



U.S. Department of  
Transportation

Office of the Secretary  
of Transportation

The Inspector General

Office of Inspector General  
Washington, DC 20590

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U.S. Office of Special Counsel  
1730 M Street, NW, Suite 218  
Washington, DC 20036

ATTN: Lisa Terry, General Counsel

On behalf of the Office of Inspector General (OIG), U.S. Department of Transportation, I offer this comment on the U.S. Office of Special Counsel (OSC) notice of proposed rulemaking (NPRM) to revise 5 C.F.R. Part 1800.

OIGs and OSC are partners in the accountability community within the United States government. Inspectors General and the Special Counsel are both members of the Council of Inspectors General on Integrity and Efficiency. Both OIGs and OSC share responsibility for protecting whistleblowers and holding agencies and agency officials responsible for misconduct, waste, fraud, and abuse. OIGs conduct many of the investigations referred by OSC to agency heads. This office and OSC have a long history of cooperation on such investigations regarding disclosures by DOT employees and ensuring that whistleblowers do not face reprisal.

With that in mind, DOT OIG would like to bring a few comments to OSC's attention concerning the pending NPRM. We identified three areas where we believe OSC should clarify the proposed rulemaking.

- First, the rulemaking should clarify that while OSC may receive protected disclosures by contractors under 41 U.S.C. 4712, complaints of reprisal for making such disclosures should be submitted to OIGs, not OSC.
- Second, the rulemaking should clarify the meaning of the phrase “wrongdoing in the government.” It is unclear to us whether that term includes wrongdoing by non-Federal employees related to Federal contracts and grants.
- Third, the proposed rule states that OSC would refer contractor disclosures as well as employee disclosures “to the agency head involved for investigation and a

written report on the findings to the Special Counsel, pursuant to 5 U.S.C. 1213(c).” Section 1213(g), not paragraph (c), would appear to apply to referrals of information provided by such private parties. Agencies and OSC have different requirements and obligations depending on the whether OSC’s referral is pursuant to paragraph (c) or (g). If OSC does, in fact, intend to refer contractor disclosures to agencies under paragraph (c), we believe OSC should provide a more detailed interpretation of its authority.

1. OSC should clarify that OIGs, not OSC, is authorized to accept retaliation complaints.

OSC should make clear that, while it is proposing to accept protected disclosures from contractors,<sup>1</sup> it does not have the authority to accept whistleblower retaliation complaints from them. 41 U.S.C. 4712,<sup>2</sup> modeled on provisions of the American Recovery and Reinvestment Act of 2009, provides whistleblower protection to contractors who disclose wrongdoing in relation to Federal contracts and grants to a host of government agencies. Contractors who make protected disclosures are protected from reprisal. Under the law, complaints of reprisal may be made to the relevant OIG. Following an OIG investigation, the head of the agency may order relief. The contractor has a private right of action if the Secretary does not order relief or fails to take action.

OSC’s preamble to the NPRM states: “Under the proposed rule, OSC may receive disclosures from current and former contractors *who allege retaliation for making a protected disclosure under 41 U.S.C. 4712...*” (emphasis added). The proposed rule itself indicates that OSC “may receive disclosures of wrongdoing from current and former Federal contractors, subcontractors, and grantees ... that are cognizable under 41 U.S.C. 4712.” Contractors may interpret OSC’s statements to mean that OSC has authority to receive disclosures of wrongdoing and to receive complaints of retaliation.

We do not contest OSC’s status as a law enforcement agency for purposes of 41 U.S.C. 4712(a)(2)(E) to ensure that contractors enjoy whistleblower protection under section 4712 if they disclose information to OSC. However, OSC should clarify that a person claiming reprisal for making such a protected disclosure must submit a complaint to an OIG, not OSC.

2. OSC should clarify whether it intends to receive complaints relating to wrongdoing by private parties.

OSC states in the preamble that the intent of the rule is to authorize OSC to receive contractor disclosures that concern “wrongdoing in the government.” However, the text of

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<sup>1</sup> For purposes of this comment, we are using OSC’s use of the term “contractor” to mean “employees of contractors, subcontractors, and grantees.”

<sup>2</sup> See Pub. L. 112-239.

the proposed rule is not limited to “wrongdoing in the government.” It is unclear to us whether “wrongdoing in the government” would include wrongdoing by non-Governmental entities with respect to Federal contracts and grants. We believe OSC should clarify the scope of its rulemaking.

3. OSC should clarify the basis for its statutory authority to utilize the procedures of 5 U.S.C. 1213(c) to complaints of wrongdoing submitted by contractors

The NPRM states that if OSC were to make a substantial likelihood determination, it would refer the information to the agency head involved for investigation and a written report on the findings to the Special Counsel pursuant to 5 U.S.C. 1213(c). OSC’s basis for concluding that section 1213(c) can be applied to disclosures by contractors is not explained.

OSC’s authority under 5 U.S.C. 1213(g) to transmit information to agencies seems to be more appropriate than 1213(c) when OSC receives information from a contractor. Section 1213(c) applies “only if” the information was transmitted to the Special Counsel by an employee, former employee, applicant for Federal employment with the agency or a Federal employee who obtained the information in connection with the performance of official duties and responsibilities.<sup>3</sup> A referral under Section 1213(c) also obligates the relevant agency head to conduct an investigation and submit a report to OSC within 60 days (or longer if agreed to by OSC). Upon receiving a 1213(c) report, complainants are entitled to a copy of the report and allowed to submit comments. OSC then determines whether the investigation was reasonable and complies with other OSC requirements. In contrast, under section 1213(g), OSC may transmit information provided by persons who are not covered by 1213(c) to the relevant agency head. Under 1213(g), the head of such agency shall, within a reasonable time after the information is transmitted by OSC, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. OSC then shall inform the individual who provided the information of the report of the agency head.

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<sup>3</sup> 5 U.S.C. 1213(c)(2).

If OSC is proposing a regulation that would require agencies to submit a report to OSC under 1213(c)-(e) after transmitting information that was submitted to OSC by private parties, it should explain its basis for doing so in greater detail. As stated above, section 1213 does not appear to enable OSC to do so. Absent clear legal authority, agencies may not be authorized to release investigative reports to OSC in order to comply with legal requirements such as the Privacy Act.

Sincerely,

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Legal, Legislative and External Affairs