

## **Tiger Team Wells Fargo Draft Report**

December 16, 2016 draft

### **Executive Summary:**

On September 8, 2016, Wells Fargo agreed to pay a fine of \$185 million to various state and federal agencies, including \$100 million to the Consumer Financial Protection Bureau (CFPB) as a result of investigations into Wells Fargo's practice of "cross-selling" where employees were pressured into opening up about 2 million fraudulent customer accounts. About 5,300 employees were fired over a five year period for related bad behavior/performance issues.

As a result of a Senate hearing, on September 22, The Honorable Elizabeth Warren asked the Department of Labor to open an investigation into whether Wells Fargo has violated the Fair Labor Standards Act (FLSA) with respect to its account executives, bank tellers, branch managers, and customer service representatives.

On September 26, Secretary of Labor, Thomas Perez, informed Senator Warren that given the serious nature of the allegations, the recent actions of our Federal partners, and recent media reports, he directed the enforcement agencies within the Department to conduct a top-to-bottom review of cases, complaints, or violations concerning Wells Fargo over the last several years.

Additionally, there were multiple media reports which alleged that some Wells Fargo employees had filed Whistleblower complaints with OSHA, up to 5 years ago, and were never interviewed.

In response, on October 5, the Occupational Safety and Health Administration convened a Tiger Team which was comprised of staff from the Regions, Directorate of Whistleblower Protection, Office of the Assistant Secretary, and Office of Communication as well as support from the National Solicitor of Labor – Fair Labor Standards Division.

The Tiger Team was tasked to review all closed and open Wells Fargo Whistleblower cases to determine what OSHA knew about these Wells Fargo Whistleblower cases, the extent of these cases, how could cases be open so long, why complainants were not interviewed timely, how did OSHA Leadership not know about it, and how does OSHA prevent it from reoccurring.

It was initially decided to focus Tiger Team activities on the OSHA Region 9 San Francisco regional office since: the State and Federal Lawsuits focused on the Wells Fargo Corporate location; there was wide spread media attention on both the Lawsuits and the settlements; and OSHA was receiving adverse media attention on its alleged mishandling of several Wells Fargo Whistleblower complaints, many of which were assigned to their office.

The Tiger Team identified immediate resource needs for Region 9. Particularly since Region 9 did not have an Assistant Regional Administrator for Whistleblower (ARA/WB) (position was vacant). Teri Wigger, Region 2 ARA/WB was asked to report to San Francisco on October 11.

Ms. Wigger was quickly able to assess the Whistleblower challenges the office was struggling with and as a result of communications with the Tiger Team and support from OSHA's senior leadership, additional resources were deployed to provide assistance. Throughout the Tiger Team's activities, OSHA Senior leadership regularly communicated to the Regional Administrators and their management staff the priority of this investigation. In all cases, when the Tiger Team identified the need for additional resources or Regional/National support, it was granted.

Region 9 assistance included: processing FOIA requests; screening new WB complaints; processing existing WB cases through the Alternative Dispute Resolution (ADR) process; identifying the 45 oldest Region 9 cases and redistributing them to other Regions for Investigation; and centralizing the responses in the National office to numerous Media inquiries.

In conclusion, it was determined that the OSHA San Francisco regional office WB section experienced the Perfect Storm. They struggled with an untenable case load, low number of Investigators with little or no experience, two Investigators who were fired for lack of performance, a lack of an Assistant Regional Administrator for the WB program and senior level management turnover.

**Background:**

On December 21, 2013, the L.A. Times published an article which indicated about 1,000 Wells Fargo employees were fired because of staff production issues related to the practice of Cross-Selling.

On May 4, 2015, the City of Los Angeles Attorney, Michael Feuer, filed a lawsuit claiming that Wells Fargo victimized their customers by using pernicious and often illegal sales tactics to maintain high level of sales of their banking and financial products.

On September 8, 2016, Wells Fargo agreed to pay a fine of \$185 million to various state and federal agencies, including \$100 million to the CFPB, the largest fine ever collected by that office. Other agencies included the Office of the Comptroller of the Currency (OCC) and authorities representing Los Angeles.

On September 20, 2016, John Stumpf, Chief Executive Officer and Chairman of the Board of Wells Fargo, was asked to appear and give testimony at the Senate Banking Committee oversight hearing. Then, on September 29, Mr. Stumpf was asked to provide testimony to the House financial services committee. In both cases, Mr. Stumpf was questioned about the Corporate wide practice of "cross selling" and the "Great 8" initiative where staff were pressured into opening up to 2 million customer accounts, many of which the customer was unaware. In the end, about 5,300 employees were fired over a five year period for related bad behavior/performance issues.

As a result of the Senate hearing, on September 22, the Honorable Elizabeth Warren asked the Department of Labor to open an investigation into whether Wells Fargo has violated the Fair Labor Standards Act (FLSA) with respect to its account executives, bank tellers, branch managers, and customer service representatives.

On September 26, Secretary of Labor, Thomas Perez, informed Senator Warren that given the serious nature of the allegations, the recent actions of our Federal partners, and recent media reports, he directed the enforcement agencies within the Department to conduct a top-to-bottom review of cases, complaints, or violations concerning Wells Fargo over the last several years.

In response, on October 5, the Occupational Safety and Health Administration convened a Tiger Team which was comprised of staff from the Regions, Directorate of Whistleblower Protection, Office of the Assistant Secretary, and Office of Communication personnel as well as support from the National Solicitor of Labor – Fair Labor Standards Division.

The Tiger Team project was managed by Robert Hooper, the former Deputy Regional Administrator of Region I - Boston.

#### **Tiger Team Staff and Roles**

The Tiger Team convened on October 5, 2016 and reported directly to OSHA's Senior Leadership. On day one, an incident command type model was used to create a Tiger Team organizational chart which: took into consideration span of control; identified significant tasks; created teams and team leaders; and was scalable as the work load shifted. It was also decided that a Sharepoint site be developed and populated with Wells Fargo related documents. Permissions were identified and training was provided to team members.

Robert Hooper, Tiger Team Leader

Teri Wigger, ARA/WB Region 2. She performed three separate temporary duty details to Region 9 through mid-December to act as ARA/Whistleblower.

#### ***Open case file review team:***

Michael Mabee, Assistant Regional Administrator/Whistleblower – Region 1 Boston. Deputy Tiger Team Leader, Wells Fargo Open case review team leader, and OSHA WB subject matter expert.

(b) (6), (b) (6), (b) (6) worked on the Case File Review team and was responsible for initially reviewing the Closed Wells Fargo Whistleblower files and then later transitioned to the Open case file reviews.

Kirk Sander, OSHA Chief of Staff, acted as the Liaison between OSHA and the Department. As a member of the Open case file review team, he also played a key role in coordinating and establishing an effective system to process Wells Fargo related CCUs.

***Closed case file review team:***

Mary Ann Howe, Assistant Regional Administrator/Whistleblower Region 5 – Chicago. Wells Fargo Closed Case File team leader, OSHA WB Subject Matter Expert, and participated in 3 details to Region 9 as Acting ARA/WB.

(b) (6), Whistleblower Investigator, from Region 5 worked on the Case File Review team and was responsible for reviewing Closed Wells Fargo case files. Additionally, he was tasked by Assistant Secretary Michaels to conduct a study of the number and types of complaints, since 2010, which were filed against the largest Financial Institutions including: J.P. Morgan Chase, Bank of America, Wells Fargo and Citibank. The Assistant Secretary was interested in determining if the Wells Fargo cross selling practice might extend to other Financial Institutions.

(b) (6), (b) (6) reviewed closed case files before transitioning to the open case file review team.

Katelyn Poe, Fair Labor Standards Attorney

Jesse Grauman, Fair Labor Standards Senior Attorney

Jim Morlach, Fair Labor Standards Attorney

Christine Han, Fair Labor Standards Attorney

***Data Team:***

(b) (6), DWPP Program Analyst, served as the (b) (6) and was responsible for running hundreds but more likely more than a thousand reports to fulfill scores of data requests from the Tiger Team, Media, OSHA Leadership, OSEC Leadership. Additionally, the data team provided IMIS reports in preparation for and as a follow up to both the Senate Banking Committee Staff hearing as well as the Senator Franken’s inquiry from the Subcommittee on Employment and Workplace Safety. (b) (6) and her staff, consisting of (b) (6) and (b) (6), were outstanding in their performance in continually being able to produce the requested information within unrealistic timeframes.

(b) (6), DWPP Program Analyst, served as a team member on the Data Team with (b) (6) and (b) (6). Among numerous other data requests, (b) (6) tracked and updated Open and Closed Cases both before and after September 8, 2016. Included in her analysis were the number of “cross-selling” cases, number that were untimely, and those that were referred to the Security and Exchange Commission (SEC) and to CFPB. Her contributions were also vital to the success of the Wells Fargo Tiger Team. (b) (6) duties included posting updates on the SharePoint site where all the Wells Fargo related documents were being stored.

(b) (6), Special Assistant, developed a Survey Gizmo which was used to capture about 60 data points during both the Closed and Open case file reviews. The identification of the data points were a coordinated effort by the NSOL and OSHA. (b) (6) was also responsible for conducting data-mining and creating graphs that showed numerous critical WB statistics; many of which were used during Assistant Secretary, OSEC, Secretary of Labor, and Senate Banking Committee staff briefings, and in response to Senator Franken's inquiry from the Subcommittee on Employment and Workplace Safety.

***FOIA/Press team:***

(b) (6), DWPP Program Analyst, served as the Team (b) (6) related inquiries. He worked extensively with the Office of Communications including: Nancy Cleeland, Chris Durso and (b) (6). (b) (6) was the liaison between OSHA and both the CFPB and SEC. He worked with the CFPB to draft an interagency MOU. He was involved with the Landing Page assignment and providing a "link" between the CFPB and DWPP's web pages.

(b) (6), (b) (6), was the FOIA team member who was responsible for: separating the Wells Fargo responsive documents from the "raw" records provided on the "O" drive, identifying and segregating potential exemption 4 documents, sanitizing the remaining responsive documents, and establishing folders that identify the records by the number on the spread sheet as well as the name and case number of the record.

Nancy Cleeland, Deputy Director of the Office of Communication worked with the FOIA/Press team and was responsible for writing briefing materials including talking points for Assistant Secretary Michaels' presentation before the Senate Banking Committee staff hearing. She also provided the Tiger Team Leader daily news clips directly related to Wells Fargo and their cross-selling tactics.

(b) (6), Office of Communications, worked on preparing numerous responses to Media inquiries including Reuters, NBC Bay Area TV, New York Times, and CNN Money. He also assisted in developing talking points for David Michaels when he appeared before the Senate Banking Committee staff hearing on September 27th.

***Customer Service Team:***

(b) (6), Road Detail to DWPP. (b) (6) was the team leader for the Customer Service team. One of the first assignments which (b) (6) eagerly tackled was to create an electronic Organizational chart of the Wells Fargo Tiger Team which included identifying all the team members' roles as well as the respective team leaders they would report to. A separate organizational chart identified the other significant players including OSEC, NSOL, FLS, and the Office of Public Affairs. (b) (6) uploaded all open Wells Fargo cases to SharePoint and continues to do so as new cases are filed. (b) (6) also provided critical support to the data team and she enthusiastically embraced her shifting role despite how challenging or demanding it was.

***Operations Team:***

(b) (6), Special Assistant. (b) (6) was the team leader for the Operation's section of the Wells Fargo Tiger Team. She was responsible for tracking internal assignments; maintaining a Wells Fargo calendar; assisting with populating the SharePoint site; tracking, coordinating, and reporting out on OSEC assignments and Agency response, ensuring that all briefing materials for both the Assistant Secretary and OSEC/Secretary were complete and accurate; and acting as the Liaison between the Tiger Team War room and the OSHA front office.

***Other DWPP Tiger Team Members:***

Anthony Rosa, Deputy Director of the Directorate of Whistleblower Protection Program. Anthony was responsible for the Wells Fargo e-Correspondence and updating the Partner Agency referrals between OSHA, CFPB and the SEC. He also provided information on the Agency response to the latest Office of the Inspector General Whistleblower audit.

Christine Stewart – DWPP Chief of the Policy Division. Christine coordinated several field requests for information and provided direction to her staff throughout the Tiger Team effort. She also participated in meetings and pre-meetings/briefings with both OSHA Leadership and the OSEC.

***National Office Solicitors who were involved in Tiger Team Operations:***

Megan Guenther served as the Liaison between the National Office Solicitors, the Field Solicitors and the OSHA Tiger Team. Megan worked hand in glove with the Tiger Team to help establish guidance to the field on Wells Fargo open cases. She participated in meetings and pre-meetings with OSHA Leadership and the OSEC. Megan also participated in the weekly ARA/WB and Field WB Counsels in which she provided specific direction/clarification to the field. Megan was instrumental in ensuring effective coordination and communication between the two Agencies.

The following National Office attorneys were involved with review of Wells Fargo case files:

Katelyn Poe, Christine Han, Jesse Grauman, Jim Morlath.

***Additional Folks who provided assistance to R9 during this period:***

(b) (6) provided Alternative Dispute Resolution assistance.

Case screening assistance was provided by:

(b) (6) assisted with reducing the backlog of Region 9 cases.

(b) (6), Region 7 Whistleblower investigator followed (b) (6).

**Process:**

Consistent with Secretary Perez's response, communicated to Senator Warren, OSHA enforces 22 separate whistleblower laws, including those under the Consumer Financial Protection Act (CFPA) and the Sarbanes-Oxley Act (SOX). The OSHA Whistleblower Protection Program received a number of complaints from Wells Fargo employees over the past five years under both the CFPA and SOX. The majority of the whistleblower cases that OSHA investigated against Wells Fargo in the last five years have been concluded, through settlement or other actions. In some cases, OSHA determined that the complaints had no merit under whistleblower laws that OSHA enforces. OSHA continues to investigate at least a handful of complaints from former or current Wells Fargo employees.

As a result of Secretary Perez' request to OSHA, the Tiger Team was asked to review the entire docket of both closed and open Wells Fargo cases received since 2010 to examine the handling and disposition of those cases, including the extent of OSHA's coordination with their Federal partners. It should be noted that given the statutory timeframes and the potential age of the closed cases, it may not be possible to provide recourse under the whistleblower laws that OSHA enforces. The Tiger Team's direction was to determine what the facts are, what we can do about them, and how can we learn from this situation. The Tiger team was also focused on working with the Federal partners to identify any appropriate recourse that individuals might potentially have.

Assistant Secretary, Dr. David Michaels testified on October 27<sup>th</sup> at the Senate Banking Committee hearing. In part, he stated that in 2005, OSHA had 61 investigators 1,934 cases. In 2016, OSHA opened 3,321 cases, with 88 investigators nationwide. He said that the cases have become much more complex as OSHA investigates financials and none of the progress OSHA made excuses the handling of several whistleblower complaints filed by former employees of Wells Fargo bank. OSHA learned that in at least one case, a complainant waited five years before being interviewed by OSHA while her case was moved from investigator to investigator in the San Francisco office. Furthermore, he emphasized that this is unacceptable and OSHA has launched a comprehensive review of the Wells Fargo whistleblower cases since 2010 to understand how this happened and ensure that it never happens again.

