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September 14, 2010

The President  
The White House  
Washington, D.C. 20500

Re: OSC File No. DI-09-0965

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), the Office of Special Counsel is forwarding to you agency reports concerning disclosures from a whistleblower at the Department of Transportation, Federal Highway Administration (FHWA) in Washington, D.C. Mr. Peter Silva, who consented to the release of his name, was a Civil Rights Specialist with FHWA. Mr. Silva disclosed that the FHWA failed to meet its statutory obligations under 49 C.F.R. § 21.11 by failing to investigate the inability of state transportation agencies to provide required paperwork to FHWA.

Mr. Silva's disclosures were referred to the Honorable Ray LaHood, Secretary of Transportation, to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). Secretary LaHood tasked the Office of the Inspector General with conducting the investigation. We received a report of that investigation dated April 22, 2010, and a supplemental report dated June 28, 2010. Mr. Silva provided comments on the reports to this office pursuant to 5 U.S.C. § 1213(e)(1); his comments are enclosed. As required by law, 5 U.S.C. § 1213(e)(3), we are now transmitting the reports and Mr. Silva's comments to you.

Mr. Silva explained that FHWA partners with state transportation agencies to provide funding for state-level transportation programs. Before these state partners can receive federal funding from FHWA (and therefore before the state partner can release those funds to local sub-recipients and prime and sub-contractors) the state partner must provide FHWA with eight written Title VI Civil Rights Assurances (Assurances). These Title VI Assurances, which are required under 49 C.F.R. § 21.7, hold specific individuals and organizations liable when state partners and their recipients fail to implement required civil rights programs and resource supports. Mr. Silva explained that these Title VI Assurances act as a safeguard against willful or inadvertent discrimination related to the Americans with Disabilities Act (ADA) and the Rehabilitation Act (particularly disabled veterans), and ensure equal access to federal aid program services and benefits and compliance with right-of-way pedestrian safety measures, while providing equal protection to those affected by FHWA federal aid projects.

Mr. Silva participated in a baseline civil rights assessment of FHWA state partners between 2007 and 2008, which audited each state partner and requested that they provide the required Title VI Assurances. Mr. Silva personally worked on assessments of approximately

eight states. Through staff meetings, Mr. Silva learned that, like the states he worked on personally, almost all the state partners were not in compliance with their obligations under the Title VI Assurances, and were unable to provide the FHWA with documentation showing the necessary resource dedication, data collection systems, analysis and reporting, or formal program documents. This non-compliance dated back to 1992; however, Mr. Silva noted that there were no formal compliance actions by the agency against state partners in approximately ten years.

Mr. Silva alleged that by not taking action to investigate the state partners' failures to provide proper Title VI Assurance documentation, the agency violated 49 C.F.R. § 21.11, which states that "[t]he Secretary shall make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part."

In its report, the agency substantiated the allegation that a number of FHWA state division offices violated § 21.11, and confirmed Mr. Silva's concern of widespread compliance problems at the state transportation agency level. Specifically, the agency identified four states that failed to provide FHWA with Title VI Assurances and 19 states that lacked the administrative mechanisms necessary to reasonably guarantee compliance with civil rights requirements. The agency also found that 10 FHWA state division offices failed to conduct required investigations into these deficiencies. However, the agency noted that, in general, FHWA state division offices were working with state transportation agencies to remedy deficiencies.

The agency stated in its supplemental report that on May 27, 2010, it issued a memorandum from the FHWA Associate Administrator for Civil Rights to FHWA Division Administrators and Directors of Field Service describing the agency's actions since the initial investigation and reemphasizing the significance of Title VI oversight and compliance. In that memo, the agency noted that of the ten states where investigations were not initiated, FHWA was able to resolve deficiencies in four states. The remaining six states were placed into deficiency status, which is the first step toward bringing them into compliance.

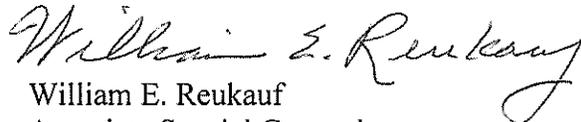
Mr. Silva submitted comments in response to the agency's report and supplemental report. In his comments, Mr. Silva reiterated his concern that the FHWA has fostered a culture of partnership with state transportation agencies, which prevents the FHWA from identifying and correcting state-level civil rights violations. Mr. Silva also expressed his belief that in many cases, FHWA Division Civil Rights Managers/Specialists who are collaterally assigned to the position do not have the requisite civil rights knowledge to fully meet the requirements of their position and to counteract this perceived "partnering culture." Mr. Silva stated that the attitude of partnership has also created a chilling effect within FHWA on employees coming forward to address identified civil rights issues. Mr. Silva also addressed his contention that the state deficiencies identified by the Baseline Assessment constitute violations of the False Claims Act and have had a disparate impact on the disabled, Hispanics, African-Americans, Native Americans, and low-income communities.

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OSC has reviewed the original disclosures, the agency's report and supplemental report, and Mr. Silva's comments. Based on that review, we have determined that the reports contain all of the information required by statute and that the agency's findings appear to be reasonable.

As required by law, 5 U.S.C. § 1213(e)(3), we have forwarded copies of the agency's report and supplemental report and Mr. Silva's comments to the Chairmen and Ranking Members of the Senate Committee on Commerce, Science, and Transportation and the House Committee on Transportation and Infrastructure. We have also filed copies of the reports and comments in our public file, which is available online at [www.osc.gov](http://www.osc.gov), and closed the matter.

Respectfully,

  
William E. Reukauf  
Associate Special Counsel

Enclosures