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Office of General Counsel
Office of Special Counsel
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Comments on Revision of Regulations to Allow Federal Contractors, Subcontractors and Grantees to File Whistleblower Disclosures with the U.S. Office of Special Counsel

Via U.S. Mail & Email

These comments are submitted on behalf of Public Employees for Environmental Responsibility (PEER), a service organization for government workers but also for employees of government contractors, subcontractors and grantees (collectively, hereinafter "contractors") working on environmental issues. PEER is supportive of the notion of giving contractors more legally protected avenues for reporting wrongdoing, waste, abuse, and threats to public health and safety.

We are concerned, however, that this proposed rulemaking will be both ineffective and counterproductive in that it would –

1. Swamp an Already Overburdened Office of Special Counsel (OSC) Disclosure Program;
2. Compromise Other Legal Remedies Available to Contractors; and
3. Risk Causing Retaliation against Contractors for Which OSC Offers No Protection or Relief.

Discussing each of these concerns in turn:

1. Swamp an Already Overburdened Office of Special Counsel (OSC) Disclosure Program

A. OSC Disclosure Unit Already Severely Backlogged

According to the OSC Fiscal Year 2016 Congressional Budget Justification and Performance Budget Goals, the total number of disclosures received in the latest year for which figures were available (FY 2014) was –

> "1,553, an all-time high and a remarkable 38 percent increase from the 1,125 received in FY2013. If the FY 2015 numbers remain constant, the disclosure rate would again increase by 49 percent, and top 2,300 disclosures government-wide. Five years ago, the number of disclosures as only 721.
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> With this steady increase in new cases, OSC's backlog of whistleblower and other cases will increase by 61 percent in FY 2015, from 1,969 cases pending at the end of FY 2014 to 3,164 at the end of FY 2015. **A larger backlog and lengthy delays in investigations have significant negative consequences for federal employees and the merit system**.
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> Quite simply, without the modest increase of $1.147 million for FY 2016, OSC will be unable to keep up with the rising caseloads. This will have a detrimental impact on OSC's ability to protect employees from retaliation and to respond to disclosures of wrongdoing…" [Emphasis added]

Quite frankly, this is an understatement of the extent of the current significant backlog. For example, PEER filed a disclosure on behalf of a Department of Interior employee on July 7, 2013. The disclosure involved systemic violations of law, abuse of authority, and depriving Indian tribes of their rights under statute. Citing backlogs, OSC was unable to review the disclosure for several months and did not make the substantial likelihood of validity finding and refer the disclosure to the Secretary of Interior until July 1, 2014, nearly a year later.

While the OSC admits that during FY 14, nearly half (44%) were not closed or referred within the 15-day statutory deadline, we do not know how many disclosures are presently languishing for months on end due to the inability of the current staff to review them.

B. Potential Additional Disclosure Workload Could Be Massive

Currently, the federal government spends more on contract employees than it does on public employees. The Government Accountability Office (GAO) found that in fiscal year 2011 alone non-Defense agencies spent $126 billion on service contractors while the Department of Defense spent $184 billion, for a total of $310 billion. By comparison, the total cost of federal civilians (excluding the Postal Service), including pay and benefits, was about $240 billion that same year. In addition, the amount the federal government spends on contractors continues to grow while the investment in civil servants remains flat.

While there are no firm estimates of the number of employees working for federal contractors and subcontractors, Professor Paul Light of NYU stated in an August 2006 white paper entitled "The New True Size of Government" that –

> "More than half of the 2005 total is composed of contract employees, which accounted for an estimated 7.6 million jobs. This number is up nearly 2.5 million since 2002, the last year that the true size of the federal workforce was measured, and the most recent year for which complete data are available. And it is up 3.2 million since 1999."

By contrast, the Office of Personnel Management states that the number of civilian federal employees is less than 2.7 million. Other commentators, such as the Brookings Institute, estimate for each non-uniformed federal employee there are at least four contract employees.

This means that this proposed rulemaking has the potential to *quadruple the workload* of the OSC Disclosure Unit, assuming that contractors disclosed at a rate comparable to civil servants. Significantly, OSC is not also proposing to quadruple its disclosure staff – it is not even seeking an augmentation of any amount to handle work beyond its current workload.

C. Long Delays Undermine Value of Disclosures

Expanding the OSC disclosure option to several hundred thousand additional employees would greatly increase the current disclosure backlog and significantly increase processing times. As a result, federal civil servants who already have the OSC disclosure option would be disadvantaged because of the inability of OSC to expeditiously review their disclosures.

Moreover, many of the contract disclosures may involve technical contract operations which may be more complicated and require specialized knowledge likely not resident at OSC. Such complex cases can be very labor-intensive and often require the attention of more than one attorney, as well as taking much longer than most disclosures. Thus, the contractor disclosures may be, on the average, far more labor intensive to analyze than those emanating from the civil service. This may even further exacerbate the inability of a small OSC Disclosure Unit to keep up with its workload in a timely fashion.