In addition, OSHA will be carefully and expeditiously reviewing all of the open Wells Fargo cases on their docket. Experienced staff were deployed to the San Francisco regional office where most of the Wells Fargo cases occurred and where the most intense media attention existed. The Tiger team reviewed all of the closed Wells Fargo cases since 2010 to determine if they were handled correctly and what lessons we can learn from these cases.

Consistent with the stated background, the Wells Fargo Tiger Team established its structure, provided initial assignment instructions and began to: organize its efforts to provide Departmental, Agency, and Media requested data; finalize the survey gizmo; review open and

closed case files; process FOIA requests; create a structure and process for incoming Wells Fargo related Controlled Correspondence (CCUs), populate the SharePoint site, identify Field resources including an Acting Assistant Regional Administrator for Whistleblower in Region 9; generate guidance documents and Field Instructions; and create briefing materials for the Assistant Secretary. The Tiger Team was assigned a conference room on the 3<sup>rd</sup> floor which became known as the War Room where the Tiger Team members would meet daily.

The Tiger Team also identified immediate resource needs for Region 9. Particularly since Region 9 did not have an Assistant Regional Administrator for Whistleblower (position is vacant), Teri Wigger, Region 2 ARA/WB was asked to report to San Francisco on October 11. An ARA rotation was established between Teri Wigger (October 11-November 1, November 14-18, December 12-16) and Mary Ann Howe (October 31-November 10, November 21-December 9).

(b) (6) was asked to provide assistance to Region 9 from October 24 – November 25. As of November 2, he was assigned 10 Region 9 cases.

Case screening assistance was provided by:

(b) (6) assisted with reducing the backlog of Region 9 cases from October 24 – November 25.

(b) (6), Region 7 Whistleblower investigator assisted with screenings from November 28-December 23.

Additionally, 45 backlogged cases were reassigned to the Regions using a Prioritized Redistribution Scenario model based on the current case load/investigator. The decision was made not to include Region 3 because their current case load was also much higher than the national average.

As part of the Region 9 aid package: Teri Wigger mailed the Region 9's 45 oldest cases to the regions for reassignment. The Tiger Team sent the list to each region on November 3, and requested the names of the investigators assigned to each case. (b) (6) coordinated with OITS to have the investigators assigned in IMIS and tracked any resulting IMIS issues. DWPP was advised that they should monitor these cases and any 11(c) cases needing legal advice will need to be coordinated through Bruce Brown, Region 9 Whistleblower Counsel. It is likely that enforcement of any issued Due Process Letters as well as preliminary reinstatement orders will occur in a Region 9 located District Court.

With the anticipated volume of documents and data which the Tiger team was expected to generate and review, document organization and document version control were day one established priorities. All staff were asked to ensure that the time/date were included on all draft



documents. Additionally, a dedicated SharePoint site was created and extensively used to create the Wells Fargo Whistleblower SharePoint Subsite. The repository subsite can hold 500GB of data and has the following folders: 1) Media Cases (with spreadsheets tracking articles involving Wells Fargo and complainants, 2) Reports, Letters, and Memos, 3) D&S 4) Historical Charts, 5) Closed Cases (case files on closed Wells Fargo Cases from 2010 to September 8, 2016), 6) Updates – Decisions & Assignments, 7) Tiger Team Deliverables, 8) Wells Fargo Policy Documents, 9) Open Cases (a repository for all open cases involving Wells Fargo), 10) Untimely Case Filings, 11) CCU, 12) Tracking Charts (data charts updated daily concerning Wells Fargo), and 13) Background Materials.

The Subsite was the platform that DWPP, the Regional Offices, RSOL, Office of Public Affairs (OPA) and FLS could use to effectively share data in some organized and controllable fashion. Most case files were too large to e-mail and the O drive is not accessible to SOL or OPA. The Subsite was also used, for example, to allow coordination of media documents with OPA or case files with FLS. The Subsite was updated regularly and provided version control for Excel spreadsheets.

It was determined that “permissions” would also be important so the following Tiger Team members were granted Owner Rights: (b) (6), and (b) (6) (DAP), who performed SharePoint training for the Tiger Team, had Owner Rights. The other members of the Tiger Team, certain attorneys in FLS, two staffers from OPA, and staff members from the Office of the Assistant Secretary (OAS), and OSHA’s Office of Communications (OOC) had Member rights. Finally, RSOL and specified regional staff were given read-only access to the Open Case files.

The primary members of the data team were: (b) (6), and (b) (6).

The staff completed their assignments using multiple sources of information including IMIS case summaries and search data, emails from Regions, staff-built spreadsheets, and survey gizmo data. More specifically, the data team:

- Created three separate Daily Update documents showing key data points related to open & closed case reviews, incoming complaints, CCU and E-Correspondence information which tracked allegations and apparent timeliness of OSHA response. These documents were updated on a near-daily basis.
- Worked with Tiger Team leadership to continue to improve and augment the daily report documents in order to meet the shifting data needs of the Tiger Team and executive staff.

The Data Team ran over 180 separate IMIS reports, per request, in order to create spreadsheets detailing:

- Average Days to Complete Investigations (by Statute & Region) FY07- FY16.
- Averaged Days Open Cases are Pending (by Statute & Region) FY07-FY16.
- CFPB/SOX complaints received FY06-FY16.
- Whistleblower Determination Data – all regions/all statutes – FY05-FY16.
- Whistleblower award amount data (by statute) FY05-FY16.
- Oldest Cases by Statute Report.
- Oldest Pending Investigations in each Region.
- Backlog Reduction Data Report – FY16 update.

The Data Team ran numerous IMIS searches in order to provide data on:

- Any additional SOX/CFPA complaints against Wells Fargo subsidiaries (FY10-FY16).
- Open & closed cases against Wells Fargo (daily) with information on cross-selling allegations, CFPB/SEC referral data, and apparent timeliness.
- Detailed Spreadsheet for Open, Closed, and Closed 2007-2009 cases against Wells Fargo with allegation summaries, etc.

Using data from multiple sources including IMIS reports, staff-built spreadsheets, and survey gizmo data, the data team:

- Created a series of charts in a consolidated chart pack that could be used for quickly gleaning program trends over time as well as regional comparisons. For example, focus areas included changes in caseload, changes in performance metrics (e.g., average days to screen complaints), and identifying “outlier” cases.
- Created simple one-page summaries of current case activity to provide key pertinent information.
- Developed a system for collecting consistent data across cases that could be used for subsequent reporting purposes.
- FY16 determination data (by Region) Chart (all determination data).
- Review of Oldest 20 Cases Pending in each Region.

***Recommendations:***

- Continue to make updates to improve the efficiency of the whistleblower information database, such as improving the reports available, and improving ad hoc reporting capabilities.
- Provide additional reports-related training/cross-training to all DWPP staff (to ensure that multiple staffers have the capability to respond to a variety of data requests).
- Devote sufficient resources to the OIS transition project to allow whistleblower data management to successfully transition to the new OIS environment.
- Explore avenues for additional tracking of data related to referrals of complaints to partner agencies.
- Explore ways to refine/expand the types of statistical reporting that DWPP performs on a quarterly and annual basis.
- Explore ways to use data OSHA has to better identify allegation trends across Regions.
- Explore ways to work with Regions in order to develop new ways to share non-IMIS data in order to identify allegation trends across Regions.

***Lessons Learned:***

In order to facilitate a more effective management overview of both the Regional and National Whistleblower program, it is imperative that OSHA identifies a core list of metrics which could be used on a Data Dashboard.

- Integrate a quality control process into all data reporting to identify and resolve any issues or discrepancies as early as possible.
- Clearly identify source of data in all reports (including information about when the data was run).
- Establish ways to ensure consistency of data point reporting (e.g. determine an authoritative source of data, such as a data column from a specific report).
- Establish clear chains of communication for requesting and providing data.

**Controlled Correspondence (“CCUs”)**

As of November 2, 2016, the Tiger Team had received and processed 36 total CCUs. As of that date, 5 were still open and 31 had been completed.

The CCU Records were maintained on the Tiger Team's SharePoint site, which contains three folders. Each will be described in the procedures below.<sup>1</sup>

Documents > CCU

✓ Name	↓ Modified	Modified By
Old CCU responses	October 11	(b) (6)
CCU Processed	October 7	Mabee, Michael - OSHA
CCU Incomings	October 6	(b) (6)

**Procedure:**

The Tiger Team (Kirk Sander) established a streamlined procedure with CCU for the handling of Wells Fargo related correspondence.

1. CCU would upload the incoming Wells Fargo related CCUs to the Tiger Team SharePoint site ("CCU Incomings" folder) and update the Tiger Team CCU tracking spreadsheet.
2. From there, the Tiger Team would triage the CCUs and assign them for response.
  - a. Correspondence that appeared to be a possible complaint was sent to the appropriate region for screening.
    - i. If the correspondence resulted in a complaint, the IMIS docket number was used to close the CCU since OSHA would then be tracking through IMIS.
    - ii. A few correspondences were closed for lack of cooperation after the regions made several attempts to contact the complainant.
    - iii. Region V volunteered to provide an initial screening for those complaints that could not be geographically identified.
  - b. The Tiger Team answered any CCUs that required only a simple reply by email (simple requests for information) and one where an individual requested a phone call from OSHA.
  - c. CCUs were assigned to DWPP if they required a more substantive response.
3. Once a response had been made, Kirk Sander would notify CCU of the response and the CCU would be closed.
4. All CCU related emails were kept in Adobe Acrobat Email Archived (grouped by CCU number) and saved to the Tiger Team SharePoint site ("CCU Processed" folder). These records should be maintained (either by DWPP or CCU).

<sup>1</sup> SharePoint Site located at: (b) (7)(E)

5. In addition, the Tiger Team reviewed three (3) Wells Fargo CCU correspondences received prior to September 8, 2016 and the responses. ("Old CCU Responses" folder). The responses were found to be appropriate.

The distribution of CCUs (as of November 2, 2016) was as follows:

Region/Section	
Tiger	14
DWPP	5
1	0
2	1
3	0
4	4
5	4
6	2
7	1
8	1
9	4
10	0
<b>Total</b>	<b>36</b>

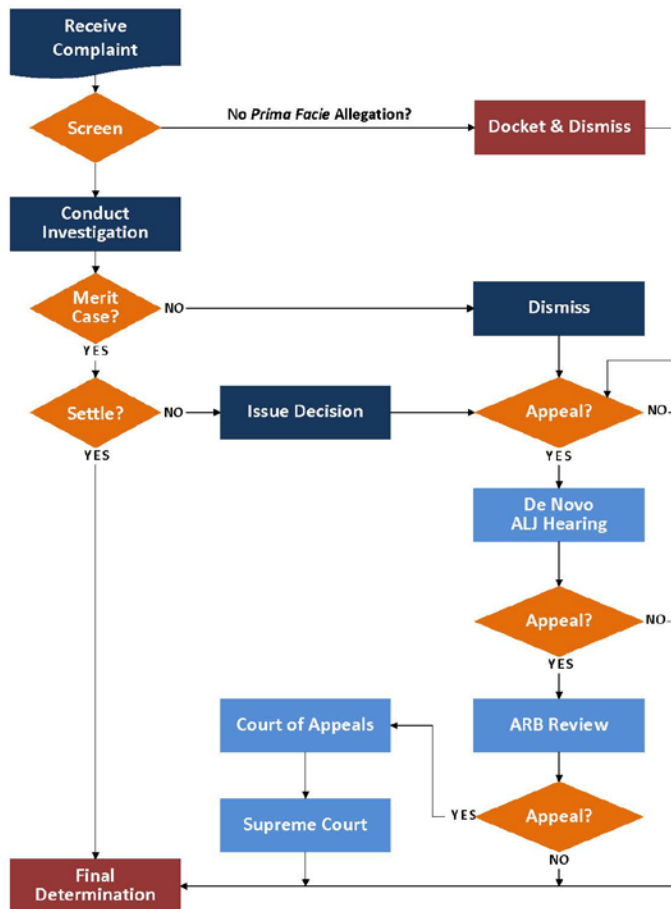
***Recommendation:***

This CCU system should be maintained for Wells Fargo Related CCUs for the duration of the DWPP Wells Fargo oversight period.

The Tiger Team also created a Whistleblower Complaint Process flow chart specifically for Sarbanes-Oxley (SOX) and Consumer Financial Protection Act (CFPA) complaints. See below.

# Whistleblower Complaint Process

*Sarbanes-Oxley Act (SOX) and  
Consumer Financial Protection Act (CFPA)*



\*At all decision points, investigators must consult with their supervisor, and RSOL when necessary.

\*\*Complainants may leave the OSHA process and take their case to District Court after 180 days for SOX cases and after 210 days for CFPB cases.

## **Closed Wells Fargo Case Review**

### **Final Report 11/21/16 draft**

This report sets forth the findings and recommendations of the Wells Fargo Closed Case Review working group, which conducted a comprehensive review of 51 closed whistleblower retaliation complaints filed against Wells Fargo (or a subsidiary) with the Department of Labor's (Department) Occupational Safety and Health Administration's (OSHA) Whistleblower Protection Program between the start of Fiscal Year 2010 through September 8, 2016.<sup>2</sup> Unless otherwise noted, only 47 cases are included in the analyses in this report; the remaining four cases were filed with or investigated by OSHA's State Plan Programs. The numbers in this report may differ slightly from numbers previously provided, as a result of further review and analysis of the case reviews, and as explained in further detail below.

The average amount of time it took OSHA to close a case against Wells Fargo was 207 days, 57 days less than the national average for OSHA's Whistleblower Program. The average time to close cases that were investigated, i.e., not administratively closed or docketed and dismissed, was 306 days, with a median investigation time of 182 days. Further, as explained below, OSHA generally took appropriate steps to investigate and analyze the elements of a whistleblower claim. And in most cases OSHA followed applicable procedures to close cases.

OSHA generally docketed complaints under the appropriate statute, but in 11 of the 47 cases (23 %) it should have but did not docket the complaint under one or more additional statutes. OSHA also did not interview the complainant in 18 of the 47 cases (38 %)—though eight (8) of these cases were administratively closed—and reviewers identified shortcomings in nine (9) of the 26 complainant interviews it conducted (35 %). OSHA sent all but five (5) of the 22 complaints it docketed under Sarbanes-Oxley (SOX) to the Securities and Exchange Commission (SEC) (77 %) and sent its findings to the SEC in 20 of these 22 SOX cases (91 %). However, it sent seven (7) of the 12 complaints it docketed under the Consumer Financial Protection Act (CFPA) to the CFPB (58 %) and sent its findings to the CFPB in only four (4) of these cases (33 %). And while OSHA generally took appropriate steps to examine whether the elements of a whistleblower claim existed, reviewers identified additional steps that OSHA should have taken to determine whether protected activity existed and/or whether the protected activity was a contributing factor in the adverse actions in a total of 14 cases.

