've seen in 11(c) cases -- are standalone  
10 employers. Frankly, they are -- at least in my  
11 experience -- comparatively small employers and they're  
12 standalone employees. We are not talking about union  
13 members. We are not talking big sophisticated  
14 companies, like the railroads, or the companies that  
15 are covered by Sarbanes-Oxley. Consequently, as you  
16 know, there's no private right of action and we are the  
17 only recourse for these unfortunate 11(c) complainants,  
18 who have lost their jobs.

19           Under Section 11(c), a retaliatory discharge  
20 is -- at least as one court has said -- it's an  
21 intentional tort. It's an intentional civil wrong.  
22 That's one of the reasons why it is a good thing that

1 we can get all appropriate relief, and aren't just  
2 limited to the back wages.

3           Recently, we've encountered a new issue, one  
4 the EEOC is more familiar with than us, because I think  
5 they just do more cases that involve this. I've  
6 actually learned a lot from talking to a fellow over at  
7 the EEOC. This is social media discovery. If you are  
8 bringing a case -- if we ever bring in a case on behalf  
9 of an 11(c) victim, the employer, which has a right to  
10 litigate its case as zealously as it can, may well go  
11 after FaceBook postings, tweets and other such things.  
12 It raises huge issues. They certainly have their  
13 rights, but you can infer the (inaudible). That's a  
14 problem for us. What we try to do is, to the extent  
15 that we can -- keep in mind what I'm saying here. I  
16 should back up a little. What we're talking about is  
17 they tried to subpoena information directly from the  
18 complainant, who has no private right of action and is  
19 unrepresented. We maintain, we have asserted that we  
20 have a common interest with the victim. We say, "the  
21 Common Interest Privilege applies," and we can stand up  
22 for them. We have a standing to try to protect these

1 folks. There's never been -- as far as I know -- a  
2 real affirmative decision about the Common Interest  
3 Privilege in Section 11(c). We've got at least one  
4 decision that assumes it, without saying it. But this  
5 can be a problem in 11(c).

6           For instance, down in Atlanta, the employer  
7 went after the complainant's medical records, from  
8 pharmacies and medical providers. Obviously, it scared  
9 the daylights out of the complainant and the Atlanta  
10 Office stepped in, asserted the Common Interest  
11 Privilege, and did its best to try to keep this  
12 discovery to a rational limit. But this is an emerging  
13 problem. Certainly, social media discovery is an  
14 emerging problem, as it is across the discrimination  
15 spectrum, and not just in the cases that the Labor  
16 Department has. I think that's about it. I want to  
17 thank you, all, very much.

18           MR. MABEE: Okay. I want to talk about the  
19 portion on the agenda, that says, "What challenges  
20 11(c) poses." The way I'm going to do this is I want  
21 to talk about what 11(c) does, next to what some of the  
22 recently-enacted Whistleblower Statutes do. If you

1 want to draw a line down the middle of your paper, the  
2 left side is going to be 11(c), and the right side is  
3 going to be the recently-enacted Whistleblower  
4 Statutes. So 11(c) has a 30-day statute of limitations  
5 for filing. The recently-enacted Whistleblower  
6 Statutes have 180 days' statute of limitations for  
7 filing, for the most part.

8           11(c), no private right of action. In the  
9 recently-enacted statutes, the complainant does have a  
10 private right of action. With 11(c), we have to file a  
11 lawsuit in Federal District Court for merit cases. With  
12 the recently-enacted Statutes, OSHA would issue  
13 findings. What is the difference? The next bullet.

14           Filing a lawsuit in Federal District Court,  
15 for those of you, who have been involved in doing that  
16 before, it's very, very resource-intensive. Whereas,  
17 issuing findings for a merit case under some of the  
18 recently-enacted Statutes is a lot less resource-  
19 intensive. 11(c) is under the motivating factor burden  
20 of proof. Whereas, the recently-enacted Statutes are  
21 under the contributing factor burden of proof.

22           11(c) has no preliminary reinstatement;

1 whereas, the recently-enacted Statutes, many of them do  
2 contain a provision for preliminary reinstatement.

3 MS. SPIELER: Mike, I'm not sure everyone  
4 here understands the implications of preliminary  
5 reinstatement. Could you just explain that, for a  
6 minute?

7 MR. MABEE: Yes, absolutely. Preliminary  
8 reinstatement means that when OSHA conducts an  
9 investigation and issues findings, we can order  
10 reinstatement in all of the Statutes, as an appropriate  
11 remedy. But in the Statues that have preliminary  
12 reinstatement, if we order reinstatement as a remedy,  
13 it is not stayed by an appeal. So the respondent could  
14 still appeal OSHA's findings, but they would have to  
15 immediately still reinstate that whistleblower back to  
16 their job, pending the appeal. The other remedies may  
17 have to wait, pending appeal. For example, back pay or  
18 compensatory damages. But the reinstatement would be  
19 immediate. If the respondent refuses to do that, the  
20 Solicitor of Labor could enforce that in Federal Court.  
21 So that's what preliminary reinstatement is versus us  
22 ordering reinstatement, for example, in the

1 environmental statutes, in the EPA statutes. That does  
2 not have preliminary reinstatement. So if a respondent  
3 files an appeal, the reinstatement is held in abeyance,  
4 along with everything else, until the outcome of the  
5 appeal. Does that answer your question?

6 MS. SPIELER: Yes. Thank you.

7 MR. MABEE: Finally, kind of on the  
8 differences of 11(c) and the recently-enacted Statutes.  
9 Under 11(c), the complainant has no further appeal,  
10 once they've gone through OSHA, and the Solicitor of  
11 OSHA, and the Solicitor believes there's no merit to  
12 the case. There is no further appeal. Whereas, in the  
13 recently-enacted Whistleblower Statutes, any decision  
14 of either OSHA, the ALJ or ARB, all of these decisions  
15 are appealable, at every level, by either side, all the  
16 way to Circuit Courts, and possibly the Supreme Court.  
17 So that's kind of the difference there.

18 Now, OSHA has another -- kind of the  
19 difference between the Statutes. The best way to  
20 describe our 22 Statutes is sort of a patchwork.  
21 Obviously, Congress is smarter than me, so I guess they  
22 knew what they were doing when they made them all

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1 different. But we have subpoena authority under some  
2 and not under others. So we have subpoena authority  
3 under 11(c), ISCA, AHERA and ACA, which is the  
4 Affordable Care Act; and we do not have subpoena  
5 authority under the other statutes.

6 Punitive damages are available under some  
7 statutes, and not under others. The ones that they are  
8 available under -- and I believe this is on your desk  
9 aid -- but 11(c), ISCA, AHERA, STAA, the Safe Drinking  
10 Water Act, the Toxic Substance Control Act, the Federal  
11 Railroad Safety Act, the National Transit System  
12 Security Act and the Seaman's Protection Act all  
13 provide for punitive damages. The other statutes do  
14 not.

15 Then finally, I wanted to talk, just a little  
16 bit, about some of the lessons we've learned from other  
17 statutes. Different industries present us with  
18 different problems. You've heard a lot about this  
19 today. You've heard about it from Dr. Michaels. You've  
20 heard about it from Ms. Slavet. You heard about it  
21 from a couple of people from the railroad industry. A  
22 great example of this. Six percent of the 11(c) cases

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1 we get are on the allegation of retaliation for  
2 reporting an injury, 6 percent. Under the Federal  
3 Railroad Safety Act, 60 percent.

4 MS. SPIELER: Wow.

5 MR. MABEE: So when we see different  
6 industries, sometimes we will see really, really  
7 remarkably different problems. That's a great example.  
8 Preliminary reinstatement is a powerful provision, and  
9 we've learned this from the statutes in which we have  
10 it. We settle many, many cases. When OSHA believes  
11 there's merit to a case, we're obligated to issue what  
12 we call a Due Process Letter, which mean prior to  
13 ordering preliminary reinstatement, we have to notify  
14 the respondent of the evidence, that has brought us to  
15 the preliminary conclusion that there's merit to the  
16 case; give them the opportunity to provide a rebuttal  
17 or any additional evidence they want us to consider.  
18 When we send those letters out, a lot of these cases  
19 settle, in our experience. Preliminary reinstatement  
20 is a credible threat to a respondent. We settle a lot  
21 of these cases.

22 Some statutes require a great deal of

1 additional training. We've learned this, for example,  
2 with the Sarbanes-Oxley Act. It requires a great deal  
3 of additional training for Investigators. Being  
4 advised that OSHA may draw an adverse inference is  
5 helpful in statutes where OSHA does not have subpoena  
6 authority. So if we request documents from a  
7 respondent and they're not cooperative, being informed  
8 that we may draw an adverse inference and issue  
9 findings against them, usually they'll have a second  
10 thought about possibly cooperating in the  
11 investigation.

12           We have noticed, over the years, that very  
13 few complainants, 11(c) complainants, are represented  
14 by attorneys. Whereas, in our other statute types that  
15 apply for attorneys' fees, many more complainants are  
16 represented by attorneys. Ultimately, many 11(c) cases  
17 are dismissed as untimely. At least, at least 310  
18 cases, in fiscal year 2012 -- or complaints, I should  
19 say -- were untimely, when they called. As you know,  
20 11(c) has a 30-day statute of limitations. Also, the  
21 last thing we've learned --

22           MS. SPIELER: Can I ask another question?

1 MR. MABEE: Sure. Yes.

2 MS. SPIELER: Do you consider the statute of  
3 limitations jurisdictional, in nature? In other words,  
4 if somebody files on the 31st day, is it just a  
5 nonissue that --

6 MR. MABEE: Yeah. That is an excellent  
7 question. The question was, does the 30-day statute of  
8 limitations, for example, jurisdictional? Is that it?  
9 We provide the principles of equitable tolling, so  
10 there may be some circumstances where, for example, on  
11 the 29th, 30th, and 31st day, there was a major  
12 snowstorm, power outage. For some reason, the  
13 complainant was unable to file the complaint. It could  
14 be a circumstance to justify equitable tolling. We  
15 will look at those. Those are outlined in our  
16 Whistleblower Manual. Our Investigators will look at  
17 circumstances where tolling may apply, in those cases.

18 Finally, on the work refusal protections of  
19 many of the newer recently-enacted statutes, actually  
20 protect workers, who report a violation of the law.  
21 That's a much higher level of work refusal protection  
22 then, for example, 11(c), which the workers are

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1 protected in some situations, where they refuse to do  
2 something and they have a reasonable belief of a hazard  
3 to life and limb if they perform this. But in some of  
4 our statutes, for example, on the Surface  
5 Transportation Assistance Act, a truck driver can  
6 refuse to drive a truck that violates DOT regulations.

7 Under the Food Safety Modernization Act, an  
8 employee can refuse to do something that violates food  
9 safety regulations, and they're protected by those  
10 Acts. The work refusal protections, in some of the new  
11 statutes, are much more robust than they were under  
12 11(c).

13 That concludes what Dave and I had, in terms  
14 of a presentation, but we're happy to answer any  
15 questions of the Committee.

16 MS. SPIELER: Okay. So we'll open it up for  
17 questions, specifically on what Mike and David have  
18 been talking to us about. When we get done with that  
19 portion of the meeting, we'll likely -- depending on  
20 what time it is -- we'll take a break and then we'll  
21 move into a more general discussion. Questions for  
22 Mike and David? Greg?

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1 MR. KEATING: I have a specific question, and  
2 I realize the folks --

3 MS. SPIELER: We should remember, also, to  
4 keep --

5 MR. KEATING: I'm sorry. It's Greg Keating.

6 MS. SPIELER: Thank you.

7 MR. KEATING: I realize the focus is on  
8 11(c), and I'm struck by the differences between 11(c)  
9 and the panoply of other statutes that have come into  
10 existence recently. With regard to those though, and  
11 I'm talking, in particular, about Sarbanes-Oxley. If  
12 you get a complaint that is specific in nature and that  
13 goes into detail about SEC violations being committed  
14 and retaliation as a result of that, will you, as a  
15 matter of course, reach out to the SEC and share that  
16 complaint?

17 MR. MABEE: Yeah. That's an excellent  
18 question. In our Whistleblower Manual, all of our  
19 statutes, where the primary jurisdiction falls with  
20 another agency, OSHA notifies the other agency, when we  
21 receive a complaint. So in the matter of a Sarbanes-  
22 Oxley complaint, in Greg's example, OSHA would send a

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1 copy of that complaint to the Securities Exchange  
2 Commission. And OSHA also sends a copy of the final  
3 letter, Secretary's findings. You know, withdrawal  
4 approval, settlement approval -- whatever closes the  
5 case -- to the primary agency. That applies under all  
6 of our statutes, except for 11(c).

7 MR. KEATING: Just to be clear -- This is  
8 Greg Keating, again. So when you say primary  
9 jurisdiction, you would have primary jurisdiction over  
10 the retaliation component, but the SEC would have  
11 primary jurisdiction over investigating the underlying  
12 issues?

13 MR. MABEE: Correct. Yes, correct.

14 MR. KEATING: Thanks.

15 MS. SPIELER: Richard?

16 MR. MOBERLY: So my understanding is that  
17 historically, those faxes to the SEC just stay there  
18 and nothing ever happened to them? Do you have any  
19 understanding of when you send that information to  
20 those primary agencies, what happens to those  
21 complaints?

22 MR. MABEE: Yeah. I can't speak for other

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1 agencies, but I would certainly encourage the Committee  
2 to look at the MOU's that we have, to the extent that  
3 the Committee's able to. You could probably speak to  
4 the other agencies to ask them, but I don't feel  
5 comfortable answering for other agencies, with what  
6 they would do with the information we send them.

7 MR. MOBERLY: As a follow-up for the OSHA  
8 ones, the substantive violation, that was complained  
9 about. What happens to those substantive reports? So  
10 you would still handle the retaliation part of it, but  
11 what happens to the underlying issue, that there was  
12 some violation of a regulation?

13 MR. MABEE: On the 11(c) complaints?

14 MR. MOBERLY: Yes.

15 MR. MABEE: Okay. If we receive a  
16 Whistleblower complaint that also has a health and  
17 safety allegation, we would refer that to the  
18 appropriate area office of OSHA, to process in  
19 accordance with their normal procedures. By the same  
20 token, when the OSHA Area Offices are working on one of  
21 their enforcement cases, and an instance of alleged  
22 Whistleblower retaliation comes to their attention,

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1 they would refer that to us. So we work very closely.  
2 Most of our Investigators work out of Area Offices, so  
3 we have a close relationship with the enforcement  
4 component of OSHA.

5 MR. MOBERLY: Thanks.

6 MS. SPIELER: Eric?

7 MR. FRUMIN: So let's pursue this very --

8 MS. SPIELER: I'm sorry. The last comment  
9 was Richard Moberly and this is Eric Frumin.

10 MR. FRUMIN: I'm sorry. My bad. Eric  
11 Frumin. Let's pursue a scenario, where the person who's  
12 filing the 11(c) complaint, the person is complaining  
13 about retaliation is covered by 11(c). So it's a OSHA-  
14 related matter, not another agency. Not another  
15 statute, and where there are some workplace safety  
16 issues involved.

