

**MERIT SYSTEMS PROTECTION BOARD, OFFICE OF
GOVERNMENT ETHICS, AND OFFICE OF SPECIAL
COUNSEL REAUTHORIZATION**

HEARING
BEFORE THE
SUBCOMMITTEE ON
GOVERNMENT OPERATIONS
OF THE
COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
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**MERIT SYSTEMS PROTECTION BOARD, OF-
FICE OF GOVERNMENT ETHICS, AND OF-
FICE OF SPECIAL COUNSEL REAUTHORIZA-
TION**

Wednesday, December 16, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT OPERATIONS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 11:10 a.m., in Room 2154, Rayburn House Office Building, Hon. Mark Meadows [chairman of the subcommittee] presiding.

Present: Representatives Meadows, Jordan, Walberg, Buck, Carter, Grothman, Chaffetz, Connolly, and Norton.

Mr. MEADOWS. The Subcommittee on Government Operations will come to order. Without objection, the chair is authorized to declare a recess at any time.

Today's hearing will examine the reauthorization of three important agencies for our Federal workforce, specifically the Merit Systems Protection Board, the Office of Government Ethics, and the Office of Special Counsel. The authorizations of the MSPB and the OGE and the OSC all expired at the end of fiscal year 2007. However, given the important work that each of these agencies perform, their funding has continued.

Still, in the nearly 10 years since their authorizations have expired, there has been little opportunity for even the most basic and needed reforms at these agencies. So, today, we will begin to have this conversation about reform and reauthorization for these agencies.

I'd like to highlight that as we go into a different type of appropriations season next year, this becomes even more critical and thus the reason for this hearing today. During this hearing, we'll have the opportunity to learn more about the MSPB and its efforts in overseeing the Federal Merit System; obviously, the OGE and its oversight role of the executive branch ethics program; and OSC and its efforts to protect Federal workers and applicants from prohibited personnel practices, especially the retaliation for whistleblowing. All three organizations have a very important role for the executive branch agencies and Federal employees.

As part of the reauthorization of these agencies, we will also examine and discuss the agencies' proposals for changes in some of their procedures and operations. We will hear testimony from the Chair of the MSPB, Susan Tsui Grundmann. Chairman

Grundmann can provide information on the current state of the MSPB accomplishments made by the agency and the challenges ahead.

And the Director of OGE, Walter Shaub, will update us on the OGE's oversight and leadership role of the executive branch ethics program and prevention of the conflict of interest. In addition, Director Shaub, on the outline of OGE's preparation for the upcoming Presidential transition.

From OSC, Special Counsel Carolyn Lerner joins us today. Special Counsel Lerner can provide us with information on OSC's role in protecting Federal employees from prohibited personnel practices and its efforts at investigating allegations of whistleblower retaliation, evaluating disclosure cases, enforcing and evaluating complaints under the Hatch Act, and protecting members of the armed services under the Uniformed Service Employment and Reemployment Rights Act.

We look forward to hearing from all of our witnesses and obtaining a better understanding of the proposed reauthorization language.

So I now recognize Mr. Connolly, the ranking member of the Subcommittee on Government Operations, for his opening statement.

Mr. CONNOLLY. Thank you, Mr. Chairman.

And thank you for holding this hearing in the last 2-1/2 days of the first session of the 114th Congress.

I have three hearings today. I belong to two committees that passionately believe no human challenge, no human problem cannot be improved with another hearing. So we are glad we are getting around to this one.

These three agencies in front of us, the Merit Systems Protection Board, the Office of Government Ethics, and the Office of Special Counsel, are among the smallest agencies in the Federal Government, but their work has a tremendous impact on the Federal workforce.

The authorizations for each of these agencies unbelievably expired 8 years ago, in 2007, Mr. Chairman. And they have been sustained by annual appropriations, so congressional action, including by this committee, is long overdue. It's especially important given the critical work that these agencies perform.

I want to thank our witnesses for being here today. Particularly, I want to commend them for the vitally important work they do and their staffs perform to ensure that the Federal civil service is merit-based, not subject to political influence or ethical conflicts of interest, and free of prohibited personnel practices, such as retaliation for whistleblowers, as you pointed out, Mr. Chairman.

MSPB's 200-person staff is charged with adjudicating appeals relating to adverse employment actions, such as removals and suspensions over 14 days, veterans' and whistleblowers' rights, and Federal disability and retirement claims.

MSPB is seeking 5-year reauthorization through fiscal year 2020 and is proposing that the Office of Personnel Management and other agencies assist it in conducting employee surveys. I look forward to a discussion of this as we proceed.

I also would like to hear about MSPB's efforts to address recent challenges, including adjudication of 32,000 appeals filed by Federal employees who were furloughed in the shutdown in 2013 due to sequestration, budget cuts, and implementation of 2014 Veterans Access, Choice and Accountability Act.

The Office of Government Ethics employs 80 individuals who prepare and issue standards of ethical conduct for the fellow workforce and oversee agency ethics programs. OGE seeks its 7-year reauthorization, which follows previous congressional practice to avoid the need to seek reauthorization during the first and last year of Presidential terms. I'd like to better understand the steps that the agency has taken to implement the 2012 Stop Trading on Congressional Knowledge Act, or STOCK Act. I would also like to hear about the agency's preparations for the next Presidential transition.

The Office of Special Counsel's primary mission is to protect Federal employees from prohibited practices. It serves as the frontline of defense and protection for whistleblowers who disclose government wrongdoing, something particularly important to this committee and our subcommittee. The agency seeks a 5-year reauthorization. It is proposing several legislative changes that would, among other things, enhance its access to Federal agency information, increase agency accountability and whistleblower disclosure cases, and modify procedural requirements for certain prohibited personnel practices.

I am pleased that OSC has achieved settlements in numerous cases on behalf of Veterans Administration employees who were retaliated against because they stepped forward to blow the whistle on both the backlog and the lack of quality of care for some of our veterans.

OSC was also instrumental in drawing congressional attention to the disclosures by Department of Homeland Security employees regarding the abuse of administratively uncontrollable overtime. Those disclosures caused DHS to stop the improper use of these payments and resulted in the passage of legislation establishing a new pay system for Customs and Border Patrol agencies.

