

FISCAL YEAR 2007
CONGRESSIONAL BUDGET JUSTIFICATION
AND PERFORMANCE BUDGET GOALS



U.S. OFFICE OF SPECIAL COUNSEL

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U.S. Office of Special Counsel Fiscal Year 2007 Budget Justification, And Performance Budget Goals

Executive Summary

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment, by protecting employees and applicants from prohibited personnel practices (PPPs). In addition, the agency operates as a secure channel for federal whistleblower disclosures of violations of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health and safety. OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. Finally, OSC enforces federal employment rights secured by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

OSC historically has had an incessant problem of large backlogs of cases in its various operating units. Through tremendous effort by the entire agency, OSC has succeeded in eliminating the backlogs from its Hatch Act unit, Disclosure unit, Complaints Examining unit, and most recently from its Investigation and Prosecution Division. The agency has been successful in hiring, and is now operating at a staff level as close to its request level as possible. OSC implemented a significant reorganization which is bearing fruit in the way the streamlined divisions and empowered individual employees accomplish the business of the agency. OSC now stands ready to meet all of its goals of efficiency and expeditious justice.

In the past several years, the agency has experienced an increase in caseload level. There are a number of factors which have contributed to this level of complaint filings with OSC:

- There has been a heightened awareness of the Hatch Act due to the 2004 elections, and increased filing of disciplinary action cases by OSC. Several of these cases have involved high-profile employees and significant national press coverage. The Hatch Act Unit processed more cases (310) during FY 2005 than any other year, with the exception of election year FY 2004.
- Congress passed a statute intended to decrease the processing time for USERRA complainants from members of our armed forces. Under the three year pilot program created by Congress, which began in February of 2005, OSC recently began processing half of the USERRA cases involving Federal employees that would typically be processed by the Department of Labor. OSC is confident that this pilot program will provide speedier justice to the members of our military who are being denied rights under USERRA.

- In recent years, OSC has had a large number of high-profile whistleblower cases, leading to increased national press coverage of OSC. FY 2005 continued this trend. Section II Part E shows examples of these cases.
- OSC continues to investigate whistleblower retaliation complaints from Transportation Security Agency (TSA) security screeners under OSC's Memorandum of Understanding (MOU) with TSA. This MOU remains viable despite the Merit System Protection Board's decision that the Board does not have jurisdiction to adjudicate these matters.
- During FY 2005, OSC continued to certify more agencies through its outreach program. Moreover, new agencies continue to sign up for the certification program. As agencies implement the certification process, agency employees who might previously have been unaware of their rights and remedies through OSC are becoming informed.
- In addition to OSC's certification program, OSC continues to provide outreach programs to agencies requesting them, or as part of OSC settlements in particular matters.

In the last year and a half, each of OSC's units has worked intensively to reduce the backlog of cases while giving full and fair resolution to claims. The agency reorganization was accomplished, and is now contributing to the prevention of the recurrence of backlogs.

During the backlog reduction, to ensure each claim received a full and fair resolution, the Special Counsel insisted that the Complaints Examining Unit's referrals for further action to OSC's Investigation and Prosecution Division (IPD) remain at a high level and even be increased. During the backlog reduction effort on PPPs, the referral rate increased 100% over historic levels.

While OSC received much credit for resolving the cases in the backlog with full and fair resolution, the agency became subject to some criticism that Disclosure Unit (DU) cases were closed without adequate review. The DU cases resolved were primarily cases that had been identified as likely closures during the last two to three years, but had not been closed due to the focus on and volume of the several types of higher priority DU cases. These older DU cases received fresh review and the backlog was reduced through a tremendous effort. Nevertheless, to dissolve this criticism entirely, OSC invited a bipartisan group of Congressional staffers to visit OSC and review the case files and the processes used in resolving these cases, as well as PPP cases. The conclusion of the bipartisan investigation was that not a single case closed for lack of merit was found to have merit.

After this investigation, OSC's successes in reducing the DU backlog and reducing the PPP backlog while increasing the internal rate of referral were commended in a congratulatory letter from the U.S. House Of Representatives Committee on Government Reform (see letter below).

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May 17, 2005

VIA FACSIMILE

Mr. Scott Bloch
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

Dear Mr. Bloch,

The Committee on Government Reform and has recently reviewed your efforts to respond to the findings of Government Accountability Office (GAO) 04-36. In that report, the GAO noted that the Office of Special Counsel (OSC) demonstrated a chronic inability to process cases in a timely manner which inevitably led to case backlogs. The report called for the OSC to develop a comprehensive strategy to address these recurrent failures.

We appreciate the professional seriousness with which you approached these recommendations and reduced the existing backlogs in the year following this report. Unfortunately, this activity, while beneficial to whistleblowers, was regarded with suspicion by activists who claim to work on behalf of whistleblowers.

At your invitation, a bipartisan group of congressional staff visited your offices on three occasions to review closed cases. The staff reviewed any closed case they requested, and you provided access to decision makers for questions and policy discussions. At the end of this period of review, one previously critical Senate staffer informed us "we have satisfied ourselves that they did not throw any folders into the Potomac." We are also satisfied that your hard work – and smart work – has resulted in a more responsive Office of Special Counsel.

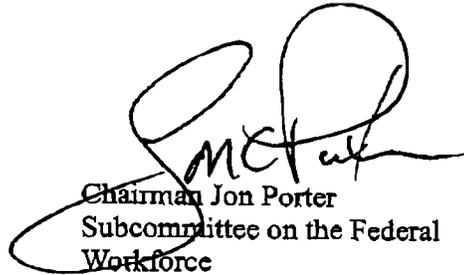
Mr. Scott Bloch
May 17, 2005
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We want to congratulate you on your efforts to improve the services you provide to whistleblowers. We continue to be impressed with the sincerity and pragmatism with which you and all your staff approach your jobs. You are providing a great service to the American people and the Federal government by protecting whistleblowers from illegal reprisals.

Sincerely,



Chairman Tom Davis
Committee on Government Reform



Chairman Jon Porter
Subcommittee on the Federal
Workforce

cc. Rep. Henry Waxman, Ranking Member

It should be noted that the increased number of internal referral cases carried with it the necessary placement of a heavy burden on the IPD. However, the IPD has been successful in working through the majority of those cases.

OSC stands in a vastly improved position entering FY 2006 – with virtually no case backlogs. The agency has been successful in hiring, and will operate during FY2006 with a staff of 108 - 110 employees, which is as close to its FY 2006 request level as possible. For OSC to continue to operate at its current staffing level during FY 2007, the agency needs \$15,937,000, which is a small increase in funding (\$612,000) over its FY 2006 funding amount. This will enable the agency to maintain its current staff, thereby having enough employees to meet the challenges of the high volumes of cases and the agency's expanded responsibilities for USERRA investigation and enforcement. Maintaining current staffing levels will also aid in prevention of future case backlogs and allow OSC to improve in meeting its statutory time requirements.

OSC'S SUCCESSES IN FY 2005

1. OSC negotiated and implemented a memorandum of understanding (MOU) at the request of the U.S. Postal Service Office of Inspector General (USPS OIG) to investigate Section 2302(b)(8) whistleblower complaints from USPS OIG employees. OSC does not otherwise have jurisdiction to investigate these complaints.
2. The newly created Customer Service Unit is now up and running. This unit handles hotline calls from employees seeking advice regarding possible statutory violations under OSC's jurisdiction. This Unit replaces the former practice of having one CEU employee designated Officer of the Week (OW) each week, requiring that employee to answer all of the above inquiries for the week. It was determined that the OW function was having a significant impact on the case processing efficiency of CEU employees. The Customer Service Unit ensures that attorneys who can be processing cases are not tied up on the telephone answering questions for several weeks each year. As a result, each of these CEU attorneys can handle approximately 10 extra cases per year.
3. OSC changed the manner in which USERRA claims were internally processed by assigning them only to experienced attorneys. The change resulted in quicker processing times. Most significant, however, was the Special Counsel's willingness to prosecute federal agencies for violations of the law. Prior Special Counsels had never filed any USERRA enforcement actions with the U.S. Merit Systems Protection Board (since USERRA was passed in 1994). In 2005, OSC set a precedent by filing three USERRA cases in one year. Full corrective action was received in all three cases.
4. During FY 2005, the Special Counsel has again focused on raising the profile of the Uniform Services Employment and Re-employment Rights Act (USERRA), so that returning reservists and veterans are aware of their rights and of the existence of OSC. In early 2005, OSC's role in enforcing USERRA again expanded. Pursuant to a demonstration project

established by the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, signed by President Bush on December 10, 2004, OSC, rather than the Department of Labor's Veterans Employment and Training Service (DOL VETS), has the authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the project, OSC also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number. OSC received 111 cases by the end of FY2005, and is on track to receive 150 cases during FY 2006.

5. The Special Counsel appeared on the worldwide Pentagon Channel to explain to the members of our military their rights under USERRA and procedures for filing complaints.
6. Referrals for full investigations of both PPP and DU cases significantly increased by lowering the hurdles employees need to get through to show that a PPP has been committed against them, or that there is a substantial likelihood that a federal employee is reporting agency waste, fraud, illegality or abuse. This helps both the merit system and federal employees.
7. The Special Counsel followed through on his promise to litigate more cases before the Merit Systems Protection Board (Board) to protect the merit system and federal employees. In FY 2005, OSC filed thirteen cases before the Board, three more than in FY 2004. Three of these cases were filed under USERRA, when prior to FY 2004, OSC had never filed a USERRA case before the Board.
8. The Special Counsel was the recipient of a ceremony at the Pentagon praising him for his support of the Guard and Reserve. All Services were represented.
9. OSC's Outreach Program efforts have succeeded in educating federal agency managers and employees concerning their responsibilities and rights. OSC also assisted federal agencies to fulfill their statutory obligation to consult with OSC concerning informing federal employees of their rights under the laws that OSC enforces.¹ OSC formally launched its government-wide 2302(c) Certification Program in October 2002. Since that time, 47 agencies (including Cabinet-level agencies such as the Departments of Labor, Energy, State, Transportation, Education, Health and Human Services and Veterans Affairs) have registered for the program.
10. OSC is now participating in the federal GoLearn Project, which could increase outreach by up to 50,000 federal employees per year.
11. OSC's Alternative Dispute Resolution (ADR) Program continued to achieve a very high (100%) resolution rate. Among those cases resolved were several high profile whistleblower reprisal cases (discussed in Section II.B.) OSC has enhanced its resources for conducting mediations. Instead of having one full time mediator, seven people from different parts of the agency have received training in conducting mediations. OSC now has a cadre of professionals with varied skills and legal expertise in multiple areas from which to draw.

12. The Employee Advisory Committee is comprised of eight staff members, elected by their colleagues, who meet monthly to provide recommendations and feedback to the Special Counsel and the agency. The Special Counsel conceived of this idea and implemented it; the Employee Advisory Committee has been highly successful. The Student Loan Repayment / Employee Retention Program is one example of the agency responding directly to suggestions made to the Special Counsel in this forum.
13. A Government Accountability Office (GAO) March 2004 Report (GAO 04-36) was critical of OSC's chronic backlog problem. We provided a detailed response back to the GAO on May 17, 2005 and it is available on the OSC website. The response includes several strategies to reduce the backlogs in PPP and other cases that have already yielded results.
14. OSC continued to handle high-profile cases that received media attention, most of which resulted in corrective action.
15. In October, OSC announced its selection of Anne Whiteman, an 18-year air traffic controller at Dallas Fort Worth International Airport (DFW), as a recipient of the Special Counsel's Public Servant Award. Ms. Whiteman disclosed to OSC that air traffic controllers and management at DFW routinely covered up serious operational errors, in violation of an FAA order. Due to her courageous efforts, the FAA was able to address these serious problems. She is the fifth recipient of the Public Servant Award. The program was established in 2001 to recognize contributions by federal employees to the public interest when – often at great personal risk – they make significant disclosures of violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or, as was the case with DFW, a substantial and specific danger to public health and safety. The Public Servant Award is a non-monetary and merit-based award. Its purpose is to publicly recognize the most significant contributions made by federal whistleblowers who have either filed disclosures with OSC or who have sought relief from OSC on the grounds that they have suffered retaliation.

It is clear that although the reduction of backlogged cases has helped OSC meet its strategic goals of protecting federal employees from PPPs, protecting the merit system, and guarding the public interest through its Disclosure Unit, there are other ways of measuring success. We must now improve the timeliness of OSC's review of PPP cases and whistleblower disclosures.

Highlights of the FY 2007 budget request include:

- The U.S. Office of Special Counsel requests \$15,937,000 for FY 2007, which is an increase of \$612,000 over the FY 2006 appropriation. This increase is necessary due to the increased costs for salaries and benefits. 86% of OSC's budget is salary and benefits. Therefore, the pay raise of FY06 and the planned pay raise in FY07 have a dramatic impact on the amount of funding OSC needs to pay its mostly professional staff.
- OSC has revised its Strategic Plan FY 2006 – FY 2011 (Appendix A), and FY 2007 Annual Performance Budget Plan (Appendix B). Analysis of these revised plans reveal outcome oriented, concrete goals that are measurable. These goals provide measures of timeliness and quality related to each of the four central missions entrusted to OSC.
- In this request, OSC also describes its performance and plans under the President's Management Agenda for: (1) Strategic Management of Human Capital; (2) Competitive Sourcing; (3) Improved Financial Performance; (4) Expanded Electronic Government; and (5) Budget and Performance Integration. This request describes OSC's achievements in each of these areas, as well as planned future efforts.

I. The Office of Special Counsel

A. Statutory Background

OSC was first established on January 1, 1979.² From then until 1989, it operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (“the Board”). By law, OSC received and investigated complaints from current and former federal employees, and applicants for federal employment, alleging prohibited personnel practices by federal agencies; provided advice on restrictions imposed by the Hatch Act on political activity by covered federal, state, and local government employees; and received disclosures from federal whistleblowers (current and former employees, and applicants for employment) about wrongdoing in government agencies. The office also enforced restrictions against prohibited personnel practices and political activity by filing, where appropriate, petitions for corrective and/ or disciplinary action with the Board.

In 1989, Congress enacted the Whistleblower Protection Act. The law made OSC an independent agency within the Executive Branch, with continued responsibility for the functions described above. It also enhanced protections against reprisal for employees who disclose wrongdoing in the federal government, and strengthened OSC’s ability to enforce those protections.³

The Congress passed legislation in 1993 that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.⁴ Provisions of the act enforced by OSC with respect to certain state and local government employees were unaffected by the 1993 amendments.

In 1994, the Uniformed Services Employment and Reemployment Rights Act became law. It defined employment-related rights of persons in connection with military service, prohibited discrimination against them because of that service, and gave OSC new authority to pursue remedies for violations by federal agencies.⁵

OSC’s 1994 reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies. It provided that within 240 days after receiving a prohibited personnel practice complaint, OSC should determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is to be taken. The act extended the protections of certain legal provisions enforced by OSC to approximately 60,000 employees of what was then known as the Veterans Administration (now the Department of Veterans Affairs), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under these provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act, and directed agencies to consult with OSC in that process.⁶

In November of 2001, Congress enacted the Aviation and Transportation Security Act,⁷ which created the Transportation Security Administration (TSA). Under the act, non-security screener employees of TSA could file allegations of reprisal for whistleblowing with OSC and the MSPB. The approximately 45,000 security screeners in TSA, however, could not pursue such complaints at OSC or the MSPB.

OSC efforts led to the signing of a memorandum of understanding (MOU) with TSA in May 2002, under which OSC would review whistleblower retaliation complaints from security screeners, and recommend corrective or disciplinary action to TSA when warranted. The MOU did not (and could not), however, provide for OSC enforcement action before the MSPB, or for individual right of action (IRA) appeals by security screeners to the MSPB.

B. OSC's Mission

OSC's mission is to protect current and former federal employees, and applicants for federal employment, especially whistleblowers, from prohibited employment practices; promote and enforce compliance by government employees with legal restrictions on political activity, and facilitate disclosures by federal whistleblowers about government wrongdoing. OSC carries out this mission by:

- investigating complaints of prohibited personnel practices, especially reprisal for whistleblowing, and pursuing remedies for violations;
- providing advisory opinions on, and enforcing Hatch Act restrictions on political activity;
- operating an independent and secure channel for disclosures of wrongdoing in federal agencies;
- protecting reemployment and antidiscrimination rights of veterans under the USERRA; and
- promoting greater understanding of the rights and responsibilities of federal employees under the laws enforced by OSC.

C. OSC's Internal Organization and Functions

OSC maintains its headquarters office in Washington, D.C. Four field offices are located in Dallas, Oakland (known as the San Francisco Bay Area Field Office), Detroit (Midwest Field Office), and Washington, D.C.

Agency components during FY2005 include the Immediate Office of the Special Counsel (IOSC), five operating units/divisions and five supporting offices explained in detail below. (See Organizational Chart on page 15.)

Immediate Office of the Special Counsel. The Special Counsel and staff in IOSC are responsible for policymaking and overall management of OSC. They also manage the agency's congressional liaison and public affairs activities, and its outreach program, which includes

promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

Complaints Examining Unit. This is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction.⁸ This Unit is responsible for screening approximately 1,800 prohibited personnel practice cases per year. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers all matters stating a potentially valid claim to the Investigation and Prosecution Division for further investigation.⁹

Disclosure Unit. This unit is responsible for receiving and reviewing disclosures received from federal whistleblowers. It advises the Special Counsel on the appropriate disposition of the information disclosed (including possible referral to the head of the agency involved for an investigation and report to OSC; referral to an agency Inspector General; or closure). The unit also reviews agency reports of investigation, to determine whether they appear to be reasonable and in compliance with statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

Investigation and Prosecution Division. Formerly three parallel units, staffed primarily by investigators and attorneys, the reorganization includes one IPD comprising four field offices, which conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit. Division attorneys conduct a legal analysis after investigations are completed to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. Investigators work with attorneys in evaluating whether a matter warrants corrective action, disciplinary action, or both.

If meritorious cases cannot be resolved through negotiation with the agency involved, division attorneys represent the Special Counsel in any litigation before the Merit Systems Protection Board. They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, on an as-needed basis, division investigators and attorneys may also investigate alleged violations of the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act. However, under the new pilot program, most USERRA functions are handled by the new USERRA unit in the Special Projects Unit to assure uniformity of policy.

