



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

September 12, 2024

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: OSC File Nos. DI-24-000838 and DI-24-000870
Referral for Investigation—5 U.S.C. § 1213(c)

Dear Acting Secretary Su:

On May 29, 2024, the Office of Special Counsel (OSC) referred for your review, pursuant to 5 U.S.C. § 1213(g)(2), whistleblower disclosures that employees of the U.S. Department of Labor, Mine Safety and Health Administration (MSHA), Arlington, Virginia, engaged in conduct that may constitute a violation of law, rule, or regulation, an abuse of authority, and a substantial and specific danger to public safety. Under Section (g)(2), the agency head is required to inform the Special Counsel of what action the agency has taken, or is being taken, and when such action will be completed. OSC requested this response by July 29, 2024. To date, OSC has not received a substantive response as required by 5 U.S.C. § 1213(g)(2); rather, the agency has indicated that the matter is under review and will require additional time to resolve. In view of this information and based on the whistleblower's disclosures, I have made a determination to refer the matter under 5 U.S.C. § 1213(c).¹

The allegations to be investigated remain the same as those documented in the attached 5 U.S.C. § 1213(g)(2) referral letter transmitted to your office on May 29, 2024, in addition to any related allegations of wrongdoing discovered during the investigation. The report must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report, along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly

¹ We note that this 5 U.S.C. § 1213(c) referral supersedes our prior referral of these allegations under 5 U.S.C. § 1213(g)(2), which was transmitted on May 29, 2024.

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available. The report of your investigation of allegations and any related matters is due to the Office of Special Counsel (OSC) on November 12, 2024.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Pages/DOW.aspx>. If your investigators have questions regarding the statutory process or the report required under 5 U.S.C. § 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 or cmcmullen@osc.gov for assistance. I am also available for any questions you may have.

Sincerely,

A handwritten signature in black ink that reads "Hampton Dellinger". The signature is written in a cursive, slightly slanted style.

Hampton Dellinger
Special Counsel

Enclosure

cc: The Honorable Larry D. Turner, Inspector General

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- The statute provides that the agency report shall be reviewed and signed by the agency head. 5 U.S.C. § 1213(d). Agencies should fulfill this Congressional mandate.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. 5 U.S.C. §§ 1213(f), 1219(a)(1).



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May 29, 2024

The Honorable Julie A. Su
Acting Secretary
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200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: OSC File Nos. DI-24-000838 and DI-24-000870
Referral – 5 U.S.C. § 1213(g)(2)

Dear Acting Secretary Su:

I am referring to you for your review whistleblower disclosures that employees of the U.S. Department of Labor, Mine Safety and Health Administration (MSHA), Arlington, Virginia, engaged in conduct that may constitute a violation of law, rule, or regulation, an abuse of authority, and a substantial and specific danger to public safety. A report informing the Special Counsel of what action the agency has taken, or is being taken, and when such action will be completed is due to the Office of Special Counsel (OSC) by July 29, 2024.

[REDACTED],
who consented to the release of his name, alleged that the continuous personal dust monitors (CPDMs) MSHA requires all coal miners to wear are unsafe and that the agency has failed to properly investigate the safety issues associated with these machines, including a fire on August 27, 2021. The second whistleblower, who chose to remain confidential, alleged that MSHA's Deputy Assistant Secretary Patricia Silvey owns stock in Thermo Fisher Scientific (Thermo Fisher), the sole manufacturer of the CPDMs, led the 2014 rulemaking effort which resulted in the required use of the CPDMs, and provides access to Thermo Fisher representatives beyond that provided to other vendors. While the Special Counsel has not made a "substantial likelihood" determination pursuant to section 1213(c), he and OSC are concerned about the allegations.

The allegations reported are:

- MSHA's failure to determine the cause of the CPDM fire that took place on August 27, 2021, at the Warrior Met No. 7 Mine in Brookwood, Alabama;

- MSHA's failure to alert the mining industry about the safety issue associated with CPDMs after the August 27, 2021, fire; and
- MSHA's Deputy Assistant Secretary Patricia Silvey's stock ownership in Thermo Fisher, as disclosed on her 2022 Form 278 filing.