Mr. Chairman, the fact that these agencies have now gone 8 years without being reauthorized is a terrible abrogation of our responsibility, congressional responsibility. And I certainly pledge to work with you in trying to rectify that situation.

Thank you for holding this hearing.

Mr. MEADOWS. I thank the gentleman.

I'll hold the record open for 5 legislative days for any member who would like to submit a written statement.

We will now recognize our panel of witnesses. I'm pleased to welcome Honorable Susan Tsui Grundmann, Chair of the U.S. Merit Systems Protection Board; the Honorable Walter Shaub, Jr., Director of U.S. Office of Government Ethics; and the Honorable Carolyn Lerner, special counsel at the U.S. Office of Special Counsel.

Welcome to you all.

And pursuant to committee rules, all witnesses will be sworn in before they testify. So if you would please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Thank you. Please be seated.

Let the record reflect that all witnesses answered in the affirmative.

In order to allow time for discussion, please limit your oral testimony to 5 minutes, but your entire written statement will be made part of the record.

And, Ms. Grundmann, you are recognized for 5 minutes.

WITNESS STATEMENTS

STATEMENT OF THE HONORABLE SUSAN TSUI GRUNDMANN

Ms. GRUNDMANN. Thank you. Good morning, Mr. Chairman, Ranking Member Connolly, Chairman Chaffetz, and distinguished members of this committee.

On behalf of MSPB and our 220 employees, thank you, Mr. Chairman, for bringing us all together.

It has been both an honor and a privilege to serve as the Chairman of the MSPB and its dedicated workforce for the last 6 years; the last 3 of which have been among the most eventful and challenging in our history. These years have also been among the most rewarding.

We are proud of what our agency, through its employees, has accomplished during incredibly trying times and the role that we have played in a variety of matters related to the overall operation of the Federal civil service.

During the last 4 fiscal years, our agency has issued over 61,000 decisions. Over 54,000 of them were issued by our 65 administrative judges, the other over 6,200 were issued by the three, now two, board members in headquarters.

Our numbers are staggering due largely to, as you say, the 32,000 furlough appeals we received during the summer of 2013 as a result of sequestration budget cuts. In a normal fiscal year, our agency processes about 6,000 to 7,000 in the regions and about 700 to 800 in headquarters.

The last 2 years have been anything but normal with a workload five times a regular fiscal year. And while processing times have been adversely impacted, I am proud to report two significant accomplishments. We have completed almost 97 percent of our furlough cases. And while we have quantity in abundance, the quality of our decisions is ever constant. Our affirmance rate by our reviewing court, the U.S. Court of Appeals for the Federal circuit, is at a 4-year high, holding steady for a second year in a row at 96 percent.

And with performance at an all-time high, our employee commitment and satisfaction reflected in our employee viewpoint survey results have dramatically improved from last year as well. With a 72-percent response rate, we showed improvement, sometimes dramatic, in the 71 of the 72 core EVS questions, with the greatest positive responses in communication from leaders, high rates of motivation, commitment to the work, and the agency's purpose,

which is to safeguard, protect, and promote the nine merit principles.

And while we do not know what the future holds for us in terms of factors and resources impacting our workload, this year's results are particularly encouraging as they come at a time when workload is at its peak, but employee morale and commitment did not falter. This year, we jumped eight slots from last year's rankings. And it is this commitment as recently as last week that the Partnership for Public Service recognized by ranking us eighth among small agencies in best places to work and the fifth most improved small agency in 2015.

I understand that you, Mr. Chairman, have been paying visits to the agencies that have been doing well. I hereby cordially invite both you and Ranking Member Connolly to pay us a visit one day soon.

Even though a great deal of our agency time has been dedicated to our adjudication function, our statutory studies function continues to produce high-quality, relevant reports that are significant to the deliberations of this subcommittee. Unlike our adjudication function, which looks backwards in time at events passed, our studies function is forward-looking, garnering a series of best practices that can and often become the basis of legislative or regulatory reform.

Some of our past reports have been uncanny in terms of their timing with respect to this committee's work, such as our barriers to whistleblowing, issued in 2011, which we believed helped assist in the passage of the Whistleblower Protection Enhancement Act in 2012; our veterans' rights report in 2013; our Federal due process report, published earlier this year during the dialogue in the VA Accountability Act; and our new SES training report, which we will release this week, and we hope that will assist in the discussion and development of initiatives by OPM following the new executive order on SES training and development just issued last night.

Mr. Chairman, we welcome this occasion for reauthorization. We welcome this opportunity to tell our story. But as you note, we have only one legislative proposal solely dedicated to our studies function, which I will be happy to discuss with you. In the meantime, our work continues, but things are going well. Thank you.

[Prepared statement of Ms. Grundmann follows:]

Chairman Meadows, Ranking Member Connolly, and other Members of the Subcommittee on Government Operations (“Subcommittee”) of the Committee on Oversight and Government Reform, thank you for the opportunity to testify at this important hearing on the reauthorization¹ of our agency, the Merit Systems Protection Board (“MSPB”), along with the reauthorization of two of our sister agencies, the Office of Special Counsel (“OSC”) and the Office of Government Ethics (“OGE”). As Chairman of MSPB, it is a great honor to be here today on behalf of our dedicated workforce, along with Special Counsel Lerner and Director Shaub. The last three years have been among the most eventful and challenging in the history of MSPB. They have also been among the most rewarding. I am proud of what our agency – through its employees – has accomplished during incredibly trying times, and the role we have played in a variety of matters related to the overall operation of the federal civil service. My testimony today will address: 1) the current state of the MSPB; 2) some of MSPB’s significant accomplishments in connection with our statutory responsibilities; 3) MSPB’s current and anticipated challenges; and 4) MSPB’s request for reauthorization for Fiscal Years 2016-2020 along with a legislative proposal related to our studies function.