17 A two-part question. One is, from your  
18 standpoint, on the anti-retaliation goals, are there  
19 any specific marching orders you have to treat it  
20 differently, depending on whether the complainant was  
21 also a complainant to the Area Office, at the same  
22 time, or prior to that? In other words, does it make

1 any difference to you, in the way you process it,  
2 whether or not they were also active, filing a  
3 complaint about hazards or violations under Section 8  
4 of the Act?

5 MR. MABEE: We don't have any specific  
6 marching orders, in the scenario you described. I  
7 don't think it makes any difference whether the  
8 person's alleging they were fired because they called  
9 OSHA, or because the person was fired because they  
10 alleged a safety hazard to their employer's attention.  
11 We're going to investigate all these cases in the exact  
12 same manner, looking for those four elements, that I  
13 described earlier. Does that answer your --

14 MR. FRUMIN: No, no. That's a very good,  
15 specific answer. Then conversely, if you find out  
16 about a retaliation case, once a complaint inspection  
17 is underway, involving the complainant, do you know  
18 whether the Area Offices, having found out about it  
19 from you, whether they would behave any differently in  
20 conducting their inspection under Section 8?

21 MR. MABEE: I think the answer is probably  
22 the same. The Area Offices have specific procedures

1 that they follow, when they receive complaints, and  
2 when they do inspections. I'm not aware of any  
3 difference. We do get information, for example, in a  
4 whistleblower case, that also involved an OSHA health  
5 and safety inspection. Obviously, we want to interview  
6 the Compliance Officer that did the inspection, because  
7 they may be a good source of information. We would  
8 want to cooperate, in terms of what information we may  
9 have that might be useful to them, or vice-versa. I  
10 don't believe there's any procedural difference.

11 MR. FRUMIN: Right. So I just want to then  
12 raise a core question for the Committee, which is, for  
13 the purposes of enhancing the enforcement of Section 5  
14 of the Act, that is employers have to comply with the  
15 standards, in Section 8, which says that OSHA has to  
16 conduct inspections. Shouldn't it make a difference to  
17 the agency, when an employer retaliates against a  
18 worker, who's a complainant, about the underlying  
19 violations? By his account, it doesn't, procedurally.  
20 I'm not saying they do a weaker investigation, but I'm  
21 simply raising this as a point. We can come to it.

22 MS. SPIELER: Why don't we come back to that?

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1 Because I think that's an interesting --

2 MR. FRUMIN: Yeah. I don't want to go with  
3 it, but I just wanted to raise that.

4 MS. SPIELER: Beth, do you want to?

5 MS. SLAVET: Yeah. Hopefully, you've made  
6 the final point. I wanted to speak to that, because  
7 actually a recent case I was involved in -- Basically,  
8 what does happen is there was actually coordination  
9 between the two Officers. There was advice sought from  
10 the National Office; and there was a thorough  
11 discussion about what was the most effective way to  
12 deal with the investigation, since it involved both  
13 reporting issues. And we had the greatest ability and  
14 power, and authority to do a thorough investigation and  
15 get as much information as we possibly could, and as  
16 quickly as we could. Do you know what case I'm talking  
17 about? So I wanted to just make clear, that they  
18 weren't like acting on these separate tracks. There  
19 was coordination, and they keep in touch with other,  
20 and in fact, have elevated to the National Office.

21 MR. FRUMIN: Okay.

22 MS. SPIELER: Nancy?

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1 MS. LESSIN: Nancy Lessin, Steelworkers. I  
2 have a lot of questions. I'm just going to go to one  
3 place though, and that's the punitive damages  
4 situation. What we see with OSHA, is that there's this  
5 graded level of importance assigned to -- if you have  
6 a serious violation of OSHA, it's a maximum, \$7,000  
7 fine. Willful, you can bump it up to \$70,000. I think  
8 you have -- is it called egregious policy, where if  
9 it's an egregious situation, willful, and a 100 people  
10 are exposed, you can do \$70,000 times 100 people. It  
11 becomes a \$7 million fine.

12 When we look at Whistleblower, it seems like  
13 any retaliatory action is egregious. So I'm wondering  
14 what happens in reality with punitive damages. I  
15 tracked, in Massachusetts, from around 1997 to 2009,  
16 the 11(c) complaints where punitive damages were  
17 sought. There were two in 1999; and one in 2003. The  
18 rest of the years, there was no punitive damages  
19 sought. Now, is that because there were so few cases  
20 that actually got to a place? It seems like that issue  
21 of punitive damages might make a difference. If an  
22 employer is just faced with -- if they lose the case,

1 they have to reinstate and do back pay. That's what  
2 they were going to pay somebody anyway, if they were  
3 working. That punitive damages could be significant.  
4 So if you can talk a little bit about why there are so  
5 few punitive damages cases pursued.

6 MR. MABEE: Dave and I decided, at the  
7 beginning of the presentation, I would handle the easy  
8 questions and he would handle the hard questions. The  
9 important thing also -- and you're talking about 11(c)  
10 cases?

11 MS. LESSIN: Yeah, 11(c).

12 MR. MABEE: In 11(c) cases, punitive damages  
13 are assessed by the court, not my OSHA. Whereas, like  
14 in a Federal Railroad Safety Act case, when OSHA issues  
15 findings, we actually can put punitive damages, as a  
16 remedy in the findings, up to the statutory cap of  
17 \$250,000. With the 11(c) cases, punitive damages may  
18 be sought in a lawsuit that gets filed, but ultimately  
19 the court makes that decision. Am I correct in that,  
20 Dave?

21 MR. BASKIN: That's a very good answer.

22 MS. SPIELER: I'd actually like to ask a

1 slightest broader question, that might help in this  
2 conversation. I assume everyone on the Committee  
3 understands that punitive damages are not fines. They  
4 go to the complainant. Data, I've seen over time,  
5 showed a significantly lower average amount in  
6 settlements of 11(c), then in other statute  
7 settlements, prior to subsequent litigation of whatever  
8 type. I actually think it would be very helpful to  
9 understand the settlement process in 11(c) cases versus  
10 in other cases. Because there's nothing that says that  
11 you could not, put on the table, punitive damages on  
12 top of back pay and other compensatory damages during  
13 the settlement discussion process. But as I understand  
14 it, many of the settlements, particularly in 11(c)  
15 cases -- and again, I may be wrong about this. Many of  
16 the settlements in 11(c) cases are reached between the  
17 employer and the employee, with some oversight, but not  
18 actually negotiated by OSHA. It's understanding that  
19 settlement process and how it works for 11(c) cases and  
20 how it works for other cases; and why the outcome  
21 appears to be quite different, which could be, of  
22 course, that, "Well, people don't have anywhere to go

1 and there aren't very many cases that are going to get  
2 actually get litigated by the Solicitor, and so the  
3 back pressure on settlement isn't as great."

4           It would be really helpful, I think, given  
5 how few cases reach the full merit decision that goes  
6 into SOL, and then into litigation. I think it would  
7 be very helpful to get a picture of what happens to the  
8 cases, many of which are settled, and not just  
9 dismissed. Right now, that seems like a black box, I  
10 think. That makes Nancy's question pertinent. It  
11 would be helpful, if you could address that.

12           MR. MABEE: Yeah. We'll talk about both from  
13 the OSHA, and then the Solicitor's perspective. One  
14 thing, just to be aware of also, is, for example, it's  
15 probably not fair to compare, like an 11(c) settlement,  
16 where you've got an hourly employee, who didn't make a  
17 whole lot of money per hour, with a SOX settlement,  
18 where you might have had a CFO of a company, whose  
19 salary was significantly higher. I think that it's  
20 important that -- some of our statutes may not be the  
21 best to compare with each other.

22           But in terms of the settlement process,

1 OSHA's settlement policy is outlined in our  
2 Investigator's Manual. Part of your question was about  
3 the parties negotiating among themselves, with little  
4 facilitation by OSHA. I generally will not, on cases  
5 that I'm supervising -- I'm generally not going to let  
6 an unrepresented complainant just speak with an  
7 unrepresented respondent and try to resolve their  
8 differences, when somebody's been terminated.

9           If both sides have attorneys, I will  
10 absolutely try to get the attorneys together, to see if  
11 they can work it out. With 11(c), we, a lot of times,  
12 have unrepresented complainants. I think that it's not  
13 a good idea to have an unrepresented complainant try to  
14 negotiate their own settlement. That being said, we  
15 try very hard to settle cases, where both sides have  
16 expressed a desire to settle the case. We can't always  
17 do it, and we're at everybody's service to do a full  
18 investigation on the merits, you know where a  
19 settlement is not something that's possible.

20           But our investigators will, early on, talk to  
21 both sides about the possibility of a settlement in the  
22 case. If there's some interest expressed, we'll try to

1 facilitate that. It would probably be better served to  
2 refer you to the Investigations Manual, in terms of our  
3 policy on settlements and how we approve settlements  
4 that we receive, for us to approve. The criteria for  
5 approving those are all in the Manual. We follow the  
6 Manual very closely, when we're approving settlements,  
7 that were negotiated by the parties and then submitted  
8 to OSHA.

9           The settlement agreements that OSHA does,  
10 come on standard language, which is also in the Manual.  
11 So many of our Investigators are able to settle cases  
12 with a very minimum of supervision, by either myself or  
13 Dave. We'll just look at the final settlement before  
14 it's executed. They'll use the language of the  
15 agreement in the Manual.

16           MS. SPIELER: I did read the Manual. I can't  
17 say I memorized it. I don't remember anything in it  
18 that specifically addressed whether the Investigator  
19 should put, kind of on the table, punitive damages  
20 versus compensatory damages, and how that would play  
21 off against reinstatement. It does set out what the  
22 possible areas are and what the unacceptable provisions

1 might be, but it does --

2           As I recollect, the average award, and I  
3 can't remember whether it's with or without  
4 reinstatement, was in the \$6,000 range settlement,  
5 which even if it's some number of months in, even for  
6 an hourly worker, unless they're a part-time minimum  
7 wage worker, sounds pretty low. So, again, I'm still  
8 trying to understand it. Because I think, ultimately,  
9 as the Committee considers, "What do we think about  
10 11(c)?" The question of whether there's inadequate  
11 back pressure, and therefore low settlement, and  
12 therefore --

13           This is not a criticism of what Investigators  
14 do. It's just trying to understand how that happens on  
15 the ground. It's been many years, but I was involved  
16 in these kinds of settlements. I know the eagerness  
17 sometimes, with which, given a large caseload, if the  
18 two parties are willing to consider a settlement, that  
19 will be done without thinking about the larger policy  
20 implications of repeated small settlements. I think it  
21 would interesting to know, at some point, how  
22 Investigators function within the range of damages that

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1 are available under the Statute. I think Jason wants  
2 to get a word in.

3 JASON ZUCKERMAN

4 SENIOR LEGAL ADVISOR TO SPECIAL COUNSEL

5 Hi. This is Jason Zuckerman. Just on the issue on  
6 what is at stake for an employer here? I think, in  
7 order to really look into that issue, it's worth it for  
8 the Department of Labor to speak with other agencies,  
9 who may be able to do more than OSHA. I think a good  
10 example is the NRC. I was involved, when I was in  
11 private practice, in a few ERA claims. Where if the  
12 Department of Labor were to conclude that there was a  
13 violation of the ERA, the NRC would also take action  
14 against that employer for the violation of the anti-  
15 retaliation provision of the ERA.

16 The anti-retaliation provision of the  
17 Sarbanes-Oxley Act is arguably a Securities Law. So if  
18 there has been a violation, then the SEC would be able  
19 to take action against that employer. I think it would  
20 be worth it for OSHA to speak with those other agencies  
21 and look at what they might be able to do, which would  
22 really give employers a much bigger stake in the

1 outcome, and might have more of an impact long-term.

2 MR. BASKIN: If I could address what Ms.  
3 Lessin was talking about? Hopefully, I would say  
4 something helpful. You are correct. Comparatively,  
5 few 11(c) cases have been filed, at least in our  
6 region; I suppose nationwide, in the recent past. We  
7 have filed -- let me think now -- I would say four, in  
8 the last 15 months; and two have already been resolved  
9 by consent judgments. If my recollection is accurate,  
10 at least one of them had punitive damages and emotional  
11 distress damages.

12 I want to talk about emotional distress  
13 damages, for just a moment, if I could. Some of you  
14 might remember the Supreme Court's decision in the  
15 Burlington Northern White case. The court said, "You  
16 can give someone back wages. It doesn't necessarily  
17 make them really whole." Because there's this whole  
18 shock value of being fired. We're not talking about  
19 somebody getting post traumatic stress or becoming  
20 clinically depressed. We're just talking about the  
21 effect of not being able to pay your bills. Just not  
22 having a job, and emotional distress damages cover

1 that. So we've been getting that, at least recently,  
2 for victims, in addition to their back wages.

3 Now, of course, a victim does have the  
4 obligation to mitigate their losses by trying to get  
5 another job. So frequently, the back wages due will  
6 seem comparatively low, but it's really a function of  
7 the fact of the mitigation. That's just the way it  
8 works out. It is important to keep in mind that the  
9 statute, of course, calls for all appropriate relief.  
10 So you can get the compensatory damages -- emotional  
11 distress damages being a subset there -- and the  
12 punitive damages.

13 With respect to the EEOC and the NRC? Some  
14 of our statutes actually cover those sorts of  
15 industries, if you will. There is the Energy  
16 Reorganization Act. There is Sarbanes-Oxley. 11(c)  
17 really doesn't have -- at least, if I can pull it off  
18 the top of my head -- a counterpart agency, other than  
19 OSHA. You know, we're talking here about small medical  
20 offices, small welding companies. At least in my  
21 experience, comparatively small companies. There are  
22 about five different economies in this country.

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1 There's the Fortune 100. There's the middle. There's  
2 the slightly below the middle. Then there are these  
3 comparatively small companies, and that, at least, is  
4 where I've seen the 11(c) cases come from.  
5 Comparatively small employers and nonunionized  
6 employees.

7 MR. MABEE: If I can see if I can address  
8 your question, a little bit more fully. 11(c) is 61  
9 percent of the cases we get, at least as of last FY. A  
10 lot of the settlements we do is before OSHA has really  
11 made a determination on the merits. I think that's an  
12 important consideration for the Committee, in that, if  
13 the parties express a desire to settle the case and the  
14 complainant wants \$6,000 and we get the complainant  
15 \$6,000, and we haven't made a determination on the  
16 merits yet, I think that there's a certain risk, if we  
17 don't allow the parties to settle that case, with their  
18 desired settlement. Then perhaps we complete the  
19 investigation and conclude that there's no merit to the  
20 case. I'm not sure that that would be a better  
21 outcome.

22 Now, what I can tell you, in the cases where

1 OSHA believes there's merit, either in the newer  
2 statutes; we've issued a due process letter. Or in  
3 11(c), for example, we're at the point where we've  
4 referred it to the Solicitor's Office for litigation.  
5 Those cases, we are looking for a make whole remedy.  
6 Settlement negotiations are settlement negotiations, so  
7 you might not always end up with that exact amount.  
8 When we believe there's merit to a case, we are trying  
9 to settle the case for a make whole remedy, plus any  
10 other appropriate damages. As David mentioned,  
11 emotional distress is a real damage. Punitive damages  
12 are real damages; and we have gotten those in  
13 settlements, in the past. I don't know if that's  
14 helpful or not.

