Testimony of the Honorable Carolyn N. Lerner, Special Counsel
U.S. Office of Special Counsel

U.S. House of Representatives Committee on Oversight and Government Reform
Subcommittee on Federal Workforce, U.S. Postal Service and the Census

"Examining the Administration's Treatment of Whistleblowers"

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Chairman Farenthold, Ranking Member Lynch, and Members of the Subcommittee:

Thank you for inviting me to testify today about the U.S. Office of Special Counsel (OSC) and its role in protecting whistleblowers in the federal government.

I. OSC's Role and Jurisdiction

OSC is an independent investigative and prosecutorial agency tasked with protecting the merit system and ensuring accountability and fairness for over 2.1 million civilian federal employees. Although my testimony today will focus primarily on OSC's role in investigating and prosecuting violations of prohibited personnel practices (PPPs) with respect to whistleblowers, we also enforce the merit system in several other ways. We serve as a safe and secure channel for federal employees to disclose government wrongdoing, specifically waste, fraud, abuse, mismanagement, and health and safety issues; we protect federal employees from all 13 PPPs, including reprisal for blowing the whistle, hiring offenses, and discrimination; we enforce the Hatch Act, which keeps partisan politics out of the federal workplace; and we support service members by enforcing the Uniformed Services Employment & Reemployment Rights Act (USERRA).

We serve the federal government and taxpayers with a staff of approximately 120 employees and one of the smallest budgets of any federal law enforcement agency. Still, even though we face the significant challenges of an ever-rising caseload, I am proud to say that we are more effective and efficient than ever before. By the close of fiscal year 2014, we expect to have received over 5,000 cases of all types for the first time in our agency's history, a 15 percent increase from last year and double the number of cases from ten years ago. This will include over 1,400 retaliation cases and over 1,500 whistleblower disclosures, an almost 30 percent increase from last year. In the past two years, we have obtained 333 favorable actions for federal employees, a threefold increase from five years ago. Importantly, we have achieved these results while at the same time reducing the cost to resolve each case by 41 percent over the past six years.

We receive cases from across the government. Our work often results in systemic changes that make government more efficient, cost effective, and safer for our citizens. Some recent examples are indicative of our work. In the past year, we addressed dozens of disclosures of fraud and waste in the payout of Administratively Uncontrollable Overtime at the Department of Homeland Security's (DHS) agencies. OSC's work with DHS whistleblowers has already

resulted in changed practices that will save over $20 million a year. More recently, we have received hundreds of cases from Department of Veterans Affairs (VA) employees. These cases include disclosures of scheduling improprieties and threats to public health and safety, as well as complaints of whistleblower retaliation, which I will discuss later.

Finally, it is important to clarify that OSC's jurisdiction regarding whistleblower retaliation cases extends to many—but not all—current or former federal civilian employees or applicants for federal civilian employment. OSC does not, for example, have jurisdiction over active military personnel. Nor does OSC have jurisdiction over whistleblowers from intelligence agencies, such as the Federal Bureau of Investigation, the Central Intelligence Agency, or the National Security Agency. *See* 5 U.S.C. § 2302(a)(2)(C)(ii). However, on October 10, 2012, President Obama issued a Presidential Policy Directive that prohibits retaliation against whistleblowers in the Intelligence Community and requires intelligence agencies to establish a review process for claims of retaliation consistent with the procedures in the Whistleblower Protection Act (WPA).

With that introduction, I will discuss three main issues: (1) how we protect whistleblowers, (2) the effect of the Whistleblower Protection Enhancement Act of 2012 (WPEA) on our enforcement authority, and (3) our 2302(c) Certification Program and education and outreach efforts.

II. How OSC Protects Whistleblowers

When a federal employee or applicant for federal employment believes they have faced reprisal for blowing the whistle, they have the option to file a complaint with OSC. When reviewing a whistleblower retaliation complaint, OSC analyzes the following four legal elements:

(1) did a protected disclosure of information occur;
(2) was a personnel action taken, not taken, or threatened;
(3) did those involved in the personnel action have actual or constructive knowledge of the protected disclosure; and
(4) was the protected disclosure a contributing factor in the personnel action.

If these four elements are met, the agency must show—by the high bar of clear and convincing evidence—that it would have taken the same action absent the whistleblower's disclosure. To assess this, we look at the strength of the agency's evidence in support of the personnel action, the existence and strength of the agency's motive to retaliate, and the treatment of similar agency employees who are not whistleblowers, as well as other factors.