Hatch Act Unit. The unit issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees. The unit is also responsible for enforcing the act. It reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to the Investigation and Prosecution Division for further action). It also oversees Hatch Act matters delegated to the IPD.

USERRA/Special Projects Unit. The Special Projects Unit uses senior trial lawyers to work cases of high priority and has also been used by the Special Counsel to conduct internal research on the processes and procedures of the operational units at OSC. In addition, a subdivision of the SPU called the USERRA Unit handles the new special project assigned by P.L. 108-454 that requires OSC to investigate the re-employment rights of military service members under USERRA, which involves new functions, increased caseload, and realigned personnel.

SUPPORTING UNITS:

Alternative Dispute Resolution Program In selected cases referred by the Complaints Examining Unit for further investigation, the agency contacts the complainant and the agency involved, and invites them to participate in OSC's voluntary mediation program. If mediation resolves the complaint, the parties execute a written and binding settlement agreement; if not, the complaint is referred for further investigation. The mediation program for Alternative Dispute Resolution has been reorganized. Rather than have a single ADR specialist under the leadership of an SES employee, the agency has expanded the program through cross-training multiple individuals from each of OSC's operating units. As a result the agency now has a broad pool of trained mediators with different legal areas of expertise.

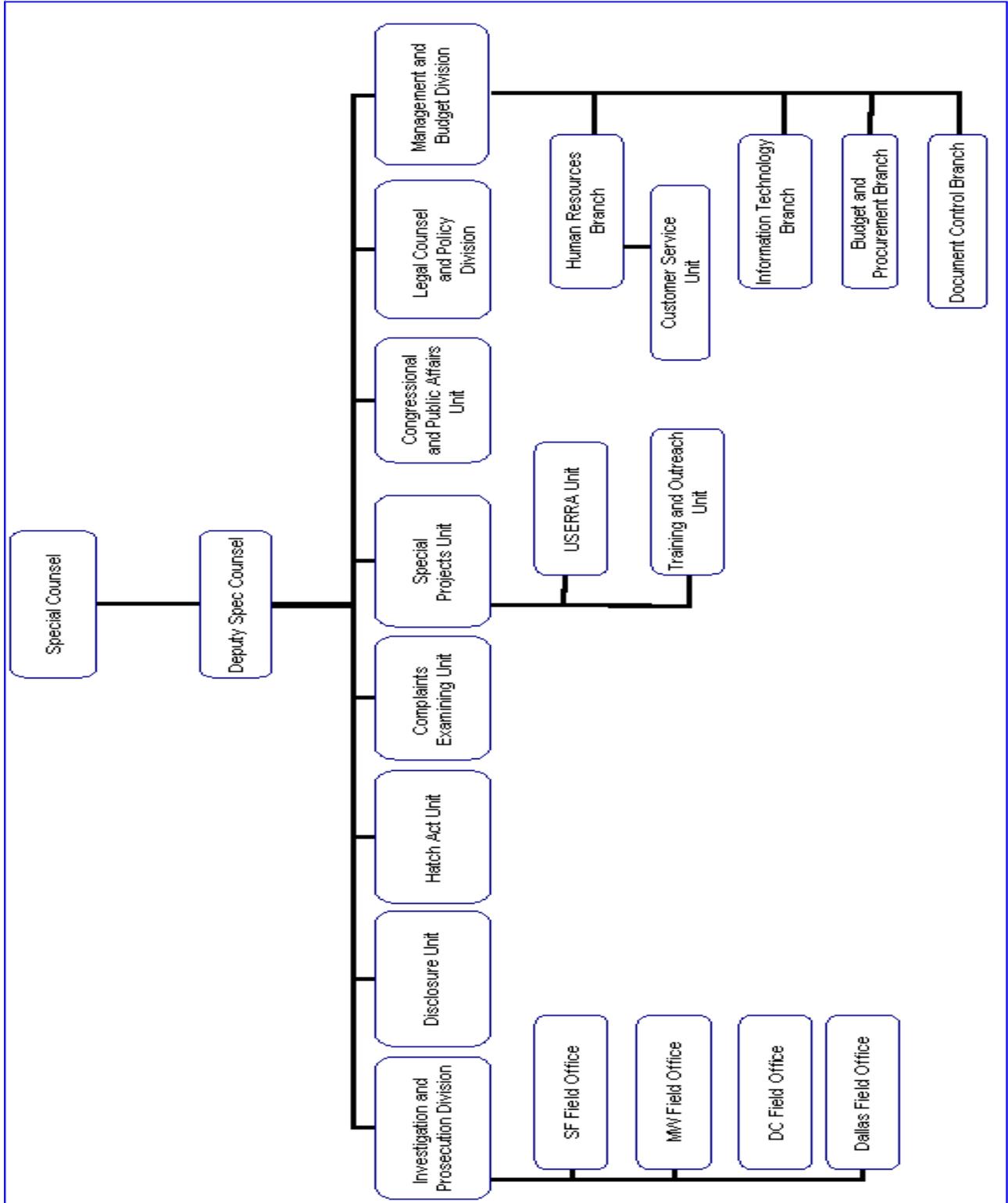
Legal Counsel and Policy Division. This division provides general counsel and policy services to OSC, including legal advice and support on management and administrative matters; legal defense of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics program.

Management and Budget Division. This division provides administrative and management support services to OSC, in furtherance of program, human capital, and budget decisions. This division also includes the Information Technology Branch, the Human Resources Branch, the Document Control Branch, and the Budget and Procurement branch. The purpose of this division is to put the administrative support functions under one authority.

Training Office. A training office has been created to train all new employees, cross train existing employees, and develop specialized training in areas such as litigation skills. Specifically, the Training Office will cross train attorneys and investigators to enable them to traverse organizational boundaries within the agency. They will develop sufficient expertise in several areas of the law, giving management the ability to detail employees to address any potential backlogs that could form in the various units.

Customer Service Unit. In the past, this function has been handled by rotating OSC staff to answer inquiries from the public or help with filing complaints and/or filling out forms. This unit will provide enhanced assistance to the public and federal employees, while streamlining operations by removing the 'Officer of the Week' duty from the attorneys in CEU.

D. Organization Chart



II. SUMMARY OF FY2005 PROGRAM CASELOAD AND ACTIVITY

A. Prohibited Personnel Practices

Unlike many other investigative entities or agencies, OSC must, as a general rule, conduct an inquiry after receipt of complaints alleging the commission of a prohibited personnel practice.¹⁰ Compare, for example, 5 U.S.C. § 1214(a)(1)(A) (“The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.”) with 5 U.S.C. app. 3, § 6(a) (“[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]”) and § 7(a) (“The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.”).

The nature of the inquiry ranges from the CEU screening process to the IPD field investigations, but one must be conducted after a complaint is filed. Complaints received by OSC can and often do involve multiple allegations, some of which can involve different prohibited personnel practices. In all such matters, an OSC inquiry requires the review of, and a legal determination about, each allegation and prohibited personnel practice.

After a complaint is received by OSC, CEU attorneys and personnel management specialists conduct an initial review to determine whether it is within OSC’s jurisdiction, and whether further investigation is warranted. CEU refers all matters stating a potentially valid claim to the IPD for further investigation. All such matters are reviewed first by the ADR Unit.¹¹

In selected cases that have been referred for further investigation, a trained OSC ADR specialist contacts the complainant and the employing agency to invite them to participate in the agency’s voluntary ADR Program. If both parties agree, OSC conducts a mediation session, led by OSC trained mediators who have experience in federal personnel law. When mediation resolves the complaint, the parties execute a binding written settlement agreement. If mediation does not resolve the complaint, it is referred for further investigation, as it would have been had the parties not attempted mediation.

The IPD conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both.

If OSC believes a prohibited personnel practice has been committed and initiates discussions with an agency, the matter is often resolved through negotiation. Before OSC may initiate an enforcement proceeding seeking corrective action (relief intended to make an aggrieved employee

whole) at the MSPB, the Special Counsel must make a formal request to the agency involved, reporting on its findings and recommendations. Only when the agency has had a reasonable period of time to take corrective action and fails to do so, may OSC proceed to petition the MSPB for corrective action.¹² When an agency refuses to grant appropriate corrective action, OSC generally proceeds immediately to file a complaint with the MSPB.

If OSC determines that disciplinary action (the imposition of discipline on an employee who has committed a violation) is warranted, it can file a complaint directly with the MSPB.¹³ Should the agency agree to take appropriate disciplinary action on its own initiative, then the matter can be settled without resort to an MSPB proceeding.

In addition to rectifying the matter at issue, OSC litigation before the MSPB – whether by enforcement actions seeking to obtain corrective and/or disciplinary action, or by intervention or other participation in matters filed by others – often has the additional benefit of clarifying and expanding existing law. It also brings greater public attention to OSC’s mission and work, a factor likely to increase the deterrent effect of its efforts.

OSC’s Complaints Examining Unit (CEU), as discussed above, is the intake unit for all prohibited personnel practice complaints.

For FY2005 OSC received 2,684 new matters, including PPP, Hatch Act, and Disclosure matters (**See Table 3**). The great majority of OSC’s staff resources were devoted to the processing of PPP complaints. Of the total 2,684 new matters OSC received during FY2005, 1,771 or 65% were new PPP complaints. (**See Table 4**).

Procedures for Remediating PPPs. Working together with investigators, IPD staff attorneys determine whether OSC’s investigation has established any violation of law, rule or regulation, and whether the matter warrants corrective or disciplinary action, or both.¹⁴ If a violation is found, OSC generally first attempts to obtain resolution of complainants’ issues informally, through negotiated settlements. (**See Table 5** for figures concerning favorable actions). If a violation of law is found and informal resolution is not possible, the Special Counsel may refer the matter in writing to the agency head under 5 U.S.C. § 1214(b)(2)(B) with a recommendation for corrective and disciplinary action, or both. If an agency declines to take corrective action, the Special Counsel may file a petition for corrective action with the MSPB under § 1214(b)(2)(C). If the Special Counsel determines that an apparent violation warrants disciplinary action, the OSC files charges against the offending employee under § 1215(a) and prosecutes the case before the MSPB.

At any time during its processing of a case, the OSC may seek a stay of any personnel action if the available evidence provides reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a PPP. The OSC may obtain a stay upon direct request to the agency concerned, or by filing a request for a stay with the MSPB under § 1214(b)(1). Also, pursuant to § 1212(c), the Special Counsel may intervene as a matter of right or otherwise participate in any proceeding before the MSPB, except that the Special Counsel may not intervene in a proceeding

brought under § 1221 or 5 U.S.C. § 7701 without the consent of the individual initiating the proceeding.

PPP Corrective & Disciplinary Action:

Nepotism. OSC secured disciplinary and corrective action in a case in which agency management officials violated nepotism laws and granted an unauthorized preference or advantage to certain applicants for vacant positions in an installation during the fall of 1999. Our investigation revealed that the selecting official completed job applications and advanced the candidacy of several relatives of agency officials and advocated for her own daughter's employment. Our investigation also revealed that the selecting official's supervisor and another Division Chief advocated for their respective daughters' employment for one of the vacant positions. At OSC request, the agency suspended the selecting official for five days and her supervisor for three days, and gave the Division Chief an oral admonishment that will remain in his supervisory file for two years. The agency also agreed to provide Outreach training about prohibited personnel practices to relevant management officials.

Unauthorized Preference. OSC secured disciplinary and corrective action in a case in which we believe a former Chief Administrative Law Judge (ALJ) of a federal agency granted an unauthorized preference to an employee. The ALJ selected the employee in 1998 as an Attorney Adviser and 18 months later, made inquiries with the agency's personnel about raising her grade. In April 2000, the servicing personnel office acted on the ALJ's request, retroactively converting the employee to a higher grade as of November 1998, 90 days after her original appointment and awarding her back pay. Four months later, the ALJ selected the employee for a management position for which she would not have been qualified without the retroactive upgrade.

While our case was pending, the ALJ was removed by the Board for alleged sexual harassment in a separate case against him. Pursuant to the settlement, if the ALJ is successful in any appeal of his removal, the agency will consider OSC's recommended discipline of 30 days' suspension for the ALJ. OSC also secured a reprimand for the personnel specialist who assisted the ALJ in retroactively promoting the employee at issue. In terms of corrective action, the agency corrected all of the employee's SF-50's; initiated collection proceedings against her for the difference in when she would have received her promotions absent the unauthorized preference; and offered priority consideration for future similar positions to the other candidates for the management position.

Reprisal for Protected Activity. OSC settled a case in which a former Security Specialist at a federal agency alleged that he was suspended for 14 days because he provided testimony in an IG investigation and released a draft IG report to the media. Additionally, the employee alleged that his security clearance was suspended and he was reassigned to a non-security clearance position at the agency because of his disclosure. This case presented novel questions, among them, whether OSC could argue that the full draft IG report released by employee is a protected disclosure when a summary version was already arguably "publicly known" and whether the draft report was Privacy

Act protected. In addition, we investigated whether the agency violated the so-called Anti-gag statute, which prohibits expending agency appropriated funds to enforce nondisclosure policies. As a result of our investigation and conclusion that the agency violated the whistleblower statute when it suspended the employee, in part, because of his protected disclosure of the unclassified draft IG report, the agency agreed to (1) rescind the 14-day suspension; (2) compensate the employee for lost pay plus interest; (3) restore all related benefits from the rescission of the 14-day suspension; (4) pay the employee \$2,000 in attorney's fees; and (5) expunge all records related to the employee's 14-day suspension from his employment files, with the exception of his Personnel Security file. The agency also agreed to provide WPA training to persons involved in the employee's suspension and acknowledge the requirements of the Anti-gag statute in the settlement agreement. In return, employee agreed to accept a one-day suspension based on "falsely listing a co-worker as the sender of an agency facsimile transmitted to the media."

Conflict of Interest. OSC settled a case in which an employee alleged that the former Director of a federal agency committed a prohibited personnel practice when she non-competitively hired another individual who was jointly and severally liable with the former Director on a \$261,600 promissory note secured by their personal residence – a \$2,885 monthly mortgage obligation. The former Director appointed this individual to a Supervisory Business Manager position. OSC investigated this matter as a possible violation of 5 U.S.C. 2302 § (b)(12), focusing on whether the former Director violated federal financial conflict of interest regulations by this hiring. These regulations prohibit an employee from participating substantially in an official capacity in any matter in which, to her knowledge, she has a financial interest, if the matter will have a direct and predictable effect on that interest. 5 C.F.R. §§ 2635.402(a) and (c). OSC filed a disciplinary action complaint against the former Director, and she signed a settlement agreement in which she accepted a five-day suspension without pay.

Reprisal for Protected Activity. In February of 2003, a supervisory systems accountant at a federal agency in Alabama, alleged that she was given a letter of reprimand in part because she disclosed to the Office of Inspector General (OIG) in May of 2002 that her two supervisors violated the Federal Acquisition Regulation and abused their authority. The OIG investigation substantiated five of complainant's thirteen allegations. Investigation revealed that her disclosures were a contributing factor in the decision by her first-line supervisor to reprimand her. The agency agreed to pull the letter of reprimand from the employee's Official Personnel File.

Retaliation for Protected Activity. OSC secured corrective action in a case in which a federal employee alleged that he was given a directed reassignment from his duty station in Virginia, to California, in retaliation for having joined in a class action lawsuit against the agency. Prior to investigating the matter, OSC secured an agreement with the agency allowing the employee to remain in Virginia, which stayed in effect until he was ready to retire.

Due Process Violation. OSC also settled a case in which a GS-13 attorney-advisor with a federal agency presently stationed overseas alleged that the agency violated his due process rights under federal law and agency regulations by initiating garnishment of wages for an alleged

\$29,962.82 debt to the agency. The Complainant (Cp) alleged that the agency did not provide him the required opportunity to provide proof that he did not owe this debt.

According to our investigation, the agency initiated the garnishment without affording him due process rights as established in the federal regulations. Thus, we found reasonable grounds to believe that the wage garnishment violated 5 U.S.C. § 2302(b)(12) because the law and regulations violated implement merit principle § 2301(b)(2) (“fair and equitable treatment in personnel management...with proper regard for constitutional rights,” i.e. due process rights under 5th Amendment to the Constitution).

We advised the agency of our finding and requested they take corrective action. As a result, they voluntarily agreed to stop Cp’s wage garnishment (approximately \$350 biweekly) and refunded Cp a total of \$14,542.57 and \$772.44 in interest.

At OSC’s request, the agency identified approximately 45 other employees who were also subjected to collection without required due process rights. The preliminary total amount of collected wages is approximately \$153,357. We are in the process of investigating these cases to determine whether the agency should provide corrective action in those cases as well.

Protected Disclosure. OSC also settled a case in which the Complainant (Cp), a nurse in a federal agency, alleged that the agency removed her because she made a protected disclosure concerning the privacy of patient information. We found that the protected disclosure was a contributing factor in her termination. OSC brokered a settlement agreement by which the agency agreed to pay Cp approximately \$32,000 in back pay, benefits and attorney’s fees, permit Cp to voluntarily resign, and provide WPA training to managers.

B. Alternative Dispute Resolution Program

Among the factors that determine “mediation-appropriate” cases are the complexity of the issues, the nature of the personnel action, and the relief sought by the Complainant. Once a case has been identified as mediation-appropriate, the OSC ADR Program Manager contacts the parties to discuss the ADR Program. “Pre-mediation” discussions are designed to help the parties form realistic expectations and well-defined objectives regarding the mediation process. Pre-mediation discussions also provide the ADR Program Manager an opportunity to assess whether a case is best handled on-site or by telephone.

The ADR Program generated a case resolution rate of 100% during FY2005 (See **Table 6**).

That rate reflects cases resolved in OSC mediation, as well as a handful of cases in which, after pre-mediation discussions with the ADR Program Manager, the complainant either withdrew the OSC complaint or settled the dispute through another mediation program.

Mediation settlement outcomes in OSC’s ADR Program vary, depending on the interests of the parties. Monetary recovery includes retroactive promotions, attorney fees, and lump sum

payments. In addition to monetary recovery, the benefits received by complainants in ADR include revised performance appraisals, transfers, and letters of recommendation.