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<sup>2</sup> The working group initially identified 53 closed cases. However, the 53 cases included one case filed on September 15, 2016 and administratively closed on September 26, 2016 (b) (6). As this case falls outside of the date parameters for the closed case review, this case has been excluded from this final report. The number 53 also counted one case (b) (6) twice, as that case had two complainants and it is currently common practice to docket such cases under separate case numbers for each complainant, rather than under one case number for both complainants. However, OSHA's policies permit either approach. As the (b) (6) case was treated as one case and investigation as such by OSHA, and to accurately reflect the supporting data for this case, i.e., whether agency referrals were sent, that case is counted only once in this report.

## I. BACKGROUND

On September 8, 2016, the CFPB issued a consent order against Wells Fargo and fined the company \$100 million for the “widespread illegal practice of secretly opening unauthorized deposit and credit card accounts.”<sup>3</sup> Wells Fargo’s CEO thereafter provided testimony to the House Financial Services Committee and was questioned about the Corporate-wide practice of “cross selling” and the Great 8 and other sales initiatives which Wells Fargo employees alleged pressured them into opening up to 2 million customer accounts, many of which the customer was unaware. In the end, about 5,300 employees were fired over a five year period allegedly for related bad behavior/performance issues. On September 22, 2016, Senator Elizabeth Warren requested that the Department open an investigation into whether Wells Fargo has violated the Fair Labor Standards Act (FLSA) with respect to its account executives, bank tellers, branch managers, and customer service representatives.

On September 26, 2016, Secretary of Labor Thomas Perez informed Senator Warren that, given the serious nature of the allegations, the recent actions of our Federal partners, and recent media reports, he directed the enforcement agencies within the Department to conduct a top-to-bottom review of cases, complaints, or violations concerning Wells Fargo over the last several years, including complaints filed with OSHA’s Whistleblower Protection Program. On October 5, 2016, OSHA convened a working group comprised of staff from the OSHA Regional offices, OSHA’s Directorate of Whistleblower Protection Programs, OSHA’s Office of the Assistant Secretary, OSHA’s Office of Communications and the Office of the Solicitor of Labor, Division of Fair Labor Standards (FLSD). The working group coordinated and oversaw the review and analysis of 51 closed cases filed against Wells Fargo.

## II. METHODOLOGY

OSHA’s working group reviewed 51 closed whistleblower complaints filed against Wells Fargo between the start of Fiscal Year 2010 through September 8, 2016.<sup>4</sup> Between October 7 and 18, 2016, a review team, consisting of seven members of the working group, four (4) from FLSD and three (3) from OSHA, reviewed the 51 closed cases. Each case was reviewed separately by two (2) reviewers, one (1) each from FLSD and OSHA. Each reviewer was assigned between 10 and 20 cases to review. The entire available case file was reviewed to determine whether OSHA adhered to the instructions, policies and procedures contained in the current Whistleblower Investigations Manual (WIM), CPL 02-03-007, and other applicable OSHA policies and

<sup>3</sup> <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/>

<sup>4</sup> Between FY2010 and FY2015, OSHA received a total of 17,255 whistleblower complaints. Between FY2010 through FY2016, OSHA received a total of 1,357 complaints filed under SOX and/or CFPA.

**Comment [KP1]:** OSHA’s website on its data only goes up to 2015. If they can get us a total through 2016, that would be even better.



procedures. For example, reviewers gathered data related to docketing, agency referrals, complainant interviews, other steps taken during the investigation to examine the elements of a whistleblower claim, information sharing, and case closure. The two reviewers for each case utilized a template “Case Review Worksheet” to each record their findings as they reviewed the case. The two reviewers then discussed their findings together to resolve any discrepancies. The reviewers then entered one set of findings for each case into a central Survey Gizmo database, developed and used to collect the data gleaned from each case file. The findings below are based on the information contained in this database.<sup>5</sup>

### III. SUMMARY OF CASES REVIEWED

*Distribution.* 17 cases were filed with OSHA’s Region 4 (Atlanta), the highest number in any one region. Eight (8) cases were filed with Region 3 (Philadelphia), seven (7) cases were filed with Region 9 (San Francisco), and five (5) cases were filed with Region 8 (Denver).<sup>6</sup> Four (4) cases each were filed with Regions 2 (New York) and 10 (Seattle), and two (2) cases were filed with Region 5 (Chicago). One (1) case was filed with Region 6 (Dallas). There were also three (3) complaints filed with the OSHA’s State Plan programs. These three complaints filed with the State Plans ((b) (6) ) have been excluded from the remaining data and analyses contained in this report, as has the (b) complaint filed with federal OSHA Region 9 (San Francisco), which was then referred to the Arizona State Plan program where it was administratively closed. Thus, from this point forward, this report analyzes the remaining 47 cases filed with and closed by federal OSHA.

*Fiscal Year Filed.* Three (3) cases were filed in FY2010. Seven (7) cases were filed in FY2011. Six (6) cases were filed in FY2012 and again in FY2013. In FY2014, 13 cases were filed. Eight (8) cases were filed in FY2015, and four (4) cases were filed in FY2016.

It should be noted that there were no major trends in the analyses below among particular OSHA regional offices or over time; rather, the allegations raised in the complaints and issues identified in this report were generally distributed across the regions and over time relatively proportionate to the number of cases filed and reviewed in each region and in each year. Any identifiable trends are discussed below in the relevant section.

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<sup>5</sup> The data discussed herein may differ slightly from initial data provided to Department leadership. This is due, in part, to the differing total case count, as discussed herein. This is also due, in part, to further analysis of the information contained in each review, with slight adjustments to some survey entries (after concurrence from the initial reviewers) to better reflect the reviewers’ findings and to promote consistency among the data.

<sup>6</sup> The seven (7) cases filed with OSHA’s Region 9 include one (1) case, (b) , that was first filed with federal OSHA but then appropriately referred to the Arizona State Plan Program, where it was properly administratively closed.

*Statutes.* Five (5) cases were docketed under both CFPB and SOX. Another 17 cases were docketed only under SOX and an additional five (5) cases were docketed only under CFPB. 18 cases were docketed only under section 11(c) of the Occupational Safety and Health Act. One (1) complaint was docketed under both SOX and 11(c). The final complaint was docketed under the Energy Reorganization Act.

*Disposition.* The majority of the cases were either administratively closed (13), i.e., closed under 11(c) without docketing or an investigation, or dismissed as non-merit (17). Three (3) of the 17 nonmerit dismissals were “docketed and dismissed,” discussed below. Three (3) complainants removed (or “kicked out”) their cases to federal district court. Nine (9) cases settled and five (5) cases were withdrawn. The average number of days the complaint was open between the date filed and date closed was 207 days, 57 days below OSHA’s overall average to close cases. The average time to close cases that were investigated, i.e., not administratively closed or docketed and dismissed, was 306 days, with a median investigation time of 182 days.

*Allegations.* Eleven (11) cases involved protected activity directly related to the conduct at issue in CFPB’s consent order.<sup>7</sup> For example, in (b) (6), the complainants alleged that they were terminated for making complaints about fraudulent and unethical banking practices conducted by other employees, including opening accounts without customer knowledge or consent and forcing banking “solutions” on customers without the requisite knowledge or consent, all in order to increase sales. These cases were distributed across several OSHA regions, and were filed between May 2010 and December 2015.

Reviewers identified an additional six (6) cases indirectly related to the conduct at issue in the CFPB consent order. These cases were also distributed across several OSHA regions and were filed between 2011 and 2016. In some of these cases, the complainant’s alleged protected activity involved similar unethical or fraudulent conduct, albeit not of the exact types identified in the CFPB consent order. For example, in (b) (6), the complainant alleged that during a Wells Fargo investigation into the complainant’s own conduct, he told the investigator (b) (6)

(b) (6). In others of these cases, the protected activity was completely unrelated to the conduct identified in the CFPB consent order, but the respondent’s alleged reason for the adverse actions involved complainant’s own alleged unethical or fraudulent misconduct. In (b) (6), for example, complainant’s alleged protected activity involved workplace violence issues. However,

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<sup>7</sup> The CFPB identified four acts and practices in its consent order: (1) opened unauthorized deposit accounts for existing customers and transferred funds to those accounts from their owners’ other accounts, all without their customers’ knowledge or consent; (2) submitted applications for credit cards in consumers’ names using consumers’ information without their knowledge or consent; (3) enrolled consumers in online banking services that they did not request; and (4) ordered and activated debit cards using consumers’ information without their knowledge or consent.

respondent's asserted reason for terminating complainant was that she engaged in unethical conduct, including opening a credit card account without the customer present.

In 12 cases, six (6) of which overlapped with those cases directly or indirectly related to the CFPB consent order conduct, complainants alleged that they contacted either Wells Fargo's Human Resources department or the Ethics Hotline, or both, and were thereafter retaliated against. For example, in (b) (6), the complainant alleged (b) (6). In (b) (6), complainant alleged that she given poor performance reviews and then terminated in retaliation for reporting to the Ethics Line and to HR that other employees were "gaming," by opening accounts for customers without their permission.

*No Issues Identified.* In nine (9) cases, reviewers indicated that the investigation fully complied with the OSHA procedures reviewed and took all appropriate steps in the investigation and case analysis. Three (3) of these cases were filed with OSHA's Region 3 (Philadelphia), two (2) each with Regions 4 (Atlanta) and 5 (Chicago), and one (1) each with Regions 2 (New York) and 8 (Denver). The remaining case reviews either did not respond to questions on these points, which generally meant that case was properly closed without investigation as discussed below, or noted some discrepancy or departure from OSHA's investigative procedures and policies, or some deficiency in the case analysis, as discussed below.

#### IV. DOCKETING AND SCREENING

*Administrative Closures.* OSHA's procedures allow the agency to administratively close, without docketing or investigation, cases filed under 11(c) where the complaint does not contain a *prima facie* allegation of retaliation or is not filed within the 30-day statute of limitations, provided that the complainant accepts this outcome (these cases are also sometimes referred to as "screened out"). Where a complainant does not accept an administrative closure, OSHA must docket the case and dismiss with appeal rights. WIM Ch. 2, § III(A)(2)(b). Additionally, OSHA often receives complaints of retaliation that are not covered by any of OSHA's whistleblower protection laws. Such complaints also may be administratively closed under 11(c) in order to keep a record that such complaint was filed with the agency, without conducting an investigation or docketing the complaint. For example, if OSHA receives a complaint that alleges that an employee was fired for raising concerns about race or gender discrimination that are not covered by any of OSHA's whistleblower laws, OSHA may administratively close the case under 11(c) after verifying that the complainant is not alleging retaliation in violation of any of OSHA's laws. [ADM 12-0.5A](#).

The vast majority (9 of 13) of decisions to administratively close a case under 11(c) were made correctly. However, in three (3) instances, more information should have been gathered prior to making the determination to administratively close the case, as the information provided to OSHA was insufficient to determine whether the complainant did or did not engage in protected

**Comment [KP2]:** Mary Ann included this cite but I'm not sure what this document is or where to find it. This policy is not in the manual.

activity under one of OSHA's whistleblower statutes. In (b) (6), the complainant alleged that she was terminated in retaliation for reporting to the Ethics Line that (b) (6)

(b) (6). While the details of this allegation are unclear, it may have involved a complaint that the supervisor was defrauding a financial institution, which could have been protected under SOX. Similarly, in (b) (6), OSHA administratively closed the case despite complainant's allegation that she was fired for (b) (6)

(b) (6). Thus, it was unclear whether complainant was alleging that (b) (6). In (b) (6), OSHA administratively closed the case prematurely; complainant's allegations related to "unethical coaching." It was not clear from the available information what unethical conduct the complainant had raised and more information should have been gathered before ruling out that there was protected activity under SOX or CFPA. Additionally, in a fourth case, (b) (6)s, OSHA administratively closed the complaint, involving workplace violence, as untimely filed. However, the complaint was in fact timely filed; by counting the days pursuant to OSHA's policies, the complainant filed on the last permissible date. Two (2) of these four (4) cases were filed and closed by OSHA's Region 9 (b) (6).

*Docket and Dismiss.* For complaints that contain an allegation of protected activity under SOX or CFPA, OSHA may not administratively close a complaint. However, OSHA may docket and immediately dismiss the case without conducting an investigation but preserving appeal rights, i.e. "docket and dismiss," if the case is untimely or it is otherwise clear, based on the complaint as supplemented by an interview of the complainant, that retaliation in violation of SOX or CFPA has not occurred. WIM Ch. 2, § III(A)(3).

Only three (3) of the cases reviewed involved decisions to docket and dismiss. In (b) (6), the decision to docket and dismiss was inappropriate, as the complainant alleged (b) (6) (b) (6)

Although OSHA may ultimately have found that there was no protected activity or retaliation, more information should have been gathered to evaluate the possibility that the complainant engaged in SOX- or CFPA-protected activity and employer knowledge. In (b) (6), the complainant alleged that the respondent did not like him and fired him after (b) (6) without conducting any investigation. The case was docketed and dismissed under SOX. While this case was appropriately closed without an investigation, it could have been administratively closed under 11(c), as complainant's allegations did not raise any possible protected activity under SOX. Finally, in (b) (6), the complainant requested to file a complaint related to racial and national original discrimination under SOX, at the insistence of his attorney, despite understanding that his complaint was filed in the incorrect forum. Thus, the docket and dismiss here was appropriate. Thus, this review indicates that OSHA appropriately limits its use of docket and dismissals, and when it does so, these decisions are generally appropriate.

*Docketing.* For those cases that were docketed rather than administratively closed, the decision to docket the complaint was made within a reasonable time after the filing of the complaint, with only one (1) exception. In (b) (6), the complaint was not docketed until almost five (5) months after the complaint was filed. The complaint was also never assigned to an investigator but instead handled by the Regional Supervisory Investigator. The case file does not contain information to explain the delay. The complainant ultimately “kicked out” to federal district court.