If OSC's Complaints Examining Unit preliminarily determines that the complaint meets the four elements above, the matter is referred to our Investigation and Prosecution Division for further investigation. When appropriate, the complainant and the relevant agency may be given the option of mediation, which I will discuss in more detail below.

The law requires that OSC give the agency the opportunity to correct a prohibited personnel practice before we pursue a formal complaint. And as we investigate, agencies often do

informally settle cases and take corrective action, restoring the *status quo ante*. These informal resolutions usually occur before OSC presents the case to the Merit Systems Protection Board (MSPB or Board), an administrative court in the executive branch that hears complaints regarding the federal merit system. But, if an agency does not take this opportunity, OSC may then file a complaint with the MSPB, which can order the agency to take corrective action.

Where warranted, an agency can also take disciplinary action against officials who have retaliated against a whistleblower. If the agency fails to do so, OSC can seek disciplinary action against the official by filing a complaint with the Board.

An Example of OSC's Work: The Port Mortuary Cases

An important matter early in my tenure as Special Counsel highlights how OSC can work with whistleblowers to shine a light a light on wrongdoing while protecting them from retaliation.

Three civilian Air Force employees at the Dover Port Mortuary disclosed to OSC that the mortuary mishandled the remains of fallen service members who died overseas. The whistleblowers also alleged that Air Force officials retaliated against them in response to their disclosures. OSC investigated and found that Air Force officials reprised against the whistleblowers, who faced removal, placement on extended administrative leave, suspensions, significant changes in duties and working conditions, and lowered performance appraisals after blowing the whistle.

When OSC presented its findings to the Air Force, the Air Force ultimately did the right thing. The whistleblowers were provided with full corrective action, and the officials responsible for retaliation were disciplined. The Air Force also reformed its mortuary operations and trained its employees on whistleblower protections. By working in collaboration with the Air Force, OSC was able to obtain relief for the whistleblowers and systemic changes without the need for litigation.

OSC's Ongoing Efforts to Help VA Whistleblowers

Cases from the VA comprise a large portion of OSC's workload, and I would like to briefly discuss our efforts regarding allegations of whistleblower retaliation at the VA.

OSC currently has about 125 active investigations of complaints from VA employees who allege retaliation for blowing the whistle on improper patient scheduling, understaffing of medical facilities, and other dangers to patient health and safety at VA centers around the country. To illustrate the growing number of VA cases, OSC has received over 80 new VA whistleblower retaliation cases related to patient health and safety just since June 1, 2014.

As our VA caseload rose rapidly this year, we reallocated OSC staff and resources and implemented a priority intake process. OSC representatives also personally met with numerous high-level VA officials, including the then-Acting Secretary, to emphasize the importance of these issues and discuss ways to work together on obtaining prompt relief for whistleblowers

who suffered retaliation. OSC representatives also traveled to Phoenix to meet with a number of VA whistleblowers at the epicenter of the scandal. In addition, we have obtained several "stays," or delays, of disciplinary action against whistleblowers while we continue our investigations of these cases. Finally, OSC has coordinated with the VA to assist the agency in its efforts to educate and train its employees about whistleblower rights and protections.

The VA's leadership has been responsive and has worked with OSC to establish an expedited process to consider and settle meritorious whistleblower cases in order to provide these whistleblowers with relief as quickly as possible. In several cases, OSC has reached agreements in principle with the VA to provide whistleblowers with significant corrective action, and we are optimistic that we will be able to announce more good news soon.

OSC's Power to Delay Proposed Personnel Actions

OSC is able to protect complainants by seeking to stay proposed adverse personnel actions by filing formal requests with the MSPB. These stays provide temporary relief to federal employees while OSC investigates their claims. In addition, agencies can, and often do, agree to informal stay requests.

During the first two full years after my appointment as Special Counsel in 2011, OSC dramatically increased the use of informal stays. In 2012 and 2013, OSC obtained approximately 55 informal stays. In contrast, in the preceding five years (2007 to 2011), OSC obtained a total of 39 informal stays. When informal stays are not possible, OSC has also been more active in seeking formal stay requests with the MSPB.