The ADR Program resolved several significant complaints during FY2005.

Wrongful termination for Whistleblowing. The complainant alleged wrongful termination in violation of 5 U.S.C. § 2302(b)(8) and (b)(9) for whistleblowing and filing a union grievance. He had been forced to work overtime with no compensation and without proper approval. When he refused to drop the grievance, his supervisor threatened him with termination. Both parties agreed to OSC mediation and all issues were resolved in a timely manner.

Disclosure led to resignation. The complainant alleged that the Agency proposed her termination in violation of 5 U.S.C. § 2302(b)(8) and (b)(9), causing her to resign during her probationary period. She had previously disclosed travel fraud and claim reimbursement irregularities. Among those implicated in her disclosures were various high-level officials with responsibility for overseeing financial matters in the Agency. Some of the disclosures resulted in investigations by the Office of the Inspector General (OIG). She cooperated with the OIG during these investigations. The parties agreed to OSC mediation and all issues were resolved.

In order to provide a dispute resolution process that best meets the needs of the parties, the ADR Program engages in ongoing self-evaluation. Feedback from participants has been overwhelmingly positive.

C. Case Processing: Hatch Act Violations

OSC is also responsible for enforcing the Hatch Act, including investigating and prosecuting complaints alleging violations of the Act, and providing advisory opinions on the Act's requirements.

The Hatch Act Unit, staffed by a Chief and four staff attorneys, is responsible for a nationwide program that provides federal, state and local employees, as well as the public at large, with legal advice on the Hatch Act. Specifically, the Hatch Act Unit has the unique responsibility of providing Hatch Act information and legal advice to White House staff, Congressional staff, the national press, senior management officials throughout the federal government, and state and local government officials. The Hatch Act Unit provides all of OSC's advisory opinions, which enable individuals to determine whether they are covered by the Act, and whether their contemplated activities are permitted under the Act.

The Hatch Act Unit also enforces compliance with the Act by receiving complaints alleging Hatch Act violations, conducting preliminary inquiries into complaint allegations and, where warranted, further investigating allegations or referring the complaints to OSC's IPDs for further investigation. Depending on the severity of the violation, the Hatch Act Unit will either issue a warning letter to the employee, attempt to informally resolve the violation, prosecute the case before the MSPB or send it to the IPD to prosecute before the MSPB.

There was an 8% increase in new advisory requests received, an increase of 75% of Disciplinary Actions obtained, and a 20% increase in Resignation from covered employment. There was also a 26% decrease in the end of fiscal year complaints that were pending. (See Table 7).

To further its advisory role, the Hatch Act Unit is very active in OSC's outreach program and conducted 17 outreach presentations in FY2004 to various federal agencies and employee groups concerning federal employees' rights and responsibilities under the Act. Many of these programs involved high-level agency officials. Also, the Unit attempts to informally resolve as many ongoing Hatch Act violations as possible without resorting to litigation.

OSC continued to issue advisory opinions on a broad range of issues in fiscal year 2005. For example, OSC issued guidance to the U.S. Department of Homeland Security regarding whether the prohibition against engaging in political activity while on duty or in the workplace applies to activity directed at the success or failure of political parties unique to Puerto Rico. OSC also issued guidance to the U.S. Department of Defense concerning the Hatch Act's application to federal employees in light of a Nebraska statute requiring registered voters to serve as election officials. In addition, OSC issued guidance about permissible and prohibited activity under the Hatch Act for federal employees interested in forming a political action committee.

D. Hatch Act Disciplinary Actions

Disciplinary action against state or local employees who were candidates in partisan elections. In one complaint a Transportation Engineer with a state agency was charged with running in the 2001 election for Southington Town Council, in violation of the Hatch Act. In another complaint a Home Care Supervisor with a New York City's agency was charged with violating the Hatch Act when he was a candidate in the 2004 election for New York State Assembly. In yet another case, a Child Support Enforcement Specialist with an agency in Hawaii was charged with being a candidate in the 2002 election for Hawaii State Representative, 35th District. Lastly, the Executive Director of a Lorain County agency was charged with violating the Hatch Act when he was a candidate in the 2004 primary election for Lorain County Commissioner.

Federal employees sending politically partisan electronic mail messages while on duty. One complaint was against a federal employee who sent an e-mail message to about 22 coworkers. The message contained a letter purporting to be written by John Eisenhower, son of former President Eisenhower that states, among other things: "... I intend to vote for the Democratic Presidential candidate, Sen. John Kerry"; "... the word 'Republican' has always been synonymous with the word 'responsibility' ... [t]oday's whopping deficit of some \$440 billion does not meet that criterion."; "Sen. Kerry, in whom I am willing to place my trust, has demonstrated that he is courageous, sober, competent ... I will vote for him enthusiastically" Prior to forwarding the above-referenced e-mail, she added the following statement: "**Some things to ponder.....**"

The other complaint also concerned a federal agency employee who sent an e-mail message titled, "Your Vote," to 27 people. The e-mail states, among other things: "... our votes should be for

the party that stands firm on morally and ethically correct issues as written in the [B]ible”; “Kerry claims he has morals and ethics ... American society under Kerry’s command is frightening to even think about.” The e-mail then states “Pass along the ‘**I VOTE THE BIBLE**’ button” and includes a small picture of the button. In addition, there is a picture of President Bush in front of an American flag with the statement “**I VOTE THE BIBLE**” superimposed on the picture.

Engaging in political activity on behalf of a political party. OSC also filed a complaint for disciplinary action against a federal attorney with a federal agency, charging that he violated the Hatch Act when engaged in political activity on behalf of a political party while on duty in his government office (e.g., using his government office equipment to receive and send more than 100 e-mails, draft documents and have telephone conversations in support of a political party and its candidates).

Soliciting, accepting, receiving political contributions. OSC also filed a complaint for disciplinary action against a federal employee, charging that he violated the Hatch Act’s prohibition against soliciting, accepting or receiving political contributions. The employee was identified as the sender of a letter that was sent to approximately 144 people seeking political contributions for a local candidate, either by attending a reception or sending a check in an enclosed envelope. The candidate’s campaign committee sent the letter, but the federal employee was aware of and agreed to the contents of the letter before it was sent.

Engaging in political activity on behalf of a Congressional candidate. OSC also filed a complaint for disciplinary action against an employee with a federal agency, charging that he violated the Hatch Act by engaging in political activity on behalf of a Congressional candidate while on duty and in the federal workplace. The employee sent an e-mail to over 300 agency employees inviting them to attend a “meet the candidate” event for Congressional candidate Tim Holden.

Disciplinary Actions Obtained in FY2005:

For example, in December 2004, OSC reached a settlement agreement with a state employee with a New York agency, who was charged with being a candidate in the partisan elections for Rochester City Council and New York State Senate, 56th District, in 2001 and 2002, respectively. As part of the agreement, the state employee admitted that she was covered by the Hatch Act and that she violated the Act in 2001 and 2002 by her candidacies in partisan elections. As a penalty for her violations of the Act, the employee agreed that she would resign from FLDDS effective January 7, 2005, and would not seek or accept employment with the State of New York for 18 months.

Also, in December 2004, the Merit Systems Protection Board found that a New Jersey state employee’s candidacies, in 2003 and 2004, for Member of the Board of the Chosen Freeholders in Cumberland County, New Jersey, violated the Hatch Act and that her removal was warranted.

Similarly, in February 2005, the Merit System Protection Board found that a civilian employee of a federal agency violated the Hatch Act, which warranted his removal, when he was candi-

date in the 2002 partisan election for the Maryland House of Delegates.

In March 2005, OSC reached a settlement agreement with the former Chief of Staff of a District of Columbia agency. The official was charged with violating the Hatch Act during a campaign rally on August 8, 2002, by specifically asking D.C. employees, many of whom were his subordinates, to volunteer to work on a reelection campaign. Additionally OSC's petition charged that, in or about May 2002, the official personally and/or through subordinates, solicited political contributions by asking individuals to purchase tickets to the Kennedy-King dinner, a political fundraiser for the District of Columbia Democratic State Committee. OSC filed its petition seeking his removal from the District of Columbia on July 9, 2004. He voluntarily resigned as Chief of Staff effective August 1, 2004. Under the terms of the settlement agreement, he agreed not to seek or accept employment with the District of Columbia for a period of two years, beginning August 1, 2004.

E. Disclosure Unit

In addition to its investigative and prosecutorial mission, the OSC provides a safe channel through which federal employees, former federal employees, or applicants for federal employment may, under 5 U.S.C. § 1213(a), disclose information they reasonably believe evidences a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. At present, the Disclosure Unit staff is comprised of a Chief and five attorneys.

The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether it shows that there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the Special Counsel must transmit the disclosure to the head of the relevant agency for further action. The agency is required to conduct an investigation and submit a report to OSC describing the results of the investigation and the steps taken in response to the investigative findings. Under § 1213(e), the whistleblower is also provided with a copy of the report for comment. The Special Counsel is then required to review the report in order to determine whether it meets the requirements of the statute and its findings appear reasonable. Finally, the report is forwarded to the President and appropriate Congressional oversight committees.

In the Disclosure Unit, there was a 38% increase in the number of disclosures processed in less than 15 days, compared to the previous fiscal year. There was also a 6% decrease in the number of cases pending at the end of the fiscal year. (**See Table 8**).

The Disclosure Unit has handled several high profile cases that have received widespread national press attention. In addition, after the terrorist attacks of September 11, 2001, more federal whistleblowers came to OSC with national security allegations and concerns. Many cases handled by the Disclosure Unit involve complex issues; some involve classified material and must be handled according to federal requirements.

The Disclosure Unit's more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to complete for a number of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and Disclosure Unit attorneys and the Special Counsel must review the report to determine whether it contains the information required by statute, its findings appear reasonable, and to prepare any comments the Special Counsel may have on the report.

The following is a representative sample of cases that have been referred by the Special Counsel to the heads of the agencies pursuant to 5 U.S.C. § 1213(c) and closed after receipt and review of the agency report. Also included are summaries of cases that are presently under investigation by agency heads. In many cases, OSC's efforts have resulted in significant media coverage and reform efforts.

Disclosures of Substantial and Specific Danger to Public Health and or Safety

Airport Security Compromised. OSC referred to a federal agency allegations that the whistleblower observed numerous violations of Checked Baggage Standard Operating Procedures while working in the checked baggage area on a temporary assignment. Among other deficiencies, the whistleblower alleged baggage screeners were not performing thorough explosives detection inspections on checked luggage and contended that these violations compromise airport security and pose a substantial and specific danger to public safety.

The Transportation Security Administration's Office of Internal Affairs and Program Review investigated. The investigation did not substantiate the whistleblower's allegations. However, the investigators did substantiate additional allegations raised by the whistleblower during the course of the investigation. Specifically, they found that several of the baggage screeners assigned to the checked baggage area do not wear latex gloves when performing physical inspections of checked bags and many screeners neglect to wipe down ETD tables with isopropyl alcohol whenever a checked bag triggers an ETD alarm. *Referred March 2004; closed November 2004.*

Prisoners Provided Inadequate Medical Care. OSC referred allegations to the Attorney General that an agency in Tennessee, improperly reduced the number of hours worked by a contract psychiatrist and a contract laboratory technician. The whistleblower reported that, as a result of the decrease in psychiatric care, two psychiatric patients decompensated and attacked other inmates. The whistleblower also stated that the reduction in the lab technician's hours caused lengthy delays in the processing of laboratory results, which hindered his ability to provide his patients with adequate medical care.

The Attorney General delegated responsibility for the report to the director of the federal agency. The Director submitted a report to OSC on March 10, 2004, which OSC found deficient. OSC asked the Director to submit additional information, which he did on August 10, 2004. The additional investigation substantiated the allegations in part confirming that the changes the

whistleblower reported had taken place, but concluding that the inmates did not suffer harm as a result. The agency further found that, during the course of the investigation, an employee (or employees) provided misleading information to the investigators.

In his letter to the President and Congressional oversight committees, the Special Counsel stated that he was unable to conclude that the agency's findings regarding certain actions taken by the agency were reasonable. Whereas the agency report found that she offered acceptable justification for decreasing the laboratory technician's hours at a time when there was a backlog of lab tests, the Special Counsel found that this action unnecessarily jeopardized the health of the inmates. Therefore, the Special Counsel recommended that the agency take disciplinary action against her. *Referred December 2003; closed January 2005.*

Uncertified Tradesmen Performing Work on ships. As a follow-up to allegations referred in November 2001, OSC referred allegations to a federal agency that tradesmen in a number of different trades were not properly certified and performing noncompliant work at a federal agency in California. The whistleblower also alleged that unqualified welders at the agency improperly welded catapult hydraulic piping systems on the aircraft carrier USS Kitty Hawk.

The agency's Office of Inspector General investigated and substantiated the allegations of welding defects on the catapult hydraulic piping systems on the USS Kitty Hawk. In addition, the investigation partially substantiated the whistleblower's allegations regarding unqualified artisans. The investigation revealed that one employee, an Integrated Electronics Systems Mechanic, continued to solder after his certification had expired. The investigators found that the mechanic's supervisor was aware that he continued to work even though his certification had lapsed. However, the investigators did not find evidence that other artisans were working without the proper qualifications. The report noted that investigators found significant deficiencies in the electronic system the agency uses for tracking employees' certification status.

The report noted the corrective and disciplinary actions taken: (1) the agency completed repairs to the USS Kitty Hawk's catapults during the week of November 22, 2004; (2) agency management took disciplinary action against the mechanic and plans to pursue disciplinary action against his supervisor; and (3) the agency plans to implement several improvements to its training and recertification programs. The Special Counsel determined that the agency report contained the information required by statute and the findings appear reasonable. *Referred December 2003; closed May 2005.*

Aviation Mechanics Working with Suspect Certificates—Federal Agency Improperly Halted Reexamination. OSC referred allegations to the agency that: (1) in the Spring of 2001, management officials of the agency wrongfully cancelled a program to reexamine individuals who received A & P mechanic certificates from St. George Aviation under fraudulent conditions; and (2) from 1998 to 2001, agency management failed to adequately staff the AirTran Certificate Management Unit (CMU), which monitors air carriers to ensure compliance with aviation safety regulations and procedures.

The Agency's Office of Inspector General (OIG) investigated the allegations and substantiated them in part. First, the OIG substantiated the allegation that the agency should not have cancelled the reexamination program, and recommended that steps be taken to reexamine the remaining 1,228 mechanics who received certificates from St. George under suspect conditions. Subsequently, some of the suspect certificate holders challenged the legality of the reexamination program. The U.S. District Court for the Middle District of Florida issued a preliminary injunction stopping the reexaminations. The program has been suspended pending reconsideration of the injunction by the Eleventh Circuit Court of Appeals.

In regard to the staffing issue, the OIG found that "there were considerable staffing issues in the Orlando FSDO" from 1998 to 2001. However, the OIG did not find evidence that the staffing shortage in the AirTran CMU could be attributed to any deliberate act or omission by the Southern Region FSD managers, nor did it find that the shortage created a substantial and specific danger to public safety. Information provided by the whistleblowers and the OIG established that the shortage which existed from 1998 to 2001 has since been rectified, and the AirTran CMU, now classified as a Certificate Management Office, is currently adequately staffed.

The Special Counsel determined that the agency reports contain all the information required by statute and the agency's findings appear reasonable. However, the Special Counsel noted that he remained concerned that the reexaminations had not yet been completed, and recommended follow-up with the agency to determine the status of the litigation and the steps the agency is taking to complete the reexaminations. *Referred March 2003; closed June 2005.*

Cover-up of Operational Errors by Air Traffic Controllers and Managers. OSC referred to the agency allegations, disclosed by an air traffic controller, that managers and air traffic controllers at a Texas airport, routinely covered up and failed to investigate operational errors contrary to agency policy and directive. The Secretary tasked the Office of the Inspector General (OIG) with conducting the investigation.

The OIG substantiated the allegations finding for the past seven years agency management had failed to investigate operational errors resulting in the underreporting of errors. Management's practice was to ask controllers whether they had committed an error. If the controller responded in the negative, the inquiry ended. This reliance on self-reporting was at odds with agency's national policy which called for electronic playback of radar and voice communication recording to investigate suspected errors. The report stated that this local practice began in 1996; the manager responsible has since retired. The report noted that the failure to detect this improper practice for seven years called into question the management oversight of agency's Southwest Region and some elements in headquarters. The report further noted that during the first six months of 2004, prior to the OIG investigation, two operational errors were noted. In contrast, after OIG's investigation and the subsequent implementation of the playback review, the agency reported 36 confirmed operational errors 2004 to December 2004, with 28 classified as moderately severe.

The agency took corrective actions which the Secretary stated represent progress toward preventing future underreporting. The agency 1) directed that the Texas airport follow the national

policy for the reporting and investigating operational errors; 2) took remedial personnel actions against all personnel, air traffic controllers as well as management officials, involved in the cover up of operational errors; and 3) placed the facility on “no-notice” review status for two years so it will be subject to close oversight by headquarters quality assurance officials. Finally, the whistleblower received the Special Counsel’s Public Servant Award for the considerable efforts and contribution to air traffic safety. *Referred May 2004; closed June 2005.*

Mistreatment of Agency Psychiatric Patients. The whistleblowers, two agency psychiatrists, alleged that their colleague, an agency psychiatrist, intentionally misdiagnosed numerous agency mental health patients and overprescribed certain medications, thereby creating a substantial and specific danger to public health. They alleged that the psychiatrist diagnosed a disproportionate number of patients with bipolar disorder and subsequently subjected these patients to an inappropriate treatment protocol consisting of risky antipsychotic and anticonvulsant medications and, often, the discontinuation of much-needed antidepressant medications.

