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Office of Special Counsel Strongly Supports the Whistleblower Protection Enhancement Act

The U.S. Office of Special Counsel strongly supports the Whistleblower Protection Enhancement Act (WPEA), S. 743 / H.R. 3289. This legislation will help OSC perform its good government mission and protect federal employees from unlawful retaliation. The WPEA strengthens protections for employees who disclose waste, fraud, and abuse in 10 critical areas.

- 1. Protecting all lawful disclosures of waste, fraud, and abuse.** The WPEA addresses court decisions that have narrowed the scope of protections Congress intended. These decisions handcuff OSC in its efforts to protect government whistleblowers. OSC can weed out frivolous claims. But, under current law, OSC is required to close out otherwise valid claims because the courts have narrowly defined who is protected for blowing the whistle. For example, employees are not protected for blowing the whistle in the course of their job duties. This eliminates protections for some of the most important positions in government. Federal auditors, safety inspectors, and other employees with health and safety roles should be encouraged to perform their jobs diligently and with the public interest in mind. An efficient whistleblower law encourages employees to work within the chain of command to resolve problems early and effectively.
- 2. Deterring retaliation through disciplinary actions.** The WPEA also furthers congressional intent by restoring OSC's ability to seek disciplinary actions against employees who engage in unlawful retaliation. Under current law, OSC cannot effectively deter retaliation by seeking disciplinary actions against managers because OSC must prove that retaliation was the only reason for taking an adverse action against an employee, an impossibly high burden to meet. The WPEA establishes a "significance motivating factor" test, which will allow OSC to effectively enforce the whistleblower law and protect employees by deterring wrongdoing. Finally, the WPEA also ensures that OSC is not deterred from pursuing disciplinary actions. Under current Board precedent, OSC may be responsible to pay the private attorneys' fees of managers if OSC is not successful in prosecuting a claim, even if the prosecution decision was reasonable.
- 3. Providing full and fair relief for victims of unlawful retaliation.** The WPEA strengthens the remedies for whistleblowers who prevail in their retaliation claims. The legislation provides for compensatory damages, which will allow OSC to seek full and fair relief for employees who suffer from sustained harassment in addition to adverse personnel actions. The need for this reform is highlighted by recent whistleblower cases at the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Law enforcement officers and other employees may believe their careers have been stifled because of their protected whistleblowing. In such cases, correcting a personnel record may be insufficient to make an employee whole, and the availability of compensatory damages is a better remedy for combating the stigma that too often is associated with conscientious whistleblowing.
- 4. Holding agencies accountable for retaliatory investigations.** The WPEA further strengthens the remedies available for whistleblowers and provides a strong deterrent to retaliatory investigations by allowing employees to recover damages or costs associated with an agency "witch hunt." Consistent with recent guidance that OSC submitted to all executive branch agencies, this provision ensures that agencies not improperly exercise their authority to investigate employees by targeting whistleblowers.
- 5. Extending whistleblower protections to all TSA employees.** The WPEA covers a loophole in existing law that exempts Transportation Security Officers from the whistleblower protections afforded to other employees. The

50,000+ employees at the nation's airports should feel confident that they will be protected from retaliation for speaking out against threats to aviation security. The WPEA provides OSC with needed jurisdiction to pursue claims on behalf of all TSA employees.

6. **Promoting scientific integrity in government operations.** The WPEA explicitly protects government scientists and other professionals for disclosures related to the integrity of the scientific process.
7. **Allowing the prosecutor to shape the law.** The WPEA would give OSC greater authority to shape the whistleblower law by allowing this office to file friend of the court briefs in important cases. Many of the concerns about the current shape of whistleblower law are on account of court decisions that narrowed protections for conscientious employees. OSC is currently unable to participate in the most important, precedent-setting cases at the appellate level. The WPEA would provide OSC with limited authority to do so, by filing amicus briefs stating our position on behalf of whistleblowers.
8. **Ensuring that whistleblower protections supersede agency non-disclosure agreements.** The WPEA makes it a prohibited personnel practice for an agency to impose a non-disclosure agreement on an employee if the agreement does not explicitly state that the employee's rights under the whistleblower law supersede the terms of the agreement. This provision is necessary to inform employees of their statutory rights and encourage lawful disclosures of misconduct and waste.
9. **Enhancing diversity in appellate review of whistleblower claims.** The WPEA established a two-year period in which whistleblower protection claims may be heard by the regional appellate courts in addition to the U.S. Court of Appeals for the Federal Circuit. This will improve the development of the law, and provide OSC with enhanced guidance in its enforcement efforts.
10. **Informing employees of their rights and protections.** The WPEA requires each agency Inspector General to designate a Whistleblower Protection Ombudsman. The ombudsman will work with employees to explain the processes for working with OSC to file a whistleblower disclosure, to make a confidential communication of wrongdoing responsibly, or to submit a retaliation claim. The Department of Justice Inspector General has already established this position. OSC looks forward to working with each of the agency IG's to inform employees of their whistleblower rights and protections.

Collectively, these reforms will make the Whistleblower Protection Act stronger than at any point in its history, and provide OSC with all the tools it needs to effectively fulfill its mission to protect employees from unlawful retaliation.

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. For more information, please visit our website at www.osc.gov.