For example, last month OSC obtained two formal stays from the MSPB in cases involving complainants at the Department of Agriculture and the Small Business Administration. In 2013, for the first time, OSC obtained stays on behalf of six former federal employees based on a novel theory of post-employment harassment. The employees claimed that they had been constructively discharged by their agency. None of the whistleblowers wanted to return to their old jobs. However, each wanted relief from the agency's continued efforts to force the employees to reimburse previously paid relocation bonuses. OSC requested an order from the MSPB to protect these former employees from this debt collection. Based on OSC's request, the Board granted the request for several of the employees and prevented the agency from seeking repayment of the bonuses.

Also, last year, OSC for the first time obtained a stay on behalf of an employee who faced retaliation for refusing to obey an order that would have violated the law. Specifically, the employee refused to follow an order to enter classified information into an unsecured computer network. The agency then placed the employee on a six-month detail out of the country, a decision that would cause the employee personal hardship and which the employee believed to be retaliatory. After OSC obtained an order from the MSPB to stay the detail, the agency agreed to discontinue the detail.

OSC's Alternative Dispute Resolution Program

As briefly mentioned earlier, OSC also refers selected prohibited personnel practice and USERRA complaints to mediation, a type of alternative dispute resolution (ADR). Under my tenure, OSC has greatly expanded our ADR program, which has been highly successful at resolving complaints to the mutual satisfaction of both agencies and complainants. For instance, in 2012, three employees of the Bureau of Alcohol, Tobacco, and Firearms who blew the whistle on Operation Fast and Furious resolved their cases through OSC's mediation program.

In fiscal year 2014, the settlement rate for mediated cases was approximately 75 percent. This is in addition to a high rate of corrective actions that are investigated and prosecuted at OSC, which result in corrective actions about 50 percent of the time. By comparison, complainants who go directly to the MSPB to litigate their claims receive corrective actions less than six percent of the time.

In addition to producing a high rate of corrective action, mediation also provides agencies and complainants with an opportunity to participate in the resolution of complaints. By taking on this productive role and working together to find solutions, the parties are more likely to have a higher compliance rate with the settlement—and, as importantly, work more productively together in the future. There is also a benefit to OSC when parties agree to mediate their cases. When cases settle through mediation, it obviates the need to investigate and prosecute meritorious claims, thereby saving OSC's limited resources.

III. Effect of the Whistleblower Protection Enhancement Act on OSC's Authority

The WPEA, which this committee worked hard to enact, has strengthened OSC's ability to protect whistleblowers. The WPEA's mandates include: a significant expansion of OSC's jurisdiction; a requirement to conduct investigations in hundreds of whistleblower cases that previously would have been dismissed; a direction from Congress to initiate more formal litigation and disciplinary actions against agency managers; and training requirements for all other government agencies. The WPEA also provides OSC with the authority to file *amicus* briefs in federal court cases that involve whistleblower protection issues.

One of the WPEA's changes is the creation of a thirteenth prohibited personnel practice, which prohibits agencies from imposing non-disclosure agreements that do not explicitly allow for whistleblowing. OSC has already successfully resolved at least two cases related to this new PPP, with relief that included supplemental training and removal of a reprimand.

The WPEA also clarified that a disclosure is not excluded from protection simply because it was made during the employee's normal course of job duties. As a result of this enhanced protection, OSC was able to obtain relief on behalf of an employee with the Department of the Army who was subjected to a retaliatory removal. The employee reported what she believed were violations of the Army's rules pertaining to the use of a government purchase card to her chain of command. Her report was made in the course of her duties. Shortly thereafter, the technician was

fired. Prior to the WPEA, and as a result of Federal Court decisions, her report would have been excluded from protection as whistleblowing because it was made in the course of regular duties. The WPEA, however, overturned these decisions and OSC was able to pursue the case. As a result of OSC's investigation and report, the Army agreed to reinstate the employee with full back pay and benefits. It also convened a disciplinary review of the subjects responsible for the retaliatory discharge and is in the process of proposing disciplinary action.

The WPEA significantly improved OSC's ability to pursue disciplinary actions and we are taking action as a result. For example, in April, OSC filed complaints with the MSPB seeking disciplinary action against three Customs and Border Protection (CBP) officials. Our complaints accuse the three of discriminating for and against applicants based on political affiliation and granting illegal preferences or advantages to the preferred candidates. The complaints are currently pending before the Board. These disciplinary actions are OSC's first complaints against management officials for political discrimination in over 30 years.