Specifically, [REDACTED] disclosed that the CPDM was approved by MSHA's Approval and Certification Center, Electrical Safety Division in 2014 under 30 C.F.R. Part 18, as "intrinsically safe."¹ The regulation defines "intrinsically safe" as "incapable of releasing enough electrical or thermal energy under normal or abnormal conditions to cause ignition of a flammable mixture of methane or natural gas and air of the most easily ignitable composition."² The 2021 CPDM fire in Brookwood, Alabama, involved a spontaneous flame, which [REDACTED] contends negates the CPDM's intrinsically safe certification. At the conclusion of the investigation into this fire in 2021, [REDACTED] told the investigators that he believed the investigatory findings to be vague and incomplete. Specifically, [REDACTED] indicated that MSHA's failure to identify the cause of the fire was not consistent with MSHA's Accident Investigation Handbook which states that "[t]he objective of an accident investigation is to determine the root causes of the mine accident and to share this information with the mining community and others so that it can be used to prevent similar occurrences."³ The investigation did not determine the root cause of the fire, and the mining community has not been made aware of this potential safety issue. [REDACTED] also disclosed that Ms. Silvey may have influenced the then-Acting Assistant Secretary Jeanette Galanis in late 2021 when the allegedly incomplete investigation into Thermo Fisher's CPDMs concluded.

The second whistleblower disclosed that Ms. Silvey's 2022 Form 278 filing revealed her stock ownership in Thermo Fisher, the exclusive manufacturer of the CPDMs MSHA requires all coal miners to use. Ms. Silvey's stock ownership appears to violate 5 C.F.R. § 2635.101, which prohibits agency employees from using their public office for private gain⁴ as well as the U.S. Office of Government Ethics' Standards of Ethical Conduct, which "prohibits [employees] from working on [g]overnment matters that will affect [their] own personal financial interest, or the financial interests of certain other people" the employee may be close to.⁵ Ms. Silvey's stock ownership may also violate 18 U.S.C. § 208, which prohibits officers or employees of the executive branch and/or any independent agency of the United States from participating "personally and substantially as a [g]overnment officer or employee" in a matter in which he or

¹ 30 C.F.R. Part 18.

² *Id.* at § 18.2.

³ See MSHA Handbook Series, Handbook No. PH20-I-4, Accident Investigation Procedures, Chapter 1: Introduction. Available at: [PREFACE \(msha.gov\)](https://www.msha.gov/PREFACE).

⁴ 5 C.F.R. § 2635.101(b)(7).

⁵ See, U.S. Office of Government Ethics, Standards of Ethical Conduct, Chapter 2, Conflicting Financial Interests Available at

[https://www.oge.gov/web/oge.nsf/0/86D5B4F72AF0FBCB852585B6005A1A22/\\$FILE/Standards%20of%20Ethical%20Conduct%20508.pdf](https://www.oge.gov/web/oge.nsf/0/86D5B4F72AF0FBCB852585B6005A1A22/$FILE/Standards%20of%20Ethical%20Conduct%20508.pdf).

she has a financial interest.⁶ Although it is unclear when Ms. Silvey acquired this stock, her efforts to require coal miners to use Thermo Fisher's CPDMs date back to 2009 when she published a request for information in the Federal Register in connection with the upcoming CPDM-related rule proposal.⁷ The whistleblower explained that Ms. Silvey was involved throughout the rule making process until it was finalized in 2014, and has since maintained a close working relationship with Thermo Fisher, facilitating and attending regular meetings and other opportunities with company management that other MSHA contractors are not afforded.

Pursuant to 5 U.S.C. § 1213(g)(2), I am transmitting this information to you for a report, within a reasonable time, that reflects what action the agency has taken, or is being taken, and when such action will be completed. As a matter of policy, OSC asks that your staff interview the whistleblower as part of any review you conduct into this matter. Further, in some cases, whistleblowers who have made disclosures to OSC that are referred for investigation or review pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their claims. I urge you to take all appropriate measures to ensure that those reporting wrongdoing and any witnesses interviewed in the course of the review are protected from such retaliation and other prohibited personnel practices. OSC may place a copy of the agency report in its public file.

If your staff have questions regarding the statutory process or the review required under 5 U.S.C. § 1213(g)(2), please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 or cmcmullen@osc.gov for assistance. I am also available for any questions you may have.

Sincerely,



Hampton Dellinger
Special Counsel

cc: The Honorable Larry D. Turner, Inspector General

⁶ 18 U.S.C. § 208(a).

⁷ 74 F.R. 52708 at p. 52708-52712. Available at: <https://www.federalregister.gov/documents/2009/10/14/E9-24665/respirable-coal-mine-dust-continuous-personal-dust-monitor-cpdm>.