The Government Accountability Project, Project on Government Oversight and Whistleblowers of America submit these comments on the Office of Special Counsel's (OSC) proposed rule that covers actions on prohibited personnel practice complaints and whistleblowing disclosures through proposed Part 1800. A regulation should provide guidance for the stakeholder community on how a remedial agency exercises its discretion so that they can most effectively and efficiently pursue their rights. Unfortunately, this proposal offers none. There are no limits or even guidance on how OSC exercises its discretion whether to assist employees, other than requiring them to fill out the agency form properly. Although the proposal purports in section 1800.1 to identify options for assistance, that list is incomplete. The analysis below illustrates the issues for which whistleblowers need guidance to know their rights and how to use them effectively. As an underview, there are specific comments on individual provisions.

COMMENTS ON INCOMPLETE GUIDANCE

Eligibility for full field investigations: Section 1800.2(c)(3) states a complaint will be sufficient for investigation where information on an OSC form lists the parties, personnel action(s) and provides a general description of the practices or activities at issue. This is not meaningful information, because to operate within resources the OSC defines an investigation as reading the complaint and responding. Depending on the Special Counsel, only 6-10% of complaints receive a field investigation where documents are reviewed and witnesses interviewed. Final regulations should tell complainants what is necessary for OSC to open a field investigation and explain the level of evidence needed

Conduct of field investigations: Employees report that the nature and quality of OSC investigations varies widely. These regulations do not disturb the total discretion to continue that arbitrary trend. For example, there should be an institutionalized right for complainants to testify and answer questions from an OSC representative on the full scope of supporting evidence for a complaint, as well as to rebut agency responses. Department of Labor regulations for the 24 corporate whistleblower laws it enforces provide this type of guidance. *See, e.g.,* 29 CFR 1980.104(c). The OSC's final regulation should provide it as well.

Stays, or temporary relief: Because investigations often take years, for unemployed whistleblowers their lifeline to remain functional is whether OSC exercises its discretionary authority to seek stays of alleged retaliation. Often OSC has made a difference through successfully seeking voluntary stays, and nearly always prevails when it files a formal petition. The proposed regulations do not even inform employees of this option to seek relief. The final regulation should highlight this valuable provision of the Whistleblower Protection Act and identify the independent criteria for OSC to seek informal or formal stays.

Alternative Dispute Resolution (ADR): This OSC unit has been more successful in helping whistleblowers than any other. Through independent mediations the ADR unit has bypassed lengthy, contentious investigations for resolutions that both sides could accept. The proposed regulation does not mention this unit or its operations. The final regulation should describe the nature, requirements, and procedures for whistleblowers to seek relief through the ADR unit.

Remedies: This is the bottom line for asserting legal rights, but the regulation is silent on the OSC's standards for seeking relief. The final regulation should inform employees of the nature of available relief and the criteria to grant it. It should include an assessment for damages caused by the pain and suffering of whistleblower retaliation and the traumatic stress it causes.

Eligibility for whistleblowing disclosures: Section 1800.3 does not identify who is eligible to make a whistleblowing disclosure under 5 USC 1213. In the past, the OSC has had inconsistent practices for deciding whether government contractors or even private citizens generally could file disclosures. Jurisdiction to blow the whistle is not specified by statutory language. The final regulation should clarify eligibility for the broadest net of meritorious evidence. It should not matter who provides the evidence that can make a difference against fraud, waste, or abuse. In the past, the OSC has made a difference through referrals of citizen whistleblowing disclosures when it permitted that option.

Reasonable belief standard to refer whistleblowing disclosures: The proposed regulation properly summarizes the Special Counsel's authority to refer disclosures supported by a substantial likelihood for controlled agency investigation. However, it skips the OSC's authority under 5 USC 1213(g) to refer disclosures for preliminary review when supported by the lesser standard of a "reasonable belief." The final regulation should recognize this additional legal standard and channel. The regulation also should explain the difference between the legal standards of "reasonable belief" and "substantial likelihood."