A. MSPB and its Role in the Federal Civil Service

The Civil Service Reform Act of 1978 (“CSRA”) created MSPB to carry on the function of the former United States Civil Service Commission to adjudicate appeals filed by federal employees in connection with certain adverse employment actions. The CSRA also granted MSPB broad new authority to conduct independent, objective studies of the federal merit systems and federal human capital management issues. In addition, MSPB was given the authority and responsibility to review and act on OPM’s regulations and review and report on OPM’s significant actions. The CSRA also codified for the first time the values of the Federal merit systems as the merit system principles and delineated specific

¹ MSPB’s last authorization expired more than 8 years ago, on September 30, 2007. The authorization of appropriations for MSPB was originally permanent under MSPB’s enabling statute, the Civil Service Reform Act of 1978 (“CSRA”), Pub. L. No. 95-454, 92 Stat. 1111. This was changed, however, under the Whistleblower Protection Act of 1989 (“WPA”) to a 6-year period that expired at the end of Fiscal Year 1994. (Pub. L. 101-12, 103 Stat. 34, 5 U.S.C. 5509 note). In 1994, MSPB’s authorization was extended through Fiscal Year 1997 (Pub. L. 103-424, 108 Stat. 4361), placing it on the same reauthorization cycle as that of OSC. MSPB was subsequently reauthorized for five years, through Fiscal Year 2002 (Pub. L. 104-208, 110 Stat. 3009), and again through Fiscal Year 2007 (Pub. L. 107-304, 116 Stat. 2364). Our request for reauthorization would amend Section 8(a)(1) of the WPA to authorize MSPB for an additional 5 years, through Fiscal Year 2020.

actions and practices as the prohibited personnel practices that were proscribed because they were contrary to merit system values. *See* 5 U.S.C. §§ 2301 and 2302. Since the enactment of the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws, including the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act (WPA), Pub. Law. No. 101-12, 103 Stat. 16; the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. Law 112-199; the Veterans Access, Choice and Accountability Act of 2014, Pub. Law 113-146; 5 U.S.C. § 4304; 5 U.S.C. § 7513; and those set out at 5 C.F.R. § 1201.3.

B. MSPB's Adjudication Function

The statutory responsibility for which MSPB is probably most well-known is its role in adjudicating appeals filed by federal employees in connection with adverse employment actions. At the outset, I would like to point out that MSPB is not involved at any point with any action or inaction by a federal agency. Only *after* a federal agency imposes an adverse personnel action upon a federal employee, and the federal employee chooses to exercise his or her statutory right to file an appeal with MSPB, does our agency become involved. Once an appeal is filed, an MSPB administrative judge in one of MSPB's regional or field offices will issue an initial decision addressing the appellant's claims. Thereafter, either the appellant or the named federal agency may appeal the MSPB administrative judge's initial decision to the three-member Board² ("Board") at MSPB Headquarters in Washington, D.C., which will review that decision and then issue a final decision. Both the Board and MSPB administrative judges adjudicate appeals in accordance with statutory law, federal regulations, precedent from United States federal courts, including the Supreme Court of the United States and the United States Court of Appeals for the Federal Circuit, and MSPB precedent.

C. MSPB Adjudication Statistics

Among the MSPB's most significant accomplishments in recent years has been the raw volume of adjudication decisions we have issued. I am proud to report that from Fiscal Year 2012 through Fiscal Year 2015, MSPB issued

² Currently, there are only two Board members: the Chairman and the Member. The Office of the Vice Chairman has been vacant since March 2015. President Obama has nominated Mark Cohen – currently the Principal Deputy Special Counsel at the Office of Special Counsel – to be a Member of the MSPB and to be designated Vice Chairman upon appointment. Mr. Cohen's nomination has been referred to the Senate Homeland Security and Governmental Affairs Committee for consideration.

decisions in 61,017 initial appeals, petitions for review before the Board, and cases that were adjudicated by administrative law judges, with whom MSPB contracts, to adjudicate certain types of appeals. During that period, the Board issued 6,221 decisions, MSPB administrative judges in MSPB's regional and field offices issued 54,584 decisions, and administrative law judges issued 212 decisions. It should be noted that this extraordinary volume of cases resulted in large part from the receipt of almost 32,400 appeals in Fiscal Year 2013 from federal employees who were furloughed³ as a result of government-wide sequestration, pursuant to the Budget Control Act of 2011. In years prior to the receipt of these "furlough appeals," MSPB typically received between 5,000 and 6,000 initial appeals filed by federal employees or former federal employees. So, to say that the last few years at MSPB have been historic in terms of our adjudication function would be a vast understatement.

During Fiscal Years 2012 and 2013, MSPB's regional and field offices processed initial appeals in an average of 93 days. The Board issued decisions on petitioners for review in an average of 263 days during that same period. The case processing timeframes for Fiscal Years 2014 and 2015 were skewed because of the historic number of appeals received near the end of Fiscal Year 2013. During Fiscal Year 2014, MSPB's regional and field offices processed initial appeals in an average of 262 days, while the Board processed cases in an average of 287 days. During Fiscal Year 2015, MSPB's regional and field offices processed appeals in an average of 499 days, while the Board processed cases in an average of 190 days. I am pleased to report that because of the great effort of our staff in both MSPB's regional and field offices, and MSPB Headquarters in Washington, D.C., we have completed adjudication in approximately 97% of the furlough appeals MSPB received in during Fiscal Year 2014.

Additionally, the Whistleblower Protection Enhancement Act of 2012 ("WPEA"), which became effective in December 2012, resulted in substantive changes in MSPB's adjudication and reporting of appeals involving allegations of illegal retaliation for protected disclosures. By clarifying the definition of the term "protected disclosure," the WPEA ensured that appeals over which MSPB had previously lacked jurisdiction – based on precedent of the United States Court of Appeals for the Federal Circuit – would survive jurisdiction and advance to a hearing on the merits before MSPB administrative judges. The WPEA also required MSPB to annually report the outcomes of such appeals, along with the number of such appeals filed in MSPB's regional and field offices and the number

³ Federal employees who are subject to a "furlough of 30 days or less" have appeal rights to MSPB. 5 U.S.C. § 7512(5). This means MSPB has jurisdiction over such appeals and is required, under statute, to provide appellants with a hearing if requested.

of petitions for review filed with the Board. Information on these appeals can be found in MSPB's Annual Performance Reports, which can be found on MSPB's website at: <http://www.mspb.gov/publicaffairs/annual.htm>

Finally, I would like to inform this Subcommittee that MSPB continues to issue high quality legal decisions that are viewed favorably by the United States Court of Appeals for the Federal Circuit, MSPB's primary reviewing court. During Fiscal Year 2012, the Federal Circuit left 94% of MSPB's decisions unchanged. The percentages for Fiscal Years 2013, 2014 and 2015 were 93%, 96%, and 96%, respectively. Simply put, I believe these numbers are a reflection of the tremendous talent and ability of our administrative judges and the attorneys in MSPB's Office of Appeals Counsel and Office of General Counsel.