The agency’s Office of Inspector General (OIG), with the assistance of another federal agency, investigated the whistleblowers’ allegations and found them to be unsubstantiated. The report stated that there was no evidence that the subject psychiatrist was prescribing inappropriately or endangering patients; however, the investigators did find significant interpersonal conflicts among the psychiatric staff. OSC reviewed the report and informed the OIG that it contained several deficiencies. The OIG submitted a supplemental report, which OSC also found to be deficient. In OSC’s transmittal letter to the President and Congress, the Special Counsel found the agency reports deficient on the grounds that the agency did not allow the whistleblowers an adequate opportunity to present their allegations to the investigators, the agency reports did not adequately address several of the issues OSC referred for investigation, and the agency failed to take appropriate corrective and/or disciplinary action in response to the investigation’s findings. *Referred March 2004; closed July 2005.*

Inadequate Food Inspections. OSC referred allegations to a federal agency that two agency food inspectors at a plant in North Carolina, performed their job duties in a negligent manner, creating a danger to public health. The whistleblower alleged that one inspector frequently fell asleep on the job and that the other regularly listened to music on headphones, danced, and conversed with other employees. The whistleblower maintained that, as a result, both inspectors allowed several chickens to pass their station every day without adequate inspection. The whistleblower informed the supervisor, Supervisory Veterinary Medical Officer and Inspector-In-Charge, but stated that he did not take any steps to correct the problem.

The agency investigated the whistleblower’s allegations and substantiated them in part. The investigation substantiated the whistleblower’s allegation that one inspector falls asleep at work, but it did not substantiate the remaining allegations concerning the other inspector or the supervisor. *Referred March 2004; closed August 2005.*

Inadequate Safety Systems on the Space Shuttle. OSC referred to the Administrator of a Federal agency allegations that the system the agency planned to use to inspect the Space Shuttle

Discovery's Thermal Protection System (TPS) while in orbit relied on inadequate, low-resolution cameras. The whistleblower contended that these cameras were incapable of detecting small breaches in the TPS that could prove catastrophic upon space shuttle's reentry into the Earth's atmosphere. In a series of three reports, the agency maintained that imaging systems upon which it planned to rely were superior to the high-resolution imaging system previously recommended by an agency working group because, unlike those high-resolution systems, they could measure the depth of suspected damage to the TPS. The whistleblower disputed the agency's findings and provided technical documentation to support his critique of the agency's TPS inspection systems. According to the whistleblower, "agency managers [were] aware of the issues [he identified], but . . . elected to ignore these concerns and fly the Space Shuttle with systems that are known to be faulty and inadequate." Despite the compelling critique presented by the whistleblower, however, OSC was unable to conclude that the agency's findings were unreasonable because the agency's selection of inspection systems appeared to have been based on a legitimate selection criterion, *i.e.*, the need to measure the depth of damage to the TPS. *Referred February 2005; closed September 2005.*

Disclosures of Violations of Law, Rule or Regulation and Gross Mismanagement

Violation of Security Regulations at Agency Facility. OSC referred allegations to the Secretary of the agency that a lead dispatcher violated security procedures and regulations by admitting individuals to highly sensitive areas of the agency solely on voice recognition. The whistleblower alleged that the dispatcher instructed other employees to admit individuals on voice recognition and that he frequently turned off the National Crime Information Center (NCIC) printer in the agency's Communication Center preventing the agency from receiving contemporaneous information on security threats and criminal activity from law enforcement agencies and the Department of Homeland Security. Finally, the whistleblower alleged that the dispatcher made violent and threatening statements to the whistleblower and other employees.

The agency's investigation partially substantiated the whistleblower's allegations finding that the dispatcher failed to follow the regulations for admitting individuals in violation of agency regulations. The investigation found that there were other employees who did not follow the proper procedures, but did not substantiate the allegation regarding the printer. Finally, the report stated that there were significant concerns with the dispatcher's behavior prior to OSC's referral. The agency was in the process of suspending him for incidents which occurred in 2003; due to additional information discovered in this investigation his suspension was expedited.

In response to the investigation, the agency ordered refresher training on access procedures for protected areas and on the proper operation of the NCIC printer. Due to the severity of his conduct, the subject dispatcher was suspended for 30 days without pay, ordered to attend counseling, and was reassigned to a different squad. The title and duties of lead dispatcher were revoked from personnel to eliminate the perception that lead dispatchers exercised special authority. All employees were required to attend training on the consideration of others and the prevention of sexual harassment.

The agency also made significant management changes undertaking a comprehensive reorganization which included converting the position of Chief, Agency Operations Division, from a military to a civilian position and hiring a civilian supervisor. The supervisor and Agency Operating Division Chief in place during this investigation were stripped of their responsibilities and under the reorganization will not hold supervisory positions. *Referred May 2003; closed May 2005.*

Management Involvement in Kickback Scheme Excused by Agency. The whistleblowers disclosed to OSC that numerous employees of a federal agency, including some management personnel, were engaged in extensive kickback and fraudulent reimbursement schemes in violation of federal law. The whistleblowers initially made a disclosure to the agency's Office of Inspection General (OIG), and the OIG published a report substantiating many of their allegations. The OIG recommended that the agency take "strong and immediate action" against the employees involved in the wrongdoing. Nearly a year after the OIG made its recommendation, however, OSC discovered that the agency decided to forego disciplinary action. Given the OIG's recommendation, the evident seriousness of the wrongdoing identified in the OIG report, and agency's refusal to take disciplinary action, OSC referred the whistleblowers' allegations to the Secretary of the agency for formal investigation by the agency.

The agency filed two reports with OSC detailing its investigation into the whistleblowers allegations. These reports uncritically accepted the assertions of management personnel that they were unaware of any wrongdoing. The agency's reports reflected a failure to take any disciplinary action against upper-level managers involved in wrongdoing and flouted OSC's request that the whistleblowers be interviewed regarding their allegations. OSC found unreasonable the agency's contention that forty-five employees at a single agency station were engaged in a pattern of conduct sufficiently egregious to warrant severe discipline without the knowledge of management. In addition, OSC observed that the agency did not avail itself of all reasonably available information in the course of its investigation. OSC's analysis of the agency's reports concluded, therefore, that the agency's investigation of management appeared pretextual, at best, and that the agencies involved "failed to conduct a *thorough* investigation." In response to the press coverage generated by this analysis, the agency publicly committed to thoroughly reinvestigate the whistleblowers' allegations. *Referred November 2003; closed May 2005.*

Contract Fraud. The whistleblower, a Public Utility Specialist at a federal agency, alleged that contracts between the agency and a contractor did not comply with agency guidance, were not reasonable, and that the contractor was paid for projects not performed. OSC referred the allegations to the agency for investigation; the agency tasked the Internal Audit Division with conducting the investigation and writing the report. The agency partially substantiated the whistleblower's allegations finding that while no laws, rules, or regulations were violated, there were several deviations from agency policy and procedure by the Contracting Officer (CO) and the Contracting Officer's Technical Representative (COTR), including, among other things, the failure to document the decision for the initial contract, maintain contract files and properly document contract modifications, and negotiating contract modifications without the knowledge or consent of the CO.

The agency took several actions to assure better compliance with agency procurement policies and procedures, including developing a COTR training and certification program. In investigating these allegations, the agency found deviations on other contracts. OSC found that the agency's report contained all of the information required by statute and that its findings appeared to be reasonable. *Referred October 2004; closed September 8, 2006.*

F. USERRA Referrals

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 et seq., as amended, protects the employment and reemployment rights of persons who perform uniformed services. USERRA prohibits discrimination against any person because of his or her service in the uniformed services and sets forth the employment and reemployment rights of persons who are absent from their federal employment due to the military service.

Under USERRA, an aggrieved person ("claimant") may choose to file a USERRA complaint with Department of Labor (DOL), Veterans' Employment and Training Service (VETS). VETS investigates the complaint and tries to resolve meritorious complaints.

OSC is the prosecutor of federal sector USERRA claims. Thus, if VETS is unsuccessful in resolving a claim involving a federal employer, the claimant may request that VETS refer the complaint to OSC. If the Special Counsel believes there is merit to the complaint, OSC may initiate an action before the U.S. Merit Systems Protection Board and appear on behalf of the claimant.

At the start of FY2005, the OSC had 12 pending USERRA cases. In FY2005, the OSC received 30 referrals from the Department of Labor. Six USERRA referrals were pending at the end of FY2005. (See **Table 9**).

On December 10, 2004, President Bush signed into law the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, which changes the manner in which certain federal sector USERRA claims are investigated. Starting on February 8, 2005, pursuant to a demonstration project established by section 204 of the VBIA, OSC rather than VETS will investigate USERRA claims filed by federal employees (and applicants for federal employment) whose social security number ends in an odd-numbered digit. In addition to those claims, OSC will receive and investigate all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction.

Under the demonstration project, VETS will continue to investigate even numbered claims that do not include a related prohibited personnel practice allegation. VBIA does not change the manner in which non-federal sector USERRA claims (*i.e.*, those involving state and local governments and private employers) are received and investigated by VETS. Likewise, OSC will continue to perform its prosecutorial function under the demonstration project.

Given OSC's new investigative responsibility, the Special Counsel established a USERRA Unit within OSC. The USERRA Unit serves as the intake, investigative, and prosecutorial unit for all matters received by OSC that directly concern or relate to federal employment issues affecting veterans and service members specifically including the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, et seq.

The USERRA Unit's primary function is to review allegations of violations of USERRA occurring in the federal sector and determine if further investigation is warranted. If warranted, the USERRA Unit conducts the investigation, makes legal determinations as to whether corrective and disciplinary action is warranted, and resolves meritorious cases through settlement or, if necessary, prosecution before the MSPB. The USERRA Unit also provides technical assistance and information about USERRA to employees and employers in the federal and non-federal sectors via a telephonic and web-based hotline.

The USERRA Unit is composed of three investigators, two attorneys, and one administrative assistant. It is headed by a supervisory attorney, who reports to the Specials Project Unit Chief. A clerk is also assigned to the USERRA Unit. It is anticipated that the USERRA Unit will receive approximately 150 USERRA cases per year.

Under the demonstration project, in FY2005, of the total referrals received, 51% were closed; corrective action was received for 28% of these closed cases (see **Table 10**).

It is the sense of Congress that the Federal government is to be a model employer when carrying out its responsibilities under USERRA. The Special Counsel agrees with that goal and intends for the USERRA Unit to enforce USERRA zealously.

Synopsis of Corrective Actions Obtained by OSC in FY2005

Claimant, a commissary store worker alleged that the agency violated USERRA by failing to extend her term appointment, which had expired while she was on military duty and for which she reasonably expected to receive an extension. OSC successfully obtained full corrective action for claimant, namely: eight weeks of back pay.

Claimant, a full-time staff nurse serving under a temporary appointment, alleged that the agency violated USERRA by terminating her employment because she was excessively absent from the work place due to her military service obligations. The agency had taken the position that claimant's position was not covered under USERRA. USERRA's antidiscrimination provisions, however, cover all types of appointments. OSC filed an action before the MSPB and successfully obtained full corrective action for claimant, namely: back pay (approximately \$53,000); the expunging of all negative documentation relating to her termination; and issuance of an SF-50 reflecting that claimant resigned from the agency. Additionally, the agency agreed to undergo USERRA training.

Claimant, a GS-10 Electronics Technician, alleged that his employer, a federal agency, failed to grant him a career ladder promotion while he was absent for 12 months due to military service. The evidence indicated that the agency routinely promoted technicians to the GS-11 level after approximately 12 months of service at the GS-10 level. Because the agency's practice was, in essence to promote automatically to the GS-11 level simply after satisfaction of 12 months time-in-grade at the GS-10 level (i.e., much like a within grade increase of salary) and because there was no issue concerning the claimant's performance, OSC successfully persuaded the agency that a failure to promote complainant effective the date he would have been in the position for 12 months but for his military service was a violation of USERRA. The agency agreed and promoted complainant retroactively, granted back pay, and made up TSP contributions.

Claimant alleged that he was offered and accepted a law enforcement position with a federal agency. When the agency gave claimant an entry on duty (EOD) date, claimant informed the agency that he could not start on such date because of military service. In response, the agency said it would delay his employment until he returned from military service. When he returned from military service, claimant told the agency about an incident of alleged misconduct that occurred while he was on military service. The incident was one that required the agency to conduct a background check before the agency would allow the claimant to start his employment. The agency investigated the matter, cleared claimant, and hired him to the position it had offered initially. OSC determined that the agency violated USERRA by failing to place claimant on the rolls at the initial EOD date and placing him in an LWOP status. Had the agency done so, there would not have been a delay in hiring claimant while it investigated the alleged misconduct. Under the terms of the settlement, the agency adjusted claimant's EOD date to when he would have started at his new, higher graded position but for his military service and paid a lump sum amount reflecting the difference in salary he would have earned upon return from military service given the new EOD date.

Claimant had been accepted into a federal agency's 16-week Associate Supervisory training program (ASP). Enrollees who successfully complete the ASP are noncompetitively promoted to supervisory positions. Over the first eight weeks of the ASP, claimant earned excellent performance evaluations and attained a grade point average of 3.65 on a 4.0 scale. While enrolled in the ASP, however, claimant performed reservist duties and was absent from employment and unable to attend the ASP on Saturdays. The agency expressed concern over the fact that claimant's military duties caused him to miss the ASP every Saturday. Moreover, the agency believed there would be an undesirable adverse affect on agency morale when claimant, after completing the program, would be assigned to a junior supervisory position but would be unavailable to work on Saturdays—as is expected of new supervisors—because of his reservist duty. Thus, it decided to dismiss claimant from the ASP. Because the evidence established that claimant's military service obligations were a substantial and motivating factor in his dismissal from the ASP, OSC determined that the agency violated USERRA. OSC filed a USERRA action before the MSPB and successfully resolved the case with claimant accepting a large cash settlement.

Claimant was appointed by a federal agency to a 90-day term. In part, claimant's job entailed the lifting of heavy packages. Soon after starting his temporary employment, claimant notified the

agency that he would be absent from work to perform military service. While performing military duty, Claimant suffered a shoulder injury. Although he returned to work and attempted to perform the duties of his civilian job, he was unable to do so. Claimant informed the agency and, in response, the agency informed him that he was being fired because of his non-agency injury. OSC determined that the agency violated USERRA by prematurely terminating his term appointment rather than finding him suitable alternative employment. OSC filed suit and the case settled with the agency awarding full back pay to claimant and issuing agency documentation reflecting that claimant completed his 90-day term appointment. The agency also agreed to undergo USERRA training.

G. Outreach Program

The Outreach Program assists agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their workforces about the rights and remedies available to them under the whistleblower protection and prohibited personnel practice provisions of the Whistleblower Protection Act, in consultation with the OSC.

In an effort to assist agencies in meeting the statutory requirement, OSC designed and created a five step educational program, the 2302(c) Certification Program. This program gives guidance to agencies and provides easy-to-use methods and training resources to assist agencies in fulfilling their statutory obligation. Agencies that complete the program receive a certificate of compliance from OSC.

Finally, OSC has continued its policy of issuing press releases when OSC files a significant litigation petition, or achieves significant corrective or disciplinary action through settlement. Most of these generate considerable press coverage, sometimes nationally, and often in trade and local press on individual cases, which contributes greatly to employee and manager awareness of the merit system protections enforced by OSC.

OSC personnel presented 42 outreach programs during FY 2005. OSC performed more outreaches in FY 2004, partly because FY 2004 was an election year. In addition, some agencies are using the improved educational materials on OSC's website and doing their own internal education programs. In FY 2005, OSC signed an agreement with the federal GoLearn project, which makes outreach style training available online for the federal workforce.

Also during FY 2005, OSC's USERRA unit created a full stand-alone USERRA presentation for use in outreach. USERRA used to be mentioned as a subsection of the Prohibited Personnel Practice presentation.

Significant outreach events this past year were the Federal Dispute Resolution (FDR) conference in August and the Office of Government Ethics (OGE) national conference in September. At FDR, OSC presented on Prohibited Personnel Practice law, Disclosure law, and USERRA. At OGE, we presented on the Hatch Act and Prohibited Personnel Practices.

III. Fiscal Year 2007 Budget Request

OSC is requesting \$15,937,000 – an increase of \$612,000 over its FY2006 appropriation of \$15,325,000. The increase for FY 2007 is not for any increased FTE or additional programs. The increase is simply to pay the salaries and benefits of the current employees of the agency during FY 2007, given the large salary increases of FY 2005 and FY 2006, and the projected salary increase of 2.2% in FY 2007.

OSC has been successful in hiring excellent staff and the agency will operate with 110 employees during most of FY 2006. The agency needs to continue with 110 employees during FY 2007 to manage and process the agency's elevated workload (since FY2000) of prohibited personnel practice complaints, whistleblower disclosures, Hatch Act complaints, Hatch Act cases, Hatch Act advisory opinions, and USERRA referral cases in a manner that precludes the formation of case backlogs, and to investigate all USERRA cases referred to OSC by the Department of Labor under the Demonstration Project set forth under the Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 204, 118 Stat. 3606 (VBIA). Continuing with 110 employees will also enable OSC to continue reducing case processing times. Below are explanations of FTE usage in OSC's case processing units.

Other notable increased expenses for OSC include the higher cost of OSC's existing headquarters rented space and field office rented spaces (average increase is 3%), higher cost of accounting and procurement activities outsourced to BPD (71% increase over FY 2006 projection), the higher cost of legal information services (11% increase), and an additional \$19,000 required for mandatory security charges payable to DHS. An additional \$31,000 will also be needed for Microsoft Enterprise Software Licenses. As the agency operates with more employees than it has in the past, a marginal increase in expenditures for supplies, travel, equipment, and other services can be expected.

Disclosure Unit:

High numbers of disclosures continue to be filed with the Disclosure Unit. The Unit's caseload numbers have been high in the last few years due to the nation's understandably acute focus on national security and defense during this time of military action. But the more definitive driver of the recently increasing caseload seems to be the high profile national press coverage received for a large number of Disclosure Unit cases. Part E of Section II shows examples of these cases. OSC's Disclosure Unit currently has 6 attorneys and a portion of a clerical position. OSC will continue to monitor the incoming disclosure levels and processing times, and may transfer an additional employee into the unit to improve compliance with statutory time requirements for determinations of substantial likelihood.