It is worth noting that OSHA receives whistleblower complaints in a variety of forms, ranging from very formal, attorney-prepared complaints that meet federal court pleading standards, to very general allegations filled in on OSHA’s on-line complaint form, to complaints filed by phone where an OSHA intake officer writes down the allegation based on a conversation with the complainant. Complaints filed with OSHA need not be in any particular form and OSHA will supplement the complaint with an interview of the complainant if necessary to determine whether the complaint contains the basic elements of a retaliation claim and should be docketed. WIM Ch. 2, §§ II, III(A); 29 C.F.R. §§ 1980.104(e)(2) (SOX regulations), 1985.104(e)(2) (CFPA regulations). Also, because OSHA’s whistleblower process is meant to be accessible to *pro se* complainants, the complainant need not advise OSHA which whistleblower law(s) the complainant is filing the complaint under. Rather, it is OSHA’s responsibility to evaluate the complaint and to determine which statute or statutes OSHA should docket the complaint under. WIM Ch. 2, § II(D). In general, if the complaint raises an allegation that may be covered by more than one OSHA whistleblower statute, OSHA should docket the complaint under all potentially applicable statutes. *Id.*

In general, cases were docketed under an appropriate statute. However, the reviewers identified 11 cases where the complaint was docketed under one statute but should also have been docketed under a second or third statute as well. Specifically, there were two (2) cases that were docketed under 11(c) that should have also been docketed under both CFPA and SOX ((b) (6) (b) (6)); three (3) cases that were docketed under SOX or SOX and 11(c) that should have also been docketed under CFPA ((b) (6)); and six (6) cases that were docketed under CFPA or 11(c) that should have been docketed under SOX as well ((b) (6), (b) (6)). For example, (b) (6) was docketed only under CFPA. However, complainant alleged that she reported violations of internal policies and unethical behavior towards consumers, (b) (6). These reports could also constitute protected activity under SOX as they might relate to bank and/or wire fraud and thus the complaint should have been docketed under both CFPA and SOX.

As a result of not docketing a case under more than one applicable statute, OSHA misses making the appropriate agency referrals of complaints and findings. OSHA sends copies of complaints and findings to the relevant enforcement agency for the statute(s) under which the complaint is docketed. Where a case is not properly docketed, the relevant agency will not receive a copy of

the complaint or findings (see discussion of agency referrals below). Further, not docketing under a statute means that OSHA has not considered, and likely will not consider, whether the parties and allegations contained in the complaint may be covered or constitute protected activity under that statute, and thus whether the complaint may have merit under one statute versus another. Thus, as discussed below, where a complaint is not docketed under multiple applicable statutes, the investigation may also have missed appropriate steps to analyze the complaint. Not docketing under an appropriate statute may also indicate that OSHA has misunderstood the scope of protected activity under a statute. For example, in (b) (6), discussed above, the investigation demonstrates that the investigator misunderstood SOX protected activity to be limited to raising concerns about fraud against shareholders and consequently the complaint was docketed under CFPA only. In (b) (6), the complaint was docketed only under SOX despite complainant's alleged protected activity relating directly to unethical practices involving consumer financial products; thus, the complaint should have been docketed under CFPA as well as SOX.

*Named Respondents.* OSHA generally added all appropriate respondents to a complaint, with one (1) exception. In (b) (6), the complainant identified a number of individuals in his complaint as parties he wanted to hold responsible for the alleged retaliation that OSHA did not add to the case. The case was docketed and dismissed, and complainant chose not to exercise his appeal rights. However, had complainant appealed, or ultimately kicked out to federal district court, the absence of these additional respondents could have hindered complainant's ability to seek relief against these parties.

*Related Case Research.* None of the case files contained evidence that IMIS was searched for related cases. The WIM requires OSHA to conduct this search as part of its pre-investigation research. WIM Ch. 3, § IV(D). However, the manual is not clear that the search needs to be documented in the case file, or how OSHA is supposed to respond to any such information if found.

## **V. AGENCY REFERRALS**

*OSHA's referral policy.* Upon receiving a SOX whistleblower complaint, the Secretary's regulations direct OSHA to send a copy of the complaint, as well as any supporting evidence, to the Securities and Exchange Commission (SEC). 29 C.F.R. § 1980.104(a). Upon receiving a CFPA whistleblower complaint, the Secretary's regulations require that OSHA send a copy of the complaint and any supporting evidence to the Consumer Financial Protection Bureau (CFPB). 29 C.F.R. § 1985.104(a). And when OSHA closes a SOX or CFPA case, the WIM provides that OSHA must send a copy of its findings to the relevant "primary enforcement agency"—either the SEC or the CFPB. WIM Ch.5, § V(F)(2).

*Cases docketed under SOX.* OSHA sent complaints against Wells Fargo under SOX to the proper agency, the SEC, in a majority of cases and sent the SOX findings to the SEC in the substantial

majority of cases. OSHA sent the complaint to the SEC in 17 of the 22 cases (77 %) in which the case was docketed under SOX. In 20 of these 22 cases (91 %), the investigator sent her or his findings to the SEC.<sup>8</sup> There were no cases in which OSHA sent a complaint docketed under SOX to the SEC but did not send the findings.

In all five (5) cases in which OSHA did not send a complaint docketed under SOX to the SEC, the investigator closed the case quickly—within 32 days or less of receiving the complaint. Three (3) of these five (5) cases were dismissed on substantive grounds—two (2) for lack of protected activity ((b) (6) ) and one (1) for lack of adverse action ((b) (6) ). One (1) of the claims was dismissed as untimely ((b) (6) ); and one (1) of the claims was withdrawn by the complainant ((b) (6) ). In all three (3) cases dismissed on substantive grounds, OSHA sent the findings to the SEC, even though OSHA did not send the complaint. In both the case dismissed as untimely and the case that was withdrawn, OSHA did not send either the complaint or the findings.

OSHA generally sent SOX complaints to the SEC quickly and always sent the findings to the SEC immediately upon closing a case. The median amount of time between OSHA's receipt of a complaint and referral of the complaint to the SEC was 9 days. And in all but two (2) cases, OSHA sent the complaint to the SEC within 35 days or less. The two outliers were ((b) (6) ), which OSHA sent to the SEC 147 days after OSHA received it, and ((b) (6) ), which OSHA sent to the SEC 306 days after OSHA received it. It is unclear what accounts for the delay in either case. However, in ((b) (6) ), the investigator sent the complaint to the SEC the same day the complaint was docketed. In ((b) (6) ), the complainant and respondent entered into a settlement agreement through the Seattle Federal Executive Board mediation program and the investigator did not refer the complaint to the SEC until after the settlement, when the SEC requested it. In all 20 of the cases in which OSHA sent the findings to the SEC, OSHA sent the findings within one (1) day of closing the case.

*Cases docketed under CFPA.* OSHA was somewhat less likely to send complaints filed under CFPA to the correct agency, the CFPB, than to send SOX complaints to the SEC. Of the 12 cases docketed under CFPA against Wells Fargo, the investigator sent the complaint to the CFPA seven (7) times (58 %). In one case where OSHA did not send the complaint to the CFPB, ((b) (6) ), the complainant withdrew her complaint within two weeks of filing it. In three other such cases, ((b) (6) ), OSHA docketed the complaints under SOX and CFPA

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<sup>8</sup> The working group determined that the investigator sent the complainant's SOX or CFPA complaint to the SEC or CFPB when the file contained evidence confirming that the primary enforcement agency received the complaint and/or the case file contained a copy of a complaint referral letter or email to the primary enforcement agency. The working group determined that the investigator sent her or his findings when the file contained evidence that the primary enforcement agency received the findings or the case file contained a copy of a findings referral letter or email to the primary enforcement agency, and/or the findings, settlement report, or other final document on which the investigator cc'ed the primary enforcement agency.

and OSHA sent the SOX complaint to the SEC but did not send the complaint to the CFPB. In the final case lacking a referral, (b) (6), OSHA sent the complaint to the wrong agency, the SEC.

OSHA was significantly less likely to refer CFPA findings to the CFPB than to refer SOX findings to the SEC. Of the 12 cases docketed under CFPA against Wells Fargo, OSHA sent findings to the CFPB in only four (4) cases (33 %). The eight (8) cases in which OSHA did not send CFPA findings to the CFPB include the five cases discussed above in which OSHA did not send the complaint to the CFPB—(b) (6)—as well as three (3) cases in which OSHA sent the complainant’s CFPA complaint but not the findings—(b) (6) (b) (6). There are no readily identifiable similarities between these cases.

Where OSHA sent CFPA complaints and findings to the CFPB, it generally did so quickly. The median period of time between the filing of a CFPA complaint and OSHA’s referral of the complaint to the CFPB was 14 days. The one outlier was (b) (6), a complaint docketed under CFPA and SOX. Three days after OSHA received (b) (6) complaint, the investigator sent her SOX complaint to the SEC but incorrectly sent her CFPA complaint to the Treasury Department; the investigator did not send the complainant’s CFPA complaint directly to the CFPB until the case was closed, 644 days after OSHA received it. In all four (4) cases in which the investigator sent her or his CFPA findings to the CFPB, the investigator made the referral on the same day she or he closed the CFPA case.

*Cases that should have been docketed under SOX or CFPA.* As discussed above, there were numerous complaints filed against Wells Fargo that were docketed under one statute but should additionally have been docketed under SOX, CFPA, or both but were not (see discussion of docketing, above). Because these cases were not docketed under all appropriate statutes, they were not referred to all appropriate outside agencies.

Accordingly, investigators sent 17 of the 30 complaints (57 %) that either were or should have been docketed under SOX to the SEC and sent their SOX findings to the SEC in 20 of these 30 cases (67 %). Investigators sent seven (7) of the 17 cases (41 %) that should have been or were docketed under CFPA to the CFPB and sent their findings to the CFPB in four (4) of those 17 cases (24 %).

## **VI. COMPLAINANT INTERVIEWS**

*Conducting Complainant Interviews.* The WIM provides that, as soon as possible upon receipt of a complaint, OSHA must evaluate the complaint for coverage and the existence of a *prima facie* allegation. WIM Ch. 2, § III(A). This will ordinarily require preliminary contact with the complainant to gather more information, and the evaluation should cover as many details as possible. *Id.* In discussing the conduct of investigations, the WIM further provides that OSHA must interview the complainant in all cases, and must do so as soon as possible. WIM Ch. 3, § VI(D).



Complainants were interviewed in 26 cases. Reviewers affirmatively noted that interviews were *not* conducted in 18 cases. Five (5) of these 18 cases without interviews were complaints that were administratively closed. In three (3) additional case files, there was insufficient information to determine whether an interview was conducted. These included two administrative closures ((b) (6) ) and one (1) case dismissed as nonmerit (another (b) case). It is possible that in these cases without a complainant interview or with insufficient documentation to determine whether an interview was conducted, the initial complaint was taken over the phone and some form of screening interview was conducted but not documented. It is also possible that in some cases, whether administratively closed or not, the investigator attempted to contact the complainant but did not document efforts to do so.

Only four (4) of the cases without interviews contained information in the case file to explain the absence of the complainant interview. In (b) , the complainant did not respond to OSHA's attempts to contact her and thus the complaint was administratively closed. In the two (b) complaints, complainant's behavior towards OSHA, including sending lewd and profane communications to OSHA personnel, justified the lack of complainant interview. These cases were ultimately dismissed as nonmerit. In (b) , the investigator attempted to contact complainant to schedule an interview but complainant was unresponsive; she then elected to withdraw her complaint.

In the remaining cases that were not administratively closed, the lack of complainant interview was often due to a delay in attempting to interview the complainant, and the case ultimately settled, kicked out, or was withdrawn before the investigator had interviewed the complainant. For example, in (b) (6) , complainants filed their complaints with OSHA (using the same attorney and making related allegations) on May 11, 2010. The investigator did not document any attempt to contact either complainant for an interview. Complainants then kicked out to federal district court on (b) (6) . (b) (6) similarly kicked out before being interviewed. In (b) (6) , the complainant was never interviewed. The case ultimately settled, but the complaint had been pending for almost a year before the parties notified OSHA of settlement discussions. Likewise, in (b) , the complainant was not interviewed before the case settled six months after it was filed. (b) , an investigation was conducted and the complaint was dismissed without an interview. The investigator corresponded with complainant over email, but there was nothing in the case file to explain the absence of an interview.

Regions 5 (Chicago), 6 (Dallas), and 8 (Denver) conducted and documented interviews in all of their cases, or, where no interview was conducted, included sufficient information in the case file to explain the absence. Of the cases either without a complainant interview and without justification in the case file to explain the lack of interview, or without sufficient information to determine whether an interview was conducted, five (5) were filed in Region 9 (San Francisco), out of a total six (6) cases filed with Region 9 relevant to this analysis. In Regions 2 (New York), 3 (Philadelphia), and 10 (Seattle), these cases represented half of their total cases, i.e. two out of four cases each for Regions 2 and 10 and four out of eight for Region 3.

*Sufficiency of Interviews.* In the 26 cases with complainant interviews, reviewers indicated that the majority (17) were conducted without any significant issues. However, reviewers identified nine (9) interviews that contained significant issues, either with respect to how the interview was documented or conducted. For example, in (b) (6), the complainant was not interviewed until four years after the complaint was filed and the interview is only documented via various notes in the case file. In the two (b) (6) cases, the complainants were not asked what the violations were that they had alleged or objected to that contributed to their termination. Similarly, in (b) (6), the investigator did not follow up with the complainant's allegations that he had reported during an internal investigation, or the issues of concerns related to violations of SOX or CFPA. In (b) (6), the investigator implied to the complainant that SOX protected activity must relate to shareholder fraud and that CFPA protected activity must relate to consumer loans. Protected activity under both statutes is broader than the investigator indicated, and the investigator's misunderstanding of the scope of protected activity may have impacted the ultimate determination of the case. However, in two (2) of the cases identified as containing significant issues with the interview, upon further review, the issues appear relatively minor. In (b) (6), the issue was that an interview was conducted but only documented via handwritten notes. This can be problematic to the extent that the notes are difficult to read, but is not per se a significant problem if clear and well documented. In (b) (6), the issue was that the case file contained only a memo to file of a telephone interview. Again, this is appropriate as long as the memo is detailed and adequately describes the interview.

## **VII. INFORMATION SHARING**

During an investigation, OSHA requests that the parties provide each other with a copy of all information submitted to OSHA related to the complaint. If the parties do not share this information with each other, OSHA will redact the submissions as necessary and provide to the other parties. Specifically, the respondent must be notified of the filing of the complaint, the allegations contained in the complaint, and the substance of the evidence supporting the complaint. OSHA generally accomplishes this by providing a copy of the complaint to the respondent (redacted as necessary). Likewise, the complainant must be provided with the substance of the respondent's response; this is generally accomplished by providing complainant with a copy of the respondent's statement of position and any supporting evidence (redacted as necessary). WIM Ch. 23, § II; 29 C.F.R. §§ 1980.104(c), 1985.104(c).

These policies and procedures regarding the sharing of information between parties during an investigation, i.e. "nonpublic disclosure," were followed in all but one case. In (b) (6), ultimately dismissed, the investigator conducted a rebuttal discussion with the complainant, but it does not appear that the complainant was provided with any of the evidence that respondent used to support its defense, despite the complainant requesting this information in order to respond.