15 MS. SPIELER: Yeah. That is very helpful.  
16 Thank you. Go ahead.

17 MS. SLAVET: I don't know if this helpful to  
18 you, Nancy, at all. But it does hit me, from my  
19 experience, at least, that when there is a statutory  
20 provision, that spells out compensatory or punitive  
21 damages with a cap, you tend to have individuals,  
22 regardless of the merit, one way or the other. At

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1 least realize that there is a cap and go there. I  
2 don't know the validity. I'm just offering this. That  
3 the 11(c), of course, doesn't specify the money at all.  
4 It uses legalese.

5 MS. SPIELER: Yeah. Richard?

6 MR. MOBERLY: Richard Moberly, again. I'd  
7 like to just switch gears and talk to you, Mike, about  
8 your role, as a Supervisor of Investigators?

9 MR. MABEE: Sure.

10 MR. MOBERLY: How many Investigators report  
11 to you, and how do you evaluate them?

12 MR. MABEE: Okay. I presently have five  
13 Investigators that report to me. We just recently  
14 added a second Supervisory Investigator in my region.  
15 We have 10 Investigators. They're now split between  
16 two Supervisors. I've, in the past, supervised up to,  
17 I believe it was 12 or 13 Investigators, in my previous  
18 region. In terms of how we evaluate Investigators,  
19 this is all available information through the OASAM,  
20 which is the Personnel Department for the Department of  
21 Labor. But Investigators have standards, that they're  
22 supposed to meet during the course of the year, and

1 they're evaluated against those standards. The  
2 standards for an Investigator contain some of the  
3 duties that Investigators are supposed to do, such as  
4 performing investigations, settlement negotiations,  
5 report-writing, those types of things. So the  
6 Investigators are evaluated on those standards. Is  
7 that what you're asking?

8 MR. MOBERLY: Is it a qualitative measure?  
9 You look at the reports they write, and evaluate them?  
10 Or they're supposed to conduct so many investigations?  
11 It's more quantitative measurements, I guess.

12 MR. MABEE: I try to look at both. I look at  
13 quality. To me, it's much more important to have a  
14 quality investigation than to have a lot of not-quality  
15 investigations. As a Supervisor, somebody is going to  
16 fare better by turning in quality work with me, then by  
17 turning in a high volume of not-so-quality work. I'd  
18 say that I probably look at both. I want my  
19 Investigators to be productive, but I want them to be  
20 turning in high-quality work. In a perfect world, if I  
21 could do it, I would have them turn in a lot of high-  
22 quality work in great volume. That's what I certainly

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1 would like. For the most part, we have a very great  
2 group of Investigators, who work very hard; some faster  
3 then others. I would say, if you're asking me quality  
4 versus quantity, both. But quality, before quantity.

5 MR. MOBERLY: Sure.

6 MS. SPIELER: Marcia?

7 MS. NARINE: Marcia Narine. I also have a  
8 question about measurements, but it goes to training.  
9 Maybe this is not an issue in your region anymore.  
10 Maybe this is an issue that has been resolved, since  
11 some of the GAO Reports. But there was a question as  
12 to the quality and the quantity of the training. It  
13 looks like it was in a few areas. There was either the  
14 question of Supervisors not thinking that people needed  
15 certain training; training that was mandatory, and  
16 people weren't getting it.

17 I remember, when I was in the private sector,  
18 we would, I guess, ding people on their reviews, if  
19 they didn't get training. And in fact, Supervisors  
20 weren't able to get certain bonuses, if their people  
21 didn't go to mandatory training. So in terms of that  
22 issue, especially as there are now 22 Statutes, some

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1 have a motivating factor; some have a contributory  
2 factor. They have a number of different kinds of  
3 areas. I'm particularly concerned if there are not the  
4 proper incentives, or the proper detriments, when the  
5 training isn't done. That may have improved already,  
6 since the GAO Report, in your region. I'd like you to  
7 comment on that, if you could.

8 MR. MABEE: Sure. The GAO Report, I believe  
9 you're referring to, is the 2009 Report.

10 MS. NARINE: I think there was also a 2010.  
11 I read a few.

12 MR. MABEE: Well, what I could tell you, I am  
13 actually one of the trainers. So if you ask me, "How's  
14 the training?" It is great. The trainers are  
15 phenomenal.

16 MS. NARINE: Just if the people would go. If  
17 they would just go. Right?

18 MR. MABEE: Yeah.

19 MS. NARINE: If they'd go.

20 MR. MABEE: There have been significant  
21 improvements, in recent years. We've revamped. We  
22 have two mandatory training courses. That's important.

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1 They're mandatory. Every Investigator has to go  
2 through these courses now. It wasn't necessarily that  
3 way in the past, and I think before the GAO Report.  
4 Perhaps there were Investigators that hadn't been  
5 through the training. Now, the training courses that  
6 we have are mandatory.

7 MS. NARINE: What I'm talking about is -- at  
8 least what I saw the GAO Report was saying it was  
9 mandatory training. That people were not going to.

10 MR. MABEE: Right. Yeah. That is no longer  
11 the case. All of our Investigators have been through  
12 the basic training course, and I believe the vast  
13 majority have been through the Federal Statutes course.  
14 We have a course that deals primarily with just, in  
15 general, discrimination investigations and 11(c). And  
16 then we have a course that deals with many of the other  
17 statutes. They've all been through the basic  
18 Investigator training. I believe the vast majority, if  
19 not all of them, have now been through -- also the  
20 Federal Statutes, with the exception of some of the new  
21 Investigators, who are going to the next courses. We  
22 have been on it, as far as getting our Investigators

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1 trained, after the GAO.

2 MS. NARINE: And just one follow-up question,  
3 if I could?

4 MR. MABEE: Sure.

5 MS. NARINE: So when a new statute comes  
6 online, what's the time period, from the time that  
7 you're told, "You now have Statute Number 23," from the  
8 time that your people, that all of your people have all  
9 gone through training?

10 MR. MABEE: That varies greatly, depending on  
11 a number of factors. Number one, the statute, and what  
12 would be needed, in terms of training. We've done some  
13 training on new statutes via webinar, because it is a  
14 more resource-friendly way to attempt to do training.  
15 In the past, we had done training conferences. I think  
16 you had heard from somebody today. That was the way of  
17 training our investigative force up on new statutes.

18 With some of the statutes -- I'll give you an  
19 example. The Consumer Financial Protection Act. I  
20 know we have somebody from there. That statute was  
21 actually enacted in 2010, but didn't become effective  
22 for OSHA until July of 2011. So it gave us a little

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1 bit more lead-time, to try and put together a training  
2 program. Actually, I was involved in that training  
3 program, for the Consumer Financial Protection Act.

4 Boy, it was great training. I'm telling you.  
5 We were able to get a little more -- and then some  
6 statutes take us a little more by surprise, and we have  
7 to, just as quickly as we can, try to get the best  
8 webinar together to try to train our people, until the  
9 next time we have a conference or a training event,  
10 where we can bring them up to speed. Does that help?

11 MS. NARINE: Yes. Thank you.

12 MS. SPIELER: Greg?

13 MR. KEATING: It's Greg Keating. Mike, I  
14 thought I wrote down, in 2012, the average Investigator  
15 has 25.8 cases, and has 286 days to complete the case?  
16 Is that right?

17 MR. MABEE: Yes. That is correct.

18 MR. KEATING: Is there a desired goal, that  
19 you'd like to get to, to push down -- I have a two-part  
20 question -- that number, 286 days? Relatedly, in the  
21 cases that are not on the 11(c) track, the cases that  
22 can go through numerous different stages, from

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1 investigation to ALJ trial, to ARB, to Circuit Court of  
2 Appeals. Is this suggesting that it's 286 days to get  
3 through the investigation? The first stage?

4 MR. MABEE: Right. Okay. I'll answer your  
5 second question, first. That number would be based on  
6 the OSHA investigation, and not the ALJ, ARB, Circuit  
7 Court. Those would all be kind of separate processes.  
8 What we track is what happens with the OSHA  
9 investigation.

10 As to the first part of your question, your  
11 question was is there a desired number of cases? That  
12 would actually require me to express an opinion, which  
13 I'm not comfortable doing. However, there was an OIG  
14 Report that discussed this issue. So if you were  
15 looking for some information on the issue of desired  
16 caseload, in September 30, 2010, the Department of  
17 Labor OIG did one Report, and then they followed up,  
18 January 20, 2012. In the 2012 Report, they did discuss  
19 the issue of caseload. They did in both of those  
20 Reports. Those are publicly-available Reports, on the  
21 OIG's website. I would encourage you to look at those  
22 Reports, in terms desirable caseloads.

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1 MS. SLAVET: Do you recollect? Can you share  
2 that with the Committee? The numbers?

3 MR. MABEE: Oh, yes. I can.

4 MS. SLAVET: Okay. Can you do that, please?

5 MR. MABEE: The OIG said that, based on  
6 information from OSHA, the desired caseload is six to  
7 eight cases per Investigator. Then, they subsequently  
8 did a follow-up Report, January 30th of this year, in  
9 which they answered Congress' question of, "How many  
10 Investigators would be necessary to do that?" Based on  
11 2011 data, they said, "You would need 146 Investigators  
12 to be able to have a caseload of six cases per  
13 Investigator." That was assuming that the caseload did  
14 not go up from 2011, which of course, we know it did.  
15 But I would encourage you to look at those OIG Reports,  
16 for some very good and detailed analysis and  
17 information on caseload.

18 MS. SPIELER: Eric?

19 MR. FRUMIN: I wanted to ask about a question  
20 that tends to get very little attention. In the  
21 reviews of 11(c), the 11(c) Program, which is the  
22 question of, at the end of the process, in cases where

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1 there's any merit at all. So there was a merit  
2 finding. There was a settlement. It wasn't dismissed  
3 or withdrawn. What measures have actually been taken  
4 to inform the workers, in that worksite, about the fact  
5 that there was an outcome favorable to a worker; and  
6 maybe even a finding, an official finding, that the  
7 employer had violated the law? And God forbid, an  
8 omission, by the employer, that they had violated the  
9 law, and will not do so, again, in the future?

10 That's a common outcome under other statutes,  
11 that you enforce. My impression is, and we've talked  
12 about this. You sent me some of the examples that the  
13 PAPA's case and the exclusive Decorator's case in New  
14 Jersey. A few of them, where you actually went to  
15 court, and got a consent judgment. There were a few  
16 cases where there were actual postings, and sometimes  
17 it's the OSHA poster. But my impression is that that  
18 is much more the exception, then the rule, even in the  
19 universal cases I'm talking about, where there was a  
20 merit finding, or a settlement, or something like that.

21 I just wanted to get your impression, as  
22 someone familiar with the agencies. You've worked on

1 this for a long time. Is my impression correct, that  
2 is it very uncommon? And secondly, that that differs  
3 so markedly, from the process and the outcome in the  
4 other statutes, where, again, my impression is that  
5 it's routine to have postings, in which the employer  
6 essentially admits, "I violated the law. I'm not going  
7 to do it again. Hey, everybody. This worker got some  
8 protection."

9 MR. MABEE: Right. I've been doing this for  
10 14 years, and supervising since 2003. In every OSHA  
11 settlement, that I can ever recall doing, we always do  
12 have the language in there, that the employer agrees  
13 that they will not violate the Act. These are in the  
14 OSHA settlements. Third party settlements may be  
15 different. But in the OSHA settlements, we do have  
16 standard language, that's in the Whistleblower Manual,  
17 that are Investigators use, when they put these  
18 settlements together, that do say that.

19 Now, in terms of what we use for a posting,  
20 in most of the cases we settle, through an OSHA-  
21 negotiated settlement, there will be a posting  
22 requirement. A lot of times, as Eric had pointed out,

1 it may just be the OSHA poster. Particularly, in  
2 cases, where OSHA has not made a determination on the  
3 merits yet, some of the things that we might do is we  
4 may require the employer to put up a poster about  
5 Whistleblower rights. We may require the employer to  
6 distribute the OSHA Whistleblower Fact Sheet. We've  
7 done that, ever since we've gotten the Fact Sheet.  
8 We've done that more and more.

9           In cases where OSHA has come to the  
10 conclusion of their investigation and we believe  
11 there's merit to the case, we're generally going to  
12 require the employer to do a more case-specific Notice  
13 to Employees posting. Those are also described in the  
14 Manual. So we've got a whole range of different  
15 postings that we'll do, for different cases. I don't  
16 have any numbers to give you, in terms of how often we  
17 do just a kind of generic employee rights posting  
18 versus a specific case posting. In my experience, we  
19 do, do the generic OSHA rights postings a lot more  
20 often, because most settlements, we haven't made a  
21 determination on the merits yet. Does that answer your  
22 question, Eric?

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1 MR. FRUMIN: Yeah. Unfortunately, it does.

2 Yeah.

3 MS. SPIELER: Rina?

4 MS. TUCKER HARRIS: Is it fair to say that  
5 when say that when you enter into -- I'm sorry. Rina  
6 Tucker Harris, Consumer Financial Protection Bureau. Is  
7 it fair to say, when you enter into a settlement, no  
8 one is admitting. The company is not admitting any  
9 guilt, that they committed any retaliatory action  
10 against an employee.

11 MR. MABEE: Right. Sometimes we will allow  
12 the company to have a non-admission clause in a  
13 settlement, especially if we have not made a  
14 determination on the merits. Later on, if we have made  
15 a determination on the merits, we may not be as willing  
16 to do that. Perhaps Dave can provide some insight from  
17 the Solicitor's end, on the cases he's settled.

18 MR. BASKIN: Well, when we settle cases --  
19 and I'm focusing here on 11(c) cases, of course -- what  
20 we're really looking for -- as I've said before -- is  
21 the appropriate back wages for compensatory damages,  
22 and if we can get them, some punitive damages.

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1 MS. SPIELER: David, I'm having trouble  
2 hearing you. Can you get closer to mic?

3 MR. BASKIN: I'm sorry. I apologize. In the  
4 11(c) cases, that we've settled, at least recently,  
5 what we've been looking for is the appropriate back  
6 wages, the compensatory damages, and punitive damages.  
7 We've been requiring posting of OSHA Notices, in a  
8 place where they can be seen. We don't want people  
9 posting them behind the toilet tank. We want them out  
10 there, where they can actually be seen, and can be read  
11 by the employees. I'm trying to think of what else --

12 MR. MABEE: The issuance of Fact Sheets on  
13 employers we've done in the past.

14 MR. BASKIN: Yeah.

15 MR. MABEE: I'd like that one.

16 MR. BASKIN: Mike has this whole laundry list  
17 with him, that he can --

18 MR. MABEE: Yeah. One of things we have done  
19 in the past, especially when we believe there's merit  
20 to a case, is require the employer, in the settlement  
21 agreement -- they're agreeing to it. It's something  
22 we're agreeing to. They're going to issue the OSHA

1 Whistleblower Fact Sheet to all their present employees  
2 and all future employees for a specific period. Perhaps  
3 a year, or whatever it is that we negotiate.

4 We do have a range of options. The goal of  
5 which is we want the workers to get the message that  
6 we're out there and that they do have a voice in the  
7 workplace, and that somebody does have their back.