USERRA Unit:

As the Army Reserve, Marine Corp Reserve, Naval Reserve, Air Force Reserve, and the National Guard are mobilized and demobilized in vast numbers, OSC's vigorous enforcement of the Uniformed Services Employment and Reemployment Act becomes a very important aspect of

supporting the country's armed forces (see Special Counsel Bloch's testimony to the VA Committee).¹⁵ During FY 2005, OSC for the first time filed a USERRA case before the Merit Systems Protection Board. But the vast majority of times the offending agency will settle rather than risk losing to OSC before the Board. It has become evident that the vigor of OSC's forceful focus in protecting the rights of members of our armed forces under USERRA is itself increasing the numbers of such complaints being filed with OSC. One example of a high profile USERRA case is that of Kaplan.¹⁶

Congress has recognized OSC's commitment to dynamic USERRA enforcement by passing the Veteran's Benefit Improvement Act (VBIA) of 2004, Pub. L. No. 108-454, § 204, 118 Stat. 3606, which creates a Demonstration Project which gives OSC responsibility to investigate half of the Federal sector USERRA claims over three years (those in which the claimant has an odd-numbered social security number). These claims would normally have been investigated by the Department of Labor.

Hatch Act Unit:

During FY 2005, OSC's Hatch Act Unit increased filings of disciplinary action cases with the Merit Systems Protection Board. Several of these cases involve high-profile federal employees, and generated significant press coverage which further contributes to awareness of the Hatch Act among the Federal workforce. The 11 disciplinary action complaints filed during FY 2005 was a 57% increase from FY 2004. The eight disciplinary actions obtained (through negotiation or ordered by the board) was 300% higher than FY 2004. There has also been an increase in the number of alleged violations receiving field investigations, either from the Hatch Act Unit, or with assistance from OSC's field offices. OSC recently detailed an additional experienced attorney to its Hatch Act Unit for one year, to work on the caseload. Besides adding case processing firepower, this furthers the cross-training goals of the agency. The unit has five full time attorneys and a clerk.

Investigation and Prosecution Division:

When analyzing the number of Prohibited Personnel Practices processed in the last few years, FY 2004 should be isolated as an outlier year, due to the effects of the intense backlog reduction effort. OSC processed 1,774 complaints during FY 2005, which was 2.4% above the 1,732 complaints processed during FY 2003. In the outlier year FY 2004, OSC processed 2,093 PPP complaints, which was approximately 20% higher than the amounts processed during each of the Fiscal Years 2003 and 2005.

Also due to the 18-month backlog reduction and the Special Counsel's lowered bar for referral during this time, FY 2004 and FY 2005 both saw an increase in the number of complaints referred for field investigations by the agency's Investigation and Prosecution Division. PPP referrals in FY 2004 were 244 (an increase of 51% over FY 2003) and PPP referrals in FY 2005 were 198 (an increase of 22% over FY 2003).

The third effect of the backlog reduction on FY 2005 statistics was in the percent of complaints processed in less than 240 days. Due to the elevated number of cases that were referred to OSC's Investigation and Prosecution Division for full investigations during both FY 2005 and the latter half of FY 2004, it took the IPD longer to investigate, settle, or prosecute these cases. The effect of this increase in complex internal referrals is seen in the FY 2005 statistics, which show the overall percentage of PPP claims processed in under 240 days to be 67.5%, down from 86% in the previous year.

OSC expects this percentage to go up during FY 2006, provided the agency maintains current staffing levels.

Budget Factors:

The agency is experiencing increased salary and benefit costs, transit subsidy increases, more expensive financial audits, increased costs under an interagency agreement for receipt of administrative services, increased security charges from DHS, increased software license agreement fees, and increased rent payments to GSA. Salaries and benefits make up approximately 86% of OSC's operating expenses for FY2005, so the agency has little ability to reprogram funds to salaries and benefits from other object classes.

The agency requests 110 FTE during FY 2007 to properly manage OSC's statutory responsibilities in the face of elevated volumes of complaints, cases, and advisory opinions, and to continue reducing process delays.

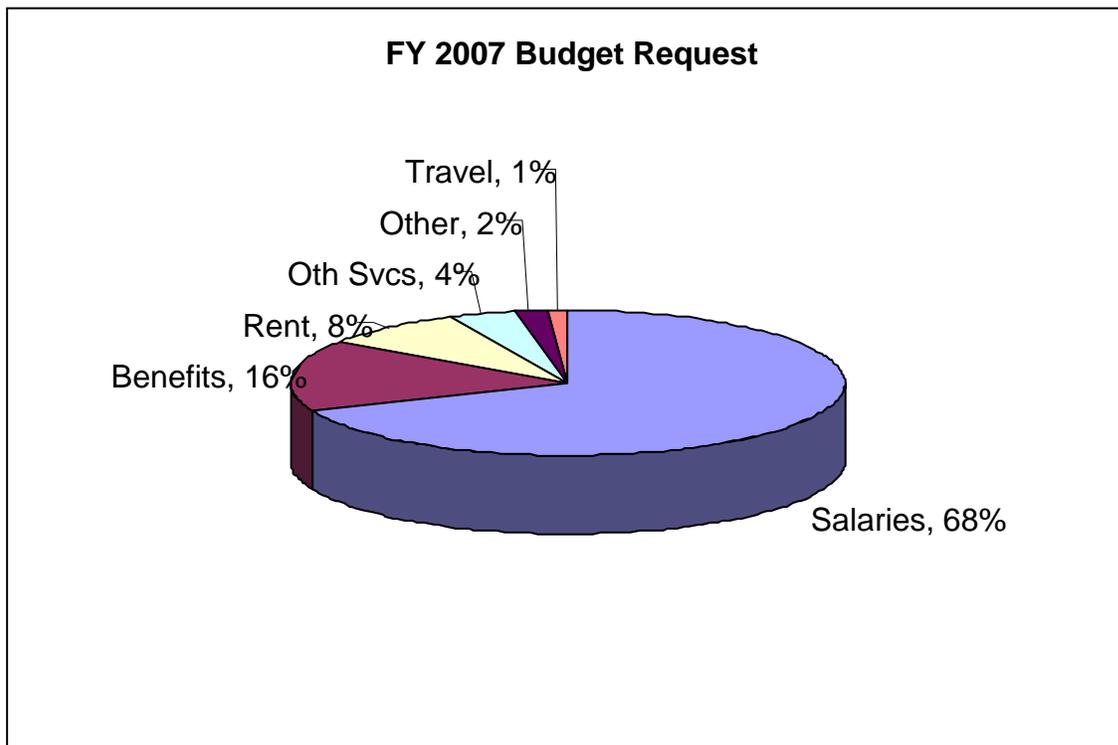
Fiscal Responsibility:

In order to operate during FY2007 within the requested funding levels, OSC has made the following adjustments in order to fund the salary and benefits for 110 FTE.

1. Based on changing needs, OSC revised its IT implementation plan. The FY 2007 request reflects the following adjustments: 1) planned expenditures on the document management system have been adjusted downward, and 2) hardware and software life cycle replacements and case tracking web application development have been rescheduled. Funding has been reallocated to support salaries and benefits of the 110 FTE needed by the agency.
2. The OMB-mandated conversion of the agency's infrastructure (network backbone) to Internet Protocol Version 6 (IPv6) will receive partial funding. All agency networks must interface with this infrastructure by June 2008. Funding has been reallocated to support salaries and benefits of the 110 FTE needed by the agency.

Components of Budget Request:

The following chart shows how the FY2007 request will be distributed on a percentage basis:



Estimated Field Office Expenditures in FY 2007:

OSC has made estimates of the expenditures that its field offices will be making during FY 2007. These estimates will certainly be refined as FY 2007 approaches, but they are a place to start to see the approximate costs of maintaining OSC's headquarters and field offices.

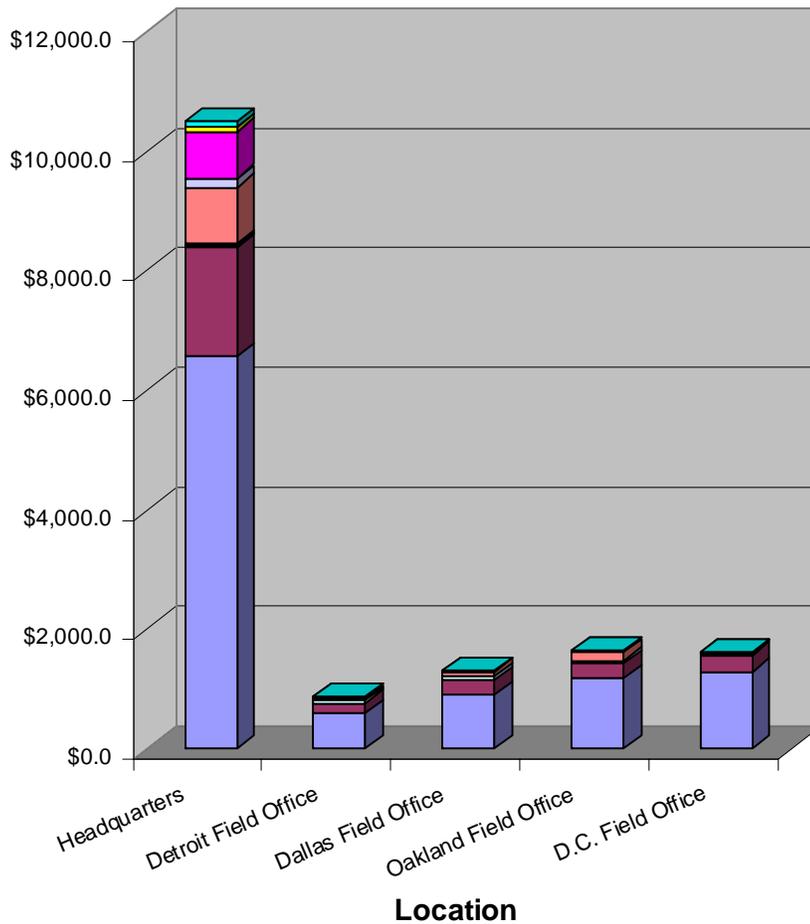
The field office expenditure estimates are based on the following assumptions for the number of FTE at OSC's headquarters and field offices. It is important to note that these FTE estimates for each office are subject to change slightly up or down as operating plans are tactically adjusted during the year in order to properly meet the management needs of the agency.

Headquarters	71 FTE
Midwest Field Office	7 FTE
Dallas Field office	10 FTE
San Francisco Bay Area Field Office	10 FTE
Washington DC Field Office	<u>12 FTE</u>
	110 FTE

FY 2007 Projected Operating Plan by Budget Object Classification and Office (projections as of January 2006) <i>(in thousands of dollars)</i>							
Budget Object Classification	Headquarters	Detroit Field Office	Dallas Field Office	Oakland Field Office	D.C. Field Office	Total	
11.0	Personnel compensation	\$6,576.0	\$589.0	\$918.0	\$1,185.0	\$1,294.0	\$10,562.0
12.0	Civilian personnel benefits	1,832.5	178.5	243.0	241.0	280.0	2,775.0
13.0	Benefits to former personnel	15.0	0.0	0.0	0.0	0.0	15.0
21.0	Travel and transportation of persons	27.0	38.0	45.0	56.0	27.0	193.0
22.0	Transportation of things	14.0	0.0	0.0	0.0	0.0	14.0
23.1	Rental payments to GSA	941.0	48.0	89.0	139.0	0.0	1,217.0
23.2	Rental payments to others	0.0	0.0	0.0	0.0	0.0	0.0
23.3	Communications, utilities and misc. charges	142.8	0.4	0.4	0.4	0.0	144.0
24.0	Printing and reproduction	15.0	0.0	0.0	0.0	0.0	15.0
25.0	Other services	769.0	8.0	9.0	7.0	7.0	800.0
26.0	Supplies and materials	75.5	3.5	5.0	5.0	0.0	89.0
31.0	Equipment	91.0	6.0	6.0	6.0	4.0	113.0
99.9	Total	\$10,498.8	\$871.4	\$1,315.4	\$1,639.4	\$1,612.0	\$15,937.0
	Approximate full-time equivalent employment (FTE) work years	71	7	10	10	12	110

FY 2007 Projected Operating Plan by Budget Object Classification and Office

(in thousands of dollars)



- Equipment
- Supplies and materials
- Other services
- Printing and reproduction
- Communications, utilities and misc. charges
- Rental payments to others
- Rental payments to GSA
- Transportation of things
- Travel and transportation of persons
- Benefits to former personnel
- Civilian personnel benefits
- Personnel compensation

In the FY 2006 appropriation HR 3058, in the committee report language for the U.S. Office of Special Counsel, there was a committee recommendation for OSC to track budget object class expenditures by field office and headquarters in addition to its normal accounting by overall budget object class. OSC will adhere to this suggestion and will institute accounting procedures to track budget object class expenditures by field office in FY 2006. Further, OSC will communicate with the House and Senate when the agency's required expenditures will differ materially from the baseline amounts for each field office.

One of the effects of this added requirement of geographic accounting is more accounting labor required by OSC and by the outsource partner that performs much of OSC's accounting. OSC requests that detailed geographical allocations of this type be omitted from the FY 2007 budget for OSC.

IV. Performance under the President's Management Agenda

OSC has developed a results-oriented, cost-effective management agenda that includes many of the core criteria in the President's Management Agenda. These initiatives are also consistent with OSC's Government Performance and Results Act planning and assessment efforts.

A. Strategic Management of Human Capital

OSC's human capital strategy is integrated into the budgetary planning and the strategic planning of the agency. OSC has revised its performance goals and associated performance measures in order to be more outcome oriented and more measurable. Success in the aggressive targets set for these new goals can only be brought about with effective management of human capital. Further, OSC has internal accountability systems to ensure effective merit-based human resource management as described below.

OSC uses existing personnel flexibilities and tools, including leave flexibilities, alternative work schedules, and a telework pilot program. The agency's new Student Loan Repayments / Retention Program was successfully implemented in the summer of 2005. The agency is addressing gaps in competence and talent through such programs as: upward mobility positions, legal internships, in-house mission-specific training, and the hiring of additional personnel.

OSC has developed extensive documentation of agency procedures in division operating manuals, memos, statements of agency policy and strategic plan. The majority of the agency's manuals and directives have been updated or completely revised in the last year. OSC also captures valuable information and ideas of departing employees through extensive exit interviews. This information is used by senior managers to refine and improve work processes.

OSC's performance management systems allow managers to differentiate between high and low performers through the use of appropriate incentives and consequences. Performance plans are in place for SES members and managers that link to agency mission, goals and outcomes.

In FY 2005, OSC furthered its strategic management goals by reorganizing, creating a Midwest field office, creating a USERRA Unit, a Training Unit, a Customer Service Unit, and a Document Control Branch. OSC also set agency and division goals for continued control of backlogged cases and the age of cases. OSC also measured the performance of each individual, and is working on creating individual case processing targets for attorneys and investigators.

B. Competitive Sourcing

OSC is a small agency, with a highly specialized inherently government mission with 84% of its FTE perform inherently governmental work, and 16% of its FTE are considered commercial in nature. According to OMB Circular A-76 and supplemental guidance issued by OMB, government performance of commercial functions is permitted when, as is the case at OSC, the position activity total is 10 FTE or less.

However, while OSC is small enough that this guidance may exempt a large proportion of OSC's administrative functions that are commercial, OSC is dedicated to the intent of the principles of

cost-effective performance of all commercial functions, and OSC's plans for strategic management of human capital require that OSC senior staff and managers continually monitor and evaluate the productivity and cost of all functions performed, with the goal of focusing resources on OSC's mission operations. Thus, personnel resources used to perform any functions considered commercial at OSC are regularly assessed to determine whether they might be more effectively performed by a contractor. OSC has looked at this in particular in connection with a management assessment it commissioned in FY 2004.

OSC has an interagency agreement with Treasury Department's Bureau of the Public Debt (BPD) to perform certain accounting and procurement services. OSC reviews the BPD interagency agreement semi-annually to confirm the agreement is meeting OSC's needs. OSC also has an interagency agreement with the National Finance Center of the Department of Agriculture to perform payroll/personnel processing functions.

C. Improved Financial Performance

OSC contracts out certain work (financial accounting, reporting accounting, budget accounting, travel management, and certain aspects of procurement and payment operations) under an interagency agreement with the Bureau of Public Debt (BPD). OSC receives accurate and timely financial information concerning these functions from BPD. Contracting these functions out to BPD has provided OSC with more specialized expertise at a lower cost. But that is being reassessed in light of BPD's announcement of significant cost increases in 2006 and again in 2007. BPD provides OSC with a report on status of funds every pay period, and a detailed financial review every quarter. BPD also provides up-to-date financial information on day-to-day operations for payroll, procurement and travel, as needed by OSC.

As a small agency without an Inspector General, OSC generally submits a combined Inspector General (IG) Act and Federal Manager's Financial Integrity Act report each October. OSC's last report, submitted in October 2005, reported that OSC relies on audits and other reviews of BPD operations by the OIG and Office of the Chief Financial Officer (OCFO) in the Treasury Department, as well as information received directly from BPD, for information about any significant issues relating to the services provided to OSC. Information provided by the Treasury

Department OIG, the OCFO office, and BPD indicated that no material weaknesses were identified during FY 2005 in BPD systems involved in the processing of OSC transactions. That information led OSC to conclude that the objectives of its management control program for agency activities handled by those systems were met during FY 2005.

Historically, OSC received a waiver from OMB for the requirement to have an audit of the agency's financial statements. Since FY 2004, however, OSC has not received an audit waiver. An audit firm selected by BPD evaluated OSC's financial statements and processes, spending time at OSC headquarters and with the Bureau of Public Debt personnel who currently perform the accounting functions for OSC. The audit was completed in December of 2005. The auditors gave an unqualified audit opinion on OSC's financial statements, finding no material weaknesses or reportable conditions.

D. Expanded Electronic Government

OSC provides one-stop service for those who wish to file a complaint or disclosure, or request a Hatch Act advisory opinion. A person can file a Prohibited Personnel Practices complaint online. Most of our PPP complaints come into the agency via this channel. A person can also make a complete Whistleblower Disclosure online and a Hatch Act advisory opinion may be solicited through the web site.

Those who wish to communicate with a knowledgeable OSC staffer through one of the agency's telephone hot lines will find the relevant information on the web site. OSC's web site is linked to FirstGov, as well as other agency web sites, such as those for the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Office of Government Ethics, among many others. OSC's Information Technology Branch (ITB) staff are continually improving OSC's web site. User sessions on OSC's web site have continued to grow: FY 2005 total number of user sessions was 607,838. This represents a 16.7% increase over the FY 2004 total number of user sessions (520,698).