D. MSPB's Studies Function

In addition to adjudicating appeals, MSPB is required under statute to:

Conduct, from time to time, special studies relating to the civil service and to the other merit systems in the executive branch, and report to the President and to Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

5 U.S.C. § 1204(a)(3).

MSPB's studies, which are based on empirical research, are typically government-wide in scope and take a long-term perspective on effective management of the federal workforce. As I have said many times, our adjudication function addresses events that have occurred in the past, while our studies function is typically forward-looking in nature. The studies function complements MSPB's adjudication function and its review of OPM regulations, enabling MSPB to fulfill its role as guardian of federal merit systems. Ultimately, MSPB seeks to ensure that the federal workforce is managed in accordance with the merit system principles, *see* 5 U.S.C. § 2301, and free from prohibited personnel practices, *see* 5 U.S.C. § 2302. Among other things, MSPB studies aim to educate MSPB stakeholders, including parties to future litigation, about MSPB practice and procedure, and particular aspects of federal personnel law.

During my time as Chairman, MSPB has issued a number of studies that I believe have been of significant value to federal employees, federal agency managers and supervisors, and other MSPB stakeholders. Among the studies we have issued are:

- *Whistleblower Protections for Federal Employees* (September 2010);
- *A Call to Action: Improving First-Level Supervision of Federal Employees* (May 2010);
- *Veterans' Employment Redress Laws in the Federal Civil Service* (November 2014); and
- *What is Due Process in Federal Civil Service Employment?* (May 2015).

In February 2015, MSPB finalized its 2015-2018 research agenda, which was developed through an open and deliberative process that included a call for ideas and input, a public meeting at which the Board Members and key stakeholders discussed the proposed agenda, and formal approval by all three Board members. I am pleased to inform the Subcommittee that, among others, MSPB will be issuing reports addressing the following issues: 1) Whistleblowing After the Whistleblower Protection Enhancement Act of 2012; 2) the Incidence and Impact of Poor Performance by Federal Employees; and 3) Current Challenges Related to the Human Resources Workforce.

I encourage all Members of the House Committee on Oversight and Government Reform, and their staffs, to review these reports and contact MSPB when considering legislation related to federal personnel matters. While admittedly biased, I can state confidently that these reports will be of significant value to you. MSPB studies can be found on our website at <http://www.mspb.gov/studies/browsestudies.htm>

E. Recent Employee Viewpoint Survey Results at MSPB and MSPB's Ranking in the Partnership for Public Service's "Best Places to Work in the Federal Government" Rankings.

I am extremely proud to report to the Subcommittee that MSPB's results for the Fiscal Year 2015 Federal Employee Viewpoint Survey ("EVS") were among the most positive we have received during my tenure as Chairman. I believe this is noteworthy because Fiscal Year 2015 was among the most challenging years MSPB has ever faced from a workload standpoint.

The response rate by MSPB employees in the Fiscal Year 2015 EVS was 72%, which represents a higher response rate than the government-wide response rate. Specifically, MSPB received positive responses from its employees in 71 of the 72 core questions in the EVS. With few exceptions, this result was the highest since MSPB's 2011 EVS. The EVS questions that received the largest increases in positive responses by MSPB employees were:

- Managers communicating the goals and priorities of the agency;

- Having sufficient resources to get the job done;
- Senior leaders generate high levels of motivation and commitment in the workforce; and
- Satisfaction with the policies and practices of senior leaders

Additionally, the following EVS questions received the highest percentage of overall positive responses:

- Willingness to put an extra effort to get the job done;
- Knowing how your work relates to the agency's goals and priorities;
- Interest in looking for ways to do your job better;
- The importance of your work; and
- The overall quality of the work done by your unit.

Moreover, in the recently released "Best Places to Work in the Federal Government," MSPB placed 8th overall among small agencies and was among the five "most improved small agencies" in the federal government. It goes without saying that MSPB leadership is both proud of, and encouraged by, these very positive results.

F. Anticipated Challenges

Although I believe that the current state of MSPB is strong, we nonetheless face significant challenges moving forward. Among our greatest challenges is the possibility of being required to adjudicate appeals for large numbers of federal employees in, at best, unreasonable time frames, under conditions which, in my opinion, call into question the constitutional validity of the entire appellate process.

In 2014, Congress passed, and the president signed into law, the Veterans Access, Choice, and Accountability Act of 2014 ("the 2014 Act"), Public Law 113-146. Section 707 of this law made significant changes to the disciplinary process at the Department of Veterans Affairs with respect to Senior Executive Service ("SES") employees. Under section 707, SES employees subjected to adverse personnel actions are permitted to appeal to MSPB not later than seven days after the date of the personnel action. Once an appeal is filed at MSPB, MSPB is required to refer the appeal to an MSPB administrative judge, who shall "expedite" such appeal and issue a decision "not later than 21 days after the date of the appeal." Under the law, if an MSPB administrative judge fails to issue a decision within 21 days, the Secretary's decision to either remove or transfer the employee becomes final. Significantly, the decision of the MSPB administrative judge in any such appeal shall be final and shall not be subject to further appeal,

either to the three-member Board at MSPB Headquarters in Washington, D.C., or to any federal court.

Since the 2014 Act, a number of pieces of legislation have been introduced in both the House of Representatives and the Senate that would expand the 2014 Act's expedited MSPB appeal process for SES employees to *all* employees of the Department of Veterans Affairs. Indeed, the House of Representatives passed H.R. 1994 – the VA Accountability Act of 2015 – which did this, albeit allowing MSPB administrative judges 45 days, instead of 21 days, to issue final decisions in appeals. This same appellate process has also been included in bills applicable to federal employees outside of the Department of Veterans Affairs, such as SES employees at the Internal Revenue Service.

