

WHISTLEBLOWER DISCLOSURES:

REPORTING ALLEGATIONS OF AGENCY WRONGDOING TO THE OFFICE OF SPECIAL COUNSEL

Catherine A. McMullen
CHIEF, DISCLOSURE UNIT

Karen P. Gorman
DEPUTY CHIEF, DISCLOSURE UNIT

U.S. OFFICE OF SPECIAL COUNSEL
SEPTEMBER 13 - 15, 2011

5 U.S.C. 1213

**THE OFFICE OF SPECIAL COUNSEL
PROVIDES A SAFE CHANNEL FOR
WHISTLEBLOWER DISCLOSURES BY
FEDERAL EMPLOYEES, FORMER
FEDERAL EMPLOYEES, AND
APPLICANTS FOR FEDERAL
EMPLOYMENT**

WHAT IS WHISTLEBLOWING?

- **DUTY TO REPORT**

- Federal employees may satisfy their duty to disclose waste, fraud, abuse, and corruption to appropriate authorities under 5 CFR 2635.101(b)(11), by filing with OSC.

WHAT CAN BE DISCLOSED?

- A VIOLATION OF ANY LAW, RULE, OR REGULATION
- GROSS MISMANAGEMENT
- GROSS WASTE OF FUNDS
- ABUSE OF AUTHORITY
- SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH AND/OR SAFETY

JURISDICTION

1. COVERED AGENCY

2. COVERED POSITION

COVERED AGENCIES

- MOST EXECUTIVE BRANCH AGENCIES
- INCLUDING FEDERAL AVIATION ADMINISTRATION, TRANSPORTATION SECURITY ADMINISTRATION, AND CENTRAL INTELLIGENCE AGENCY

NON-COVERED AGENCIES

- U.S. POSTAL SERVICE AND POSTAL RATE COMMISSION
- MEMBERS OF THE ARMED FORCES OF THE U.S. (i.e. NON-CIVILIAN MILITARY EMPLOYEES)
- STATE EMPLOYEES OPERATING UNDER FEDERAL GRANTS
- EMPLOYEES OF FEDERAL CONTRACTORS

COVERED POSITION

DISCLOSURE MUST BE MADE:

- BY AN EMPLOYEE, FORMER EMPLOYEE, OR APPLICANT, IN THE AGENCY WHICH THE INFORMATION CONCERNS, OR
- BY AN EMPLOYEE WHO OBTAINED THE INFORMATION IN CONNECTION WITH THE PERFORMANCE OF THE EMPLOYEE'S DUTIES AND RESPONSIBILITIES

WHAT DOES OSC DO AFTER RECEIVING THE DISCLOSURE?

THE SPECIAL COUNSEL SHALL MAKE A DETERMINATION WITHIN 15 DAYS AFTER RECEIVING THE INFORMATION FROM THE WHISTLEBLOWER.

5 U.S.C. § 1213(b)

SUBSTANTIAL LIKELIHOOD DETERMINATION

SUBSTANTIAL LIKELIHOOD IS
DEFINED AS THE DETERMINATION
THAT THE AGENCY IS *MORE LIKELY*
THAN NOT TO FIND THE ALLEGATION
SUBSTANTIATED AT THE
CONCLUSION OF ITS INVESTIGATION

FACTORS REVIEWED IN MAKING SUBSTANTIAL LIKELIHOOD DETERMINATION

- IS THE WHISTLEBLOWER RELIABLE?
- IS THE WHISTLEBLOWER IN A POSITION TO KNOW THE FACTS?
- IS THE DISCLOSURE PLAUSIBLE?
- DOES THE WHISTLEBLOWER HAVE FIRST HAND KNOWLEDGE OF FACTS ALLEGED?
- HAS THE WHISTLEBLOWER PROVIDED RELIABLE INFORMATION TO OSC IN THE PAST?

SUBSTANTIAL LIKELIHOOD

IN MAKING THE SUBSTANTIAL LIKELIHOOD DETERMINATION, DU FOLLOWS THE MERIT SYSTEMS PROTECTION BOARD DEFINITIONS OF A GROSS WASTE OF FUNDS, GROSS MISMANAGEMENT, AND AN ABUSE OF AUTHORITY

REFERRALS FOR INVESTIGATION

5 U.S.C. § 1213(c)

- IF SUBSTANTIAL LIKELIHOOD DETERMINATION IS POSITIVE, THE SPECIAL COUNSEL REQUESTS THE AGENCY HEAD TO CONDUCT AN INVESTIGATION AND SUBMIT A REPORT

5 U.S.C. § 1213(c)(1)

WHO INVESTIGATES?