OSC's ISB is constantly working to improve OSC's IT efficiencies by continually re-engineering processes for productivity improvements. For example, an ongoing effort during FY 2006 and FY 2007 will be the design, development, and implementation of an integrated electronic document management system. Once completed, this system will be a powerful tool for OSC's staff to search its existing case files, manage current caseload documents, and to process Freedom of Information Act (FOIA) requests. Searches of case files and FOIA requests are currently handled manually.

E. Budget and Performance Integration

OSC's senior staff meets regularly to discuss the current status of programs, current initiatives, general policy, and budget, and thus integrate OSC's GPRA planning, program evaluation

and budget. Each operating unit of OSC participated in the revision of OSC's Performance Budget Goals and the setting of aggressive targets for FY 2006 and FY 2007. Though they didn't used to be so, after this revision the goals and associated performance measures are now clear, outcome oriented, and measurable. The new goals demonstrate how well OSC is performing in its core statutory missions. The narrative associated with the goals explains in detail the impact of budgetary and resource issues on performance.

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Table 1

Budget Object Classification of Obligations: FY2005-FY2007			
<i>(in thousands of dollars)</i>			
Budget Object Classification of Obligations	FY2005 <i>(actual)</i>	FY2006 <i>(projected)</i>	FY2007 <i>(projected)</i>
11.0 Personnel compensation	8,942	9,882	10,562
12.0 Civilian personnel benefits	2,369	2,769	2,775
13.0 Benefits to former personnel	107	24	15
21.0 Travel and transportation of persons	264	185	193
22.0 Transportation of things	20	12	14
23.1 Rental payments to GSA	1,167	1,183	1,217
23.2 Rental payments to others	2	1	0
23.3 Communications, utilities and misc. charges	128	152	144
24.0 Printing and reproduction	15	10	15
25.0 Other services	904	734	800
26.0 Supplies and materials	108	80	89
31.0 Equipment	701	140	113
32.0 Land and structures	366	0	0
99.9 Total	15,093	15,172	15,937

Detailed notes concerning object classes in **Table 1**:

Object Class 11.0: No additional FTE are requested for FY2007. The increase is to pay the salaries for the 110FTE of the agency, given the pay raises of FY 2005 and FY 2006, and the projected pay raise of FY 2007.

Object Class 12.0: The increase is to pay the benefits for the 110FTE of the agency, given the pay raises of FY 2005 and FY 2006, the projected pay raise of FY 2007, and the associated increases in the costs of providing benefits, such as increased amounts for transit subsidies and payments for the agency's student loan repayment / employee retention program.

Object Class 21.0: In FY 2007, OSC will curtail travel to 27% below the actual amount expended in FY 2005. Travel will be closely controlled, in order to be able to realize these reductions. The existence of a Midwest Field Office will aid in this, providing a presence for the agency in that region of the country.

Object Class 22.0: In FY 2007, OSC will endeavor to cut expenditures for transportation of things by 30%.

Object Class 23.1: Rental Payments to GSA in FY 2007 include approximately \$917K for DC, \$24K for DC real estate taxes, \$89K for Dallas, \$139K for Oakland, and \$48K for Detroit.

Object Class 25.0: In the Other Services category, OSC will reduce expenses by 12% from actual FY 2005 expenditures. 43.6% of the requested amount is required to cover OSC's Interagency Agreement with the Bureau of Public Debt for accounting, travel, and procurement services. Also included here are the following items: approximately \$56,000 for Westlaw fees, \$40,000 for training, \$40,000 in DHS reimbursement charges for facility security related services, \$35,000 for software maintenance and support, \$31,000 for enterprise software licenses, \$31,000 for the FY2007 financial audit, \$25,000 (a reduced amount) for program support for a document management system, \$20,000 for program support for the OMB mandated HSPD-12 program, \$11,000 for NFC payroll services, and various amounts for Cyberfeds, court reporters, depositions, transcripts, copy machine maintenance contracts, air conditioning maintenance for the computer room, checkpoint firewall maintenance, and telephone system maintenance.

Object Class 26.0: OSC will attempt to cut its supplies expenditures to \$89,000, which is 18% below FY 2005 actuals. This object class represents office supplies, subscriptions, and other items for the headquarters and all field offices.

Object Class 31.0: In order to operate at its overall agency wide FY 2007 Budget Request funding level, OSC plans to reduce expenditures dramatically in this category. The projected FY 2007 expenditures are \$113,000, which is only 12% of actual expenditures in this object class during FY 2005. OSC's reductions of expenditures in this category are brought about by reducing the annual investment in the agency's hardware life cycle replacement plan, and by rescheduling several other technology investments, such as the case tracking web applications project. This object class includes \$30,000 for law books for OSC's legal library, and \$25,000 for life cycle replacement software. This reduction of expenditures in Object Class 31.0 enables OSC to realign funds to support salaries and benefits for the 110 FTE of the agency.

Table 2

Analysis of Resources: FY2005-FY2007			
<i>(in thousands of dollars)</i>			
Description	FY2005 <i>(actual)</i>	FY2006 <i>(projected)</i>	FY2007 <i>(projected)</i>
Budget authority	15,325	15,172	15,937
Outlays	13,851	13,786	14,481
Approximate full-time equivalent employment (FTE) work years	97	110	110

Table 3

Breakdown of Matters ¹ Pending and Completed FY2004 to FY2005		
	FY2004	FY2005 ²
Matters pending at beginning of fiscal year	1,921	995
New matters received	2,754	2,684
Matters closed	3,680	2,685
Matters pending at end of fiscal year	995	994

¹ The term “matters in this table includes prohibited personnel practice complaints (including Transportation Security Administration matters); Hatch Act complaints, whistleblower disclosures (DU matters); USERRA referrals from the MSPB pursuant to 5 U.S.C. x 1221(f)(3).

² Includes USERRA Documentation Project matters.

Table 4

Summary of Prohibited Personnel Practice (PPP) Complaints Activity – Receipts and Processing ¹			
	FY2003	FY2004	FY2005
Pending complaints carried over from previous fiscal year	594	653	524
New complaints received (Intake Unit)	1,791	1,964 ²	1,771
<i>Total complaints:</i>	2,385	2,617	2,295
Complaints referred for field investigation	162	244	198
Complaints processed and closed	1,732	2,093	1,774
Processing times			
	<i>Less than 240 days</i>	1,471	1,799
	<i>More than 240 days</i>	261	294
Percentage processed in under 240 days	85%	86%	67.5%

¹ The numbers in this table, as well as in other tables in this report, may vary somewhat from those in previous years' reports. This is due to the fact that in response to an audit by the General Accounting Office, OSC enhanced its case tracking software system to more accurately track prohibited personnel practice and whistleblower disclosure matters. Use of the improved system has led to recalibration of some statistics from previous years.

² This figure is higher than reported in the President's FY 2006 Budget because it includes several closed cases that were reopened.

Table 5

Summary of Prohibited Personnel Practice Matters Activity – Favorable Actions				
		FY2003	FY2004	FY2005
Total favorable actions obtained ¹ (all prohibited personnel practices)	<i># of actions</i>	115	80	45
	<i># of matters</i>	83	65	45
Favorable actions obtained (reprisal for whistleblowing)	<i># of actions</i>	75	57	37
	<i># of matters</i>	75	49	37
Stays negotiated with agencies ²		6	11	3
Stays obtained from Merit Systems Protection Board		1	1	1
Disciplinary actions negotiated with agencies		12	11	3
Corrective action complaints filed with the Board		0	1	1
Disciplinary actions obtained from the Board		1	0	1

1 The purpose of this breakout is to show the number of favorable actions obtained, and the number of matters involved. A matter (case) can have more than one action (favorable outcome).

2 Stays and disciplinary actions listed in this table (except for disciplinary actions obtained by OSC from the Board) are included in the totals shown in the two rows above, but are broken out here for further information.

Table 6

Summary of Prohibited Personnel Practice Complaints Activity – Mediation Program				
		FY2003	FY2004	FY2005
Matters identified before investigation as mediation-appropriate		43	82	22
Initial acceptance rates by parties	<i>Complainants</i>	82%	68%	27%
	<i>Agencies</i>	69%	64%	22%
Mediated and other resolutions ¹		23	18	5
Resolution rate – OSC mediation program		92%	86%	100%

¹ This category includes complaints settled through mediation by OSC (including “reverse-referrals” - i.e., cases referred back to the Alternative Dispute Resolution Unit by an Investigation and Prosecution Division due to the apparent potential for a mediated resolution). Also included in this category are complaints that entered the initial OSC mediation process, and were then resolved through withdrawal of the complaint, or through mediation by an agency other than OSC.

Table 7

Summary of Hatch Act Advisory Opinion and Complaint Activity				
		FY2003	FY2004	FY2005
Advisory opinions issued		3,284	3,913 ¹	2,558
New advisory requests received (written)		159	176	191
New complaints received		197	248	245
Warning letters issued		43	93	87
Complaints processed and closed in fiscal year		201	357	310
Corrective actions taken by recipients of cure letters:	Withdrawal from partisan races	18	17	4
	Resignation from covered employment	7	8	10
	Other	0	6	3
	Total:	25	31	17
Disciplinary action complaints filed with the Merit Systems Protection Board		4	7 ²	11
Disciplinary actions obtained (through negotiation or ordered by the Board)		4	2	8
Complaints pending at end of FY		254	146	79

1 This number is lower than reported in the President's FY2006 Budget (Other Independent Agencies, Appendix, p. 1209) because of a duplication error.

2 This number is higher than reported in the President's FY2006 Budget because of system entries made after that publication.

Table 8

Summary of Whistleblower Disclosure Activity – Receipts and Dispositions¹				
	FY2003	FY2004	FY2005	
Pending disclosures carried over from previous fiscal year	556	690	98	
New disclosures received	535	572	485	
<i>Total disclosures on hand at start of the fiscal year:</i>	1,091	1,262	583	
Disclosures referred to agency heads for investigation and report	11	18	19	
Agency head reports sent to President and Congress	23 ²	8	16	
Results of agency investigations and reports	<i>Disclosures substantiated in whole or in part</i>	13	8	16
	<i>Disclosures unsubstantiated</i>	10	0	0
Disclosures processed	<i>In more than 15 days</i>	290	1,019 ³	237
	<i>In less than 15 days</i>	111	135	236
Percentage of disclosures processed in less than 15 days	28%	12%	50%	
Disclosure matters processed and closed	401	1,154 ⁴	473	

¹ It should be noted that many disclosures contain more than one type of allegation. This table, however, records all allegations received in a whistleblower disclosure as a single matter.

² This number includes reports on disclosures referred to agency heads by OSC before FY2003.

³ This number is large due to the backlog reduction effort.

⁴ This number is large due to the backlog reduction effort.

Table 9

Summary of USERRA Referral Activity			
	FY2003	FY2004	FY2005
Pending referrals carried over from previous fiscal year	8	4	12
Referrals received from DOL during fiscal year	7	14	30
<i>Pending Referrals closed</i>	11	6	36
Pending referrals at the end of the fiscal year	4	12	6
Closed cases where corrective action was obtained (including corrective actions obtained in matters referred to litigation)	3	1	6
Closed cases where no corrective action was obtained	8	5	25
Closed cases referred for litigation	0	0	5
Litigation closed; no corrective action obtained	n/a	n/a	n/a
Litigation closed; corrective action obtained	n/a	n/a	3
Litigation pending	n/a	n/a	2

Table 10

Summary of USERRA Referral Activity ¹	
	FY2005
Pending referrals carried over from previous fiscal year	0
Cases opened	111
Cases closed	57
Cases pending at the end of the fiscal year	54
Closed cases where corrective action was obtained	16
Closed cases where no corrective action was obtained	38
Closed cases referred for litigation	0

¹ Under VIBA, P.L. 108-454; OSC started receiving cases in Feb. 05.

ENDNOTES

¹ Reorganization Plan Number 2 of 1978. See 5 U.S.C.A. App.1, § 204. The Civil Service Reform Act of 1978 (Public Law No. 95-454, 92 Stat. 1111) enlarged OSC's functions and powers.

² Public Law No. 101-12 (1989). Provisions setting forth OSC authorities and responsibilities were codified at 5 U.S.C. § 1211, *et seq.*

³ Public Law No. 103-94 (1993), codified in scattered sections of 5 U.S.C. and 12 U.S.C.

⁴ Public Law No. 103-353 (1994), codified at 38 U.S.C. § 4301, *et seq.*

The Veterans' Employment Opportunities Act of 1998 (Public Law No. 103-424) also expanded OSC's role in protecting veterans. The act made it a prohibited personnel practice to knowingly take, recommend, or approve (or fail to take, recommend, or approve) any personnel action, if taking (or failing to take) such action would violate a veterans' preference requirement. See 5 U.S.C. § 2302(b)(11). (The former § 2302(b)(11) was re-designated as § 2302(b)(12)).

⁵ Public Law No. 103-424 (1994), codified in various sections of title 5 of the U.S. Code. The provision making federal agencies responsible, in consultation with OSC, for informing their employees of rights and remedies under the Whistleblower Protection Act appears at 5 U.S.C. § 2302(c).

⁶ Public Law 107-71 (2001).

⁷ Unless noted otherwise, all references after this to prohibited personnel practice complaints include complaints alleging other violations of civil service law, rule, or regulation listed at 5 U.S.C. § 1216, except for alleged violations of the Hatch Act.

⁸ When the Complaints Examining Unit makes a preliminary determination to close a complaint without further investigation, it must by law provide complainants with a written statement of reasons, to which they may respond. On the basis of the response, if any, the unit decides whether to close the matter, or refer it to the Investigation and Prosecution Division.

⁹ Compare, for example, 5 U.S.C. § 1214(a)(1)(A) ("The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.") with 5 U.S.C. app. 3, § 6(a) ("[E]ach Inspector General ... is authorized— ... (2) to make such investigations and reports relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary or desirable[.]") and § 7(a) ("The Inspector General may receive and investigate complaints or information from an employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."). OSC cannot, however, investigate complaints over which it has no jurisdiction, with the result that some complaints are closed without further action after receipt and review. During FY2004, for example, OSC lacked jurisdiction in 617 (or 31.4%) of the complaints received, leaving 1,347 complaints (69%) in which OSC was required by statute to conduct an inquiry. In addition, discrimination based on race, color, religion, sex, or national origin, age, or handicapping condition is illegal under laws enforced by the Equal Employment Opportunity Commission (EEOC), and is also a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). However, since procedures for 10 investigating discrimination complaints have already been established in the agencies and the EEOC, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiate an independent investigation. 5 C.F.R. § 1810.1. When a matter is not referred for further investigation, CEU must by law provide complainants with a written statement of reasons, to which they may respond. 5 U.S.C. § 1214(a)(1)(D). On the basis of the response, if any, CEU decides whether to finalize its preliminary determination to close the matter, or to refer the matter to an Investigation and Prosecution Division. 11 5 U.S.C. § 1214(b)(2)(C).

¹³ Corrective action seeks a remedy for any injury to the individual complaining employee, such as back pay or reinstatement, while disciplinary action seeks to impose discipline on the perpetrator of the PPP.

¹⁴ Several factors are believed to account for or contribute to this workload increase. They include: publicity about an increased number of high-profile cases handled by OSC, including whistleblower disclosures, and four Public Servant Awards issued to whistleblowers by OSC; increased public interest in elections since the 2000 presidential election, the public interest generated by the 2004 campaigns; OSC's 2302(c) Certification Program; significant improvements in OSC's web site, increasing awareness by government employees and others of OSC and its functions.

¹⁵ http://www.osc.gov/documents/osc_lst3.pdf

¹⁶ http://www.osc.gov/documents/press/2005/pr05_15.htm

VII APPENDICES

OSC's Revised Strategic Plan (FY 2006-2010)

The Five Year Strategic Plan – Introduction

Beginning in 2000, OSC saw an increased interest in Whistleblower Disclosure cases, and in particular following 9-11, there was a sizeable increase in filings, greater awareness of security and health and safety issues, improved outreach by OSC, and widespread publicity about high-profile cases. During this time of dynamic growth and change, the agency focused on establishing standards for prioritizing cases but did not systematically address the growing backlog or the process-driven system that contributed to the backlog. The system in place permitted paperwork and multiple layers of review that did not, in many cases, contribute to any tangible benefit or result to the agency or the merit system or our constituency, the federal executive employees. While there were some advantages gained through the establishment of standards for prioritization, it proved to be very ineffectual in reducing the backlog. In fact the backlog grew worse. In the past several years, the agency experienced an increase in caseload level across all units. This increase, coupled with a top-heavy and process-driven organizational structure and byzantine processes, caused the backlog to escalate even more in 2002, 2003 and early 2004. This was the situation facing the new Special Counsel, as he entered the agency in January of 2004. All of this was reflected in a GAO report that came out early in 2004, shortly after the new Special Counsel's arrival. It called for a radical solution to these problems that would not only solve existing backlogs but assure the structure and processes of the agency would be permanently changed to solve this 10-year backlog trend once and for all.

In the spring of 2004, an outside assessment team was hired to evaluate and assess the workforce, strategic alignment, agency efficiency, training needs, and strategic human capital management of the agency. Concurrently, a Special Projects Unit (SPU) was formed to go into one OSC operating unit at a time and work side by side for months with the unit's personnel in a long and intense backlog reduction effort. At the same time the SPU was analyzing the processes of the agency, many of which were convoluted. The SPU made recommendations to the Special Counsel, and the final report from the assessment team with specific recommendations was released in September 2004. Soon after, in early 2005, the agency was significantly reorganized, both structurally and procedurally. This reorganization is now bearing fruit in the way the streamlined divisions and empowered individual employees accomplish the business of the agency. The last phases of the reorganization, updates on the standard operating procedures to be used on a day-to-day basis by individual investigators and attorneys, are being implemented currently.

With the backlog fully controlled in all units for the first time in recent history, OSC is now focusing on the concept of expeditious justice. Since his first days in office, the Special Counsel has been summarizing his views on slow case processing with the phrase "Justice delayed is justice denied." Achievements have been realized in case processing times. Now OSC stands ready to set aggressive goals in case processing times, and to find innovative ways to meet those goals.

During the last five years, the agency organizational structure and case processing procedures were not the only significant challenges facing the agency. The Annual Performance Goals were opaque and close to being meaningless. They were unquantifiable, and seemed to be designed to obscure rather than to provide illumination into the effectiveness of the agency's various operating units.