As an initial matter, to be clear, in no way am I suggesting that it is unwise policy for our government to ensure that our nation's veterans receive all that they deserve and to which they are entitled, or that poor performing employees have an entitlement to continued federal employment. However, any law that limits the amount of time that MSPB has to adjudicate an appeal (and issue a written decision), prevents participation by the three-member Board in the MSPB adjudication process, or requires the parties (appellants and agency representatives) to litigate cases at warp speeds is of serious concern to me and our agency.

First, for obvious reasons, requiring MSPB to docket an appeal, preside over discovery, hold a hearing, and issue a written decision within 21 (or even 45)⁴ days would pose significant, and possibly crippling, challenges to our agency. If this process were to be expanded to all employees of the Department of Veterans Affairs, or worse, all employees in the federal government, it is, plainly stated, difficult for me to see how our agency could continue to produce the same quality decisions as we have in the past.

Additionally, I would like to note that the above-referenced provisions of the 2014 Act are currently the subject of a constitutional challenge at the United States Court of Appeals for the Federal Circuit. *See Helman v. Dep't. of Veterans Affairs*, Case No. 15-3086 (Fed. Cir. 2015). The plaintiff in that litigation is alleging that Section 707 of the 2014 Act is unconstitutional primarily on two grounds:

⁴ Because the 2014 Act provides that the Secretary's decision becomes final unless a decision is issued within 21 days, MSPB administrative judges are under intense pressure in these appeals to issue decisions within those 21 days.

- By permitting the Department to remove a tenured federal employee without any pre-removal notice or an opportunity to respond, and by severely limiting post-removal appeal rights, Section 707 violates an employee's right to constitutional due process as articulated by the Supreme Court; and
- By removing the three-member Board from the MSPB appellate review process and permitting MSPB administrative judges to make a final decision binding an executive branch agency which is not reviewable by a presidential appointee, Section 707 violates the Appointments Clause contained in Article II, Section 2 of the United States Constitution.

G. MSPB's Legislative Proposal

Clarification of MSPB's Authority to Collect Information Incident to Its Studies Function

MSPB's legislative proposal concerns its statutory responsibility to conduct studies. As stated above, under current law, MSPB "shall conduct . . . special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." 5 U.S.C. § 1204(a)(3). Current law further provides that, in carrying out this function, MSPB "shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from agencies as needed." 5 U.S.C. § 1204(e)(3).

Among the research methods MSPB uses to conduct studies are literature review, questionnaires to federal agencies, focus groups, statistical analysis of personnel records, interviews of experts, and surveys of federal employees. In particular, the federal employee surveys provide important insights into employee perceptions and experiences, and help MSPB round out and focus its findings and conclusions on the health of the merit systems. Information obtained from surveys has been featured in several MSPB reports, including: *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs* (2015); *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* (2012); *Employee Perceptions of Federal Workplace Violence* (2012); *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* (2011); and *Women in the Federal Government: Ambitions and Achievements* (2011).

Unfortunately, recent experience has shown that sometimes federal agencies misunderstand or resist MSPB's survey efforts. Simply stated, federal agency cooperation – in connection with surveys – is essential for MSPB to collect the data it needs. In order to conduct a successful survey, among other things MSPB must acquire a list of valid email addresses for a sample of employees in various agencies; work with agency IT departments to prevent spam filters and security screens from blocking survey invitations; and ask agency officials to inform their employees that an MSPB survey is legitimate and may be taken during work hours. I believe that amending the law to make explicit MSPB's authority to conduct employee surveys would help MSPB highlight to agencies the importance of their cooperation in surveys.

MSPB also asks that the law be amended to give it express statutory authority to gather records and information concerning applicants for federal employment. The merit system principles apply to hiring, and applicants are protected from prohibited personnel practices. See 5 U.S.C. §§ 2301(b)(1) & (2), 2302(a)(2)(A), (b). However, the extent to which MSPB's existing authority to obtain records and information in support of its studies function applies to records and information concerning applicants is something of a gray area. As a result, MSPB's research into the treatment of applicants and the applicant experience has not been as robust as it might otherwise be. The requested statutory amendment would provide MSPB with an important tool for assessing federal hiring practices and making recommendations for improvement.

H. Conclusion

This concludes my testimony. I will be happy to answer any questions that the Subcommittee has.

Mr. MEADOWS. Thank you so much.
Director Shaub.

STATEMENT OF THE HONORABLE WALTER M. SHAUB, JR.

Mr. SHAUB. Chairman Meadows, Ranking Member Connolly, and Chairman Chaffetz, and members of the subcommittee, thank you for the opportunity to testify on behalf of the reauthorization of the Office of Government Ethics. I'm happy to be here with my colleagues from OSC and MSPB.

OGE was established by the Ethics in Government Act of 1978, which came out of the same committee in the same month as the Inspector General Act.

Congress established OGE as part of a broader framework for integrity which is coordinated among a variety of executive branch entities. Among others, this includes OSC, MSPB, and the 14,000-member inspector general community. The language of the Ethics in Government Act makes clear that the primary mission and objective of the ethics program is one of prevention. The program works to prevent conflicts of interest so that the American people can be confident that public servants make decisions based not on their own financial interest but on the interests of the public. Congress designed this program to be decentralized, with OGE setting ethics policies and agency ethics offices carrying out day-to-day operations.

Our strategic goals focus on the three pillars of uniformity, continuity, and transparency. OGE's work includes a wide range of activities for a small agency of about 70 employees. Much of that work can be grouped into the following general areas: Nominations and support for Presidential transitions; regulations and guidance; oversight of agency ethics programs; development of an electronic filing system; assistance to stakeholders; ethics education; and engaging leaders in ethical compliance and ethical culture.

My written testimony details OGE's accomplishments in these areas. I'll just highlight a few. Since I became Director in January 2013, we have leveraged technology to deliver more training, with our classes going from 1,400 attendees a year to 7,500 attendees in 2015. And 90 percent of customers surveyed said the training helped them to do their jobs better.