8 MR. BASKIN: I'd emphasize that the usual  
9 11(c) case was a standalone employer. If we were to  
10 see an employer that's a national employer, one thing  
11 that's worth considering is some sort of an enterprise-  
12 wide deal, where they would agree to do training on  
13 11(c) for the employees and for the managers, so they  
14 understand what rights employees have. Many a time,  
15 what you'll see is a violation, that's a function of --  
16 well, it might be a function of a retaliation, it's  
17 also a function of ignorance. If you've got an  
18 employer, as I said, a national one, you want them to  
19 ensure that they will train their employees, so this  
20 sort of thing doesn't happen again. That's a good  
21 idea, if you can get it accomplished.

22 MS. SPIELER: Ava, did you have?

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1 MS. BARBOUR: Yeah. Ava Barbour, National  
2 Union UAW. A slightly different topic here. Can you  
3 talk a little bit about how Investigators handle  
4 deferral to other remedies that a complainant might be  
5 pursuing, like charges with the International Labor  
6 Relations Board; or in a Union, where's they're going  
7 to place a grievance under the Grievance and  
8 Arbitration Procedure. What the standards are, and how  
9 Investigators deal with that?

10 MR. MABEE: Sure. Actually, in our  
11 regulation for 11(c), 29 C.F.R. 1977, it talks about a  
12 postponement of investigations and deferral to  
13 arbitration. That's kind of our official policy. As a  
14 practical matter, we don't generally tend to postpone  
15 investigations. But we may defer to findings of  
16 another agency, such as the International Labor  
17 Relations Board. We may defer to the findings of an  
18 arbitrator, if they've covered the issues brought under  
19 the 11(c) case. And the regulation talks about,  
20 exactly how we look at that, and I believe the Manual  
21 does also. We can defer to cases.

22 So, for example, if a complainant filed an

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1 11(c) complaint with OSHA and an Unfair Labor Practice  
2 charge with the National Labor Relations Board, and if  
3 their charge to the National Labor Relations Board  
4 resulted in them getting their job back and getting  
5 their back pay, there may be nothing further for OSHA  
6 to do, at that point, and we can defer to the NLRB. Or  
7 if the case settles in another forum, we can defer to  
8 the settlement, also. The same with the (inaudible)  
9 arbitration procedures. That's in our regulation.

10 MS. BARBOUR: Just a follow-up. Is there any  
11 thought to remedy? Because the remedies aren't  
12 necessarily -- even if the substantive issues are the  
13 same, the remedies aren't necessarily the same, under  
14 the NRLA or a grievance.

15 MS. MABEE: Right. And that's a great  
16 question. Especially with some of the newer statutes,  
17 also, which may provide for other remedies. To give  
18 you another example, OSHA will not defer, let's say for  
19 example, to an arbitration under the Railway Labor Act,  
20 where there would have been remedies available under  
21 the FRSA, that were not available to the complainant in  
22 the forum that they were in. So we will look at

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1 remedies, to find out whether that forum could provide  
2 the same remedies, that we could provide under our  
3 particular statute, before we made a decision whether  
4 to defer. Does that answer your question?

5 MS. BARBOUR: Yes. Thank you.

6 MS. SPIELER: Let me just add one thing here.  
7 I know that there's an MOU with the NLRB and that it's  
8 being thought about right now, within OSHA. I think it  
9 might be helpful if it would be possible to get the  
10 Committee, at the point at which you've collected them.  
11 If you haven't, to get any MOU's that you have with  
12 other agencies, it may be that there would be  
13 worthwhile advice that we could give. I'm not  
14 suggesting that we do that today. But I do know that  
15 they exist with other agencies, and it's come up a  
16 couple of times today. It might be useful for us to  
17 see them.

18 MS. SLAVET: Let me just address that and  
19 Ava's question. I'm not sure that the MOU's are going  
20 to be that helpful to you, to the extent that I think  
21 they need to be revisited, and revised, and made more  
22 active. So that's one thing.

1           The second thing is, Ava, you're raised a  
2 question, that I've certainly found of concern, in  
3 terms of both remedies and also adequacy of the forum,  
4 which has been a case that has been noted in the  
5 Railroad cases. That is, that the forum in which these  
6 cases were pulled out, were not adequate, in terms of  
7 due process.

8           With regard to arbitration, certainly one  
9 concern, that I have had, and have asked people to look  
10 at, is the issue that, frequently, you will find in  
11 arbitration determinations, that an arbitrator will put  
12 an employee back to work, as of the date the arbitrator  
13 makes the decision. There are some case law, that I am  
14 familiar with, that indicates that that is not an  
15 appropriate way to determine a remedy, because it can  
16 be that is the timing of the arbitrator's decision.  
17 Basing a remedy on that can be arbitrary and  
18 capricious. That's one thing that I've certainly been  
19 concerned about, and taking a look at.

20           MS. SPIELER: Nancy?

21           MS. LESSIN: I just wanted to pick up a  
22 couple threads. One is, for the record, the

1 Steelworkers Union represents very small shops, very  
2 large shops and everything in between. We have 11(c)  
3 cases, that have come out of our multinational steel  
4 companies, our multinational tire companies, and I  
5 absolutely believe what you say about Region 1 and what  
6 you've seen, or Massachusetts, but we have cases, from  
7 all size employers.

8           Secondly, you talked about 60 percent of the  
9 FRSA cases being related to injury retaliation, for  
10 people who report injuries; and 6 percent of 11(c). I  
11 just want to say, from our experience and the research  
12 that we've done, over 90 percent of employers, our  
13 numbers, have some kind of, at least one, policy,  
14 program or practice, that is discouraging workers from  
15 reporting injuries and illnesses. I think one of the  
16 things that we have seen, as a result of that is that  
17 workers aren't reporting their injuries. They're not  
18 being retaliated against, because they're not doing the  
19 reporting, to begin with. That is a very serious  
20 problem.

21           The other thread I wanted to pick up. Mike,  
22 I would love to take a course from you. I think you'd

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1 be the great trainer. But I'm just thinking about  
2 CSHOs. Actually, when they take training, as far as I  
3 know, they usually go to OTI, and they have  
4 instructors, who are instructing the courses and not  
5 somebody who's trying to do double-duty, as a trainer,  
6 as a Supervisor.

7           Is there anything within this Whistleblower  
8 that's looking at more regular routine training? Maybe  
9 that's a job that you would want, but I not -- I don't  
10 want to go there. Again, I want to come back to that  
11 training issue and understand. Is it all that it can  
12 be right now? Can we see some improvement? I know you  
13 don't want to opine on anything, but I think some of  
14 our real understanding of this is going to come from  
15 where the rubber meets the road, which is you guys.

16           MS. SPIELER: Eric?

17           MS. MABEE: I guess there was a question in  
18 there somewhere. No. I certainly am not going to  
19 opine, but I will state the obvious. We have 22  
20 Statutes. We could use some more training.

21           absolutely, no doubt about that. I don't  
22 think I'm speaking out of school, by saying that. I

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1 think that we've done the best we can with the present  
2 resources we have, in terms of doing training. I think  
3 training is a great issue for the Committee to talk  
4 about, and I will leave it at that.

5 MS. SLAVET: Nancy, could you provide those?  
6 Your collection of information, with regard to the 90  
7 percent, that you were talking to? And we can leave  
8 the record open, with Ed's permission, to receive that?

9 MS. LESSIN: The surveys that we have done.

10 MS. SLAVET: Do you have an aggregation that  
11 you would like to provide for the record?

12 MS. LESSIN: We do this regularly, but it's  
13 also in the classes that we give. One of the first  
14 questions that we ask is, "Are any of these practices  
15 here?" It's generally over 90 percent, that are  
16 telling us. We have some surveying that we've done.  
17 We've also just routinely do this, and we find that  
18 there are many, many, many workers, again, in all size  
19 employers, who are not reporting injuries and illnesses  
20 due to either -- the kinds of things that Dr. Michaels  
21 was talking about. The prize programs, or the  
22 retaliation, with punishment. We see everything from,

1 just, again, for the record. Somebody has the  
2 beginning symptoms of carpal tunnel or a repetitive  
3 strain and they report that, and the first thing they  
4 have to do is go pee in a cup. There's automatic drug-  
5 testing for anybody who reports an injury. It's really  
6 all over the map, the kinds of things that we're  
7 seeing. But many of them are covered in the Fairfax  
8 Memo.

9           We're very excited about that. I think one  
10 of the things that we'd like to talk about, is how  
11 really can that move forward? How do we get that out  
12 there? Because I think some of the cases that we're not  
13 seeing, we perhaps, would begin to see.

14           MS. SPIELER: I think I had recognized Eric  
15 before. Go ahead, Eric.

16           MR. FRUMIN: I want to say more about this  
17 issue after the break, but I just wanted to run by you,  
18 what appears to be a kind of conundrum, you have. In  
19 the last two years, 2011 and 2012, you had roughly 400  
20 cases a year under 11(c), which were not withdrawn or  
21 dismissed. Out of that, roughly 20 of them had merit  
22 findings. All the rest, the other 95 percent were

1 settled, one way or another, on your chart. It sounded  
2 like, during your previous description -- in response  
3 to my question about informing workers, employer  
4 admissions, employer postings, employer statements --  
5 that in the cases with merit findings, there's a pretty  
6 clear definitive path, by the agency, and direction to  
7 the employer. There's going to be this information,  
8 that you're going to tell workers, specifically, about  
9 what's happened, and what you've done.

10 But where there's no merit finding, there's a  
11 wide range of practices. If you could just confirm  
12 that that's the case, then we can talk later about what  
13 the effect of that is, in terms of deterrents. There's  
14 very little money involved here, in deterrents under  
15 11(c). Let's admit that. If the deterrents are going  
16 to come from other things, and yet we have this huge  
17 wide range of practices in non-merit cases that still  
18 are "meritorious," because there's a settlement going  
19 on, then there's a disconnect. I'm just trying to  
20 check with you, whether I'm picking up on the reality  
21 here or not.

22 MS. MABEE: Yeah. As I said before, there is

1 a wide range of different tools that we would use in  
2 settlements to try to get the word out to workers,  
3 which can run from just the standard OSHA Rights  
4 poster, up to a specific posting on that particular  
5 case, or issuance of Fact Sheets to workers.

6           The majority of cases that we settle, that  
7 you're looking at on this chart, were settled before we  
8 made a determination on the merits of the case. I  
9 think it's safe to say that the majority of those would  
10 have had probably OSHA postings, such as the OSHA  
11 posters and Fact Sheets, as opposed to the more  
12 specific, "We violated the Act and we won't do it  
13 again," type of posting, that you were just talking  
14 about.

15           MR. FRUMIN: I was just trying to make sure  
16 that I understood that correctly.

17           MR. MABEE: Right. Well, I want to make sure  
18 that I answered your question.

19           MR. FRUMIN: That's fine.

20           MS. SPIELER: Richard, did you have your hand  
21 up?

22           MR. MOBERLY: Yeah. Richard Moberly. I

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1 think I need to apologize to the rest of the Committee,  
2 if I'm the only one that needs this. But I need OSHA  
3 Organizational Structure 101.

4 MR. MABEE: I apologize.

5 MR. MOBERLY: No, no. Because I know in the  
6 top to bottom report, the conclusion was that OSHA was  
7 going to keep the regional structure. Now I know that  
8 Beth's Office has been removed and is now reporting  
9 directly to the Assistant Secretary. I just wondered,  
10 who do you report to, and who do the Regional  
11 Investigators report to? Because we've heard  
12 complaints about different regions enforcing in  
13 different ways. If you could help me figure that out,  
14 I'd appreciate it.

15 MR. MABEE: Or, if you figure it out, let me  
16 know. No. I report to the Deputy Regional  
17 Administrator for Region 1. Beth might be able to talk  
18 more, in terms of the National structure and elsewhere.  
19 The Regional Investigators report to the Regional  
20 Administrator or their designee, in the individual  
21 regions.

22 MR. MOBERLY: So Beth's National Office

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1 actually doesn't -- it doesn't have authority over the  
2 Regional Investigators? Where's the authority behind  
3 there?

4 MR. MABEE: Hard questions go the Beth.

5 MS. SLAVET: To make it short, the answer is  
6 yes.

7 MS. SPIELER: Yes, they do not.

8 MS. SLAVET: Beth's Office does not have  
9 authority. Correct.

10 MS. SPIELER: I was the President Obama  
11 person on the Transition Team for the Department of  
12 Labor, that got assigned to OSHA. I thought I knew  
13 Health and Safety Law, and I got into this morass of  
14 organizational structure. Both in terms of how the  
15 Solicitor's Office functions separately from the agency  
16 functioning, and has different reporting; and how the  
17 Regional Office -- the Regions function versus Central.  
18 It is pretty complex. I think it can be said that  
19 policy issues may be determined centrally, therefore,  
20 through the Directorate. But Supervisory functions run  
21 through the Region. Okay. That's a very different  
22 kind of way of thinking about it. That Supervisory

1 functions actually run up separately, for the  
2 Solicitor's Office and for the agency. Although I  
3 think, in the current, starting with Patricia Smith's  
4 administration, as Solicitor of Labor, as David has  
5 talked about, there's been a much closer -- there has  
6 attempted to be a much closer relationship, in both  
7 enforcement actions and at the policy level between  
8 what is generally referred to as SOL and the agencies.  
9 And that's true, not only for OSHA, but in all the  
10 other agencies. But it is a very complex question.

11 I actually do, before we break, I would like  
12 to know how much you have a sense that Region 1 is  
13 typical of what's going on, or atypical, and how much  
14 there's a range of what's going on in the Regions. I  
15 say this, knowing that Region 1 is actually a terrific  
16 region, in my opinion. Of course, that's it's region I  
17 live in. Right. I think you have an aggressive  
18 Administrator. You have a terrific Regional Solicitor.  
19 You both are onboard, on this issue of really getting  
20 together early on issues. Is that going on in the  
21 other regions? Or do you not want to talk about it?

22 MR. MABEE: It's not that I don't want to

1 talk about it. It would be much more appropriate for  
2 the Committee to look at the top to bottom report,  
3 which discusses the structure in detail and some of the  
4 challenges in the various regions, in much more detail.

5 I will say that I believe Region 1 functions  
6 exceptionally well, since I got there. Actually, I  
7 mean the critical things for me -- and this isn't an  
8 opinion. This is fact. We actually have a Regional  
9 Solicitor, very interested in Whistleblower cases. We  
10 have a Regional Administrator, very interested in  
11 Whistleblower cases; and a couple of decent Supervisors  
12 and good Investigators. That's why Region 1 is  
13 functioning very well.

14 In terms of the other regions, I really can't  
15 speak to that. I think the top to bottom review had  
16 quite a bit to say, about the different regional  
17 structures.

18 MS. SPIELER: Nancy? We are running out of  
19 time for this section. I bet there are people who need  
20 a break.

21 MS. LESSIN: A quick question. I seem to  
22 remember that there was one of the pilots. And I can't

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1 remember Region 2 or Region 3, where there was a direct  
2 reporting from the sort of Whistleblower Office  
3 nationally. There was a pilot like that. In the list  
4 of things that we would get, at some point, I would  
5 love to see how that worked; didn't work; what folks  
6 said about it.