With a reorganized agency now hitting on all cylinders, it is clear the revision of the Annual Performance Goals is the next step to take. Therefore, the U.S. Office of Special Counsel presents the following very revised Five Year Strategic Plan, and associated FY 2007 Annual Performance Budget Plan.

These goals serve three purposes. They focus the agency on the reasons for its existence. They set aggressive goals that can bring out the best in individuals, units, and management. And they provide an additional way for the public and Congress to see and appreciate what is happening at OSC.

The Five Year Strategic Plan – Where Does OSC want to be in 2010?

- **Timeliness.** The U.S. Office of Special Counsel currently has a reputation for quality. By the year 2010, OSC wants to have firmly established its reputation for speed as well.

This means meeting and exceeding statutory time limits associated with two of OSC's missions (PPPs and Disclosures). In the case of the agency's responsibility to examine incoming disclosures, part of the solution may include a change to the statute itself.

For the other two missions of the agency (Hatch and USERRA), in the absence of statutory requirements, OSC will set aggressive goals for timeliness for each mission. A detailed description of the timeliness goal for each mission is included below, in the Revised Goals section.

- **Quality.** OSC's Complaints Examining Unit has long had the motto "We have to be right" when performing legal examinations of incoming claims which allege Prohibited Personnel Practices. And it is true. If CEU ever erroneously closed a case for lack of merit, besides closing an avenue of possible remedy to the Federal employee who made the claim, OSC would soon know about it. If OSC were to make a mistake in the legal analysis, others (outside attorneys, Congress, interest groups, etc.) would soon be pointing out what specific legal mistake was made. This is why such care goes into every incoming CEU case. All cases are discussed with management, and in complex cases, the back and forth discussion includes the Senior Associate Special Counsel, a career SES employee that has been with the agency for many years.

The reality is that CEU is practically never wrong in its legal analysis. Perhaps once every several years (with an average of 1800 cases per year being filed with CEU).

Other units within OSC have their own robust sense of quality. The aggregate result is that the agency already has a strong reputation. Every year between now and 2010, we want to build on this existing strength, and raise the level of quality wherever possible. With the help of the measurable quality goals outlined below for each mission of the agency, we look forward to achieving continued progress.

- **Outreach.** Aggressive investigations and enforcement are one good way of slowly educating the management in executive branch agencies, in terms of what types of actions are legal, and what types of actions are violations of the Civil Service Reform Act, the Hatch Act, or the Uniformed Services Employment and Reemployment Rights Act. But the other side of the prevention coin is for OSC to help prevent wrongdoing from occurring in the first place, through outreach and education concerning the laws. OSC takes its outreach responsibilities very seriously, realizing that the overall goal is a Federal workplace free from illegal activity. This is the reason that measurable outreach goals are included in the revised performance plan for several of the missions of OSC.
- **Great place to work.** While the Office of Special Counsel is already a good place to work, another goal is to continue making progress in the creation of an excellent work environment. We see this as a combination of providing meaningful work, having good management at all levels of the organization, and making use of as wide a variety of innovative benefits as possible, as an aid in attracting and retaining top talent.

Part of having good management for the agency is in the development of managers in-house and creating and implementing a thoughtful succession plan for the management that will be the future of the agency. This is in progress at OSC.

As for innovative benefits, besides the flexible schedules and alternate work schedule benefits, OSC has a successful Student Loan Repayment / Employee Retention Plan that is highly valued by the attorneys at OSC. Various units of OSC have been using a Telecommuting Pilot Plan, and in the future this plan will be expanded to more units of the agency.

- **Emphasis on USERRA.** It is becoming well known that the Special Counsel is doing everything possible to raise the profile of the Uniform Services Employment and Re-employment Rights Act, in order to put an end to discrimination against service members in the Federal workforce.

Under his leadership, OSC aggressively enforces the Uniform Services Employment and Re-employment Rights Act. In fact, OSC set a precedent in FY 2005 by filing three USERRA cases in one year. Full corrective action was received in all three cases.

In addition, the USERRA Unit does outreach so that returning reservists and veterans are aware of their rights and of the existence of OSC. The Special Counsel himself does outreach for

USERRA (on the Pentagon channel and at other high profile venues).

With the signing of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC's role in protecting service members again expanded. Under a demonstration project created by the VBIA, OSC now has the authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit (instead of the Department of Labor's Veterans Employment and Training Service). Under the project, OSC also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number.

Through 2010, OSC will continue to look for ways to provide superb assistance to service members under USERRA. The agency is committed to continue finding the resources to enable this legislation to protect service members at the level at which it was intended to do.

The Five Year Strategic Plan – the Revised Goals

OSC's revised performance goals are organized by the four statutory missions of the agency: (1) to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing; (2) to enforce restrictions on political activity by government employees covered by the Hatch Act; (3) to facilitate disclosures of wrongdoing in federal government by operating a secure channel for whistleblowers; and (4) to enforce military personnel rights against re-employment discrimination for military service.

The performance goals of the agency are divided into four sections corresponding to the above statutory missions. There is some redundancy between the explanations of the performance goals in this section of the Five Year Strategic Plan, and the explanation of the goals in Appendix B (OSC Annual Performance Budget Goals.) This is intentionally done, since some readers may read only the Strategic Plan and others may read only the Annual Performance Budget Goals.

OSC'S Prohibited Personnel Practice Enforcement Mission

Performance Goal 1:

TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING

The indicator selected is the percentage of PPP cases processed in less than the statutory requirement of 240 days.

This timeliness indicator measures the combined effectiveness of both OSC's Complaints Examining Unit (CEU) and OSC's Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The target for FY 2006 is 85% and the target for FY 2007 is 95%. The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases.

Success in achieving the targets set for FY 2006 and FY 2007 would be a huge step in providing expeditious justice for PPP claims from employees in the Federal workforce.

Performance Goal 2:

TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS

The important performance indicator for quality is the percent of favorable outcomes in meritorious cases.

The numerator for the equation to determine the percent of favorable outcomes is the number of favorable outcomes. The number of favorable outcomes is defined as the number of successful mediations plus the number of settlements achieved plus the number of successful litigations. The denominator for the equation is the number of meritorious cases.

A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise

its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action.

Performance Goal 3:
TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (PPPs)

The indicator is defined as the number of new Federal agencies certified in the 2302 (c) Program by OSC.

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector's need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 47 certified agencies, including most of the major ones. Nevertheless, OSC has set targets to add participating agencies to the 2302(c) certification program.

Other outreach activities:

- Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law.
- OSC's Customer Service Unit maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR)."
- OSC's website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 15% each previous year.
- The GoLearn project is a new initiative that will bring OSC expertise to thousands of Federal workers. OSC does not have responsibility for this project, other than providing expert content.

OSC's Hatch Act Mission

Performance Goal 1:

***TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT -
THROUGH TIMELY CASE PROCESSING***

Performance Indicator A is the percentage of formal written advisory opinions issued in less than 120 days. The target is set at 75% for FY 2006 and 80% for FY 2007.

Written advisory requests are the requests for an advisory opinion that come in to OSC's Hatch Act Unit that are very complex and require significant analysis before answering.

Performance Indicator B is the percentage of oral and e-mail advisory opinions issued in less than five days. If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A. Therefore the goal for processing these oral and e-mail advisories is set at 99% within the five days. With a constant focus on meeting this target, there should be very few times that a requested oral or e-mail advisory opinion is not handled by the Hatch Act Unit within the five days.

Performance Indicator C is the percentage of Hatch Act complaints resolved in less than 365 days. The target is set at 60% for FY 2006 and 70% for FY 2007. A number of these involve litigation, and the timeframe for events to transpire during litigation is out of OSC's control. Even for those that do not actually end in litigation, sometimes there are timeframes outside of OSC's control. For example, OSC may not know that the subject of a complaint ignored an OSC warning to pull out of an election or resign employment until the election actually occurs and it can be verified that neither action has occurred.

Performance Goal 2:

***TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS
AND ENFORCEMENTS***

The performance indicator for quality in Hatch Act investigations and enforcements is the percent of favorable outcomes achieved by OSC in meritorious cases.

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment); or (4) a written warning, in lieu of prosecution, which cures the violation.

The target is set at 90% for FY 2006 and 90% for FY 2007.

Performance Goal 3:
***TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE
COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (HATCH ACT)***

This goal denotes the importance of going out to do outreach programs at agencies that make a request of OSC. Performance Indicator A is specifically defined as the percent of Hatch Act trainings and outreaches given, over the number of invitations received. OSC has set a target for the Hatch Act Unit to fulfill 90% of these requests each year, recognizing that there will be times when a staff member can not be spared, due to the caseload at the time and/or trial schedules.

Performance Indicator B deals with the written advisory section of the Hatch Act portion of OSC's website. The Hatch Act Unit commits to adding one complex advisory opinion to the website every month. There are already many written opinions displayed on the website. Strengthening the content provides more ability for federal, state, and local employees subject to the Hatch Act to research their questions online and gain an informed idea of what the law means in their particular situation.

Other outreach activities:

- In addition to the performance of outreach visits and the website enhancement described above, OSC is producing both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act laws for each of these audiences. When it is finished, OSC should be able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.
- OSC continues to provide free Hatch Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Hatch Act posters.

OSC's USERRA Mission

Performance Goal 1:

TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING

OSC receives four types of USERRA cases—RE, DP-OD, DP-MX, and DP-TSA:

- RE cases** - USERRA cases referred to OSC for prosecution after investigation by the Dept. of Labor.
- DP-OD cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS #.
- DP-MX cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS# and alleges a PPP in addition to the alleged USERRA violation.
- DP-TSA cases** - Transportation Security Administration USERRA cases.

Given the different nature of each of these types of cases, different performance indicators apply. Therefore, under Goal 1 (timely case processing) there is a Performance Indicator A and a Performance Indicator B for each of these four types of cases.

RE Cases:

Definition: Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans' Employment and Training Service (VETS). Pursuant to 38 U.S.C. § 4324, in the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as "RE cases."

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. USERRA Unit reviews the information and make as "de novo" determination.

Where the USERRA Unit disagrees with an RSOL determination that OSC should represent the claimant, the unit sends the RSOL a report setting forth the factual and legal basis of the unit's preliminary determination not to represent the claim and invites the RSOL to respond. The unit considers any response received from the RSOL in making a final representation determination. The RSOL is typically given two weeks to respond to the report.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that further investigation is often warranted (e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC). In such cases, the USERRA Unit will always contact the agency and relevant witnesses to

obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

Performance Indicator A for the referral cases is defined as the percentage of cases where the representation decision is made in 75 days or less. The targets for this performance indicator are set at 90% for FY 2006 and 90% for FY 2007.

DP-OD cases:

Definition: In late 2004, Congress expanded OSC's role in enforcing USERRA and protecting the employment rights of federal employees and applicants. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC was given the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the demonstration project, OSC also investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number (so-called "mixed claims"). VETS' investigative authority was limited to federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit and who do not allege a prohibited personnel practice. Pursuant to section 204(d)(1) of VBIA, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project. The demonstration project began on February 8, 2005, and ends on September 30, 2007.

Given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project and the Special Counsel's desire to revitalize OSC's enforcement of USERRA during his term, Special Counsel Bloch established the USERRA Unit as part of the January 6, 2005, directive reorganizing the agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues. The Unit is responsible for investigating USERRA claims to determine whether prosecution is warranted.

DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases typically come from two sources: 1) from VETS, where a claimant files a USERRA Form 1010 (i.e., a USERRA complaint form) with VETS and 2) directly from the claimant, where the claimant files with OSC the OMB approved form OSC-14 "Complaint of Possible violation of USERRA."

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in an USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

Performance Indicator A for the odd-numbered social security number demonstration project cases is defined as the percentage of cases where the representation decision is made in 120 days or less. The targets for this performance indicator are set at 80% for FY 2006 and 80% for FY 2007.

DP-MX cases:

Definition: As stated above, OSC is responsible for investigating all federal sector USERRA claims where the claimant, regardless of his or her social security number, alleges a prohibited personnel practice over which OSC has jurisdiction.

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in an USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicators incorporate those factors.

Performance Indicator A for the demonstration project cases in which a PPP is also alleged (mixed case) is defined as the percentage of cases where the representation decision is made in 160 days or less. The targets for this performance indicator are set at 80% for FY 2006 and 80% for FY 2007.

DP-TSA cases:

On June 9, 2005, the MSPB held in Spain v. Department of Homeland Security (MSPB Docket # PH-0353-04-0361-I-1) that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the Spain decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials (akin to the manner in which OSC is permitted to investigate and report on allegations of whistleblower reprisal).

The performance indicator for these types of cases reflects the MSPB's decision in the Spain case.

Performance Indicator A for the TSA cases is defined as the percentage of cases where a "no merit" determination is made or a request for voluntary corrective action is sent to TSA in 160 days or less. The targets for this performance indicator are set at 80% for FY 2006 and 80% for FY 2007.

Performance Goal 2:
***TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS
AND ENFORCEMENTS***

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action. “Meritorious cases” under this performance indicator are to be distinguished from the “test cases” found under Performance Indicator B.

Performance Indicator A is defined as the percent of favorable outcomes in cases determined by OSC to be meritorious. Total favorable outcomes are the sum of the number of successful mediations and the number of settlements achieved and the number of successful litigations.

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept.

Performance Indicator B is defined as the number of test cases filed. While not appropriate to set a specific target for this indicator, since there may be years when no viable test case presents itself, the number of such test cases that OSC files is still an important indicator to track, as OSC assists in safeguarding the rights of service members in the parts of the law that are still vague or undefined.

Performance Goal 3:
***TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE
COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (USERRA)***

OSC recognizes the federal sector’s need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the

law. For example, such outreach efforts include USERRA seminars presented by OSC staff to the D.C. Bar in May 2005, at the annual Federal Dispute Resolution Conference in August 2005 in New York, and at an upcoming presentation at the Army's Advanced Labor and Employment Law Course on October 18, 2005, at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Additionally, the unit maintains a telephonic and web-based "hotlines" for answering USERRA-related questions from the public and private sectors.

The performance indicators reflects the practical budgetary constraints of providing OSC-sponsored USERRA training to all requesters and OSC ability and desire to provide such training.

Performance Indicator A is specifically defined as the percent of USERRA outreaches given, over the number of invitations received. The USERRA Unit has set a target to fulfill 90% of these requests each year (where the requesting agency is paying for travel), recognizing that there will be times when a staff member can not be spared, due to the caseload at the time and/or trial schedules.

The USERRA Unit will also endeavor to assist those agencies who need outreach or training but are unable to offer reimbursement for expenses. Thus, the target for this Performance Indicator B is 50%. It is estimated that half of the requesting agencies of this sort will be local and therefore the costs would be minimal for OSC to meet their needs.

OSC's Whistleblower Disclosure Mission

Performance Goal 1:

TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by an [employee] which the [employee] reasonably believes evidences: a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, the Special Counsel must review the information within 15 days and determine whether there is a *substantial likelihood* that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of several ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 7% for FY 2005) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (93% for FY 2005) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector General (IG) for the agency involved, with a request that the IG assist OSC in making the determination.

Because of the time involved in preparing cases for referral under § 1213 and in cases referred to the IG, the statutory 15-day time frame is rarely, if ever, met in these cases. As a result the Indicator for Goal #1, “[p]ercentage of disclosures processed within the statutory 15 day timeframe,” is intended to capture only those cases in which the substantial likelihood determination has not been met. Even in those cases, the actual percentage of cases resolved in less than 15 days is relatively low. It should also be noted that the Special Counsel is considering proposing a legislative change in the statutory language to enlarge the time frame from 15 days to 45 days, a number which would more accurately reflect the average amount of time required to resolve a whistleblower disclosure. The performance indicator for this goal is the percentage of disclosures resolved within the statutory 15 day time frame. The target is 50% in FY 2006 and 50% in FY 2007.

Performance Goal 2:

TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5 U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Since OSC's Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the "substantial likelihood" bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to "promote justice and protect the merit system." **Because the statutory mandate of § 1213 contemplates that OSC make a determination whether there is a *substantial likelihood* that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral.** OSC's analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

The performance indicator for this goal is specifically defined as the percentage of disclosures referred to agency heads, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process. The target for FY 2006 is set at 7% and the target for FY 2007 is set at 7%.

Performance Goal 3:

TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES (DISCLOSURE)

OSC's Disclosure Unit does not have a statutorily defined mandate to perform compliance outreach, and as such does not regularly provide training or outreach to other government entities, with the exception of informational presentations to foreign delegations and annually at the Federal Dispute Resolution Conferences.

OSC continues to provide free Whistleblower Disclosure Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Whistleblower Disclosure Act posters.

APPENDIX B:

OSC ANNUAL PERFORMANCE BUDGET GOALS (FY2007)

**OSC Statutory Missions:
 PPP ENFORCEMENT MISSION**

Goal 1: TO PROTECT THE MERIT SYSTEM THROUGH TIMELY CASE PROCESSING					
PPP Enforcement Mission	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
Prohibited Personnel Practices Cases	Indicator A: Percentage of cases processed in less than 240 days.	85%		95%	

Comments for Goal #1:

1. Indicator A: PPP Cases.

This timeliness indicator measures the combined effectiveness of both OSC’s Complaints Examining Unit (CEU) and OSC’s Investigation and Prosecution Division (IPD).

OSC receives complaints of Prohibited Personnel Practices into the CEU. If, after initial screening, investigation, and legal analysis, a complaint meets the requirements for merit, it is internally referred to the IPD for further investigation. If the IPD investigates and determines the case does indeed have merit, the IPD either seeks relief for the claimant through mediation, settlement, or prosecution.

The reason the target is less than 100% is because in some cases the settlement process can take a considerable amount of time. In cases involving litigation, the timeframe for events is no longer driven by the speed of work of OSC attorneys and investigators. To strive for 100% would carry the implicit assumption that OSC would not litigate any cases.

Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS					
PPP Enforcement Mission	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
Prohibited Personnel Practices Cases	<u>Indicator A:</u> % favorable outcomes in cases determined by OSC to be meritorious = (# successful mediations + # of settlements achieved + # of successful litigations) / (# meritorious cases)	99%		99%	

Comments to Goal #2

1. Performance Indicator A

A meritorious case is one in which the Office of Special Counsel is satisfied that claimant is entitled to relief. In certain meritorious cases, OSC may endeavor to use mediation to secure relief for the claimant. If mediation was not appropriate or did not succeed, OSC may exercise its prosecutorial authority and file for corrective or disciplinary action before the MSPB. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases warranting corrective action.

Goal 3: TO ENHANCE OUTREACH TO FEDERAL AGENCIES TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES					
PPP Enforcement Mission	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
Prohibited Personnel Practices Outreach	Indicator A: # of new Federal agencies certified in the 2302 (c) Program by OSC.	5		5	

Comments to Goal #3

OSC has statutory authority to administer the 2302(c) Program, which recognizes the federal sector’s need for awareness of Prohibited Personnel Practices and training in avoidance of committing them. However, OSC cannot force any agency to apply for certification. There are no statutory penalties for not being certified. This annual numeric target is not overly aggressive because 1) OSC cannot force compliance, and 2) the number of Federal agencies that may seek certification is limited by the number of agencies in existence. OSC already has 47 certified agencies, including most of the major ones.

Other outreach activities:

- Additionally, members of the Investigation and Prosecution Division and the Complaints Examining Unit regularly accept invitations to provide outreach services designed to educate Federal personnel on these issues so that agencies comply with the law. Employees from OSC were able to educate employees of many agencies during a presentation at the Federal Dispute Resolution Conference (FDR).”

- OSC's Customer Service Unit maintains a telephonic hotline for answering PPP-related questions from members of the Federal workforce.
- OSC's website provides a wealth of information regarding PPPs and is a valuable and constantly improving resource for educating the Federal workforce on this subject. Every year the website statistics for user sessions increase, with an average increase in activity of 15% each previous year.
- The GoLearn project is a new initiative that will bring OSC expertise to thousands of Federal workers. OSC does not have responsibility for this project, other than providing expert content.

**OSC Statutory Missions:
 HATCH ACT MISSION**

Goal 1: TO DEFEND THE MERIT SYSTEM BY ENFORCING THE HATCH ACT - THROUGH TIMELY CASE PROCESSING					
HATCH ACT MISSION	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
HATCH ACT WRITTEN ADVISORY OPINIONS See comment 1.	Indicator A: Percentage of formal written advisory opinions issued in less than 120 days.	75%		80%	
HATCH ACT ORAL & EMAIL ADVISORY OPINIONS See comment 2.	Indicator B: Percentage of oral and e-mail advisory opinions issued in less than five days.	99%		99%	
HATCH ACT COMPLAINTS	Indicator C: Percentage of matters resolved in less than 365 days.	60%		70%	

Comments for Goal #1:

1. Performance Indicator A: written advisory opinions

These are the requests for an advisory opinion that come in to OSC's Hatch Act Unit that are very complex and require significant analysis before answering.

2. Performance Indicator B: oral or e-mail advisory opinions

If an oral or e-mail advisory opinion were to take longer than five days, generally it would be treated as a formal written advisory request and be captured by Indicator A.

Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS					
HATCH ACT MISSION	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
HATCH ACT CASES See comment 1.	Indicator A: % favorable outcomes in meritorious cases	90%		90%	

Comments to Goal #2

1. Meritorious cases

A meritorious Hatch Act case is a case in which OSC finds a violation of the Hatch Act. A favorable outcome in a Hatch Act case is either (1) successful litigation of the case; (2) successful settlement of the case; (3) successful corrective action (individual corrected his violation after receiving notice from OSC, for example, by withdrawing his candidacy or resigning from his employment); or (4) a written warning, in lieu of prosecution, which cures the violation.

Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES					
HATCH ACT MISSION	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
HATCH ACT OUTREACH VISITS	Indicator A: (# of HA trainings and outreaches given) / (# of invitations to provide HA training or outreach, where the inviter sponsors OSC)	90%		90%	
HATCH ACT SECTION OF OSC WEBSITE	Indicator B: Number of new advisory complex opinions added every month to the website.	One		One	

Comments to Goal #3

1. Outreach DVD

In addition to the performance of outreach visits and the website enhancement described above, OSC is producing both a Federal Hatch Act DVD and a State & Local Hatch Act DVD that explains the basics of the Hatch Act. When it is finished, OSC should be able to mail the appropriate DVD to certain requestors who require a basic tutorial overview of the Hatch Act.

2. Hatch Act poster

OSC continues to provide free Hatch Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC's rider at the Government Printing Office to order the required number of Hatch Act posters.

**OSC Statutory Missions:
 USERRA MISSION**

- A. **RE cases** – USERRA cases referred to OSC for prosecution after investigation by the Dept. of Labor.
- B. **DP-OD cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS #.
- C. **DP-MX cases** - demonstration project USERRA cases where the claimant has an odd-numbered SS# and alleges a PPP in addition to the alleged USERRA violation.
- D. **DP-TSA cases** -Transportation Security Administration USERRA cases.

See Comment 1.

Goal 1: TO ENFORCE THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH TIMELY CASE PROCESSING					
USERRA MISSION	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
USERRA A: RE Cases Cases received from DOL pursuant to 38 U.S.C. § 4324. See Comment 2.	<u>Indicator A:</u> Percentage of cases where the representation decision is made in 75 days or less.	90%		90%	
USERRA B: DP-OD Cases Cases received by OSC pursuant to the VBIA. See Comment 3.	<u>Indicator A:</u> Percentage of cases where the representation decision is made in 120 days or less.	80%		80%	

<p>USERRA C: DP-MX Cases</p> <p>Cases received by OSC pursuant to the VBIA.</p> <p>See Comment 4.</p>	<p><u>Indicator A:</u> Percentage of cases where the representation decision is made in 160 days or less</p>	<p>80%</p>		<p>80%</p>	
<p>USERRA D: DP-TSA Cases</p> <p>TSA Cases received by OSC.</p> <p>See Comment 5.</p>	<p><u>Indicator A:</u> Percentage of cases where a “no merit” determination is made or a request for voluntary corrective action is sent to TSA in 120 days or less.</p>	<p>80%</p>		<p>80%</p>	

Comments for Goal #1:

1. USERRA Cases

OSC receives four types of USERRA cases—RE, DP-OD, DP-MX, and DP-TSA—each of which are explained in detail below. Given the different nature of such cases, different performance indicators apply.

2. RE Cases

Under USERRA, certain federal sector claims are investigated by U.S. Department of Labor, Veterans’ Employment and Training Service (VETS). Pursuant to 38 U.S.C. § 4324, in the event that VETS is unable to resolve such a claim, a claimant has a right to have his or her claim referred to OSC for a determination on whether OSC will represent the claimant before the U.S. Merit Systems Protection Board (MSPB). Such cases are identified by OSC as “RE cases.”

RE cases have already been investigated by VETS and reviewed by a DOL Office of Regional Solicitor (RSOL). The USERRA Unit receives the VETS investigative file and a legal memorandum from RSOL indicating whether RSOL recommends that OSC represent the claimant. USERRA Unit reviews the information and make as “de novo” determination.

Where the USERRA Unit disagrees with an RSOL determination that OSC should represent the claimant, the unit sends the RSOL a report setting forth the factual and legal basis of the unit's preliminary determination not to represent the claim and invites the RSOL to respond. The unit considers any response received from the RSOL in making a final representation determination. The RSOL is typically given two weeks to respond to the report.

It is to be noted that while RE cases have already been investigated by VETS, OSC has found that: further investigation is often warranted, e.g., key witnesses need interviewing; important documents need to be obtained; too much time lapsed between alleged initial violations and their referral to OSC. In such cases, the USERRA Unit will always contact the agency and relevant witnesses to obtain the information necessary to allow it to make a well-reasoned determination regarding the prosecutorial merit of a given claim.

The need and extent of any supplemental investigation affects the processing time of RE cases and is reflected in the performance indicator.

3. DP-OD cases

In late 2004, Congress expanded OSC's role in enforcing USERRA and protecting the employment rights of federal employees and applicants. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC was given the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the demonstration project, OSC also investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number (so-called "mixed claims"). VETS' investigative authority was limited to federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit and who do not allege a prohibited personnel practice. Pursuant to section 204(d)(1) of VBIA, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project. The demonstration project began on February 8, 2005, and ends on September 30, 2007.

Given the new, additional investigative responsibilities Congress assigned to OSC with the passing of the demonstration project and the Special Counsel's desire to revitalize OSC's enforcement of USERRA during his term, Special Counsel Bloch established the USERRA Unit as part of the January 6, 2005, directive reorganizing the agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues. The Unit is responsible for investigating USERRA claims to determine whether prosecution is warranted.

DP-OD cases are federal sector USERRA claims filed by persons having an odd-numbered social security number. DP-OD cases typically come from two sources: 1) from VETS, where a claimant files a USERRA Form 1010 (i.e., a USERRA complaint form) with VETS and 2) directly from the claimant, where the claimant files with OSC the OMB approved form OSC-14 "Complaint of Possible violation of USERRA."

The USERRA Unit conducts an investigation of DP-OD cases and determines whether OSC will represent the claimant in an USERRA action before the MSPB. The performance indicator reflects the time reasonably expected to investigate such cases.

4. DP-MX cases

As stated above, OSC is responsible for investigating all federal sector USERRA claims where the claimant, regardless of his or her social security number, alleges a prohibited personnel practice over which OSC has jurisdiction.

The USERRA Unit conducts an investigation of DP-MX cases and determines whether OSC will represent the claimant in an USERRA or prohibited personnel practice action before the MSPB.

The processing time of DP-MX cases is affected by 1) additional complexity of such cases and 2) the USERRA Unit's adoption of OSC's practice in prohibited personnel practice cases of granting a claimant 13 days to respond to OSC's preliminary determination regarding prohibited personnel practice allegations. The performance indicator incorporates those factors.

5. DP-TSA cases

On June 9, 2005, the MSPB held in *Spain v. Department of Homeland Security* (MSPB Docket # PH-0353-04-0361-I-1) that USERRA does not apply to Transportation Security Administration (TSA) Security Screeners or TSA Supervisory Security Screeners and, therefore, the MSPB does not recognize jurisdiction over such cases. Consequently, OSC is unable to prosecute USERRA actions involving TSA Security Screeners or TSA Supervisory Security Screeners.

Notwithstanding the *Spain* decision, TSA voluntarily permits OSC to investigate USERRA claims and reports its findings and recommendations for corrective action to TSA management officials (akin to the manner in which OSC is permitted to investigate and report on allegations of whistleblower reprisal).

The performance indicator for these types of cases reflects the MSPB's decision in the *Spain* case.

Goal 2: TO PROMOTE JUSTICE THROUGH THE QUALITY OF INVESTIGATIONS AND ENFORCEMENTS					
USERRA MISSION	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
USERRA Cases	<p>Indicator A: % favorable outcomes in cases determined by OSC to be meritorious = (# successful mediations + # of settlements achieved + # of successful litigations) / (# meritorious cases)</p> <p>Indicator B: # of "test cases" filed</p>	90%		90%	
		Inappropriate to set a specific target		Inappropriate to set a specific target	

Comments to Goal #2

1. Performance Indicator A

Where the Office of Special Counsel is satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, in certain circumstances, the U.S. Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 4324(a)(2)(A) and (d)(2). As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or via litigation.

Typically, OSC will prosecute cases it believes are meritorious but where the involved agency is unwilling to resolve them voluntarily. OSC is confident of its ability to prosecute successfully cases

warranting corrective action. “Meritorious cases” under this performance indicator are to be distinguished from the “test cases” found under Performance Indicator B.

2. Performance Indicator B

It is foreseeable that OSC will desire to file cases where the law is not clear (e.g., novel legal issues requiring “test cases” to define the bounds of the law) but will establish legal precedent benefiting all service members, if the litigation is successful. The outcomes of these types of cases do not depend on OSC’s skill in weighing of the evidence, applying of law, and trying the case. Instead, the cases involve questions of law.

It is difficult to define a performance goal that accurately reflects “success” or “failure” of OSC’s identification of cases that are fertile for expanding the law. The mere fact of filing test litigation with an eye toward expanding the law, however, seems appropriate. Performance Indicator B captures this concept. OSC will track how often it files this type of case. However, a target can not be identified because OSC cannot determine how often appropriate “test cases” will come into the agency from claimants.

Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES					
USERRA MISSION	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
USERRA Outreach	Indicator A: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where inviting agency sponsors OSC})	90%		90%	
	Indicator B: (# of USERRA trainings and outreaches given) / (# of invitations to provide USERRA training or outreach visits {where OSC pays expenses})	50%		50%	

Comments to Goal #3

OSC recognizes the federal sector’s need for USERRA training although it has no statutory obligation to provide it. Thus, the USERRA Unit regularly accepts invitations to provide outreach services designed to educate federal personnel on USERRA issues so that agencies comply with the law. For example, such outreach efforts include USERRA seminars presented by OSC staff to the D.C. Bar in May 2005, at the annual Federal Dispute Resolution Conference in August 2005 in New York, and at an upcoming presentation at the Army’s Advanced Labor and Employment Law Course on October 18, 2005, at the Judge Advocate General’s Legal Center and School in Charlottesville,

Virginia. Additionally, the unit maintains a telephonic and web-based “hotlines” for answering USERRA-related questions from the public and private sectors.

The performance indicators reflects the practical budgetary constraints of providing OSC-sponsored USERRA training to all requesters and OSC ability and desire to provide such training.

**OSC Statutory Missions:
 WHISTLEBLOWER DISCLOSURE MISSION**

Goal 1: TO RECEIVE AND RESOLVE WHISTLEBLOWER DISCLOSURES WITH TIMELY PROCESSING					
WHISTLE-BLOWER DISCLOSURE MISSION	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
DISCLOSURES See comment 1.	Indicator A: Percentage of disclosures resolved within the statutory 15 day time frame.	50%		50%	

Comments for Goal #1:

1. Performance Indicator A: Timely Disclosure Processing

Pursuant to § 1213(b), when the Special Counsel receives any disclosure of information by an [employee] which the [employee] reasonably believes evidences: a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, the Special Counsel must review the information within 15 days and determine whether there is a *substantial likelihood* that the information discloses one or more of the above categories of wrongdoing.

OSC handles these whistleblower disclosures under 5 U.S.C. § 1213 in one of several ways. If the Special Counsel makes a positive determination, he must transmit the information to the appropriate agency head, and require the agency head to conduct an investigation and submit a written report on the findings of the investigation. These referrals under § 1213 represent a small percentage (approximately 7% for FY 2005) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel does not make a positive determination, the matter is closed. These closures make up the vast majority (93% for FY 2005) of the total number of cases resolved by OSC in any fiscal year.

If the Special Counsel is unable to make the substantial likelihood determination on the basis of the information supplied by the whistleblower, the matter may be informally referred to the Inspector General (IG) for the agency involved, with a request that the IG assist OSC in making the determination.

Because of the time involved in preparing cases for referral under § 1213 and in cases referred to the IG, the statutory 15-day time frame is rarely, if ever, met in these cases. As a result the Indicator for Goal #1, “[p]ercentage of disclosures processed within the statutory 15 day timeframe,” is intended to capture only those cases in which the substantial likelihood determination has not been met. Even in those cases, the actual percentage of cases resolved in less than 15 days is relatively low. It should also be noted that the Special Counsel is considering proposing a legislative change in the statutory language to enlarge the time frame from 15 days to 45 days, a number which would more accurately reflect the average amount of time required to resolve a whistleblower disclosure.

Goal 2: TO PROMOTE JUSTICE AND PROTECT THE MERIT SYSTEM THROUGH THE QUALITY OF DETERMINATIONS AND REFERRALS					
WHISTLE-BLOWER DISCLOSURE MISSION	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
DISCLOSURES See comment 1.	Indicator A: % of disclosures referred to agency head, pursuant to 5 U.S.C. § 1213, or under the informal IG referral process.	7%		7%	

Comments to Goal #2

1. Indicator A: Whistleblower referrals:

The U.S. Office of Special Counsel does not have investigative or enforcement authority under 5 U.S.C. § 1213. As such, the Indicator for Goal #2 reflects a quality measure based on the number of cases referred under §1213, regardless of the outcome of the referral. The percentage of cases referred out of the total number of cases received in a fiscal year is a relatively low number historically, and as such, the FY 2006 and FY 2007 targets are low. Since OSC’s Disclosure Unit processes nearly 500 disclosures annually, this percentage can be seen as an indicator of the average relative height of the “substantial likelihood” bar in a given year.

The Indicator for Goal #2 reflects only one way of measuring quality as defined in Goal #2, to “promote justice and protect the merit system.” Because the statutory mandate of § 1213 contemplates that OSC make a determination whether there is a substantial likelihood that the information discloses wrongdoing, a negative determination under the statute, resulting in a closure, is as quality driven as a positive determination resulting in a referral. OSC’s analysis of a whistleblower disclosure may result in a determination not to burden an agency with an inappropriate referral, thus promoting justice and protecting the merit system. Notwithstanding this difficulty in identifying a measure of quality, the individual whistleblower who initiates the disclosure, thus accessing the statutory protections, is more inclined to measure quality by whether or not his or her disclosure is referred. As such, the Indicator for Goal #2 for now reflects this single measurement.

Goal 3: TO PROMOTE COMPLIANCE WITH THE STATUTES THAT OSC ENFORCES THROUGH ENHANCED OUTREACH TO FEDERAL AGENCIES					
WHISTLE-BLOWER DISCLOSURE MISSION	PERFORMANCE INDICATORS	FY 2006 TARGET	FY 2006 RESULTS	FY 2007 TARGET	FY 2007 RESULTS
NA	NA	NA		NA	

Comments to Goal #3

1. Disclosure outreach

OSC’s Disclosure Unit does not have a statutorily defined mandate to perform compliance outreach, and as such does not regularly provide training or outreach to other government entities, with the exception of informational presentations to foreign delegations and annually at the Federal Dispute Resolution Conferences.

OSC continues to provide free Whistleblower Disclosure Act posters to requesting agencies, if the quantity requested is less than ten. If the quantity requested exceeds ten, the interested agency can use OSC’s rider at the Government Printing Office to order the required number of Whistleblower Disclosure Act posters.