March 23, 2015

Lisa V. Terry
General Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036

Re: NPRM

Dear Ms. Terry:

We are submitting these comments on behalf of the National Whistleblower Center (NWC) on the rule proposed by the Office of Special Counsel (OSC) to extend protections under the Civil Service Reform Act and the Whistleblower Protection Act to employees of Federal contractors. For the reasons stated herein, we believe that part of the proposed rule should be modified to ensure that employees of contractors are aware of their rights under the False Claims Act, and the part pertaining to disclosure of classified information should be withdrawn until further clarification about the use and handling of classified information is provided to OSC by the President, Director of National Intelligence and Attorney General.

I. THE PROPOSED RULE MAY CONFUSE OR HARM PRE-EXISTING CONTRACTOR EMPLOYEE RIGHTS UNDER THE FALSE CLAIMS ACT.

This proposed rule may cause confusion and interfere with other preexisting rights contractors have under other laws. OSC should reconsider whether such a rule is even necessary given that employees of contractors already have stronger whistleblower protections under state and federal law than federal employees. In any event, if the proposed rule is enacted it should be amended to make sure this confusion or weakening of other rights does not occur.

As grounds for this new rule OSC cites 41 U.S.C. §4712, which is a law Congress enacted in 2013 that weakened pre-existing whistleblower rights for employees of federal contractors. Under that law, contractor employees have a right to disclose "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(a).

However, the most effective tool to uncover and punish government contracting waste and fraud against the United States is the False Claims Act (FCA). The FCA provides enhanced whistleblower protection for employees of contractors, double back pay and other remedies to combat retaliation and the FCA also contains other provisions for *qui tam* rewards for employees who expose violations of law and misuse of federal monies. The FCA has mandatory reporting requirements that are not reflected in the OSC's proposed rule. The failure of whistleblowers to follow the complex FCA rules and procedures could disqualify them from enhanced protection

under the FCA, and could undermine the ability of contractor employees to collect a reward under the FCA or other *qui tam* laws. In fact, the OSC does not even mention the more significant rights that federal contracting employees have under the FCA.

Since 1986, the Department of Justice (DOJ), working with whistleblowers, has collected $25 billion from corrupt contractors and well over 1,000 whistleblowers have benefited from the FCA's enhanced protections. It's concerning that the OSC, which does not have adequate resources to protect Federal employees, would propose to expand to an area that is already covered by the DOJ. In addition, the OSC's proposed rule does not contemplate informing contractor employees of their rights under the FCA. Nor does the OSC's propose rule state whether and under what circumstances information disclosed by federal employee contractors might be shared with the DOJ, which since 1986 has had primary jurisdiction over litigating cases under the FCA, or with other federal agencies or inspector generals that investigate fraud, waste and abuse.

Some employees who attempt to submit information to OSC under the proposed rule may not realize that the information they are providing could be relevant to or qualify an employee for a *qui tam* award under the FCA. Additionally, many courts have ruled that the FCA does not permit an employee to pursue a *qui tam* award under the FCA unless that person is represented by counsel.

In order to mitigate these problems, if the OSC adopts the proposed rule it should also inform contractor employees of their rights under the False Claims Act, and warn employees to consult with a private attorney of their choice who is knowledgeable about the False Claims Act before submitting any information to OSC about federal contractors. Given the unique requirements of the FCA, contractor employees should seek legal counsel if they wish to file a case seeking an award under the *qui tam* provisions of the FCA, and also seek legal advice to determine whether filing any disclosure with the OSC would hurt or help their claims or potential claims under the FCA.

We request the OSC to amend this proposed rule to eliminate confusion and to prevent Federal contractor employees from acting in a way that might disqualify them from seeking a *qui tam* award or seeking other enhanced whistleblower protections under the False Claims Act.

II. THE PROPOSED RULE ON DISCLOSING INFORMATION ABOUT ELEMENTS OF THE INTELLIGENCE COMMUNITY OR CLASSIFIED INFORMATION SHOULD BE WITHDRAWN UNTIL THE CONGRESS, PRESIDENT, DIRECTOR OF NATIONAL INTELLIGENCE AND ATTORNEY GENERAL PROVIDE ASSURANCES THAT CONTRACTOR EMPLOYEES WILL NOT BE DISCIPLINED OR PROSECUTED FOR UTILIZING THE OSC DISCLOSURE PROCEDURES.