7 MS. SLAVET: I can answer that. It was the  
8 direct reporting pilot. It was in Region 1, and it was  
9 basically determined that it was indeterminate, and  
10 didn't have a fair opportunity, and should be attempted  
11 again with either another region, or with the region,  
12 again, whatever. But it didn't have anything to do --  
13 it was no fault of the regions, in any way.

14 MS. SPIELER: Okay. We had a 15-minute break  
15 on our agenda. We'll take it now, and we'll reconvene.  
16 Dr. Michaels will be rejoining us, at that point.

17 (15-minute break)

18 MS. SPIELER: We're going to reconvene now.  
19 David Raskin is -- Baskin, I'm sorry -- has to leave at  
20 ten to four. I've asked him and Mike to stick with us  
21 for a few more minutes, in case there are any final  
22 questions for him. The Committee has until five,

1 although at least one member may need to leave a few  
2 minutes early. I understand there's a chance the  
3 Solicitor may come by. We may run out of time because  
4 we would like. I have a suggestion about how to at  
5 least think about how we might go forward. I'm  
6 certainly open to alternative suggestions.

7           It seems to me there are two very different  
8 strands of conversation that we've had today. One of  
9 them deals, almost exclusively, with complaints that  
10 come to OSHA and how they are managed by OSHA. And  
11 arguably, those come in two different types: the 11(c)  
12 complaints, which relate directly to OSHA's primary or  
13 core business; and, if you will, all the others, which  
14 relate to, obviously, the same kind of on-the-ground  
15 retaliation perhaps, but have alternative remedies and  
16 other agencies involved. I would see that as 1(A) and  
17 1(B).

18           The second strain that I've heard has much  
19 more to do with external activities by employers. How  
20 do we change employer behavior? I understand that the  
21 deterrents that can be obtained from aggressive and  
22 efficient processing and adjudication of complaints

1 affects external behavior, but there are many other  
2 things that may affect it and OSHA may have a role in,  
3 including what happens, for example, to the Fairfax  
4 Memo. Therefore, I see that second strain as, "How do  
5 you change how the environment, in which people are  
6 functioning outside, separately from the processing of  
7 the complaints that come in, that may or may not be  
8 representative of all the problems out there.

9           Specifically, with regard to Track A, the  
10 first track that I've just enumerated, it seemed to me  
11 that it might be useful to have Mike and David still at  
12 the table, while we have a conversation about next  
13 steps for the Committee. In that regard, those next  
14 steps might be requests for additional information; the  
15 creation of a working group; whether or not we're far  
16 enough along, to shape a working group; or whether we  
17 want to put certain questions on the agenda for the  
18 next full Committee Meeting.

19           So first, let me ask the Committee, do you  
20 feel that the way I've just articulated the issues, is  
21 an appropriate way to proceed? Or does anyone not?  
22 That would probably be -- I should say that I see

1 training as a component of how complaints, themselves,  
2 are handled. I'd like to observe that this whole issue  
3 of what becomes complaint-driven, and how you step back  
4 and develop a strategic idea of how you protect  
5 Whistleblowers is a similar issue, that the Wage and  
6 Hour Division has been struggling with, over in a  
7 situation, where many, many complaints come in, and  
8 turning to strategic enforcement, may mean the  
9 complaints are inadequately dealt with.

10 I think that same tension may exist in the  
11 conversations that we have going forward. I don't  
12 think there are easy answers to that, but it is  
13 something that we should acknowledge and keep in our  
14 minds, as we have the conversation about how to handle  
15 complaints versus how to have effective programs going  
16 forward.

17 So why don't we focus for the next -- well,  
18 ten minutes, if there are any questions for David. But  
19 the next half-hour, on this question of, the managing  
20 of complaints and where we want to take it. I'm not  
21 going to direct this conversation very much. I'd like  
22 people to feel that they can just put their ideas out

1 and we'll try to synthesize them, as best we can, in  
2 order to go forward. Go ahead.

3 DISCUSSION RE MANAGING OF COMPLAINTS

4 MS. NARINE: I have another question, if no  
5 one else does. Not to beat the training horse to  
6 death, but I have a couple of just very tactical  
7 questions. Have you been able to measure the  
8 effectiveness of the training? I ask this, as a person  
9 who's had to implement training, both live and  
10 webinars, and knowing that webinars are a lot easier to  
11 push out. But, a lot of times, they're not nearly as  
12 effective. Are these webinars, where they are live and  
13 people can actually ask questions, by typing them in?  
14 Or are they just kind of computerized?

15 Then the second question is, do Supervisors  
16 in the Office supposed to have additional training, so  
17 that they are considered experts? Or they are experts  
18 in your offices?

19 MR. MABEE: Okay. I believe a three-part  
20 question here. I can give you an anecdote on what the  
21 first part of your question, about the effectiveness of  
22 the training. That would have to do with the Sarbanes-

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1 Oxley Act. When that Act first came out -- what the  
2 Sarbanes-Oxley Act says is, "No company with a class of  
3 securities registered under Section 12 of the  
4 Securities Exchange Act of 1934, or a company required  
5 to file reports under Section 15(d) of the Securities  
6 Exchange Act of 1934, will retaliate against  
7 Whistleblowers for these things."

8           So the first challenge OSHA had was, what in  
9 the world is a company, with a class of securities  
10 registered under Section 12, required to file under  
11 15(d)? What does that mean? You know? What we did  
12 was we figured it out and then we realized that going  
13 through the SEC's EDGAR database, we could determine  
14 whether a company had a class of securities registered  
15 under Section 12, would be required to file reports  
16 under 15(d). We put together a webinar on that. As  
17 one of the people who actually is very involved in the  
18 SOX training, and SOX in OSHA, my phone used to ring  
19 off the hook constantly, really, really with basic  
20 questions about basic companies and whether they were  
21 covered under SOX, so that we could then proceed  
22 forward and do the investigation.

1           So we put together a webinar for all the  
2 Investigators in the country, and then we did  
3 subsequent iterations also, for the Solicitor's Office.  
4 After that, my phone stopped ringing. When I would get  
5 calls, would be on really, really tough cases, where we  
6 had to really kind of dig into the weeds to figure out  
7 whether it was a covered company or not. But, for the  
8 most part, the vast majority of our Investigators, in  
9 the country, now, if you give them the name of a  
10 company, can independently tell you if it's a company  
11 with a class of securities registered under Section 12,  
12 required to file reports under 15(d). So, yes. That  
13 was extremely effective, that particular webinar.

14           In answer to the second -- or maybe it was  
15 the third part of your question. I'm not sure. On the  
16 webinars, that we do, we do them live, and people can  
17 and do ask questions. Questions can come via email, or  
18 via voice. We do that. And then we also archive the  
19 webinars, so that Investigators, who aren't able to  
20 attend that day, for any particular reason, would be  
21 able to use that as a resource, down the road.

22           Another issue with having 22 different

1 Statutes is you don't necessarily get an AIR21 case  
2 every single day. So maybe you haven't had training in  
3 AIR21 in a particular period of time. We try to have  
4 resources available, where Investigators who can get a  
5 case type, that they haven't had in a while, can  
6 refresh themselves.

7 In most of our statutes, we have various  
8 internal experts, around the country, that know about  
9 the statutes. People will, for example, call me on SOX  
10 complaints. If I happen to be looking into a STAA  
11 complaint, that is not my field of expertise, but I  
12 know the people I can call, who know about the Federal  
13 Motor Carrier Safety Administration regulations. We  
14 do, within our group of Investigators and Supervisors,  
15 have people we can call on particular statutes, which  
16 is helpful. I think there was a third part of your  
17 question.

18 MS. NARINE: No. I think that covers it.

19 MR. MABEE: Did I?

20 MS. NARINE: Yeah. Well, I guess I asked --  
21 the question was how do you measure the effectiveness  
22 of the training? I don't know if you have any metrics

1 or anything like that, that you use? Other the survey  
2 results, which you saw, might be old, about how the  
3 actual users thought the effectiveness was.

4 MR. MABEE: Yeah. Perhaps Beth may have  
5 more on that, but I believe, at this point, it's fairly  
6 anecdotal, on the effectiveness of the training.

7 DR. MICHAELS: The weeklong trainings we do,  
8 that's the standard. We impose things like that. I  
9 don't know if we've actually really gone out to see how  
10 things --

11 MR. MABEE: Yeah.

12 MS. SPIELER: I can't hear.

13 DR. MICHAELS: I'm sorry. I'm sorry. David  
14 Michaels. In our weeklong trainings, our standard sort  
15 of evaluations, they don't necessary due the in-depth  
16 evaluation of what happens, a few months down the line,  
17 in terms of the individual. If you have thoughts on  
18 these, we welcome.

19 MS. SPIELER: Dave?

20 MR. EHERTS: With respect to Emily's part 1  
21 and part 2, kind of argument, if we communicate and  
22 encourage employees to use the Whistleblower

1 Protections that they have, that's going to increase  
2 the number of claims coming in.

3 MS. MABEE: Well, actually, if you encourage  
4 the employees to report safety violations, regulatory  
5 violations to the company and then take care of them,  
6 we'll never even know this happened. That's a perfect  
7 world for me. I do not want to even be involved, if  
8 the system is working. I prefer the employees to raise  
9 it to their employer. The issue gets addressed and we  
10 never get a complaint. The only time that we get  
11 involved is if there is an allegation of retaliation.

12 MR. EHERTS: Right.

13 MR. MABEE: You know, for engaging the  
14 Protective Act.

15 MR. EHERTS: But to change the behavior,  
16 which is what Emily would call Part 2, we're assuming  
17 that, when these claims come in, you're going to have  
18 to have the resources and the staffing to respond in a  
19 timely way with high quality. If you don't, then  
20 there's going to be no effect on Part 2.

21 MS. SPIELER: Actually, I confess, and I  
22 talked to David about this, right before. I thought

1 there were actually three strains here. The first one  
2 was managing complaints. The second was encouraging  
3 complaints. And the third one was changing employer  
4 behaviors in ways that would not result in complaints.

5 I actually didn't say number 2, because I  
6 didn't see how it could be conscionable to encourage  
7 Whistleblower complaints, unless we have an answer, to  
8 how they're going to managed effectively.

9 MR. EHERTS: That's my point.

10 MS. SPIELER: Right. But I do think that  
11 there are things that OSHA might be able to do, which  
12 we haven't gotten to, in terms of learning employers to  
13 what appropriate practices are, with regard to managing  
14 how you deal with employees, who come forward, that  
15 might be protective within workplaces, of these  
16 employees and have better results. It may be that the  
17 Labor Representatives here will argue with me on that.  
18 It's entirely possible.

19 When I was saying -- I was not thinking of  
20 the second strain, as more Whistleblower complaints. I  
21 was actually thinking of it as training, or in some  
22 way, encouraging employers to not retaliate.

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1 MR. EHERTS: I like that approach better.

2 MS. SPIELER: I figured you would. In any  
3 event, go ahead, Eric.

4 MR. FRUMIN: So on the question of -- the  
5 last point, Point 2. This Eric Frumin, here. By the  
6 way, for the stenographer, that was David Eherts, who  
7 made the comment before. Just go (inaudible).

8 MR. FRUMIN: On the point about changing  
9 company behavior, or what David has referred to as  
10 culture, two thoughts. This is not so much a question  
11 for Mike. It's just a comment. One is, that in  
12 looking at the performance of management systems -- if

13 I could call it that -- where does the  
14 response to work complaints about -- then you could  
15 pick which thing you want to talk about: violations of  
16 law; health and safety hazards; violations of company  
17 policy; having to do with health and safety hazards,  
18 etcetera. Where does the response to that sit within  
19 the management system? Within that company, on things  
20 not having to do with health and safety? Is there a  
21 protection for people who complain about other  
22 employment problems, broadly read? Because something

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1 tells me, that when you scratch a company, who's going  
2 to beat up on people for reporting injuries; or beat up  
3 on people for reporting out, what they think are  
4 hazards or violations, they would probably do the same  
5 for people who are complaining about being shorted on  
6 vacation pay, or overtime pay, or whatever. Especially  
7 where you're looking at the vast swath of the economy,  
8 where workers are not in unions, low wages, completely  
9 not trained or knowledgeable about their rights under  
10 the law; very distant from any legal process, which is  
11 galloping -- you know, the proportion of that  
12 population, in that situation, is getting bigger by the  
13 minute.

14           To cut to the chase, we can't look at the  
15 health and safety issues in a vacuum, when it comes to  
16 management systems. I think that's not only an  
17 important issue for the Committee, as a whole, but I  
18 would encourage the Management Reps, on the Committee,  
19 to share with us, what kinds of solutions they've  
20 observed, when a company uncovers that kind of  
21 systematic problem. How it comes to the attention of  
22 the front office, we don't know. Some OSHA Inspector

1 shows up and the Head Regional Office gets a call, "We  
2 got a problem on our hands. We got a situation here."  
3 Or all of a sudden, they've got a class action. But,  
4 whatever. They're going to have deal with a broader  
5 array of problems.

6           How do you deal with that? Because if the  
7 Labor Department were better informed about the  
8 systemic approaches to fixing those broken systems, it  
9 could better inform the work that they do, both on  
10 stopping retaliation, as well as other management  
11 system breakdowns.

12           MS. SPIELER: Go ahead.

13           MR. KEATING: This is Greg Keating. I think  
14 Eric makes some very good points. I want to just  
15 harken back to something I said earlier, which is that  
16 I do work with companies of all sizes, being at the  
17 largest management side firm in the country. These  
18 companies are aware that we have a completely changed  
19 landscape right now, as a result of at least three  
20 major things going on. We have a massive increase in  
21 legislative activity, providing more protection to  
22 people who feel they've been retaliated against. We

1 already heard, today, that in the last -- I don't know  
2 -- 10 years, there have been 10 or 12 new Statutes  
3 dumped on OSHA. There are also statutes that are being  
4 created at the State level, and at the Federal level,  
5 every day.

6           Dodd-Frank, we haven't even touched on, which  
7 is their (inaudible), which creates a bounty for the  
8 whistleblower. Employers are not immune or ignorant to  
9 the fact that there's a raft of new legislative rights  
10 and remedies. Similarly, there's been a significant  
11 change in judicial rights and remedies, from the  
12 Supreme Court down to the ARB. There have been a  
13 significant tilting of the landscape, for writing  
14 broader protections, for (inaudible).

15           And third, there has been, as we've heard  
16 today, both at the Department of Labor, and at the SEC,  
17 and other government agencies, they've stepped up  
18 government enforcement. They're more funded. They're  
19 more mobilized. They're more aware of this. This is  
20 not going on deaf ears with the employers. That's all a  
21 prelude to, "So what are they doing about it?" Well, I  
22 can tell you, and I think it's salutatory. It would be

1 wonderful, if part of this Commission, our goal is to  
2 try to further these efforts.

3           Maybe a working group. A working group would  
4 be a great idea. I know of a number of cutting edge  
5 vendors, who are out there now, just stressing all  
6 kinds of new ways in which employers can adopt new  
7 integrated complaint procedures, that are completely  
8 different from before, vesting much more power and  
9 discretion in a Compliance Officer, and really having a  
10 much better response mechanism in place. So that when  
11 an issue is percolated -- and Eric, to your point, it  
12 may not be a safety issue. It might be a wage an hour  
13 issue. It might be a discrimination issue. It might  
14 be a financial fraud issue. When that is raised,  
15 they're in a much better position to track it, to track  
16 the Whistleblower and make sure that adverse action  
17 isn't taken against him or her, etcetera, etcetera.