As mentioned, the WPEA also expanded OSC's authority to file *amicus curiae* briefs in cases related to federal whistleblower retaliation. Prior to the WPEA, OSC had limited ability to file *amicus* briefs in whistleblower retaliation cases. Since receiving this expanded authority, OSC has filed three *amicus* briefs in federal appeals courts, including one this past month.

OSC first exercised its new *amicus* authority in *Kaplan v. Conyers*, arguing that the Federal Circuit Court of Appeals' decision threatened to undermine the enhanced whistleblower protections passed by Congress.

Then, in 2013, OSC filed an *amicus* brief with the Ninth Circuit in *Kerr v. Jewell*. OSC argued that the WPEA should be applied to cases pending before its enactment because: (1) it clarifies existing law by overturning prior decisions that unduly limited whistleblower protections; (2) Congress expressly intended the WPEA to apply to pending cases; and (3) applying the WPEA to pending cases promotes government efficiency and accountability. In its ruling, the Ninth Circuit determined that portions of the original Whistleblower Protection Act had been misapplied since its inception and that the WPEA simply clarified the protections Congress intended to confer in the statute.

This August, OSC filed an *amicus* brief with the Federal Circuit in *Clarke v. Dep't of Veterans Affairs*. OSC urged the court to reverse the MSPB's decision because it erected unnecessary procedural barriers for whistleblowers to meet in order to have their cases heard by the MSPB. This matter is pending.

Finally, OSC is currently considering filing an *amicus* brief with the U.S. Supreme Court later this month in *MacLean v. Dep't of Homeland Security*. This would follow the *amicus* brief we filed in Mr. MacLean's case with the MSPB in August 2011. Our concern in this case is that agencies might use regulations to create categories of disclosures exempt from whistleblower protections, contrary to the plain meaning and intent of the Civil Service Reform Act of 1978.

Our *amicus* briefs are meant to help courts interpret the contours of whistleblower laws, and we are optimistic that over time this will lead to a more pro-whistleblower body of jurisprudence.

IV. OSC's 2302(c) Certification Program

Government functions best and can address problems most effectively when employees feel comfortable and confident that they can blow the whistle at their agencies without retaliation. Creating this environment requires employees at all levels to be educated about their rights and responsibilities.

Federal agencies now have a statutory obligation to inform their workforces about the rights and remedies available to them under the WPA, the WPEA, and related civil service laws. OSC's 2302(c) Certification Program helps agencies meet this obligation through the following simple steps: agencies must place informational posters at agency facilities; provide information to new and existing employees and train supervisors about PPPs, the WPA, and the WPEA; and display a link to OSC's website on the agency's website or intranet.

To strengthen and expand whistleblower protections for federal government personnel, the Administration mandated participation in OSC's certification program under the White House's second National Action Plan on Open Government. Many agencies have contacted our office to begin the 2302(c) Certification Program process, and we keep an up-to-date list of all compliant agencies on our publicly accessible website. I am particularly encouraged that large agencies like the VA, the Energy Department, the Department of Health and Human Services, and NASA have taken steps to begin the certification progress.

Since my tenure as Special Counsel began, OSC has expanded its education and outreach efforts. In FY 2014, for example, we conducted 90 training sessions throughout the federal government. This compares with 33 sessions just three years ago. To help expand our education efforts in the federal workforce, we are also developing a new, online training quiz for federal employees that covers prohibited personnel practices, whistleblower disclosures, and the merit system principles. This quiz will allow us to educate a far larger portion of the federal workforce than in-person trainings alone. Better education can also help prevent retaliation from occurring in the first place.

Finally, OSC interacts with the federal community we serve through our website, which I am proud to announce we re-launched in July. We can now more easily communicate with federal employees. Filing complaints, making disclosures, and accessing information on our website is now easier. While we are pleased with the results so far, we are working to make further improvements. For example, we have been hard at work on a new online complaint filing system, which is designed to make it even easier for employees to report wrongdoing and ask for our help.

V. Reauthorization

An issue for the subcommittee's consideration is the fact that OSC has not been formally reauthorized since 2007. Reauthorization provides Congress with an opportunity to evaluate OSC's authorities and responsibilities and make any necessary adjustments. At the Senate's request, we have provided recommendations for a range of legislative changes and would be pleased to provide this information to this Committee, as well.

Thank you for the opportunity to testify today. I look forward to answering your questions.

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Carolyn N. Lerner
Special Counsel

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her five-year term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights.

Ms. Lerner earned her undergraduate degree from the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.