OSC also proposes that employees of contractors may file disclosures with the OSC about violations committed by Federal contractors, and further states that with respect to disclosures containing classified information that "any disclosure made by a contractor that involves foreign intelligence or counterintelligence information that is specifically prohibited by law or by

Executive Order will be transmitted to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the U.S. Senate." *See* OSC Notice of Proposed Rulemaking (Jan. 22, 2015).

This part of the proposed rule must be withdrawn by OSC because there is no authority or assurance provided with the proposed rule that contractor employees will not face discipline or even criminal prosecution for making disclosures of classified information to OSC. Notably, the law cited by OSC in its notice of proposed rulemaking for authority to transmit classified information received as part of any disclosure to the National Security Advisor or the intelligence committees of Congress, expressly excludes the reporting or disclosure of any classified information. *See* 41 U.S.C. §4712(f). In that statute Congress states:

> Exceptions.—(1) This section *shall not apply to any element of the intelligence community*, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).
>
> (2) This section *shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—*
>
> (A) *relates to an activity of an element of the intelligence community*; or
>
> (B) *was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community*.

41 U.S.C. §4712(f) (emphasis added).

Thus, as the law is currently worded, employees of contractors that relate to activity of an element of the intelligence community are not covered by this law, and there is absolutely no authority in this law providing for the submission of any information about wrongdoing by contractors of an element of the intelligence community to the OSC.

More significantly, the OSC's proposed rule suggests that employees of contractors may submit information to OSC about activities of an element of the intelligence community and that if it appears the employee's disclosure to OSC contains classified information then that would be submitted to the National Security Advisor or to the appropriate intelligence committees of Congress. However, such a procedure as that proposed by OSC is not authorized by 41 U.S.C. §4712(f), or any other provision of law.

If this proposed rule is enacted then employees of Federal contractors who disclose information to OSC about matters that involve services provided to, or activities of, an element of the intelligence community may find themselves the subject of discipline or even criminal prosecution for mishandling or disclosing classified information. There have already been too many cases filed against employees who have tried to report wrongdoing and violations of law committed by elements of the intelligence community. Rather than holding the elements of the intelligence community accountable, the government has chosen to criminally prosecute

individual employees and employees of contractors as spies, or accused them of wrongfully disclosing classified information or improperly handling classified information. Even if individual employees are not criminally prosecuted it is not difficult to imagine that employees will be subject to employment retaliation and suffer some form of discipline for making such disclosures to OSC that may involve classified information or other information about elements of the intelligence community.

Another problem with the disclosure of information about contractors who provide services to an element of the intelligence community is that the employee may not know the information disclosed to OSC is classified, or the information may undergo retroactive classification. There may even be instances when the very existence of the contractual service to, or the activity of, an element of the intelligence community itself may be classified.

In all of these cases the employee of the Federal contractor that provides services to an element of the intelligence community will be taking an enormous risk and could suffer not only loss of employment but also loss of personal freedom by making a disclosure of any information to OSC.

If this part of the proposed rule is enacted we would not recommend that any employee who works for a contractor that provides services to an element of the intelligence community make a disclosure to OSC unless there is a change in the law that expressly permits it. Short of a change in the law by Congress, the President could issue an Executive Order or directive to permit such disclosures to OSC, but that would likely require the input of the Attorney General and the Director of National Intelligence. The President, Director of National Intelligence and the Attorney General are in the position of providing assurances to employees of Federal contractors that they will not face discipline or criminal prosecution if information about an element of the intelligence community is disclosed to OSC.

Without such clarification by the President, Director of National Intelligence and Attorney General, or an act of Congress that expressly provides for such disclosures, we must request that this portion of the proposed rule, as it applies to services provided to or activities of an element of the intelligence community, be withdrawn by OSC.

Sincerely,

/s/
David K. Colapinto
General Counsel
National Whistleblower Center
Washington, D.C.