Congress set in statute a 15-day period for OSC to make its "substantial likelihood of validity" finding so that law-breaking, government waste, and needless dangers to public health and safety could be addressed as soon as possible. Conversely, increased delays in processing disclosures means that the underlying misconduct, dysfunction, or risk is prolonged and perhaps aggravated.

In short, swamping the Disclosure Unit would dramatically undermine whatever value this function now delivers to the American public and taxpayer.

2. Compromise Other Legal Remedies Available to Contractors

The subject matter of 41 U.S.C. § 4712 significantly overlaps that of the False Claims Act (FCA). The FCA, however, provides both legal protection and monetary compensation for employees who expose fraud in federal contracts and grants well beyond the scope of 41 U.S.C. § 4712.

The OSC proposed rulemaking does not reference the FCA or its mandatory reporting requirements. Thus, contractors who file disclosures with OSC may be disqualified from the ability to collect a reward under the FCA or other qui tam laws or bounty programs.

For example, the FCA has a public disclosure bar (31 U.S.C. § 3730(e)(4)(A)) which disqualifies qui tam action based upon information that has been disclosed to the public through any of several means: government hearings, audits, reports, or investigations, or through the news media, unless the relator was the original source of the information. Thus, a contractor who is

not the original source who stimulates an official investigation through an OSC disclosure would likely forfeit his or her FCA rights.

Nor does the proposed rulemaking provide for coordinating or sharing information with the Department of Justice, which has principal jurisdiction in enforcing the FCA. In just the past fiscal year, Justice reports that it collected in excess of $6 billion in FCA actions.

Since the Disclosure Unit does not inform or counsel employees (even civil servants) about their legal rights and options under various laws (such as informing contractors of their rights under the FCA), this rulemaking may result in significant harm to some of the very people it purports to benefit.

3. Risk Causing Retaliation against Contractors for Which OSC Offers No Protection or Relief.

In the *Federal Register* notice section labeled "Supplemental Information" is the following statement:

> "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…"

This statement is misleading in that the OSC disclosure process does not concern retaliation against the contractor. Instead, the OSC disclosure process concerns a review of the evidence presented by the contractor of "gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant." 41 U.S.C. § 4712.

In point of fact, OSC has no jurisdiction to address, let alone remedy, any retaliation against contractors for making protected disclosures to OSC or any other person or entity. Of greater concern is that the proposed rulemaking may put contractors at greater risk of retaliation for reasons discussed below.

Significantly, the OSC *Federal Register* notice declares "OSC deems such protection against retaliation a precondition to asking insiders to risk their careers to report wrongdoing." PEER could not agree more with this statement.

A. Disclosure to OSC May Not Be Protected by Statute

The language of 41 U.S.C. § 4712 stipulates that in order to be protected under its provisions the disclosure must be made to a specified entity, such as a Member of Congress or the GAO. In the proposed rulemaking, OSC asserts that it is a "law enforcement agency" within the meaning of the statute, one of the listed entities authorized to receive such a disclosure. Yet, the basis of this assertion is unclear, in that –

- OSC has no jurisdiction to enforce federal contract or grant requirements or any of the subject matter covered by 41 U.S.C. § 4712;

- As the rule declares, "The law does not authorize OSC to investigate the subject of a disclosure."

Thus lacking both investigative as well as enforcement authority in this area, it is not at all clear that OSC is a law enforcement agency for purposes of 41 U.S.C. § 4712 simply because it has enforcement authority in matters unrelated to this statute, such as the Hatch Act. As a result, contractors who make disclosures to OSC may do so at their legal peril.

B. Anonymous Disclosures May Compromise Whistleblower Legal Protection

The rulemaking gives contractors the option of remaining anonymous. An OSC finding triggering a referral to the relevant federal agency would result in an investigation into the subject matter of the disclosure. A contract, subcontract, or grant employer may be very able to infer the source of the disclosure from the subject matter of the subsequent investigation.

Retaliation flowing from an anonymous disclosure may be difficult for the victim to challenge, as the employee bears the burden of proving the connection between his or her protected disclosure and the employer's retaliation. This difficulty becomes even more problematic when the contract employer discharges a whole phalanx of employees (sacrificing some wheat to remove the suspected chaff) following an anonymous disclosure.

In the event of post-disclosure retaliation, OSC would be utterly helpless to legally protect the contractor-discloser or to remedy the damages incurred due to OSC's actions.

For the foregoing reasons, PEER urges that this proposed rulemaking be withdrawn and recast so that it is more fully integrated into the legal protections available to contractors and better coordinated with the operations of the official agencies responsible for the administration of these laws and requirements.

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