18           My point is there's a much higher  
19 consciousness among the employer community then I think  
20 people at this table may realize. But this is a very  
21 serious issue, and they need to start thinking about --  
22 in addition to training. Training is taking off.

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1 Online training, live training, manager training, Board  
2 training. It's all happening. Companies that are  
3 aware of the importance of this issue are doing it  
4 more, and others may need to do it more.

5 MR. EHERTS. Good. I'm sorry. This is Dave  
6 Eherts. Back to both of those points, Eric's and  
7 Greg's. I think the strategy is working, because what  
8 good companies put in place is kind of raise our hand  
9 policies, where employees have one place to go, to make  
10 any kind of a complaint, whether it's safety, quality,  
11 financial. Then, to make that work, the companies want  
12 the employee to come to the company first, before they  
13 go to the agencies. They put in place such things as  
14 non-retaliation policies and handbooks. So the  
15 employees are very well aware that they're very safe in  
16 bringing these things forward. If the strategy of the  
17 regulators was to put these things in place, to have  
18 this happen, it does. It succumbs.

19 MS. SPIELER: Richard.

20 MR. MOBERLY: This is Richard Moberly. I  
21 just have a question on that policy. Is that promise  
22 enforceable, do you think, in there? Or is there like

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1 at at-will disclaimer, in that handbook?

2 MR. EHERTS: I don't think anything is. I  
3 don't think the company sees this as discretionary. The  
4 company feels that this is the policy, and this is how  
5 they're going to enforce it. I expect that a  
6 supervisor who retaliates is in a lot more trouble than  
7 the employee who raised their hand.

8 MR. MOBERLY: I think that would be great,  
9 because the experience of the people who've done  
10 surveys of employees, is that as much as the companies  
11 have high levels, these whistleblower hotlines, is that  
12 employees just don't use them. We may be able to  
13 educate employees to use those better. But they go  
14 their supervisors. So part of all of this has to be  
15 some -- there may be all the great intentions in the  
16 world, of the people in the C Suite and the managers,  
17 but if that doesn't get brought down to the supervisor  
18 level, I worry that retaliation is just going to still  
19 happen. Right? Because that's who the people are  
20 reporting to. So I hope you can do some of that  
21 training and have some of those policies, that would be  
22 great.

1 MR. MABEE: Fair enough.

2 MS. NARINE: I think it's kind of a circular  
3 problem you have here. First of all, I keep going back  
4 to the -- this is Marcia Narine -- going back to the  
5 comments that were just made. I don't think, and maybe  
6 it's anecdotal. Maybe your experience is different.  
7 Maybe there are a lot of employers that don't know that  
8 you can't retaliate against employees. I think most  
9 employers, large and small, know you can't retaliate  
10 against employees. I don't think there's a huge amount  
11 of ignorance out there. They might not know it's an  
12 11(c) issue or something like that, but they know it's  
13 not right.

14 The problem, that I think you may have, and  
15 it may be a little counterintuitive, but if people know  
16 that employees are almost always going to lose, some  
17 employers are going to do a cost benefit analysis and  
18 say, "What's the harm?" So if you really want this --  
19 I'm a Management Representative -- okay? -- but I'm  
20 also a person that ran a hotline in 15 countries, and  
21 have spoken to Whistleblowers all over the world, and  
22 I've spoken to them for hours, and days at a time; and

1 I've spoken to managers as well. So I feel like I have  
2 some perspective. If a manager knows, at some point,  
3 "What's the risk that something's going to happen?" And  
4 if the Whistleblower knows, "I don't care what this  
5 policy says. Somewhere down the line, somebody might  
6 come and get me." Everybody's doing a cost benefit  
7 analysis.

8           Part of the reason I was hemming and hawing  
9 so much about the training, is that I'm trying to  
10 figure out, "Can all these Whistleblowers have non-  
11 meritorious cases? Or is it that the -- with all due  
12 respect to the Investigators -- is it that maybe the  
13 training isn't getting at the right issues? Or there  
14 may be skills issues?" I remember training our HR  
15 people on how to -- they might have known the law, but  
16 in terms of how to interview certain people and how to  
17 get certain kinds of information, it was a whole  
18 different skill set. When we did the training, we got  
19 a lot more complaints, but I was fine with that. We  
20 did more training, we got more complaints. Eventually,  
21 it leveled off.

22           Part of what I'm wondering -- and this is

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1 kind of a -- it's a comment -- is, when were looking at  
2 changing how management and culture, management knows  
3 what's wrong. But at some point, management has to  
4 know what the real consequence is. So if I know that 2  
5 percent of SOX Whistleblowers are ever going to be  
6 reinstated or something like that, I know what the law  
7 is. I just don't know if there's that big of a  
8 penalty. I'm talking for the good companies, that are  
9 represented here. I'm talking about the bad companies,  
10 that are going to sit there and think about it. Because  
11 at some point, I think all companies operate on some  
12 level of incentive. What is the incentive for the  
13 company to do better? And what's the incentive for the  
14 good company to get better, but more importantly,  
15 what's the incentive for the other companies to focus  
16 not on tone of the talk, because everybody does that.  
17 But tone at the middle, and tone at the bottom. You're  
18 exactly right. Everybody's focuses on what the  
19 supervisor does. What is the line manager doing? Not  
20 what is the CEO doing, or what's in the Code of  
21 Conduct. So that's where we have to, in terms of  
22 changing corporate behavior, I'd like this Committee to

1 kind of focus on that. You have to have some kind of  
2 penalties. People need to see something happening for  
3 companies, the bad companies to take it seriously.

4 MS. SPIELER: Oh, I'm sorry, Ashley. I know  
5 you've been waiting go get in for a while. Why don't  
6 you go ahead.

7 MS. TUCKER HARRIS: In terms of that, when  
8 you're looking, I know that most of your manners are  
9 probably subtle. In terms of when you're looking at  
10 sort of trying to alter management's culture, in some  
11 cases, you may want to consider that there are certain  
12 terms of your settlement, you're not going to  
13 negotiate. So that means that when they're dealing  
14 with OSHA, in resolving these issues, they set a  
15 certain term, that, "This is our standard settlement  
16 agreement. We're willing to negotiate this. These  
17 standards are in all of our agreements, and we're not  
18 taking them off the table." That's something maybe  
19 OSHA should consider, as it further develops its  
20 program.

21 MR. MABEE: Right. Just in answer to that,  
22 in our Manual, we do have a standard settlement

1 agreement, with standard language. So I think the  
2 question would be, "Is there better language, we should  
3 be using?" Our Investigators cannot deviate from this  
4 language without going through their approval process,  
5 of going to the Supervisor and to the Solicitor in the  
6 National Office. So we do have those standards in  
7 place, but certainly, the Committee should take a look  
8 at our Manual, at the adequacy of those.

9           If I could just respond, briefly, to what you  
10 were talking about with training. I'm an army guy, so  
11 you never have enough training. I think we have done  
12 the best we can with the resources we have, at this  
13 point, on training. If additional resources come for  
14 training -- we could always use more training. But in  
15 terms of whether Investigators are adequately trained,  
16 and if that's a reason for a particular merit rate --  
17 you know, there is a population. These are largely  
18 circumstantial cases. Very rarely, in my 14 years, in  
19 investigating and supervising these cases, have I had a  
20 smoking gun piece of evidence that retaliation  
21 occurred. Honestly, probably less than five times in  
22 14 years; probably substantially less. I can think of

1 two, off the top of my head, where I actually had a  
2 smoking gun or an admission.

3           There are a large population of cases, where  
4 in our gut, we may think there's something to it, but  
5 we can't prove it. You know, it's a circumstantial  
6 case. There were two people in the office having this  
7 conversation. We have two totally different versions  
8 of this conversation. We have no corroborating  
9 witnesses. We have no email. And these can be  
10 extremely tough cases to do. There's probably not much  
11 in terms of training, that would change that dynamic,  
12 in some of those cases.

13           I think training can do a lot of things for  
14 us. It can make us more efficient. We can be better  
15 at understanding the statutes; have to do less research  
16 on every particular case we have, to figure out the  
17 protected activity. There's no downside to training.

18           MS. TUCKER HARRIS: And that's not a cure-all  
19 for anything. I'm just trying to kind of figure out --  
20 you know?

21           MR. MABEE: Right. Yeah. But there's a lot  
22 of dynamics to these Whistleblower cases. But being

1 largely circumstantial cases, and looking at the  
2 difference in the burdens of proof and some of the  
3 statute types. There clearly are some challenges to  
4 Whistleblower cases.

5 MS. TUCKER HARRIS: Right.

6 MS. SPIELER: It is true, across the board,  
7 in the agencies, that the degree of believing that  
8 there's even a prime facie case, or reasonable cause,  
9 or whatever is actually surprisingly low. I mean, we  
10 could have a separate conversation about that. If you  
11 count the settlements, as part of the positive, which  
12 we could also debate, I'm sure. It actually pretty --  
13 it's not atypical for agencies, in terms of their  
14 processing of complaints, in terms of viewing cases as  
15 meritorious. It's actually a little hard to figure  
16 that piece out. Eric?

17 MR. FRUMIN: Two things. One, just to  
18 respond to some -- Eric Frumin -- comments from Keating  
19 and Eherts. So if, indeed, in the twenty-first  
20 century, and in the 2000-teens, there is a broader and  
21 increasing understanding by employers, that any  
22 retaliation policies and practices, and management

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1 systems, must be part of their standard practice, you  
2 wouldn't know it from the way the government behaves in  
3 its dealings with them. We don't see this as a  
4 standard feature in the vast majority of retaliation  
5 case settlements, where, at most, you see a poster,  
6 which is unique to that one individual, but doesn't  
7 piggyback on top of what has just been described as the  
8 twenty-first century management system for dealing with  
9 retaliation. It's unique to that individual. We have  
10 a couple of enterprise-wide agreements, with postings  
11 out there, but not many.

12           You would never know it, in looking at the  
13 resolution of the compliance cases, where there is next  
14 to never, any effort made, either with individual  
15 citation cases and all the settlements that come from  
16 those, or broader settlements, to inform workers that,  
17 "I, the employer, violated this law -- at least I'm  
18 signing this agreement, saying there was a citation --  
19 and workers have a right to complain. And here's our  
20 internal complaint process, and here's the person you  
21 could call, if you know about any violations of these  
22 standards, going forward. Never mind. Here's the

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1 number for the local OSHA Office -- never mind the 800-  
2 number -- right here, in River City, who you could  
3 call."

4           So we have this huge disconnect between  
5 patterns of agency practice, developed over a long  
6 period of time, for whatever reason -- we're here to  
7 change that -- and this new evolving management  
8 practice. I think one of our challenges here, as a  
9 multi-stakeholder group, is to try to kind of resolve -  
10 - not resolve, but link some of these practices, in a  
11 way that's accessible to the agency, given its limited  
12 resources; its invariable silo thinking; its disconnect  
13 from the real -- any problems all of us having, getting  
14 out of own organizational practices. But at least try  
15 to make it easier for them to look ahead and say,  
16 "Okay." In the way, that they are doing in other  
17 areas, with enterprise-wide enforcement;  
18 communications; social apps; or whatever they're doing.

19           "Here's how to connect with what we're doing.  
20 We, the agency, with the real world." We're here to  
21 try to give them advice. I think we can really help  
22 move them along, in those directions, by increasing

1 their own expectations for how they interact with  
2 employers, who supposedly have these systems in place,  
3 or are rushing to adopt them.

4 MS. SPIELER: I'm going to sort of move the  
5 focal point away from Mike and toward sort of a  
6 resolution of how the Committee wants to move ahead. It  
7 seems, in part, underlying this conversation, is this  
8 sense that the employers, who are the subjects of these  
9 complaints don't look like the employers that Greg may  
10 be describing. I'm sure all of us, who have been in  
11 this world for a long time, know that there's often a  
12 disconnect between the people who come forward and  
13 complain, or the people that some of the unions may be  
14 dealing with, and the employers that Littler or ORC  
15 deals with, in terms of their sort of desire to develop  
16 best practices and adhere to them.

17 It has always seemed to me, and it's always  
18 seemed to me, in relation to this Committee, that one  
19 of the challenges has always been, for any regulatory  
20 agency, to link the truth of both of those narratives  
21 together in a way that changes the behavior of the  
22 employers living with the problem. There are some

1 things that have been done, but in large part, these  
2 still remain hugely problematic. I think one of the  
3 great things, frankly, about this Committee, is that  
4 I'm assuming that we will believe each others'  
5 narratives. I've been in a lot of meetings, where  
6 people simply don't believe each other, so the  
7 possibility of coming up with some creative solutions  
8 to this approach is zero.

9 I do think though, that it's about five after  
10 four now. I would like us come out of today with some  
11 idea of our next steps. What information we would  
12 like, if possible, from the agency; when it can be  
13 compiled; what working groups, we think we could put  
14 together at this point, that might address some of the  
15 questions that I think there's a lot of interest and  
16 energy around the table; any advice for the Assistant  
17 Secretary, as to if he's willing to appoint those  
18 working groups; how they might function. So I'd like  
19 to move to that sort of next steps conversation.  
20 There's going to be an endless amount that we're still  
21 going to want to learn, I'm quite sure, and we will  
22 continue to do that, as we go forward. Nancy?

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1 MS. LESSIN: Nancy Lessin, Steelworkers. I  
2 think, in terms of information, I still would love to  
3 see the final evaluation of the pilots. Did we learn  
4 anything there? In the terms of the regional  
5 structures; and what's working and what isn't? What  
6 could be best practices? What have we learned from  
7 that? It seems like that would be useful. In terms of  
8 working groups --

9 MS. SPIELER: Maybe we should start with  
10 requests for information. Go around the room and then  
11 move to working groups. Is that all right with you,  
12 Nancy?

13 MS. LESSIN: Yeah.

14 DR. MICHAELS: Without overwhelming us with  
15 data requests.

16 REQUESTS FOR INFORMATION

17 MS. SPIELER: Yeah. No. You're absolutely  
18 right. Richard?

19 MR. MOBERLY: Richard Moberly --

20 MS. SPIELER: How about we'll take them under  
21 advisors to do what they can?

22 MR. MOBERLY: I'm interested, in large part,

1 because I think employees report, or don't report, in  
2 part, because of a fear of retaliation. But in large  
3 part, the studies show because they fear that nothing  
4 will be done with what they report, on the substantive  
5 side. I think one of the difficult things here is  
6 that OSHA is tasked with only one aspect of that  
7 Report, which is the retaliation side, as opposed to  
8 the substantive violation side, or everything outside  
9 of the OSHA, the safety and health.

10 I understand, from previous discussion, that  
11 there are some Memos of Understanding, with various  
12 agencies, on how they might deal with those underlying  
13 substantive violations. So I'd be interested in those  
14 and what they entail.