Respondents must submit any position statement to OSHA within 20 days of receipt of the notice of the filing of the complaint. 29 C.F.R. §§ 1980.104(b), 1985.104(b). However, as a practical

matter, OSHA often grants respondents a reasonable extension of time in which to submit a position statement, if requested and for appropriate reasons (e.g., gathering company records). In the cases reviewed, OSHA largely adhered to these policies. However, in a few cases, the respondent was given a very long time in which to provide its statement of position. For example, in (b) (6), respondent was given almost six months to provide a position statement before OSHA sent a “10 day letter” requiring respondent to provide its statement, at which point the complainants kicked out to federal district court. In (b) (6), the respondent took roughly six months to provide a position statement to OSHA. Respondent took an additional two months to redact the statement before sending it to the complainant.

#### **VIII. STEPS TAKEN IN THE INVESTIGATION TO ANALYZE THE ELEMENTS OF A WHISTLEBLOWER CLAIM**

Reviewers examined whether appropriate steps were taken to determine whether a violation of the relevant whistleblower statute(s) existed. To do so reviewers answered four questions, each relating to an element of a whistleblower claim: (1) did the investigation take the appropriate steps to determine whether there was protected activity under each relevant statute; (2) did the investigation take the appropriate steps to determine whether there was adverse action; (3) did the investigation take the appropriate steps to determine whether there was employer knowledge of the protected activity; and (4) did the investigation take the appropriate steps to determine whether the protected activity was a contributing factor in the adverse action. Reviewers also examined whether the investigation followed up with all issues raised in the parties’ position statements and evidence, and whether the case file contained information to adequately justify the decisions not to take a particular step in the investigation. The analyses below refer only to the reviewers’ responses to these questions and do not consider previous issues discussed, such as appropriate docketing or complainant interviews.<sup>9</sup>

In many cases, all appropriate steps were taken to gather information and analyze each element of the whistleblower’s claim.<sup>10</sup> For example, in (b) (6), a complaint appropriately filed only

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<sup>9</sup> In reviewing the responses to these questions, it is worth noting that throughout the period of 2010 to 2016, the standards both for protected activity under SOX and for determining causation under the “contributing factor” standard of causation that applies to SOX and CFPA cases have become more employee friendly both as a result of developments in case law at the Department’s Administrative Review Board (“ARB”) and as a result of federal court case law under these statutes. Reviewers have applied the standards in place within the Department following the ARB’s May 2011 decision in *Sylvester v. Parexel* to review all claims of SOX-protected activity because we believe that decision was binding on OSHA nationwide notwithstanding prior federal court decisions in some circuits adopting the Department’s prior more limited views on SOX-protected activity.

<sup>10</sup> Reviewers responded to all relevant questions to indicate that in 14 cases, all appropriate steps were taken in the investigation. Eight (8) of these 14 cases were appropriately administratively

under SOX and ultimately dismissed as nonmerit, the investigator took appropriate steps to determine that there was protected activity under SOX. The investigator also examined whether there was protected activity under CFPA, appropriately concluding that no such protected activity existed. The investigator further took appropriate steps to determine that respondent knew of complainant's protected activity and that the complainant suffered adverse actions, but that the protected activity was not a contributing factor in the adverse actions. The investigation followed up on all appropriate issues, conducted appropriate witness interviews and document requests, and fully tested the respondent's defense before concluding that the case lacked merit. Likewise, in (b) (6), a case filed only under Section 11(c) and ultimately dismissed, the investigation correctly determined that the complainant had engaged in protected activity, had suffered an adverse action, that the employer had knowledge of the protected activity, but that the protected activity was not the "but-for" cause of complainant's adverse action, which is the appropriate standard of causation under 11(c). The reviewers noted that the investigation followed up with and explored all necessary issues, and conducted several interviews to test to the respondent's defense.

However, as discussed below, in some cases the reviewers noted that the investigation did not take all take appropriate steps to examine certain elements of the whistleblower complaint. Some of these cases missed appropriate steps to determine multiple elements of the whistleblower claim, while others missed appropriate steps to analyze only one element. In several cases, the reviewers noted that the investigation did not follow up on appropriate issues or conduct appropriate interviews and document requests. These cases largely overlapped with those cases in which the investigation did not take appropriate steps to analyze the elements of the whistleblower claim.

*Protected Activity.* Reviewers noted that in 12 cases, the investigation did not take appropriate steps to determine whether there was protected activity under SOX and/or CFPA.<sup>11</sup> This includes three (3) cases that were administratively closed or docketed and dismissed. Five (5) of the 12 cases were filed with OSHA's Region 4. However, this is only slightly above the proportional distribution of cases filed with Region 4 overall. Nine (9) of the 12 cases were filed in FY2014 or after (75 %), which significantly exceeds the proportion of total cases filed in that same

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closed or docketed and dismissed, and six (6) of were closed after an investigation. However, as discussed below, in many additional cases, reviewers did not respond to all questions for cases that were administratively closed or that settled, were kicked out, or were withdrawn, as there was no investigation to review, which generally meant that the case was likely properly handled and all appropriate steps were taken to close that case.

<sup>11</sup> In roughly half (23) of the cases, reviewers noted that the investigation took all appropriate steps to determine whether protected activity existed under all applicable statutes. In 12 cases, reviewers did not answer the questions related to appropriate steps taken for protected activity. However, most of these cases were either settled, withdrawn, kicked out, or were administratively closed and thus there was likely no investigation or analysis to review.

timeframe (53 %). In two (2) of these 12 cases, the investigation also did not take appropriate steps to analyze whether there was protected activity under section 11(c).

The most frequent issue in this area was that a complainant's allegation might be protected under more than one statute, SOX and CFPA for example. OSHA, in many of these cases, docketed and thoroughly explored protected activity under only one of the applicable statutes but did not docket the complaint or explore protected activity under another applicable statute. This issue was present in seven (7) of the 12 cases in which the investigation did not take appropriate steps to explore protected activity. For example, in (b) (6), the complaint was docketed under only CFPA. Complainant alleged she complained about the unethical banking practices at issue in the CFPB consent order; thus, this complaint was appropriately docketed under CFPA (and CFPA protected activity was appropriately explored), but there was no exploration of whether these allegations may also constitute protected activity under SOX.

In four (4) of the remaining cases where appropriate steps were not taken, OSHA did not appropriately consider protected activity under any applicable statute, including the statute under which the complaint was docketed. For example, in (b) (6), docketed only under CFPA, the investigation did not include any research or interviews to determine whether complainant's complaints about (b) (6) would constitute protected activity under CFPA. The cursory examination of complainant's allegations indicates a lack of understanding of the scope of CFPA protected activity. Likewise, while the investigation examined SOX protected activity, the interview makes clear a misunderstanding that SOX protected activity must be limited to shareholder fraud. Thus, despite conducting a complainant interview, the investigation did not include appropriate questioning of the complainant to determine whether complainant's reports related to the types of fraud that are covered under SOX, such as bank and wire fraud. Consequently, the case was not docketed under SOX, and as discussed above, copies of the complaint and findings were not sent to the SEC.

In the final of the 12 cases, (b) (6) the complaint was appropriately docketed under both SOX and CFPA, but the investigation only took appropriate steps to explore protected activity under CFPA and did not fully explore protected activity under SOX based on complainant's allegations.

As noted above, not docketing a case under all appropriate statutes has several consequences for the investigation. Not only may OSHA not recognize and investigate protected activity under one of OSHA's whistleblower statutes, but also, complaints and findings in the matter are not sent to all appropriate agencies. For example, in (b) (6), the complainant initially alleged that he was (b) (6). This case was thus filed under 11(c). However, during the course of OSHA's investigation, the complainant alleged that respondent's investigation of complainant involved whether (b) (6).

(b) (6)

Despite this allegation, the OSHA investigation did not examine whether there was potential protected activity under SOX or CFPA, or amend the complaint to include either statute. Thus, this complaint was not docketed under either statute and the complaint and findings were not sent to the SEC or the CFPB.

*Adverse Action and Employer Knowledge.* Reviewers identified only four (4) cases that missed steps to determine employer knowledge; in three of these cases, the investigation also missed steps to determine adverse actions.<sup>12</sup> However, all four (4) cases were closed without any in-depth investigation. Two (2) of these four (4) cases were inappropriate administrative closures/docket and dismissals, (b) (6), discussed above, that were improperly closed without an investigation. One (1) of the other cases, (b) (6), also discussed above, was settled but after having been pending for a great deal of time without an interview or any investigation beyond gathering position statements. In the final case, (b) (6), the complainant withdrew her complaint after the respondent submitted a position statement but no other investigation or interview was conducted. Thus, in cases where an investigation was conducted, these elements were appropriately investigated and considered.

*Causation.* In 10 cases, reviewers noted that the investigation took appropriate steps to determine whether the protected activity contributed to the adverse actions.<sup>13</sup> In nine (9) cases, seven (7) of which overlapped with those cases that did not take appropriate steps as to protected activity, the investigation did not take appropriate steps to determine whether the protected activity was a contributing factor in the adverse action. Two (2) of these cases were administratively closed or docketed and dismissed ((b) (6)). Both of these cases are discussed above as inappropriately closed without an investigation. One (1) of nine (9) cases, (b) (6), ultimately settled. However, as noted above, the investigator gave the respondent an exceedingly long time to provide a position statement and the case was pending for over a year before the parties notified OSHA of settlement discussions. Another of the nine (9) cases, (b) (6), was ultimately

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<sup>12</sup> In 17 cases, reviewers noted that the investigation took appropriate steps to determine whether the complainant suffered any adverse actions. Reviewers did not respond to this question in 27 cases, most of which were settled, kicked out, withdrawn, administratively closed; thus, there was likely no investigation or analysis to consider. Likewise, in 14 cases, reviewers noted that the investigation took appropriate steps to determine whether the employer had knowledge of the protected activity. Reviewers did not respond to this question in 29 cases, but again, these cases were mostly settled, administratively closed, withdrawn, or kicked out and there often appropriately was no investigation of these elements to consider.

<sup>13</sup> Reviewers did not respond to this question in 28 cases, most of which were administratively closed, settled, withdrawn, or kicked out and there often appropriately was no investigation of these elements to consider.

withdrawn. However, the reviewers noted that the respondent's position statement was accepted without any testing or questioning, and the investigator informed the complainant that her complaint had the potential to be dismissed, at which point the complainant withdrew.

In the remaining five (5) cases, where an investigation was conducted and the complaint was dismissed, the reviewers all noted that the investigation did not fully test the respondent's defense. For example, in (b) (6), discussed above, the investigation did not fully explore the issue of causation because the complaint was dismissed largely on the basis of lack of protected activity. The report of investigation does note that there was no disparate treatment because two other employees were also fired at the same time as the complainant for similar reasons. However, the investigation did not follow up on any of the inconsistencies in respondent's position statement that complainant identified in her rebuttal.

In (b) (6), a case involving progressive discipline resulting in termination, the investigation did take all appropriate steps to determine whether the complainant engaged in protected activity under all relevant statutes, and to determine employer knowledge and adverse action. The investigation concluded that Respondent had provided clear and convincing evidence that the complainant was terminated for violating company policy and not for engaging in protected activity. However, the investigation did not consider whether the protected activity contributed to any of the progressive discipline that culminated in the complainant's termination. The investigation also did not follow up on issues presented by respondent's defense, such as how other employees were treated or the internal discussions/decision-making process to discipline the complainant. Likewise, in (b) (6), OSHA took appropriate steps to determine protected activity, employer knowledge, and adverse action, but did not take appropriate steps to determine causation by appearing to simply believe the employer's position statement over complainant's allegations and did not conduct any interviews or request additional documentation to resolve discrepancies between the parties' accounts or to verify the events leading up to the complainant's termination. It is impossible to know whether the issues identified here would have impacted OSHA's ultimate determination of the case, but it is possible that gathering information to test the respondent's proffered reason for terminating the complainant in each of these cases could have impacted the result.

*Issues Not Followed Up.* Reviewers identified nine (9) cases in which the investigation did not follow up on all relevant issues and/or significant interviews and document requests were not conducted. These cases largely overlapped with the cases discussed above where the investigation did not take appropriate steps to determine whether an element of the whistleblower claim was satisfied. For example, in (b) (6), discussed above, the reviewers noted that the investigation did not explore whether respondent's reason for firing complainant, i.e., that he had engaged in gaming, was pretextual, in light of complainant's allegations that these practices were commonplace and he had been instructed to do this by his supervisor.

*Justification in Case File.* Of the above cases either missing an appropriate step in the investigation or missing significant information from the case file, most did not contain information in the case file to explain any missing step or information.

## **IX. CASE CLOSING AND SETTLEMENT PROCEDURES**

*Case Closure Documents.* Where OSHA conducts an investigation, the investigator generally must prepare a Report of Investigation (ROI), which is an internal summary of the investigation, and the agency must issue Secretary's Findings to notify the parties of OSHA's determination. WIM Ch. 5, §§ IV(B), V. In April 2012, OSHA issued guidance clarifying that in certain cases, e.g., cases that settle, the investigator need not prepare a ROI but may instead enter relevant information into IMIS. This guidance also clarified that OSHA need not issue Secretary's Findings in cases that are settled or withdrawn.<sup>14</sup>

Reviewers examined whether the case files contained any relevant ROI and Secretary's Findings, and if so, whether these documents contained the appropriate analysis and whether that analysis was supported by the evidence. For those cases reviewed where an investigation was conducted, these case files largely contained the required case closure documents. However, where the case analysis was incorrect or appropriate steps were not taken, as discussed above, the relevant ROI and Secretary's Findings similarly contained errors in analysis or were unsupported by the evidence. For example, in (b) (6), discussed above, the ROI and Findings contained incorrect analyses and were unsupported by the evidence because there was no evidence gathered or analysis of disparate treatment. This case also contained an 11(c) allegation that was not analyzed in the ROI or Findings.

*Closing Conferences.* At the conclusion of an investigation where OSHA intends to issue nonmerit findings, OSHA must also hold a closing conference with the complainant and this conference must be documented in the case file. WIM Ch. 3, § VI(K); Ch. 5, § IV(C). For the cases reviewed here, in most cases where an investigation was conducted and OSHA dismissed the complaint as nonmerit, OSHA conducted a closing conference with the complainant as required.

*Settlement.* OSHA must review and approve all settlement agreements according to OSHA's settlement criteria in order to close a whistleblower complaint. WIM Ch. 6, § XII. In those cases reviewed here that settled, OSHA's settlement policies were largely followed. However, in the (b) (6) case, OSHA permitted the complainants to withdraw their complaint, despite being aware that complainants were doing so pursuant to a private settlement agreement with the employer. In that case, there was no documentation that OSHA informed the parties of their

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<sup>14</sup> <http://www.whistleblowers.gov/memo/2012-04-18FairfaxWBDispositionProcedures.html>



obligation to submit the settlement or requested the settlement, which was contrary to OSHA's procedures.