Through innovative new approaches, we've also cut costs. For example, we hosted our 2014 national ethics summit for less than 1 percent of the cost of OGE's traditional conferences. In 2015, we showed 59 reports in our oversight reviews of agency ethics programs, and we are on pace to review all agencies before the end of my 5-year term.

We have improved our financial disclosure program by going paperless and cutting review times for annual reports from 180 days to 30 days. As required by the STOCK Act, we developed an electronic filing system for financial disclosure. In less than a year, we have registered about 10,000 employees and, as of yesterday, 90 agencies in that system. And 90 percent of agency administrators who operate the system for their agencies were surveyed and rated the system favorably.

In 2015, we responded to about 2,000 requests for assistance from agencies. And 91 percent of agency ethics officials surveyed

said our assistance helped them do their jobs. We received another 700,000 requests from outside the government.

Since our last authorization expired, we have issued over 100 legal advisories. This year, 98 percent of responders to our survey said these advisories helped them in their work. We also actively support the enforcement community. As Director, I am statutory member of CIGIE, the Council of the Inspectors General on Integrity and Efficiency, as well as CIGIE's Integrity Committee. OGE also provides IG staffs and prosecutors with legal advice and training.

Looking forward, our next big challenge will be the Presidential transition. A Presidential transition is a critical time when the Nation is vulnerable with the potential for man-made, natural, and economic disasters to strike while the government's top positions are vacant. OGE makes sure that nominees are free of conflicts of interest so that top leadership positions can be filled quickly.

During a transition, our nominee work triples in volume and increases in complexity. The challenge is nothing short of extraordinary, and it requires a full commitment of resources. We're doing everything possible to be ready for the transition because we know how important it is.

Finally, we have submitted a legislative proposal to amend this Ethics in Government Act. Because the systems in place are working, the proposal is limited to technical corrections.

We are also seeking reauthorization through 2022 so that the next reauthorization does not coincide with a Presidential transition, when OGE's resources will be stretched thinnest, but we are more than happy to talk to you at any time in between.

So thank you for the opportunity to testify today.

[Prepared statement of Mr. Shaub follows:]

HEARING BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM
SUBCOMMITTEE ON GOVERNMENT OPERATIONS

“MERIT SYSTEMS PROTECTION BOARD, OFFICE OF GOVERNMENT ETHICS,
AND OFFICE OF SPECIAL COUNSEL REAUTHORIZATION”

DECEMBER 16, 2015

TESTIMONY OF WALTER M. SHAUB, JR.
DIRECTOR, U.S. OFFICE OF GOVERNMENT ETHICS

Chairman Meadows and members of the Subcommittee, thank you for the invitation to appear today to talk about the reauthorization of the U.S. Office of Government Ethics (OGE). I would like to take this opportunity to discuss OGE’s important work in support of the executive branch ethics program and to highlight some of our accomplishments since our most recent reauthorization expired in 2007. I would also like to tell you about the critical role that OGE will play in the next Presidential transition. The Presidential transition will present both a significant challenge and an opportunity for OGE, with the objective of helping to ensure the continuity of government at a critical time when most of the government’s top leadership posts will be vacant.

I. The Executive Branch Ethics Program

Although the roots of the executive branch ethics program go back further, a key point in time was 1978, when sweeping civil service reforms in the post-Watergate era were enacted under the Civil Service Reform Act. That year, OGE was established by the Ethics in Government Act, which came out of the same committee in the same month as the Inspector General Act. Though initially established as part of the Office of Personnel Management, OGE became a separate agency on October 1, 1989.

Under the Ethics in Government Act, OGE is charged with the unique mission of supervising the government’s efforts to prevent conflicts of interest. OGE undertakes this important mission as one piece of a framework for institutional integrity that is coordinated among a variety of agencies and entities in the executive branch. This broad framework reaches beyond OGE’s purview and includes merit system protections in the civil service; fair competition in procurement; fiscal controls; transparency programs; investigation of waste, fraud, and abuse; and criminal, civil, and administrative enforcement. With combined staffs of approximately 14,000 employees, the executive branch’s Inspectors General are well equipped to investigate potential ethics violations. Each agency has enforcement authority to address violations by imposing administrative penalties such as suspensions, demotions, and terminations. In addition, the Department of Justice has enforcement authority that includes civil and criminal penalties.

The Ethics in Government Act grants OGE responsibility for providing “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and

employees of any executive agency.” As the statutory language makes clear, the primary objective of the executive branch program is one of *prevention*.

This program works to ensure that public servants make impartial decisions based on the interests of the public when carrying out the governmental responsibilities entrusted to them and serve as good stewards of public resources. Toward this goal, the program’s mission centers on preventing conflicts of interest and the appearance of conflicts of interest that stem from: financial interests; business or personal relationships; misuses of official position, official time, or public resources; and the receipt of gifts. The systems in place to prevent conflicts of interest, including financial disclosure systems and training, establish a foundation on which to build and sustain an ethical culture in the executive branch.

OGE is the supervising ethics office over the decentralized ethics program established by the Ethics in Government Act. While the statute does not give OGE direct supervisory control over agency ethics officials, OGE issues ethics regulations and interpretive guidance that define the contours of their work. OGE oversees a financial disclosure program covering approximately 26,000 public filers and 380,000 confidential filers. OGE also provides ethics officials with training to promote consistency and uniformity in the application of these regulations to the workforce of 2.7 million federal civilian employees across the executive branch. In addition, OGE conducts program reviews to ensure that executive branch agencies have established appropriate procedures to implement the statutory and regulatory requirements.

Although specialized, the work performed by OGE’s 70-person staff covers a surprisingly wide range of activities for such a small agency. Speaking broadly, most of our work to achieve uniformity, continuity and transparency in the ethics program can be grouped into the following major categories: (1) Presidential nominations and support for Presidential transitions; (2) regulations and interpretive guidance; (3) oversight of agency ethics programs; (4) development of the electronic filing system for public financial disclosure required by the STOCK Act of 2012; (5) direct assistance to stakeholders; (6) ethics education; and (7) engaging senior leaders on the importance of compliance and ethical culture. I will tell you a little about our accomplishments in each of these areas of our work. I will also describe new approaches we have taken and ways in which we have innovated since I became Director in January 2013 to improve OGE’s effectiveness and efficiency in accomplishing its important mission.