15 MS. SPIELER: With the understanding, I  
16 think, that Beth as already indicated that the  
17 Directorate is going to be undertaking a review of  
18 those MOU's, anyway. So it would be a, very much,  
19 "take it for what it's worth." It's a historical view,  
20 not a future view. Of course, if members of the  
21 Committee had specific sort of suggestions, I'm sure  
22 that Beth would consider them, but it's a negotiation,

1 obviously. Marcia, were you about to say something?

2 MS. NARINE: No. I was just thinking of an  
3 example. So, for example, if SOX is the third-highest  
4 number of the complaints you get, and there is criminal  
5 penalties for a SOX retaliation, for example, I wonder  
6 if there was any kind of a connection, in terms of any  
7 agencies that ever worked together in dealing with  
8 those kinds of cases. There might be none. But it  
9 would just be interesting know, in terms of on the  
10 civil side, and on the criminal side, how the agencies  
11 worked together, as it relates to information, that you  
12 may learn in a SOX retaliation complaint. Does that  
13 make sense?

14 MR. MOBERLY: Yes.

15 MS. SPIELER: Eric.

16 MR. FRUMIN: I think it would be helpful to  
17 get more information about the patterns and the  
18 settlements, at least within the range of variation,  
19 that go on. Neither the 11(c) process -- under the  
20 OSHA Act, I'm talking about -- neither the 11(c)  
21 process, nor for that matter, the Review Commission,  
22 for the enforcement side, are participating in Pacer

1 (ph). It's hard to get your hands on these documents;  
2 and, in fact, sometimes you get a, "Sorry." You can't  
3 even get it FOIA. I've had to work my way through that  
4 mistake, sometimes, as well, even with the 11(c) cases,  
5 which is understandable.

6 I'm just saying that you default it with  
7 11(c), which is why we can't give you settlements. We  
8 really could use -- because the settlement cases are  
9 such a vast number of those, that have any merit to  
10 them at all, but we're really in the dark about it. It  
11 would probably be helpful to the agency as well, to  
12 have a better handle on what those patterns are, given  
13 what the range of variation within them, whatever they  
14 are. They all are going to have something in them, but  
15 what's the range of variation?

16 MS. SPIELER: I know you're developing  
17 performance metrics. I want to make sure that the  
18 Committee doesn't somehow work across purposes. I  
19 don't know the extent to which the performance metrics,  
20 and how you're working with them would be available to  
21 us. I'll leave that to you. But I do want to make  
22 sure that you aren't developing performance metrics

1 that the Committee is going to were are the wrong ones.  
2 You know? To the extent, that that's possible to have  
3 in a dialogue, it would probably be useful. Nancy?

4 MS. LESSIN: Along those lines, I would love  
5 to see, maybe the thinking about performance metrics,  
6 but I'd also like to see data. I think that was Eric's  
7 first thing. However, we heard the story about Eric  
8 saying something about data. That, again, I think  
9 identifying where things are working and why; and where  
10 things may not be working; and what's going wrong. That  
11 means looking at different data metrics, but broken out  
12 by region, in a way that maybe some best practices  
13 could be seen. Again, I would put the caution of, you  
14 can do this right or you can hide it under the rug. I  
15 want to see real kinds of meaningful data. But I think  
16 that would be useful.

17 MS. SPIELER: In the agency's defense, I  
18 think they would too. As I understand it, there's a  
19 lot of work being done on that. The rate at which it  
20 will be accomplished is, unfortunately, neither in  
21 Beth's, nor David's hands, but involves a lot of other  
22 people. I have also expressed an interest in having

1 more extensive data, region-based. I think that if it  
2 doesn't come forward quickly, it's not because it's not  
3 being shared with the Committee.

4 DR. MICHAELS: This is David Michaels. Let  
5 me add. There are some real challenges. We've really  
6 been thinking about improving, first, the data that we  
7 do collect. Now, we clearly have to do a better job.  
8 But the underlying questions are very difficult to  
9 answer. There is no correct merit rate. We have to  
10 think about innovative ways to measure the quality of  
11 our work. So we're thinking about that. That, in the  
12 long run, would be something that would be very useful,  
13 to have some discussion about.

14 MS. SPIELER: Terrific. Okay. Why don't we  
15 make a note, that we may want to put that kind of  
16 discussion on the future agenda? Okay. Moving on.  
17 Working groups. Nancy, I'm going to turn back to you,  
18 since I cut you off.

19 WORKING GROUPS DISCUSSION

20 MS. LESSIN: So I had a couple of thoughts. I  
21 can think of about 100 working groups, I'd like to see.  
22 I think, definitely, the issue of Rail. A working

1 group, that since there's nobody on the Committee from  
2 Rail, and Rail is such an important piece of the puzzle  
3 here. A working group, that maybe is focusing on the  
4 issues that are happening in Rail. What's working and  
5 what isn't; and best practices; and what else needs to  
6 be done? So that was one group.

7 I would love to see, personally, in addition  
8 to that, a group that's looking at proceeding on the  
9 larger issue of workers being retaliated against when  
10 they report injuries, either by not getting prizes or  
11 being punished, and beyond the Fairfax Memo. How to  
12 really that issue forward. Because it is so prevalent  
13 in every workplace, where I talk to workers. Inside  
14 and outside the Steelworkers Union, it is a huge issue.  
15 I think that there are some real challenges beyond the  
16 Memo, of how to really move forward with that. That  
17 could be a group.

18 MS. SLAVET: This is Beth. Nancy, if you  
19 were going to give that group, working group, a name,  
20 how would you characterize it?

21 MS. LESSIN: Employer Incentive and  
22 Disincentive Programs, that are discouraging. They're

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1 reporting systems, injuries, illnesses. Yeah. I'll  
2 come up with it.

3 MS. NARINE: I would think managers would  
4 call it a Safety Bonus Group. Do you know what I mean?  
5 Because I think the management side people would think  
6 of it as a safety bonus.

7 MS. LESSIN: Except there's also --

8 MS. NARINE: I know. But it's a punishment.

9 MS. LESSIN: Yes. Yes.

10 MS. NARINE: I'm just saying, from the way  
11 they look, they would call it a Safety Bonus, in the  
12 workplace, because that would be --

13 MS. SPIELER: What?

14 MS. NARINE: A Safety Incentive, or a Safety  
15 Bonus. So if you want it shorthand.

16 MS. SPIELER: Actually, just because I  
17 suspect the three of us will end up in some  
18 conversations about these working groups, to what  
19 extent, Nancy, are you focusing these thoughts on how  
20 do we change employer behaviors outside of -- I'm still  
21 stuck in my paradigm. Outside of the complaint, how do  
22 we reach employers on these issues, and if not that,

1 exactly what are you thinking about?

2 MS. LESSIN: I think there are many levels to  
3 this. One is how can OSHA best pursue cases, in this  
4 arena? We heard about one in Michigan, that has just  
5 moved forward. In our experience, we're seeing some  
6 very problematic things happening. Again, the law of  
7 unintended consequences. We have long talked about the  
8 issue of when somebody reports an injury, they get  
9 disciplined for inattentiveness, or not paying  
10 attention, or whatever. We know it's really because  
11 they reported the injury, and that is something in the  
12 Fairfax Memo, that is laid out. This use of violation  
13 of safety rule, when it's a pretext.

14 So now, since the Memo, some of the practices  
15 that we're seeing is, when somebody reports an injury,  
16 a whole group of workers in the area are getting  
17 disciplined for not doing that rule. Are you following  
18 me here? So that then, the employer says, "Well,  
19 obviously, it's not a pretext. We are just enforcing  
20 this rule, that nobody knew about." Now it's a whole  
21 group of people. Then OSHA will, perhaps, look at this  
22 and say, "Well, since the whole group got disciplined

1 here, this doesn't fall within it. We know that if the  
2 person didn't report the injury, nobody would have  
3 gotten disciplined."

4           There's a lot that's going on out there.  
5 This is a huge issue. In my experience, and I've been  
6 tracking this for 34 years, it is not getting better.  
7 We're actually seeing some less prize programs. You  
8 know, the lottery for the truck. We're seeing a lot  
9 more discipline kinds of things. I think the issue is  
10 thinking through how OSHA can best implement this Memo.  
11 Is there anything else? But also talking about how to  
12 stop employers from doing this.

13           Are the sanctions that OSHA comes up with  
14 enough to get employers, who are doing this, to not do  
15 this? If that isn't the case, what else maybe needs to  
16 happen? Should there be an absolute prohibition on  
17 these kinds of programs, rather than just waiting for a  
18 Whistleblower case?

19           MS. SPIELER: Richard?

20           MR. MOBERLY: Richard Moberly. I'd like to  
21 see a working group on something roughly called  
22 outreach. It has two aspects to it. The first is what

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1 we've talked about, with providing, to employers, who  
2 are interested, in good faith, and having a state-of-  
3 the-art best practices systems. What can we, as an  
4 expert group, provide? Or what can OSHA provide, as an  
5 expert group? Things that the great companies are  
6 doing, to encourage and protect Whistleblowers.

7           Then the second part of that outreach would  
8 be to employers, themselves. What could OSHA do to  
9 inform employees of their rights, that they aren't  
10 doing already? Maybe they're doing everything, now  
11 already, that they can do. I think some employees may  
12 benefit from knowing a little bit more about what their  
13 rights may be, and perhaps what the dangers are, given  
14 the statistics. Just some more education and outreach  
15 to that group as well.

16           MS. SPIELER: Dave, you were just, a thumbs  
17 up, there? Eric?

18           MR. FRUMIN: I agree with the recommendation  
19 fir the Rail working group, and I would ask whether  
20 it's possible to extend that to Transit Rail. Because,  
21 even though, if I understand correctly, they're not  
22 covered by the FRSA, State Plans will cover them. So

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1 we have major transit rail systems: New York, City  
2 Metro -- You know, the MTA, which they don't have the  
3 benefit of FRSA coverage, but New York State PESH, has  
4 the obligation to protect them.

5 MS. SPIELER: Actually, it turns out OSHA may  
6 have some coverage.

7 MR. FRUMIN: Okay.

8 MS. SPIELER: I'm going to let Mike say --

9 MR. FRUMIN: Then we don't need any of it.  
10 Well, let's add Transit Rail.

11 MS. SPIELER: Yeah. Let's say Transit.

12 MR. FRUMIN: Transit Rail. So that's one.

13 Then on Moberly's suggestion about outreach, to  
14 employers, which, if I understood you correctly, said  
15 something about identifying best practices. Or  
16 identifying ways that employers can do right. Do the  
17 right thing. I think it's important to identify models  
18 for good management systems, to prevent retaliation.

19 OSHA is very familiar with boilerplate  
20 descriptions of safety and health management systems,  
21 whether it's its own guidelines, the NZT 10 Standard,  
22 and so forth. But there's very little discussion, in

1 them, about managing a complaint process, a reporting  
2 process; and more important, preventing retaliation. I  
3 was just looking at the NZT 10, you know, 2010. Nothing  
4 in there about it, and yet there's all this discussion  
5 about incident investigation. All the ways the workers  
6 can run afoul, you know, of the powers that be, and  
7 trigger latent inclinations to retaliate. So I think  
8 we need to expand -- we need to help, we. We need to  
9 help OSHA expand it's view of management systems, to  
10 focus specifically on managing the threat of  
11 retaliation within a corporate management system.

12 MS. SPIELER: That sounds like a -- it's very  
13 similar to some of the ideas that have been put out,  
14 with regard to figuring out what's going on out there?  
15 How are these systems being managed? Are they working?  
16 There may be some very concrete recommendations this  
17 Committee could make to OSHA, with regard to both the  
18 management system questions, and also other guidance  
19 that could be put out.

20 Certainly, of a very long time, under sexual  
21 harassment policies, there have been alternative  
22 mechanisms for dealing with complaints. They don't

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1 always work. Nothing always works. It seems to me we  
2 ought to be able to bring it together, a working group,  
3 that really takes a look at some of that; brings it  
4 back to the Committee, and then we can talk about  
5 recommendations.

6 By the way, as I understand it, there was a  
7 little bit of a side conversation here, and I think I  
8 mentioned, this morning, that it is possible for the  
9 Assistant Secretary to put on working groups, non-  
10 members of the Federal Advisory Committee. Certainly,  
11 for a Rail group, we would extend that and bring some  
12 people in from the industry, to be part of the working  
13 group. That would be up to this Assistant Secretary,  
14 when he puts together the working groups. It is not a  
15 barrier. It will also, I think, if we go ahead with  
16 that working group, correct. I think a missing piece  
17 on this Committee. It might make a lot of sense.

18 MR. KEATING: It's Greg Keating. And just to  
19 that point, I think also, on the...

20 MR. FRUMIN: What did you call your working  
21 group, again?

22 MR. KEATING: Outreach.

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1 MS. SPIELER: It's not really outreach.

2 MR. KEATING: I just made it up.

3 MS. SPIELER: It doesn't matter what we call  
4 it.

5 MS. SPIELER: Yeah. On that group, I think  
6 that there are a number of very cutting edge sort of  
7 vendors, in different spaces. Whether it be an  
8 industry group, that are nonprofit, focused on  
9 corporate ethics of compliance; or some of these actual  
10 providers, that are really becoming more robust, these  
11 days. I think hearing their input on what our best  
12 practices, and ways of stopping the problem before it  
13 happens, would be a help.

14 MS. SPIELER: Yeah. And that could be done  
15 either through the working group, or we could ask them  
16 to come speak to the Committee, if that makes the most  
17 sense, in the working groups' view. That's very  
18 helpful. Are there other sort of 11(c)-focused, or  
19 process-focused, complaint processing-focused issues?  
20 Actually, I'm fascinated, that after this extensive  
21 discussion, really, none of the recommendations with  
22 regard to working groups have zoned in on those

1 questions. We've asked for data, but we haven't  
2 thought that -- maybe it is premature for us to think  
3 about a working group that looks at the processing of  
4 complaints. But none of the suggestions, that have  
5 been made so far, kind of focused in on that. Yes,  
6 Christine.

7 MS. DOUGHERTY: Christine Dougherty, the  
8 State of Minnesota. One of the things that we didn't  
9 even really touch on, in terms of complaint numbers, is  
10 the online complaint system and what that's generated  
11 and where that's going, in terms of the whole process.  
12 Is Federal OSHA going to be ready, when that system's  
13 in place, to do the evaluation and assignment of those  
14 that come in from -- are you going to have a central  
15 hub? Are you going to have individual regions taking  
16 them? Just looking at that form, that raised a whole  
17 bunch of flags for me, in terms of just the sheer  
18 numbers. Because if you can put down anything on those  
19 forms, somebody, at least, has to work to look at it  
20 and decide, "Is this appropriate for a (inaudible)?"  
21 And then, what do we do with it?

22 MS. SLAVET: I would just point out that, to

1 the extent that we have that problem, in getting oral  
2 complaints -- in some ways, having an electronic  
3 complaint may actually be of an aid. Because,  
4 obviously, taking an oral complaint is incredibly  
5 labor-intensive.