## **X. CONCLUSION AND RECOMMENDATIONS**

The working group's review of the closed cases against Wells Fargo revealed multiple potential areas of improvement for OSHA's whistleblower program, several of which would likely be relatively simple to achieve. First, OSHA could significantly improve its investigations if it committed to conducting a timely interview with the complainant in every whistleblower case, monitored its cases to ensure that interviews occurred soon after receipt of a complaint, and provided its investigators additional training on exploring the elements of a whistleblower claim, particularly protected activity causation, through effective complainant interviews. OSHA's new whistleblower training curriculum includes a required course in investigative interviewing, which may help significantly to resolve the issues identified in the interviews in this review.

The allegations in the cases the closed case team reviewed varied considerably and the reviewers do not believe that OSHA should have identified the cases we reviewed as presenting a trend of retaliation against employees who complained to Wells Fargo about the issues in the CFPB consent order or other issues based on the size of Wells Fargo's business, the number of Wells Fargo complaints received over the period as compared to other financial institutions of similar size, the geographic spread and spread in time between the complaints and the issues raised in the complaints. Nonetheless, we have considered whether OSHA could take steps to identify trends in retaliation or other conduct in its caseload. If OSHA wishes to effectively identify cases involving similar conduct and the same respondent, across regions, it should clarify its policy in the Whistleblower Investigations Manual that investigators must search IMIS for related cases when initiating an investigation to make clear how the search should be documented and what steps investigators should take when they learn that the respondent in their case has other open or closed cases with OSHA. OSHA may also want to consider ways that the National Office may assist in identifying any trends in the cases filed with the agency. Possible steps range from reviewing IMIS allegation summaries in advance of OSHA's annual or semi-annual meetings with partner agencies and highlighting repeat respondents and allegations in those meetings, adding an alert to IMIS when Regions enter allegations summaries using key words so that trends on national issues can be identified to determine if action is needed, or hiring a data analyst with the ability and training to spot trends/patterns in data so that OSHA can discuss a strategy for handling such cases at the earliest possible time.

This review presented a relatively unique circumstance in which many cases raised protected activity under multiple OSHA whistleblower statutes. As such, it highlighted that OSHA could also improve its practices with regard to recognizing when a case raises protected conduct under both SOX and CFPB and its practices with regard to dual docketing complaints. If it is an agency priority to ensure that primary agencies are timely notified of each whistleblower complaint and findings relevant to the primary agency's enforcement authority, OSHA should take steps to

ensure that investigators understand the importance of dual docketing and ensure that in every case, including those filed under SOX and CFPA, the agency sends a copy of the complaint and its findings to the appropriate enforcement agency (SEC for SOX cases and CFPB for CFPA cases).

OSHA could also improve its investigations if it provided its investigators with additional training on what constitutes protected activity under SOX and CFPA and on the different causation standards that apply to OSHA's whistleblower statutes. As previously noted, Department of Labor Administrative Review Board and other relevant case law regarding protected activity under SOX and "contributing factor" causation under both SOX and CFPA have been evolving in recent years in ways that make it easier to establish the elements of a retaliation claim at the OSHA level. OSHA should take steps to ensure that investigators who investigate SOX and CFPA claims accurately understand the current standards that the Department applies to these claims.

As explained above, the reviewers identified a number of instances in which the investigation deviated from OSHA procedures, and in some cases steps were missed, such as a complainant interview early in the case, or the investigation did not take the appropriate steps to follow up on or test information provided during the investigation. Additional case management or case monitoring may be helpful. Some ideas OSHA may wish to consider are:

- Establishing an audit team to conduct an audit of each Region within the next 12 months to determine the extent of the inconsistencies among the Regions and create an audit schedule for each region in the future.
- Creating a whistleblower consistency committee to address problem areas uncovered during regional audits.

Adding an alert in the WBIMIS or other management system that alerts the National Office and Region when cases reach the one year old mark or at some other designated interval.

### **Open Wells Fargo Case File Review**

As of November 1, 2016, there were 48 open Wells Fargo Cases. Eleven of these were filed prior to September 8, 2016 (when the CFPB, OCC and City of Los Angeles settlements were announced). The remainder of the complaints were filed following the intense publicity surrounding the Wells Fargo scandal.

Because this was an "open" case review, it is necessarily ongoing and perpetually incomplete. The intent of the review was to insure consistency and adherence to policy. Unlike the closed case reviews, in the open case reviews, the reviewers were able to actively make corrections when deficiencies were found since the investigations were ongoing and still under OSHA's jurisdiction.

Data Scientist, (b) (6), created a new data point on the “Survey Gizmo” (which had been used in the closed case reviews) for use in the open case reviews. The new “date interviewed” field related to the Complainant interview.

The open case review team consisted of:

Reviewer	Regions
ARA Teri Wigger	9
(b) (6) (b) (6)	2, 3, 4, and 5
Attorney Katelyn Poe (NSOL)	6, 7, 8 and 10

The open case reviews were supervised by Region 1 ARA and Deputy Tiger Team Leader, Michael Mabee and NSOL-FLW Whistleblower Counsel, Megan Guenther.

Based on departmental, congressional, and media interest, several key points were pre-established for monitoring:

1. Was the complaint properly docketed under the correct statutes?
2. Was there a complainant interview?
3. What was the date the complainant was interviewed?
4. Were referrals of the complaint made to partner agencies (e.g., SEC, CFPB, DOJ)?

There were also many other data points which were captured in the survey which will be available for later review and analysis.

In preparation for the reviewing of the open Wells Fargo case files, MaryAnn Garrahan forwarded the following e-mail to the field:

**From:** Garrahan, MaryAnn - OSHA  
**Sent:** Thursday, October 13, 2016 10:23 AM  
**To:** zzOSHA-RAS; zzOSHA-DRAS; zzOSHA-WB-ARA  
**Cc:** Hooper, Robert B. - OSHA CTR; (b) (6) - OSHA; zzOSHA-WB-DWPP  
**Subject:** Wells Fargo Open Cases

Colleagues,

Thank you for your responsiveness to our requests given this fluid and high visibility environment. Understand that in the coming weeks, there will likely be additional requests for information of an exigent nature. The Tiger Team is in need of some additional items on the open cases.

#### 1. IMIS Allegation Summaries

We are going to need ARAs to review all open case allegation summaries. Make sure that they are a concise, accurate description of Complainant’s alleged protected activity. Sometimes the initial allegation summaries entered are not complete or concise. Please make sure all of the

allegation summaries now reflect CP's alleged protected activity. Since we do not have the open case files, this is a critical piece of information we need in order to look at what the issues are nationally. As you update these, please send any updated summaries to Michael Mabee with a cc: to (b) (6). Please attempt to complete your review and updates by COB 10/19/2016 (sooner, if possible).

## 2. Screening interviews / memos for all "untimely" cases

We need the Regions to upload the complaint, screening interview (or memo to file) of all "untimely" complaints filed against Wells Fargo since September 8, 2016 (the date of the LA City Attorney, CFPB and OCC settlements). Upload these files to the "O" Drive here:

(b) (7)(E)

Please create a folder with the case number as the first part of the file name (e.g., "(b) (6) (b) (6) v Wells Fargo"). Please let Michal Mabee know when you have completed uploading the files from your region. We realize that many of the screens have not yet been done or the process has just started. Please try to get these done within 14 days – but sooner if you possibly can. (For now, at least load the complaints.)

We are looking hard at these untimely complaints to see what the options are. The Tiger team will talk more about the untimely complaints tomorrow during the ARA/WB conference call.

Thank you for your assistance.

MaryAnn Garrahan, Director, Directorate of Whistleblower Protection Programs

Again, unlike the closed case file reviews, the open case file reviews are ongoing. As of November 1, 2016, the review team had completed a "first pass" of 29 of the 48 open cases (60%). One of the most prominent deficiencies related to notifying Partner Agencies which the reviewers addressed immediately by notifying the regions and asking them to correct it. More often than not, the region had already performed the work but had not forwarded the reviewers the documentation.

Related to the Open case files, the Tiger Team forwarded to the field an urgent message to request additional documentation on the open Wells Fargo cases. "As you are aware, we are briefing the Senate Banking Committee staff on Thursday. For each case on the attached spreadsheet (44 open cases as of 10/22/2016), we need documentation of the referral to any partner agencies (SEC, CFPB and DOJ). You can send a copy of the final cover memo or the email to the agency. Please include the actual complaint as it was sent to the partner agency as well.

Please email these as soon as possible, but no later than Wednesday October 26, 2016.

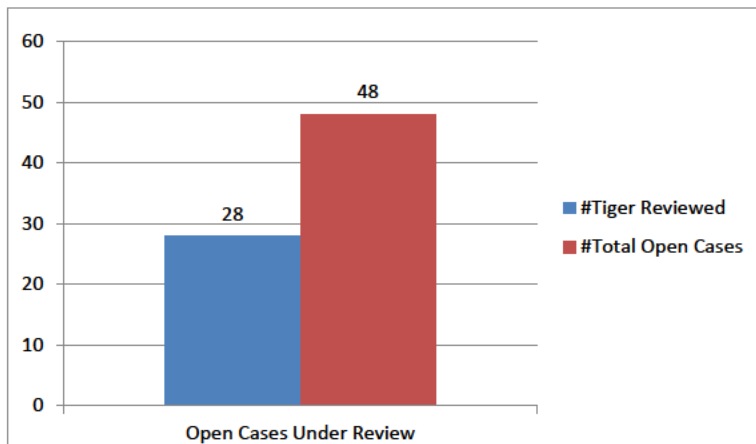
Regions should email these to the reviewer of their cases listed below:  
Regions 2, 3, 4, and 5: Send to (b) (6)

Regions 1, 6, 7, 8 and 10: Send to Katelyn Poe at [Poe.Katelyn@dol.gov](mailto:Poe.Katelyn@dol.gov)

Region 9: Send to Teri Wigger at [Wigger.Teri@dol.gov](mailto:Wigger.Teri@dol.gov)

Your immediate assistance is greatly appreciated.”

**ALL OPEN WELLS FARGO CASES UNDER REVIEW**



**OPEN CASES UNDER REVIEW BY REGION AND STATUE**

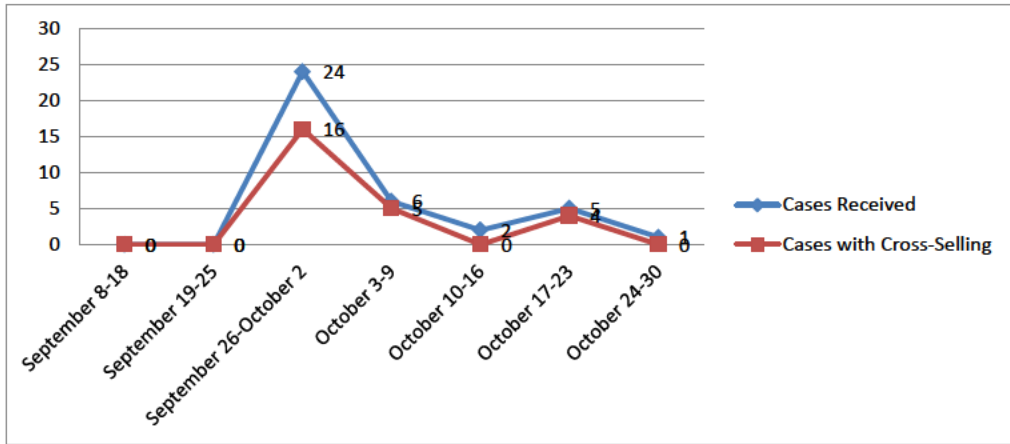
Regions	Total Open Cases	SOX	CFPA	OSHA	SOX/CFPA	CPFA/SOX	OSHA/SOX	11(c) State Cases
1	4	3	0	0	0	1	0	0
2	4	1	1	0	2	0	0	0
3	1	0	0	0	0	1	0	0
4	8	1	3	1	0	3	0	0
5	2	1	0	1	0	0	0	0
6	3	2	0	0	1	0	0	0
7	3	1	0	1	1	0	0	0
8	2	2	0	0	0	0	0	0

9	19	6	3	0	7	2	1	0
10	2	1	1	0	0	0	0	0
<b>Totals</b>	<b>48</b>	<b>18</b>	<b>8</b>	<b>3</b>	<b>11</b>	<b>7</b>	<b>1</b>	<b>0</b>

**OPEN CASES – TIMELY/UNTIMELY**

Region	#Untimely Filed (Open cases after 9/8)	#Timely Filed (Open cases)
1	3	1
2	2	2
3	0	1
4	6	2
5	2	0
6	2	1
7	2	1
8	1	1
9	12	7
10	2	0
<b>Total</b>	<b>32</b>	<b>16</b>