1. Presidential Nominations and Support for Presidential Transitions

OGE provides an independent review of the financial disclosure reports of candidates for the highest level positions in the executive branch: Presidentially appointed, Senate-confirmed nominees and candidates for the Office of the President of the United States. OGE is not involved in recruitment, background investigations, or political vetting. OGE makes sure that the nominees and Presidential candidates have complied with the extensive requirements for financial disclosure under the Ethics in Government Act. These requirements are highly complex, and ensuring full compliance is labor-intensive. OGE’s goal with regard to a nominee’s disclosures is to ensure that the Senate receives a complete accounting of relevant financial interests in order to facilitate its advice-and-consent role in considering the President’s nominees. The goal as to a Presidential candidate is to provide the electorate with similar information.

OGE's review of nominees' disclosures presents a critical opportunity to evaluate their financial interests for potential conflicts of interest and introduces top leaders to the importance of ethical leadership. We approach this function from the perspective of managing risk. To that end, we require nominees to reduce the potential for ethical issues to arise in the first place, and we prescribe mechanisms for addressing conflicts of interest if issues do arise. In evaluating the potential risks, we consult with agency ethics officials who are familiar with their agencies' programs and activities. Based on these consultations, we prepare an ethics agreement that describes the steps a nominee will take to avoid conflicts of interest. After confirming with the agency that there are no unresolved conflicts of interest, we then transmit the package directly to the Senate.

The nominee function is never more important than during a change of Presidential administrations. A Presidential transition is a critical time when the nation is vulnerable, with the potential for manmade, natural, or economic disasters to strike while the government's top leadership positions are vacant. OGE works expeditiously to make sure that prospective candidates are free of conflicts of interest, so that top leadership positions can be filled quickly. During a Presidential transition, the nominations going through OGE typically triple in volume and increase in complexity.

To manage this challenge, OGE must prepare for the possibility of a transition every four years. Starting two years before a transition, we begin training additional staff members to review nominee packages. One year out from the inauguration, we step up both our internal training and the training we provide to agency ethics officials. At that point, the training focuses both on reviewing nominees and on counseling outgoing officials on the legal restrictions applicable to them when they are seeking post-government employment and after they leave government. In the year after a Presidential election, we necessarily draw down on other program activities in order to commit additional resources to managing the volume of transition-related work. When a sitting President is reelected, the increased volume of work is challenging, due to the turnover of appointees between the first and second terms. When a new President is elected, however, the challenge is nothing short of extraordinary, and delivering on the promise of a smooth transition demands a full commitment of resources.

With an election coming in November 2016, OGE's transition preparations are already well under way. We are conducting extensive training of our own staff, and we have scheduled similar training for agency ethics officials. We have also streamlined our processes, and our nominee program is currently operating at an unprecedented level of efficiency. One innovation since the time of our last reauthorization is a comprehensive 75-page ethics agreement guide that has sped up the process of resolving potential conflicts of interest and increased the uniformity of nominee ethics agreements across the executive branch. This innovation, coupled with our ethics agreement tracking efforts, increases accountability for Presidential nominees coming into the government. We have also developed a highly complex workflow feature in our electronic filing system, *Integrity*, that enables us to review nominee packages electronically. We began using this feature in November, and we anticipate that it will help us greatly during the Presidential transition. In March 2016, we will also convene another National Government Ethics Summit, and the focus of that event will be the Presidential transition.

At the same time, we have been communicating with other service providers and stakeholders who will be our partners in the Presidential transition. We are working with the General Services Administration (GSA), the Office of Personnel Management (OPM), and the National Archives and Records Administration (NARA) to coordinate transition preparations. We have also been working closely with the Partnership for Public Service, a non-partisan group that has been active in promoting efforts to ensure a smooth transition. In this effort, we have obtained input from individuals who were active in Presidential transitions on behalf of President Bush and President Obama, respectively.

Finally, we have been working with representatives of Presidential candidates in connection with their financial disclosure reports and preparing to work with the Presidential transition team. We are currently finishing work on a guide that the Presidential transition team and later the new Presidential administration will be able to provide to their nominees, and we will create a booklet for use by members of the Presidential transition team. We are also contributing material for a similar guide being prepared by the Partnership for Public Service and for a transition website maintained by GSA. In addition, we are finalizing a completely overhauled online guide on financial disclosure that will support nominees and other filers, as well as ethics officials, in preparing and reviewing financial disclosure reports.

2. Regulations and Interpretive Guidance

The next major category of OGE's mission involves ensuring uniformity in the executive branch ethics program through interpretive guidance and regulatory work. OGE issues and administers regulations that are applicable to all executive branch agencies, including the Standards of Conduct for Employees of the Executive Branch and regulations implementing the conflict of interest laws, among others. The most significant regulatory development since OGE's last reauthorization is the issuance of a comprehensive regulation implementing revolving-door restrictions. In the past two years, OGE has also carried out a significant regulatory modernization project reevaluating and drafting updates to several other significant parts of OGE's regulations, including restrictions on gifts and seeking employment, in part to implement the STOCK Act. All of these recent regulatory activities have involved extensive consultations with agency ethics officials to capture the best thinking and expertise of the entire community of ethics officials. In addition, OGE oversees the establishment of supplemental ethics regulations requested by individual agencies to address agency-specific issues. Currently 52 agencies have established supplemental regulations with OGE's concurrence.

With regard to interpretive guidance, since the time of our most recent reauthorization, OGE has issued and made publicly available more than 100 legal advisories, 30 program advisories, a highly detailed financial disclosure guide, an ethics agreement guide, an updated ethics agreement guide, and dozens of summaries of key subjects related to government ethics. This guidance is used by ethics officials throughout the executive branch, as well as by outside entities that interact with the government. In addition, OGE has worked with agencies to develop or distribute materials addressed directly to the government employees who are covered by the ethics rules. Feedback on OGE's work has been highly favorable. For example, in response to a survey OGE conducted this year, 98.6% of Designated Agency Ethics Officials (DAEOs) and

Alternate DAEOs, as well as 95.9% of agency ethics officials who responded, indicated that OGE's legal advisories help them perform their jobs.

