

March 24, 2015

Ms. Lisa V. Terry
General Counsel
Office of Special Counsel
1730 M Street NW, Suite 218
Washington, DC 20036-4505

Dear Ms. Terry,

My name is Jeffrey M. Elkin. I am a law student at the American University Washington College of Law specializing in government accountability and whistleblowing law and policy. I respectfully submit the following comments to the Office of Special Counsel (OSC) through the Federal eRulemaking Portal at www.regulations.gov, rulemaking ID: OSC-2015-001-0001. My comments address OSC's rulemaking entitled "Allowing Federal Contractors, Subcontractors, and Grantees to File Whistleblower Disclosures."

If OSC decides it is wise to expend public funds on the proposed federal contractor, subcontractor, and grantee disclosure program, OSC should inform employees of federal contractors, subcontractors, and grantees (1) of their rights under the False Claims Act (FCA), and (2) that a disclosure to OSC may prejudice the individual's ability to blow the whistle via a False Claims Act (FCA) lawsuit on the same instance of mismanagement, fraud, waste, or abuse.

Employees of federal contractors, subcontractors, and grantees ("covered employees") are eligible to report wrongdoings by government personnel under the False Claims Act (FCA)'s *qui tam* provision. However, the FCA provides courts with jurisdiction to hear only claims brought in compliance with strict non-disclosure requirements. Likewise, the FCA provides whistleblower protections only to those who follow the strict non-disclosure requirements in filing a complaint.

Some courts have held that a would-be whistleblower forfeits his/her FCA claim regarding an act of wrongdoing when he/she discloses the wrongdoing to a government agency prior to filing his/her complaint under the FCA. Other courts have held more narrowly that the claim is forfeited only if the agency has begun an investigation prior to the whistleblower's FCA filing.

In both situations, a potential FCA plaintiff at least risks his/her rights under the FCA by first disclosing wrongdoing to OSC.

When a plaintiff loses the right to pursue a whistleblower claim under the FCA, the federal government and all American taxpayers lose the benefit of having a private plaintiff expend his/her own funds to recover public money for the federal treasury. Also, the whistleblower loses the anti-retaliation protections that would have protected him/her from retaliation for disclosing wrongdoing via an FCA suit. Instead, when a potential FCA suit discloses wrongdoing with OSC, he/she gets the possibility that his/her disclosure might be investigated by the agency, and that he/she will be protected if that happens. Whistleblowers place themselves at great peril to do the right thing by disclosing wrongdoing. They cannot afford to blow the whistle unless they know that they will be protected. The FCA provides that certainty of knowledge. The OSC does not.

The OSC's regulation, while the product of laudable intentions, does more harm than good. Covered employees with the opportunity to expose wrongdoing might mistake the OSC's disclosure program as their only channel through which to expose wrongdoing. Or they may not know of the strict requirements for filing an FCA claim. In either case, the individual might harm their rights under the FCA by filing a claim with OSC, in which case the government is deprived of the free money recovery services of an FCA suit.

Most individuals — sophisticated and unsophisticated — have never heard of the FCA or OSC. If the OSC expands its disclosure program to covered employees, the chances are very high that a potential FCA plaintiff will squander his/her rights under the mistaken belief that his only chance of remedying wrongdoing is to disclose it to OSC. Covered employees may not know that a disclosure to OSC can only potentially result in at most an agency investigation and conclusion that wrongdoing had occurred. Also, covered employees may not know that by disclosing wrongdoing to OSC, they have a chance to return ill-gotten money to the federal treasury. Therefore, OSC's rule will mislead covered employees — potential FCA plaintiffs — into squandering their rights under the FCA by disclosing wrongdoing in a way that will neither stop nor remedy wrongful conduct.

If the OSC decides that it must issue its regulation, OSC should clarify to covered employees that (1) covered employees have rights under the FCA, and (2) such rights could be prejudiced by making a disclosure to OSC.

Thank you for your time and consideration.

Sincerely,

Jeffrey M. Elkin
Juris Doctor, 2016
Washington College of Law
The American University