**Incoming Wells Fargo Cases with Cross Selling Implications – September 9-October 30**

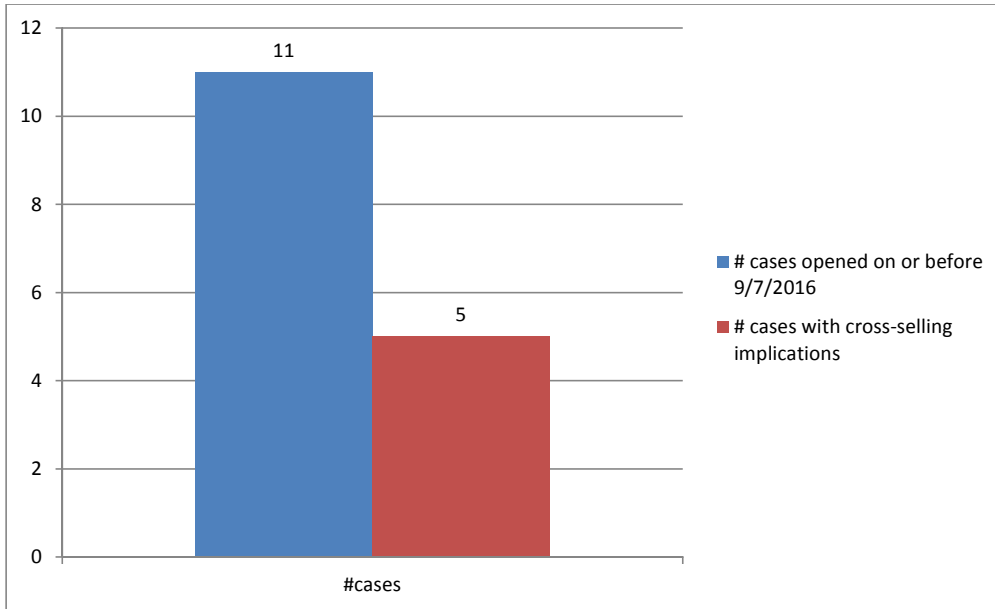


**NUMBER OF WELLS FARGO CASES RECEIVED WITH CROSS-SELLING IMPLICATIONS**

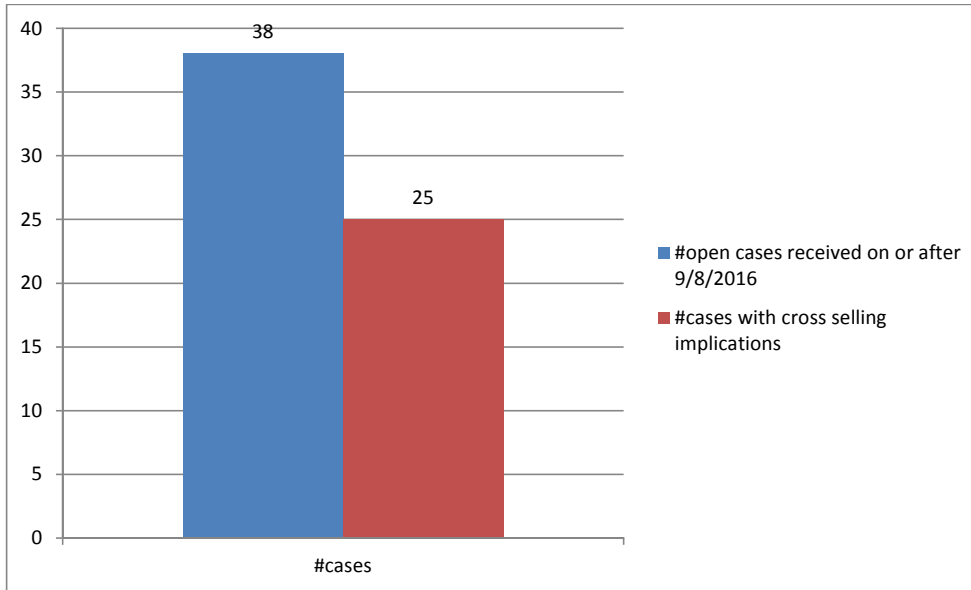
Week (2016)	# Cases Received (Date filed)	# Cases Received with Cross-Selling Implications
On or before Aug. 7, 2016	10	5
August 8-14	1	0
August 15-21	0	0
August 22-28	0	0
August 29-September 4	0	0
September 5-7	0	0
<b># complaints filed <u>prior to</u> September 8, 2016</b>	<b>11</b>	<b>5</b>
September 8-18	0	0
September 19-25	0	0
September 26-October 2	24	16
October 3-9	6	5
October 10-16	2	0
October 17-23	5	4
October 24-30	1	0
October 31-November 6	0	0
<b># complaints received <u>after</u> Sept. 8, 2016/ # involving cross-selling allegations</b>	<b>38</b>	<b>25</b>



**CROSS-SELLING CASES – PRE-9/8/16 CASES**



**CROSS-SELLING CASES – POST-9/8/16 CASES**



**Findings:**

The Tiger Team’s evaluation of the Region 9 Wells Fargo cases revealed significant program issues and was also “ground zero” for several media criticisms against OSHA.

One question Assistant Secretary Dr. Michaels asked the Tiger Team was “how could we not have known about [the problems in Region IX].”

Statistically, compared to National averages, Region 9 had mounting issues with both investigator case load and the average age of open cases. As can be seen in the charts below, the region has carried a significantly higher than national average case load per investigator. The region has also carried a significantly higher average age of open cases than the national average. The latter is a national performance measure and therefore, is important to monitor.

These are only two of many data points that management should review on a regular basis to evaluate the health of the program.

**Fig. X: Average Open Caseload/Investigator**

	Region 9	National Avg.
FY2010	22.7	20.1
FY2011	43.3	28.3
FY2012	40.6	26.6
FY2013	34.8	25.2
FY2014	37.7	24.1
FY2015	87.3	25.3
FY2016	79.8	29.3

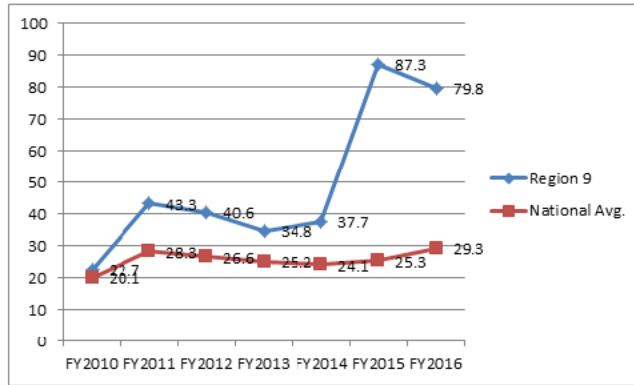
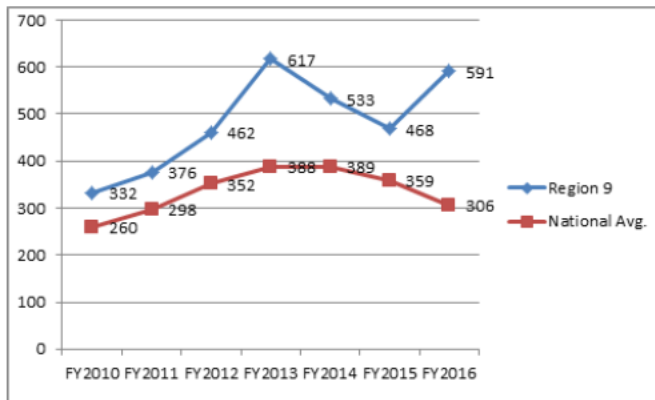


Fig. X: Average Age Open Cases:

	Region 9	National Avg.
FY2010	332	260
FY2011	376	298
FY2012	462	352
FY2013	617	388
FY2014	533	389
FY2015	468	359
FY2016	591	306



Tiger Team Wells Fargo related media and FOIA requests.

The Tiger Team received four separate FOIA requests.

- Sarah Lynch, Thomson Reuters, filed two FOIA requests. The first request sought Wells Fargo whistleblower complaints, amended complaints, Secretary's Findings, and settlements from closed Wells Fargo cases files from 2010-Present. All of the case files have been redacted; however, OSHA has provided nearly 10 law firms that represented Wells Fargo in these cases an opportunity to object to the release of confidential business information. At this time, OSHA has granted an response extension for several of Wells Fargo's attorneys to raise or decline objections. This FOIA will be closed in the next month.
- Ms. Lynch also requested data on the number whistleblower complaints against Bank of America, J.P. Morgan, and other large banks in comparison with Wells Fargo. Because OSHA was already running this data, this chart was submitted for clearance and will be released in December.
- Matt Egan, CNN Money, requested the 2008 Secretary's Findings in a merit case brought in the San Francisco office as well as a confidential internal Wells Fargo e-mail. The Findings were sent on November 7, 2016. In a letter received on December 5, 2016, Wells Fargo objected to the release of the confidential e-mail. In a letter dated December 8, 2016, OSHA declined to provide Mr. Egan the e-mail, but offered him an opportunity to appeal.
- A former whistleblower complainant has requested his case file under FOIA. Because of the large size of the file and the approximately 1,000+ pages of confidential business information, the requestor modified his request on December 12, 2016 to reduce the scope of his request.

The Tiger Team helped to answer the following Media Inquiries as follows:

- November 23, 2016, Thomson Reuters international finance reporter, Richa Naidu, requested data for whistleblower complaints that OSHA has received since 2010, broken down by Region Office. OSHA provided a response on November 23, 2016. The story run date is TBD.
- October 20, 2016, NBC Bay Area News investigative reporter, Liz Wagner, requested whistleblower complaint data by region and disposition. OSHA provided a response on November 2, 2016 and a follow-up request to clarify data by issue and statute was provided response on November 4.. The story ran on November 22, 2016: <http://www.nbcbayarea.com/news/local/Dozens-of-Wells-Fargo-Employees-Filed-Whistleblower-Complaints-with-Feds-New-Data-Shows--402566925.html>

- October 4, 2016, Reuters SEC reporter, Sarah Lynch, submitted questions regarding OSHA whistleblower program, cases received, referrals and procedures, and allegations from Darrell Whitman and the Shankar case. The Tiger Team and Department cleared the response on October 7, 2016. The story ran on October 13, 2016:  
<http://www.reuters.com/article/us-wells-fargo-accounts-whistleblower-idUSKCN12D2M0?il=0>

***Tiger Team Guidance:***

Guidance to the field was primarily provided through written instructions from Maryann Garrahan, Director of DWPP through Dorothy Dougherty, Deputy Assistant Secretary; weekly updates/instruction from OSHA Leadership on the weekly Regional Administrator WebEx conference calls; e-mails from DWPP; e-mails from the Tiger Team; and DWPP weekly ARA/WB conference calls. Guidance included: providing information to the Field on the handling of Wells Fargo cases including processing FOIA requests and basic instructions on what to do with incoming Wells Fargo complaints.

***Reuters FOIA:***

“Attached is a FOIA requiring some additional documents from the Regions. For all Wells Fargo Cases from 2002-2009 (we already have 2010 forward):

Complaints

Final disposition letters

Any supplements provided by the complainant that shed additional light on the case

Upload the responsive documents to: (b) (7)(E)

We understand that some of the older files may have been destroyed in accordance with record retention schedules. We will just need to know which files were destroyed for our response.

Specifically, the Tiger Team developed the following procedures for handling a few subsets of the open Wells Fargo Complaints. The key factors in any of these are consultation with your RSOL first, and then submitting the issue to the Tiger Team for final approval.”

On October 7, Mary Ann Garrahan, forwarded the following e-mail to the field:

From: Garrahan, MaryAnn - OSHA

Sent: Friday, October 7, 2016 6:44:45 AM

To: zzOSHA-WB-ARA

Cc: zzOSHA-RAS; zzOSHA-DRAS; Dougherty, Dorothy - OSHA; Barab, Jordan - OSHA; zzOSHA-WB-DWPP; Guenther, Megan - SOL

Subject: Request to send SOX & CFPA complaints to DOJ

Colleagues:

As a part of the Justice Department's effort to ferret out financial fraud, they request that we send them all complaints and case closure documents for SOX and/or CFPA complaints filed in FY 2016. Submissions to the DOJ's Civil Frauds Division are to be sent to (b) (7)(F).

Please confirm with Christine Stewart whether you have completed this action by Friday, October 28, 2016.

On October 11, MaryAnn Garrahan forwarded the following guidance to the field:

**From:** "Garrahan, MaryAnn - OSHA" <[Garrahan.MaryAnn@dol.gov](mailto:Garrahan.MaryAnn@dol.gov)>

**Date:** October 11, 2016 at 9:58:29 AM EDT

**To:** zzOSHA-RAS <[zzOSHA-RAS@dol.gov](mailto:zzOSHA-RAS@dol.gov)>, zzOSHA-DRAS <[zzOSHA-DRAS@dol.gov](mailto:zzOSHA-DRAS@dol.gov)>, zzOSHA-WB-ARA <[zzOSHA-WB-ARA@DOL.GOV](mailto:zzOSHA-WB-ARA@DOL.GOV)>

**Cc:** "Dougherty, Dorothy - OSHA" <[Dougherty.Dorothy@dol.gov](mailto:Dougherty.Dorothy@dol.gov)>, "Barab, Jordan - OSHA" <[Barab.Jordan@dol.gov](mailto:Barab.Jordan@dol.gov)>, "Sander, Kirk - OSHA" <[Sander.Kirk@DOL.gov](mailto:Sander.Kirk@DOL.gov)>, "[rhooper267@gmail.com](mailto:rhooper267@gmail.com)" <[rhooper267@gmail.com](mailto:rhooper267@gmail.com)>, "Brand, Jennifer S. - SOL" <[Brand.Jennifer.S@dol.gov](mailto:Brand.Jennifer.S@dol.gov)>, "Guenther, Megan - SOL" <[Guenther.Megan@dol.gov](mailto:Guenther.Megan@dol.gov)>, zzOSHA-WB-DWPP <[zzOSHA-WB-DWPP@dol.gov](mailto:zzOSHA-WB-DWPP@dol.gov)>

**Subject: FOIA and Wells Fargo Incoming Complaints -- Script Guidance**

Colleagues:

As you have heard, the Secretary of Labor has ordered a "top to bottom review" of Wells Fargo cases in both the Wage and Hour Division and OSHA. As a result, OSHA has stood up a Tiger Team comprised of Regional, DWPP, OAS and OC personnel as well as support from NSOL-FLS. The Tiger Team project is being managed by Robert Hooper, the former Deputy Regional Administrator of Region I. The Tiger Team is presently reviewing both closed and open Wells Fargo cases. This project is being monitored at the highest levels.

Below is some initial guidance and information on the handling of Wells Fargo cases. We will have more information in an upcoming conference call which will be scheduled later this week.

**Initial Basic instructions on what to do with incoming WELLS FARGO complaints**

o Conduct a normal screening interview. Either record the interview or do a detailed memo to file as per regional procedure. If the complaint appears untimely, please be sure to explore

whether there may be any bases for tolling or whether there are any potential later actions (such as quarterly bonus payments the complainant would have received but for the alleged retaliation) that may be timely.

- o Be sure to explore and get detailed information on any allegations related to any of the following:

- § Retaliation for raising concerns about the opening of unauthorized deposit accounts for existing customers and/or the transferring of funds to those accounts from their owners' other accounts, without the customers' knowledge or consent

- § Retaliation for raising concerns about the submitting of applications for credit cards in consumers' names using consumers' information without their knowledge or consent

- § Retaliation for raising concerns about enrolling consumers in online banking services that they did not request

- § Retaliation for raising concerns about the ordering and activating of debit cards using consumers' information without their knowledge or consent

- § Allegations that retaliation occurred after the complainant raised concerns to Wells Fargo's ethics line

- o Explore with the complainants the internal process they used. Did they raise their concerns through the ethics hotline or other supposedly anonymous source? Did they raise their concern by contacting HR? After raising their concerns internally were they subjected to a WELLS FARGO "investigation?"

- o Also, did they intend the complaint to be anonymous and/or confidential? If so, do they have reason to believe it was not kept confidential and what is that evidence?

- o If the complaint appears to be timely, docket and process docket letters as normal. Send a copy of the complaint to the partner agencies (SEC, CFPA)

- o If the complaint does not appear to be timely, docket in IMIS and tell the complainant we will review their allegation and get back to them (we believe within a week or so). **DO NOT SEND DOCKET LETTERS YET.** Send a copy of the complaint to the partner agencies (SEC, CFPA)

- o Keep an ear out for any Wage and Hour issues (unpaid hours of work, unpaid overtime). If Wage and Hour issues are alleged, make a referral to Wage and Hour and document the referral in the file.

Do not close or screen out any Wells Fargo cases without talking with the Tiger Team and your RSOL.

Thank you.

MaryAnn Garrahan

Director, Whistleblower Protection Programs

**From:** Garrahan, MaryAnn - OSHA

**Sent:** Thursday, October 13, 2016 9:32 AM

**To:** zzOSHA-RAS; zzOSHA-DRAS; zzOSHA-WB-ARA

**Cc:** Dougherty, Dorothy - OSHA; Barab, Jordan - OSHA; Hooper, Robert B. - OSHA CTR;

(b) (6) - OSHA; zzOSHA-WB-DWPP

**Subject:** Additional instructions for sharing complaints and findings with Partner Agencies

Please see the attached memo that supplements the WIM regarding the partner agency referral process.