Disclosure Unit procedures: The Whistleblower Protection Act in 5 USC sections 1213(b-e) establish a detailed process for action on whistleblowing disclosures that the OSC refers after making a "substantial likelihood" finding. It requires a report signed by the agency chief based on a statutorily-controlled investigation, followed by the whistleblower's comments, an OSC evaluation of adequacy for the President and Congress, and transparency of the results. The proposed regulation is silent on all these functions.

Clarity is needed. For example, agency reports repeatedly are signed with impunity by acting managers rather than agency chiefs, although the law's purpose is for agency chiefs to assume responsibility. The OSC's interpretation of this legal provision requires clarification. The most significant step in the process is whether the OSC finds the agency report to be reasonable, sends it back for more work or rejects it as unreasonable. Unfortunately, the proposed regulation does not describe these steps in the process, or explain how the OSC exercises discretion. To prepare their comments, whistleblowers need to know the OSC's decision-making criteria for acceptance of agency reports. The final regulation should disclose all material Disclosure Unit procedures and standards.

Unpublished OSC policies for case disposition: The OSC has numerous unwritten policies that are critical for employee rights. For instance, as in the MacLean case the OSC closes the case if an employee rejects a settlement that the OSC believes is as generous as the Merit Systems Protection Board would order in litigation. Employees need to know these policies to assess their own advocacy strategy. The final regulation should disclose all OSC policies that are material for action on prohibited personnel practice complaints and whistleblowing disclosures. If the complainant dies before settlement is finalized, the family should be informed of their rights as beneficiaries and if the estate can continue the claim.

Unpublished policy on privacy and redactions: Another practice that should be addressed by the regulation is to define the standards for determining what and who will be redacted from the public record, such as agency reports, whistleblower comments, referral letters etc.

Defining Standards for Investigating Agencies on Key Witness Evasion: Offices of Inspectors General have closed investigations without conclusions due to key government witnesses retiring or resigning from their position during the investigation period. In some instances, the investigators chose not to attempt to interview these alleged wrongdoers, despite their departure from the agency. Inferences can be drawn from one's refusal to cooperate with an investigation. However, it does not appear to be common practice to try to reach witnesses and draw inferences from non-cooperation. The practice of declining to complete an investigation and produce a finding allows wrongdoers to evade the system and puts OSC's system of investigating misconduct and ensuring government accountability at risk. The proposed regulations should address both the standards for investigating agencies more specifically and the procedures for handling agency evasion of complete investigations and reports that respond to the issues identified by Special Counsel's referral letter.

COMMENTS ON SPECIFIC PROVISIONS

Eligibility to seek relief: Section 1800.2(c) states that anyone can file a prohibited personnel practice complaint. This is too broad. So that there should be no confusion, the boundary needs to be clear that the law provides rights to Title 5 competitive service applicants, current employees, and retired annuitants.

OSC forms: The proposed regulation warns that the agency only will act on complaints in properly completed OSC forms. For employees in various nonprofessional federal jobs, including employees with disabilities who may be unable to access these forms, this can be a difficult or even chilling challenge. Proper completion of an OSC form should not be a prerequisite for rights if the necessary information is supplied for an investigation. This is the rule for the 24 corporate whistleblower laws administered by the Department of Labor.

RECOMMENDATION

These proposed regulations leave whistleblowers flying blind when it comes to the nature of their rights, what is expected of them to assert their rights, and how the OSC exercises its discretionary authority to enforce their rights. It provides no accountability for the OSC. Without further amendments providing this important information, federal employees would know more by reading statutory provisions rather than by reading this regulation that is supposed to put meat on the bones.

Most employees are not subject matter experts in OSC policy and need tools and guidance that is accessible and valuable to them in a language that they can understand. Prior to finalizing the proposed regulations, the Special Counsel should convene a public town-hall meeting to hear from employee and management stakeholders to develop regulations reinforcing what has worked, and fixing what has not. These public stakeholder meetings have produced constructive dialogues in the past. Inviting that dialogue now could help create an experience-based record to address issues that are missing from the current regulation proposal.