

Public Comments on Allowing Federal Contractors, Subcontractors, and Grantees to File Whistleblower Disclosures:

Title: Allowing Federal Contractors, Subcontractors, and Grantees to File Whistleblower Disclosures

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Director of the Office of the Federal Register

National Archives and Records Administration

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RE: Allowing Federal contractors, subcontractors, and grantees to file whistleblower disclosures, RIN: OSC-2015-0001-0001

I am a Student at the American University Washington College of Law, and I respectfully submit this comment to the above captioned Proposed Rule issued by the Office of Special Counsel (OSC)s consideration.

This particular proposed rule piques my interest because I am interested in government contracts/procurement law and I know that Congress recently extended protection against retaliation to government contractors who make whistleblower complaints. Overall, I believe that the proposed rule is a positive one. After all, the Federal workforce has changed to increasingly rely on contractors with their roles, duties, and expectations being almost identical to those of Federal employees.

During my internships at GSA in their Suspension/Debarment and Agency Protests division and FEMA in their Procurement and Fiscal Law Division, I have read about an abundance of wrongdoing via OIG reports and Qui Tam Actions. I used the facts gathered in these OIG reports along with any criminal information to draft proposals for debarment of contractors and their agents, principals, affiliates, etc. The decay of ethics in the Federal workplace is surprising and I believe that this proposed rule rightly opens another avenue for wrongdoing to be reported.

Although I support the proposed rule, I plan to address the following issues: (1) the lack of investigative resources; (2) whether the new rule is even necessary given the stronger whistleblower protections contractors have under state and federal law, i.e., the False Claims Act; and (3) whether contractors will use their new-found rights as leverage over their contracting official.

#### (1) Lack of investigative resources or signal of willingness to commit more

It is traditionally within DOJ's realm to deal with whistleblowers. The concern I have is that OSC is a small office that is lacking in adequate resources to protect those covered by the proposed rule. I recommend that OSC inform contractor employees of the possibility that their report may be elevated to DOJ for review and other federal agencies or inspector generals that investigate fraud, waste and abuse.

On the other hand, there is the distinct possibility that Congress has bigger things in mind for OSC in terms of hiring and expansion. In 2013, Congress enacted 41 U.S.C. 4712 to provide whistleblower protections to employees of federal contractors. These new whistleblower protections are only supposed to be a four-year demonstration project. The instant proposed rule provides a clue that the demonstration project will become permanent. If nothing else, this rule will most certainly expand OSC's reach to private sector employees. As such, OSC's employees should be trained to handle reporting by private sector employees due to OSC's inexperience with the private sector.

#### (2) Is the rule necessary? What about the False Claims Act?

This proposed rule has the possibility to cause considerable confusion when it comes to preexisting rights contractors have under other laws. The agency should also consider the necessity of the rule given that contracting employees already have stronger whistleblower protections than government employees. Before enactment, the agency should make light of this confusion and strive to reassure those that fall within its reach that their rights will be strengthened as a result, and not weakened.

It is also slightly concerning that the proposed rule fails to mention anything about preexisting rights contractors have under the False Claims Act (FCA). The allure of the FCA is that it provides arguably greater protections than the instant proposed rule because it allows for double back pay and monetary rewards for contractor employees who report misappropriation of federal funds. Furthermore, the FCA has mandatory reporting requirements that the instant proposed rule does not.

#### (3) Leverage.

There is the possibility that contractors will use their whistleblower protections as a ploy to gain leverage over their government customers. But, I generally anticipate that this proposed rule will foster good behavior by all and encourage reporting as it proposes to do instead. After all, it is in the contractors best interest to cooperate with the government so as not to tarnish its reputation on future endeavors. Government personnel may actually have an incentive to treat contractors better too. Even so, it will be important to keep track of the impact this proposed rule could have on future private-public relationships and potential for the rule to backfire and create more fraud than it originally set out to diminish.