October 12, 2016

**MEMORANDUM FOR:**

REGIONAL ADMINISTRATORS

**THROUGH:**

DOROTHY DOUGHERTY

Deputy Assistant Secretary

**FROM:**

MARYANN GARRAHAN,

Director Directorate of Whistleblower Protection Programs

**SUBJECT:**

Updated Guidelines on Sharing Complaints and Findings with Partner Agencies

This guidance has been developed to supplement the existing guidance in Chapters 2, 4, and 5 of the Whistleblower Investigations Manual regarding the partner agency referral process. This policy applies to all complaints received by the whistleblower protection program.

1. Several of the regulations require that OSHA provide copies of incoming whistleblower complaints to the appropriate partner agency. The Regions are to send copies of incoming complaints to each relevant partner agency no later than the date that notification letters are sent to the parties.



2. In cases where the complainant withdraws his or her complaint prior to docketing, the Regions should request permission from the complainant to forward the complaint to the relevant partner agency(s). If the complainant does not give consent to forward the complaint, then the regional whistleblower manager should review the underlying substantive allegation (e.g. defective wings on an aircraft) and consider the gravity of the impact to the workforce and the public. Should the manager believe that serious harm would result if the complaint goes unaddressed; the regional manager has the discretion to notify the relevant partner agency(s) of the substance of the allegation without revealing the identity of the complainant. The regional manager will notify the complainant of such action.
3. The regional manager should ensure that the Region sends all of the relevant partner agencies copies of the complaint and findings in each case. For example, if a claim is docketed under FRSA, but also has NTSSA implications, both the FRA and FT A should be notified.
4. In all cases, the relevant partner agency(s) should be notified of OSHA's closure of a case regardless of the disposition (e.g. merit, dismissed, settled, kicked-out, or withdrawn). The Regions should transmit case closure documentation (e.g. findings, settlement approval letters, or confirmation of withdrawals) to the relevant partner agency(s) on the same day that such information is sent to the parties. The Regions should transmit kick-out information to the relevant partner agency(s) when OSHA receives a copy of the district court complaint from the complainant or otherwise learns that complainant has filed an action in district court.
5. When a complaint alleges conduct that may violate both SOX and CFPB, the Region should docket the case under both statutes. The Region should send copies of the complaint to both the CFPB and the SEC no later than the date that OSHA sends notification letters to the parties. The Region should send case closure documentation to both SEC and CFPB on the same day that it sends that documentation to the parties.
6. In all cases that are filed under CFPB, SOX or both, the complaint and case closure documents should also be sent to the U.S. Department of Justice, Civil Frauds Division at the same time that they are sent to the primary agency(s). Please see the attached Distribution of Complaints and Investigation Findings chart.
7. As a reminder, please utilize the system set forth in the email of April 27, 2015, addressing standardized subject lines for emails sent to our partner agencies. See attached.

#### Attachments

The field also received the following Tiger Team requests sent out by Maryann Garrahan:

Colleagues,

In addition to requesting the updated allegation summaries and the untimely screenings (below), we now need to ask for the following on **all open WF investigations**:

Timely Complaints:

For the “timely” complaints that are under investigation, we need:

1. Complaint
2. Complaint interview (audio file and/or memo to file)
3. Position Statement
4. Any Complainant rebuttal information

Please upload these documents **by Friday 10/21** to your regional folder located at:

(b) (7)(E) \

Untimely Complaints:

And, as stated below, upload the “untimely” complaints and screening interviews/memos **within 14 days of receipt** to:

(b) (7)(E)

Thank you for your attention to this matter.

MaryAnn Garrahan, Director, DWPP

From: Garrahan, MaryAnn - OSHA  
Sent: Monday, October 24, 2016 8:15 AM  
To: zzOSHA-RAS; zzOSHA-DRAS; zzOSHA-WB-ARA  
Cc: Dougherty, Dorothy - OSHA; Barab, Jordan - OSHA; zzOSHA-WB-DWPP; Guenther, Megan - SOL; Hooper, Robert B. - OSHA CTR  
Subject: New Guidance on WF open WF cases

Colleagues,

The Tiger Team has developed the following procedures for handling a few subsets of the open Wells Fargo Complaints. The key factors in any of these are consultation with your RSOL first, and then submitting the issue to the Tiger Team for final approval.

*Withdrawals:*

The regions should process withdrawal requests in accordance with the manual upon insuring that:

1. The withdrawal is not due to a settlement or agreement with Respondent.
2. Investigators obtain the best contact information possible.
3. There is no indication that the withdrawal was coerced (by Respondent other party to include OSHA).
4. Each OSHA Region will consult with their RSOL on WF withdrawals.
5. Tiger team will approve all WF withdrawal requests until further notice.

*ADR Requests:*

WF ADRs may proceed on cases when:

1. The OSHA Region and RSOL agree that ADR is appropriate.
2. Tiger team will approve all ADR requests until further notice.

*Complaints with No Prima Facie Allegation* (i.e. cases in which the complainant is not raising concerns related to any OSHA whistleblower statute):

Normally OSHA would either:

1. Screen out if Complainant concurs with the reason for administrative closure.
2. Docket and dismiss if Complainant does not concur (giving Complainant appeal rights).

The regions should apply this policy as normal on WF cases after:

1. Consulting with their RSOL.
2. Tiger team will approve all WF dismissal requests until further notice.

Please direct any questions to Bob Hooper or Mike Mabee of the Tiger Team.

MaryAnn

MaryAnn Garrahan, Director Whistleblower Protection Program

From: Hooper, Robert B. - OSHA CTR  
Sent: Monday, October 31, 2016 12:52 PM  
To: zzOSHA-WB-ARA  
Cc: Dougherty, Dorothy - OSHA; Barab, Jordan - OSHA; Garrahan, MaryAnn - OSHA; Cleeland, Nancy - OSHA; (b) (6) - OSHA; (b) (6) - OSHA; Howe, Mary - OSHA; (b) (6) - OSHA; Mabee, Michael - OSHA; (b) (6) - OSHA; (b) (6) S. - OSHA; (b) (6) - OSHA; Sander, Kirk - OSHA; (b) (6) - OSHA; (b) (6) - OSHA; (b) (6) - OSHA; Wigger, Teri - OSHA  
Subject: Reminder - New Guidance on WF open WF cases

We have learned that it is possible that some folks may be discouraging Wells Fargo complaints because they are untimely.

Consistent with Leadership direction, it is important that complainants are not discouraged from filing complaints, particularly those related to cross-selling, since they may be included in future Global settlement discussions with Wells Fargo.

As we have in the past couple of weeks during the ARA/WB calls, we ask that you report out on significant Wells Fargo investigations as well as those individual cases where the complainant has a compelling story to tell regarding the tremendous pressures Management applied to open up fraudulent customer accounts. Thanks.

From: Hooper, Robert B. - OSHA CTR  
Sent: Monday, October 31, 2016 9:03 AM  
To: zzOSHA-WB-ARA  
Cc: Dougherty, Dorothy - OSHA; Barab, Jordan - OSHA; Garrahan, MaryAnn - OSHA; Cleeland, Nancy - OSHA; (b) (6) - OSHA; (b) (6) - OSHA; Howe, Mary - OSHA; (b) (6) - OSHA; Mabee, Michael - OSHA; (b) (6) - OSHA; (b) (6) S. - OSHA; (b) (6) - OSHA; Sander, Kirk - OSHA; (b) (6) C - OSHA; (b) (6) - OSHA; (b) (6) - OSHA; Wigger, Teri - OSHA  
Subject: Reminder - New Guidance on WF open WF cases

Just a friendly reminder that the guidance on Wells Fargo cases, enclosed below, is still in effect. Please ensure that before any action is taken on Withdrawals, ADR Requests, and Complaints with no prima facie allegations, that you have a conversation with the Tiger Team. We will include Megan Guenther in the conversation. Thanks.

Colleagues,

The Tiger Team has developed the following procedures for handling a few subsets of the open Wells Fargo Complaints. The key factors in any of these are consultation with your RSOL first, and then submitting the issue to the Tiger Team for final approval.

*Withdrawals:*

The regions should process withdrawal requests in accordance with the manual upon insuring that:

1. The withdrawal is not due to a settlement or agreement with Respondent.
2. Investigators obtain the best contact information possible.
3. There is no indication that the withdrawal was coerced (by Respondent other party to include OSHA).
4. Each OSHA Region will consult with their RSOL on WF withdrawals.
5. Tiger team will approve all WF withdrawal requests until further notice.

*ADR Requests:*

WF ADRs may proceed on cases when:

1. The OSHA Region and RSOL agree that ADR is appropriate.
2. Tiger team will approve all ADR requests until further notice.

*Complaints with No Prima Facie Allegation* (i.e. cases in which the complainant is not raising concerns related to any OSHA whistleblower statute):

Normally OSHA would either:

1. Screen out if Complainant concurs with the reason for administrative closure.
2. Docket and dismiss if Complainant does not concur (giving Complainant appeal rights).

The regions should apply this policy as normal on WF cases after:

1. Consulting with their RSOL.
2. Tiger team will approve all WF dismissal requests until further notice.

Please direct any questions to Bob Hooper or Mike Mabee of the Tiger Team.

### **Additional Tiger Team recommendations**

It is important to note that our Wells Fargo Whistleblower audit was largely case and IMIS data based and we did not conduct interviews of Investigators.

It is critical that the Whistleblower program be fully staffed in Region 9 and that a qualified Assistant Regional Administrator be hired to provide direction and mentoring for his/her staff.

Investigators should perform complainant interviews at the time of screening. E-mails should not be a substitute for telephone or in-person interviews.

Consistently provide copies of cases to partner agencies. A reminder memo was sent to the field on October 12, 2016. The Policy Memo will result in a clarification to the WIM.

Meaningful quarterly statistics on multiple data points should be provided to management. Because these are presently difficult to produce in the current IMIS system, DWPP should identify the data points, produce, analyze and distribute these. This may be the best way to identify adverse statistical trends in a Region.

In the intake module of IMIS, there is a need for a case type of "inquiry" for cases that do not fall under one of the OSHA statutes. (These "inquiry" coded complaints cannot be docketed). This is needed in order to allow documentation of incoming calls / CCUs that do not turn out to be actual complaints but should be documented. For example, in many of the Wells Fargo CCUs, the people wrote to Secretary Perez to "tell their story" but did not intend to file a whistleblower complaint.

A strategy that should be considered by DWPP to reduce the oldest and possibly some of the most vulnerable whistleblower cases would be to identify all cases over 5 years old (presently 15).

1. Each quarter, DWPP will run the list of cases over 5 years old. This list will be sent only to the regions with cases on the list and it will request a status update i.e. why does the case continue to be unresolved, what needs to be done to complete the case, and what is the estimated completion date?
2. When the number of cases over 5 years is reduced, DWPP will lower it to the cases over 4.5 years and so on until such time as it is no longer deemed necessary to produce these lists.

Example below: These are all cases that are or will be over 5 years old as of November 30, 2016:

<u>Case Number</u>	<u>Respondent Name</u>	<u>Complainant Name</u>	<u>Investigator Name</u>	<u>Case Type</u>	<u>Date Filed</u>	<u>Status</u>
(b) (6)	Koller Concrete, Inc.	(b) (6)		STAA	11/30/2011	Pending
(b) (6)	Metropolitan Trucking, Inc.	(b) (6)		STAA	10/20/2011	Pending
(b) (6)	Environmental Solutions Worldwide America	(b) (6)		OSHA	09/26/2011	Pending
(b) (6)	National Railroad Passenger Corporation (AMTRAK)	(b) (6)		FRSA	08/03/2011	Pending
(b) (6)	Reidler Decal Corp.	(b) (6)		OSHA	07/27/2011	Pending
(b) (6)	Dept. of Accounting & General Services (DAGS)	(b) (6)		AHERA	06/08/2011	Pending
(b) (6)	Kinder Morgan	(b) (6)		OSHA	06/06/2011	Pending
(b) (6)	Wells Fargo Bank, N.A.	(b) (6)		SOX	06/01/2011	Pending
(b) (6)	Vision Airlines	(b) (6)		AIR21	05/31/2011	Pending
(b) (6)	Omni Air International	(b) (6)		AIR21	05/23/2011	Pending
(b) (6)	AK Steel	(b) (6)		OSHA	05/04/2011	Pending
(b) (6)	BNSF Railway Co.	(b) (6)		FRSA	11/22/2010	Pending
(b) (6)	Zeiders Enterprise, Inc.	(b) (6)		OSHA	09/14/2010	Pending
(b) (6)	ACP Jet Charters, Inc	(b) (6)		AIR21	05/25/2010	Pending
(b) (6)	ACP Jet Charters, Inc	(b) (6)		AIR21	05/25/2010	Pending

It is important to ensure that even some basic procedures are in place that seemed to be lacking in Region 9 in October. For instance, the RSI had not been reviewing administrative closings.

This came to light when the Acting ARA/WB was discussing the “cheat sheet” for the rotating screeners. That means that for an unidentified period of time the administrative closures have not been reviewed. This period of time could be months or years. R9 investigators screened cases without supervisor oversight and the cases may have then been administratively closed/screened out.

It is recommended that a case management system be developed to better allow DWPP to spot trends and effectively analyze outliers.

The Whistleblower Investigator’s Manual could use some clarifications including:

Page 3-16 B. Contact with the Complainant. The investigator’s initial contact with the complainant should be made during the complaint intake and evaluation process. The assigned investigator must contact the complainant as soon as possible after receipt of the case assignment. Contacts must be made even if the investigator’s caseload is such that the actual field investigation may be delayed.

D. Complainant Interview. The investigator must attempt to interview the complainant in all cases. The investigator must arrange to meet with the complainant as soon as possible to conduct an interview regarding the complainant’s allegations.

For example, the modified guidance to supplement the existing guidance in the Whistleblower Investigations Manual regarding the timing of complainant interviews could include:

To ensure quality, consistency and enhance customer service, all cooperative complainants will be interviewed within 7 business days after filing their complaint except in the situations noted below:

1. Lack of cooperation;
2. Parties enter Alternative Dispute Resolution;
3. Parties inform OSHA that they are actively negotiating a settlement agreement;
4. A written complaint that alleges prima facie allegation with such specificity leaving no initial questions for OSHA. In these cases, the complaint will be informed that they will be interviewed after OSHA receives Respondent’s position statement. Such interviews shall occur within 30 days after Complainant received the position statement.

It is also recommended that DWPP develop a process to improve communications across the regions to alert folks about a possible corporate wide issue. One recommendation would be to include bullets in the WB manual to do an IMIS search. The Manual may have some information on this subject already.



There is also a need to develop a training program specifically for RSIs (Whistleblower supervisors)

Lastly, it is recommended that regular Regional independent whistleblower audits be performed which could identify inconsistencies with Regional and National Policy.