OSC DOES NOT HAVE INVESTIGATIVE
AUTHORITY

SPECIAL COUNSEL REQUIRES
AGENCY HEAD TO CONDUCT AN
INVESTIGATION

5 U.S.C. 1213(c)

HOW LONG DOES THE AGENCY HAVE TO INVESTIGATE AND REPORT?

- THE REPORT IS DUE IN 60 DAYS
 - EXTENSION REQUESTS
 - PENDING CRIMINAL MATTERS

WHAT DOES THE SPECIAL COUNSEL DO AFTER RECEIPT OF THE REPORT?

- THE SPECIAL COUNSEL REVIEWS THE AGENCY REPORT AND DETERMINES WHETHER IT CONTAINS THE INFORMATION REQUIRED BY STATUTE AND WHETHER THE FINDINGS APPEAR REASONABLE
- 5 U.S.C. § 1213(d) and (e)(2)

STATUTORY REQUIREMENTS

5 U.S.C. § 1213(d)

- AGENCY HEAD MUST SIGN OR DELEGATE AUTHORITY TO SIGN

- THE REPORT MUST INCLUDE:
 - SUMMARY
 - DESCRIPTION
 - EVIDENCE
 - LIST OF VIOLATIONS
 - ACTION TAKEN OR PLANNED

IS THE REPORT REASONABLE?

- THE SPECIAL COUNSEL DETERMINES WHETHER THE FINDINGS OF THE AGENCY HEAD APPEAR REASONABLE.
- 5 U.S.C. § 1213(e)(2)(a)

WHISTLEBLOWER'S COMMENTS

- WHISTLEBLOWER REVIEWS REPORT AND PROVIDES COMMENTS
- COMMENTS ARE SENT TO OSC
- COMMENTS ARE PLACED IN THE PUBLIC FILE WITH THE WHISTLEBLOWER'S CONSENT

5 U.S.C. § 1213(e)(1)

WHAT DOES OSC DO WITH THE REPORT?

THE REPORT AND COMMENTS ARE SENT TO THE PRESIDENT AND THE CONGRESSIONAL OVERSIGHT COMMITTEES WITH JURISDICTION OVER THE AGENCY THAT THE DISCLOSURE INVOLVES

5 U.S.C. § 1213(e)(3)

OSC'S PUBLIC FILE

A LIST OF NONCRIMINAL MATTERS REFERRED TO THE AGENCY HEADS, TOGETHER WITH REPORTS FROM AGENCY HEADS, SHALL BE MAINTAINED AND MADE AVAILABLE TO THE PUBLIC

5 U.S.C. § 1219

NO SUBSTANTIAL LIKELIHOOD. WHAT NOW?

THE SPECIAL COUNSEL INFORMS THE
WHISTLEBLOWER:

- THE REASONS WHY THE DISCLOSURE MAY NOT BE FURTHER ACTED ON AND
- DIRECTS THE WHISTLEBLOWER TO OTHER OFFICES AVAILABLE FOR RECEIVING DISCLOSURES

1213 U.S.C. §1213(g)(3)

REASONS FOR CLOSURE

- NO JURISDICTION
- NO FIRST HAND INFORMATION
- DE MINIMIS
- WITHDRAWAL OF DISCLOSURE
- DISCLOSURE ALREADY INVESTIGATED

OTHER OPTIONS FOR HANDLING DISCLOSURES

REFERRAL TO OFFICE OF INSPECTOR GENERAL

- IF NO POSITIVE SUBSTANTIAL LIKELIHOOD DETERMINATION, OSC MAY REFER MATTER TO THE OFFICE OF THE INSPECTOR GENERAL
- REQUEST THAT THE IG ASSIST OSC IN ITS DETERMINATION
- NO STATUTORY REQUIREMENT THAT IG COMPLY

HOW TO FILE A DISCLOSURE WITH OSC

VISIT WWW.OSC.GOV

FILE IN WRITING OR USE FORM OSC-12,
DISCLOSURE OF INFORMATION

Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
Tel: (800) 572-2249
(202) 254-3640