6 MS. DOUGHERTY: But you still have to  
7 evaluate it?

8 MS. SLAVET: Yes.

9 MS. DOUGHERTY: The oral complaints, at  
10 least, in the State of Minnesota, when it comes in,  
11 it's one of two Investigators, that look at it and make  
12 the decision. If it's an iffy one, you know, there's  
13 questions, we talk about as a group. We talk with our  
14 supervisor. But we get an answer back to because  
15 really quickly, as to whether or not we're going to  
16 take the complaint, or it needs a referral, or what the  
17 problem might be, if there is one. But when stuff  
18 comes in over the internet in a complaint, you have to  
19 have that same ability to respond, and respond quickly,  
20 and send people to the right places. Because you don't  
21 want it sitting and find out that really where they  
22 needed to be was Human Rights, and now maybe their time

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1 lapsed on that. A different agency that covers it, or  
2 even a State agency versus a Federal agency, because  
3 everything will come in. You know?

4           That are a lot of agencies that do take  
5 complaints via the internet. I don't know what their  
6 experience has been, in terms of complaints that are  
7 actually focused to the agency that they need to be?  
8 Because sometimes when people are surfing on the web  
9 and find somebody that actually has a Complaint Form,  
10 they'll hope that it gets to the right place. They'll  
11 fill it out and send it. Or they might send 15  
12 complaints, all on different days, different times.  
13 Something happened to them.

14           Because we didn't talk about that at all  
15 today, and I don't exactly know where it would fit in  
16 our process here. Just some discussion about what's  
17 going to happen with all of those? What kind of  
18 timeline are you on? Like you said, you submitted it.  
19 I was looking at the form, and I don't know if anybody  
20 else looked at the form, but there were some things  
21 that I thought -- when something comes in, when I'm  
22 personally asking questions, I have a whole lot more

1 than you have on that form, to the person, when they're  
2 filing a complaint.

3 MS. SLAVET: I think, to some extent though,  
4 in some ways what you're saying in implicating, is  
5 really, it involves our screen-out process, as opposed  
6 to a complaint, which is a whole question we haven't  
7 talked about at all. We've talked about how we process  
8 complaints, and we've been only really counting  
9 complaints, as opposed to counting screen-outs. I  
10 think, in my mind, what I'm addressing, in some ways,  
11 that by actually having an electronic form, that asks  
12 some of those questions, we, in some ways, are  
13 providing ourselves a better mechanism to ensure that  
14 our screen-out may, in fact, be -- is working, or not  
15 working. Because now, we actually take in complaints,  
16 not only on the telephone, but things that just come  
17 in, in a letter or a correspondence.

18 MS. DOUGHERTY: I know. I see those.

19 MS. SPIELER: Yes. I think I'm going to have  
20 to cut this conversation off, because I think it's  
21 probably something that's going to come up at a  
22 subsequent meeting. Certainly, given where we are in

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1 the process, it's unlikely it's going to be something  
2 we'll look at in the interim, between the meetings.  
3 With apologizes.

4 DR. MICHAELS: Although anybody can send us  
5 comments. It's out for public comment. If you have  
6 suggestions, we'd love to see them. Just send them to  
7 us directly, not through the Committee.

8 MS. SPIELER: Yeah. Jason?

9 MR. ZUCKERMAN: Jason Zuckerman. It might be  
10 helpful, actually, to have a working group, that would  
11 look very closely at how all of the complaints are  
12 processed at OSHA, that would look at every step of  
13 that process. I might be able to offer some practical  
14 ideas for how the agency could deal with this, this  
15 huge new influx of claims. One of the things it could  
16 look at is whether the agency has had any success yet  
17 with the ADR. Where I work, at the OSC, we also have a  
18 huge, huge influx in new claims of reprisal. We've  
19 been able to use ADR very, very well. So far, we've  
20 had an ADR success rate of over, I think, 60 percent.  
21 Probably higher, actually now. So it might be helpful  
22 to have a working group, that would look at those

1 issues and offer, hopefully, some very practical ideas  
2 for OSHA, on how to deal with this huge increase in new  
3 claims.

4 MS. SPIELER: Eric?

5 MR. FRUMIN: Well, this is not a suggestion  
6 for a working group, but an issue that I just want to  
7 comment on. It looks like we're done taking  
8 suggestions. When you asked about 11(c), so I'd like  
9 to suggest something about 11(c), that I alluded to  
10 earlier, a couple of times.

11 MS. SPIELER: Why don't you go ahead. What  
12 I'm going to suggest, actually, because there have been  
13 a number of ideas thrown out, some of which intersect  
14 with each other. Is that I'll be in communication with  
15 Beth and David about what the Assistant Secretary and  
16 the Office here, feels might be useful at this  
17 juncture. Then we'll get back in touch with this  
18 Committee and ask for volunteers of the working groups,  
19 and ask for suggestions about outside members, for  
20 those groups, as well. Then it'll go back to Beth and  
21 David's office, to sort out and appoint those groups.  
22 If the Committee is comfortable with that, as a

1 process, then the floor is open for any and all  
2 comments, including additional ideas about working  
3 groups. With no commitment being made that they will  
4 all be functioning in this next period.

5 ADDITIONAL IDEAS

6 MR. FRUMIN: On the 11(c) question, so I  
7 referred, in regard to this posting issue, about the  
8 linkage between 11(c) investigation and compliance  
9 investigations. I think that's really an underrated  
10 area of work for the agency. But it is, I think,  
11 increasingly the reality for an OSHA complainant, for  
12 workers who file complaints with OSHA, about the  
13 underlying hazards.

14 Putting aside the Mendelson clients, it's a  
15 pretty bad jungle out there. It's gotten to the point  
16 now where employers, who, as Marcia has pointed out,  
17 don't worry about the consequences, are pretty brazen  
18 and ruthless, in going after people who file complaints  
19 with OSHA or State OSHA about violations of the Act,  
20 violations of standards or hazards.

21 I think maybe there was a time, when you  
22 could look at these separately. But I think right now,

1 they're just organically -- they're just joined. It's  
2 impossible, I think, now, for workers, who file  
3 complaints about underlying hazards, to realistically  
4 be protected, given the brazenness of the retaliation  
5 that's happening. I say this from bitter, personal  
6 experience, just in the last year, with some pretty big  
7 companies, who knew they were under the gun, and who  
8 have tested the patience of this case. California  
9 Labor Officials, but it could well be the case with  
10 Federal as well. The brazenness of the retaliation  
11 against complaints, filing complaints under Section 8,  
12 is getting pretty bad, and it's not limited to OSHA.  
13 Other State and Federal Statutes as well.

14 I'm not sure how we approach this as a  
15 Committee, or for that matter what to recommend to the  
16 agency, or to the Office of Whistleblower Protection,  
17 how to approach it. But you've got regional offices.  
18 You've got area offices, as Mike described, who are  
19 looking at these things together. My hunch is there's  
20 a better way to integrate those investigations, of  
21 looking for remedies, which can figure out how to  
22 single-out that kind of brazenness and deal with it.

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1           MS. SPIELER: It sounds like -- this has come  
2 up, not only in regard to 11(c), but also in regard to  
3 the coordination with the external agencies that have  
4 the substantive laws in their jurisdiction. It might  
5 be an issue that we really want to spend some time on,  
6 at the next Committee meeting, I think. Because it's  
7 fairly complex, but out of it, we might be able to have  
8 some ideas about how to take it forward, with  
9 recommendations. Part of that might be the MOU's, but  
10 that might be a secondary issue within in.

11           I'm going to pause for a minute, because I  
12 was not watching, but we've been joined by Solicitor,  
13 Patricia Smith. I wanted to welcome you and know  
14 whether you'd like to say anything to the Committee?

15           PATRICIA SMITH

16           SOLICITOR'S OFFICE

17 First, I want to say thank you to Michael, for inviting  
18 me. I do want to say that this is an incredibly  
19 important Committee. I want to echo how important  
20 these issues are to the Department. I just came from a  
21 meeting with the EEOC. I don't know if you know this,  
22 but retaliation is the number one complaint, which is

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1 filed at the EEOC. They have more retaliation  
2 complaints then they have discrimination complaints. We  
3 find this issue across our agencies.

4 In MSHA, we just filed more retaliation  
5 reinstatement complaints, last year, then they filed,  
6 ever. I'm about to run out to a meeting, about  
7 Retaliation Remedies Under the Fair Labor Standards  
8 Act. In OFCCP, we had a discussion, about last week,  
9 about what do we do about retaliation. It really is a  
10 huge issue, so it's very important work. I thank, all  
11 of you, for devoting your time and your energy to  
12 thinking about it. It's very important to workers and  
13 it's very important to Labor Management relations in  
14 this country. Anyway, thank you, and hopefully, we'll  
15 be at a future meeting.

16 DR. MICHAELS: Thank you so much.

17 MS. SPIELER: Thank you. So there were hands  
18 up and I'm trying -- Yes, Marcia?

19 MS. NARINE: I have a couple of more data  
20 questions, if we can open the floor back up for that. I  
21 don't know if you will have this information. I've  
22 seen lots of studies that show how many people in the

1 workforce believe they've suffered retaliation or that  
2 kind of a thing. Does OSHA have that information, in  
3 terms of what percentage of the national workforce has  
4 filed OSHA complaints, or something like that? I don't  
5 know if that would even exist someplace.

6 DR. MICHAELS: I don't believe we have any  
7 data of this sort. There are some plans to include  
8 some questions about worker voice in some national  
9 surveys.

10 MS. NARINE: Right.

11 DR. MICHAELS: We don't have that yet. We  
12 certainly don't have numbers. You raised an  
13 interesting question. We'll certainly look around to  
14 that. But if other people know sources of this data,  
15 we'd be very interested in seeing it.

16 MS. NARINE: And the second question is,  
17 since you mentioned the EEOC -- I apologize, if this is  
18 in some of the materials. I didn't see it. I know the  
19 EEOC regionally and nationally nominates companies for  
20 awards, for good works that they've done, whether it's  
21 training programs or other kinds of things. Has OSHA  
22 done that in the past? Because I think we've talked

1 about kind of brazen, terrible things that some  
2 companies have done, but I think there's also a lot of  
3 really great companies out there, that should also be  
4 recognized, if they've done things.

5           Because, by the way, the Fairfax Memo, I  
6 think would be surprising to a lot of managers.  
7 Because they think it's probably a good thing. They're  
8 obviously the managers that will say, "Now, you've  
9 messed up the bonus for everybody, and you're  
10 ostracized." On the other hand, those that think that  
11 they're raising their safety metrics, probably think  
12 it's a great thing. To show the employer community,  
13 "This is what we think is great, and here's an example  
14 of Kraft -- or whatever it is -- a great program." Is  
15 that something that OSHA has done in the past?

16           DR. MICHAELS: Well, certainly Kraft and  
17 Schakowsky would be the first ones.

18           MS. NARINE: Since he hasn't said anything, I  
19 thought I'd just (inaudible).

20           DR. MICHAELS: In the Whistleblower Program,  
21 we haven't done anything like that. But part of this  
22 discussion is what should we do new for the

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1 Whistleblower Program? We have recognition programs in  
2 the safety and health world.

3 MS. NARINE: Right. Right. Those I know  
4 about. Right.

5 DR. MICHAELS: But we have not done anything  
6 like this. We interested in thinking about everything.  
7 That's the point of getting this group together.

8 MS. SPIELER: Nancy.

9 MS. LESSIN: This is Nancy Lessin. There are  
10 a couple things. One is, I just want to point out what  
11 I'm seeing as a disconnect. Maybe there's a reason for  
12 this. I think, on the one hand, we're hearing about  
13 how employers are taking this more seriously now, and  
14 for certain reasons. Then we're hearing that there's  
15 more reutilization complaints than ever. Maybe it's  
16 because people don't file complaints, if they don't  
17 think anyone's going to do anything about it. Then  
18 this administration, they see this being done. Still,  
19 if things are going so well, I wouldn't expect to see  
20 this rise in complaints. I just wanted to put that out  
21 there.

22 I think, in terms of working groups, that at

1 some point, it might be worth having a group looking at  
2 the regional structure and how it happens and what are  
3 some best practices? I don't think we can even think  
4 about doing that till we get the evaluation of the  
5 pilots and some more information. But at some point,  
6 looking at the regions, and where the rubber meets the  
7 road, and what's working, and what isn't, would be  
8 worth doing.

9           Then my pushing the envelope issue would be  
10           -- I think we have heard, and those of us who  
11 have been involved in this, understand that some of the  
12 problems, with 11(c), in particular, are that 11(c) has  
13 not been brought into the twenty-first century. There  
14 are legislative fixes, for example: increasing the  
15 number of days, private right of action. One question  
16 I have, is could this Committee, if we wanted to, make  
17 a formal recommendation to the Assistant Secretary, to  
18 go forth with whatever can be done to support to  
19 legislative changes?

20           MS. SPIELER: I think the Committee can make  
21 recommendations to the Assistant Secretary. As to how  
22 he then deals with them, that is obviously an

1 administrative matter. At some point, the frustrations  
2 in our discussions about 11(c), that also back to  
3 Marcia's points, may very well lead us, I think, to  
4 feeling that some kind of report, or recommendation,  
5 that enumerates the inadequacies of 11(c), as we have  
6 come to understand them, and makes recommendations or  
7 simply enumerates them, might be useful, I think. At  
8 some point, we could certainly have a working group to  
9 puzzle over that.

10 I was joking with someone in Region 1 about  
11 this, because they are, and justifiably so, very proud  
12 to have brought four 11(c) complaints in the last 15  
13 months. But I told that to someone else, who said,  
14 "That's all?" And I said, "Well, it all depends on  
15 where you started." Right? They are phenomenally  
16 labor-intensive, those cases. So having litigated  
17 discrimination cases myself, in Federal Court, it's  
18 like the last place you want to be, to do an individual  
19 case.

20 I think we are caught in a system here, in  
21 terms of some of the work that the Committee could do,  
22 that could easily lead us to feel that the only

1 solutions are those that are really outside the  
2 capacity of the Committee to address, and we can say  
3 that.

4 I think we're running out of energy here.  
5 Unless there's objection, I would -- or final thoughts  
6 that people want to share, I would suggest that we turn  
7 this information and thinking over to the Assistant  
8 Secretary and the Director and that they, in  
9 consultation with me, come up with some proposal about  
10 working groups, that we will share with you, and that  
11 will, obviously, also be public, and that we'll go from  
12 there.

13 Based on how that evolves, a decision will be  
14 made, probably by them, not me, as to whether we will  
15 try to meet again, in say June, versus say September.  
16 If there's no objection to any of that, I would  
17 entertain a motion to adjourn. Wait. Whoops.

18 DR. MICHAELS: I just want to take the last  
19 moment to thank Emily, who I think has really been an  
20 extraordinary Chair. We expected as much of her, and  
21 that was why she was chosen as Chair. She has guided  
22 this meeting very well. I think we're all very

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1 fortunate that she volunteered for this position. I  
2 want to thank all of you, for taking this on.

3 MS. SPIELER: As I told David, I spent my  
4 last 10 years chairing faculty meetings. Motion to  
5 adjourn.

6 MR. EHERTS: So moved.

7 MS. NARINE: Second.

8 MS. SLAVET: Second.

9 MS. SPIELER: Any objection? Thank you, all,  
10 very much for coming, and I look forward to working  
11 with you in the coming months.

12 (Whereupon, the meeting was adjourned  
13 at approximately 4:49 p.m.

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1 CERTIFICATE OF COURT REPORTER

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