3. Oversight of Agency Ethics Programs

OGE's most significant oversight activities with regard to agency ethics programs include conducting agency ethics program reviews, issuing an annual executive branch-wide data call, examining financial disclosures of high level officials reviewed by the agencies, and monitoring compliance with ethics agreements by Senate-confirmed appointees.

As part of OGE's process of conducting program reviews, we routinely make specific recommendations for improving individual agency ethics programs, and we hold the agencies accountable by monitoring their efforts to implement our recommendations. I took a new approach to this work by establishing a methodology that allows us to more regularly and timely conduct these important reviews. We have also refined our review processes in order to provide increased support to agencies in making program improvements. This past year, OGE issued 59 reports on its reviews of agency programs and is on pace to review all executive branch agencies during my five-year term. We make every one of these program review reports available to the public on OGE's website.

The annual data call is a comprehensive questionnaire about the composition and activities of each agency's ethics program that provides invaluable oversight data. Recognizing the value of this material to a wider audience, in 2014 we published on OGE's website for the first time a summary of aggregate data from the agencies' responses. In 2015, we posted all of the raw data from agency responses in order to be even more transparent. Currently, we are working with the Merit Systems Protection Board to survey a statistically significant sample of federal employees throughout the executive branch to learn more about the strength of agency ethics programs.

OGE's review of the financial disclosure reports of hundreds of high level officials is another oversight mechanism. When I became Director, I focused on improving this important mechanism because timely review is necessary to detect and resolve conflicts of interest. Since my appointment, OGE has improved its efficiency by going paperless and reducing its average review time for annual and termination reports from over 180 days to less than 30 days. Notably, these improvements were achieved at a time when, due to new STOCK Act reporting requirements, OGE also received approximately 900 periodic transaction reports. OGE's second-level review is a quality control mechanism to ensure that agencies are timely reviewing these reports for conflicts of interest and to ensure the filers' compliance with their ethics agreements. In January 2015, we also began to issue year-end status reports to agency heads regarding the status of their agency's efforts to review the financial disclosure reports of Senate-confirmed appointees. These "report cards" have generally resulted in agencies getting annual filings to OGE earlier in 2015 than in prior years.

4. Development of the Electronic Filing System for Public Financial Disclosure Required by the Stop Trading on Congressional Knowledge Act of 2012

The STOCK Act created significant new legal requirements for OGE and the executive branch ethics program, resulting in a permanent increase in workload across all of OGE's functions. The most significant of these requirements tasked OGE with developing an electronic filing system for the approximately 26,000 executive branch public financial disclosure filers.

Although quite a significant undertaking for a small agency like OGE, I am pleased to report that on January 1, 2015, we successfully launched *Integrity*, a secure, web-based electronic filing system for the executive branch. OGE named its new electronic filing system "*Integrity*" to emphasize to users the importance of financial disclosure for preventing conflicts of interest. OGE contributed its own extensive financial disclosure expertise to develop a system that significantly enhances the filing, review, and program management aspects of the executive branch public financial disclosure program. A combination of smart data-entry tables and context-dependent questions helps filers disclose all of their reportable financial interests with increased accuracy. *Integrity* enables agency ethics officials to assign, review, track, and manage reports electronically. OGE also focused on ensuring the security of user access and maintaining data. Notably, *Integrity* is hosted in a secure government cloud and has successfully undergone a full, independent security assessment. Both *Integrity*'s authentication provider and host are authorized under GSA's Federal Risk and Authorization Management Program (FedRAMP). Using a shared-services model with operational funding in OGE's budget, OGE is continuing to make *Integrity* available to executive branch agencies without charge, thereby reducing duplication and fragmentation within the executive branch.

In less than a year, we have registered 88 agencies and nearly 10,000 filers in the system. Our first major test came during the 2015 annual financial disclosure cycle, and the results exceeded our greatest expectations. Based on feedback from current agency users, *Integrity* has already resulted in more accurate and complete public financial disclosures. We also received a 90% favorable rating from agency administrators who responded to a satisfaction survey.

5. Direct Assistance to Stakeholders

OGE provides direct assistance to stakeholders in the executive branch ethics community. The primary recipients of this support are agency ethics officials, who are responsible for providing ethics services to the 2.7 million civilian employees at the more than 130 executive branch agencies. OGE's Desk Officers assist agency ethics officials in evaluating complex issues, provide information about how other agencies are implementing ethics requirements, and give guidance on OGE's policies regarding program activities. The Desk Officers are also able to assist agencies in implementing the recommendations that OGE makes through its program reviews. To enhance OGE's staff expertise to perform this complex work, I launched an aggressive Employee Development Program. As a result, feedback about Desk Officer responses to the nearly 2,000 requests for assistance received this year was very favorable: 91% of respondents to OGE's executive branch-wide customer satisfaction survey indicated that the assistance provided by OGE's Desk Officers has been effective in helping them do their jobs. In addition, OGE leverages technology by using information collected through Desk Officer

interactions in order to make data-driven decisions about how best to serve agency ethics programs and identify agencies in need of special outreach.

OGE also actively supports the investigative and enforcement communities. For example, As Director of OGE, I serve as a statutory member of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), the body that addresses integrity, economy and effectiveness issues across government, and aids in developing a professional and highly skilled workforce in Offices of Inspectors General. As Director of OGE, I participate in CIGIE's monthly meetings and have had the pleasure of making two presentations to the Council. As Director, I also serve as a statutory member of CIGIE's Integrity Committee, which investigates allegations against individual Inspectors General. On a day to day basis, OGE also works closely with Inspectors General who request assistance in interpreting the complex ethics laws and regulations in connection with investigations. In addition, OGE actively provides training for investigators in Offices of Inspectors General throughout the executive branch. OGE has provided similar assistance and training to prosecutors and the staffs of U.S. Attorneys, including occasions when investigations have led to prosecutions and civil penalty enforcement. Finally, with information provided by U.S. Attorneys, OGE publishes an annual prosecution survey to raise awareness of the consequences of violating ethics laws.

OGE responds to numerous contacts from other outside sources, such as non-governmental organizations, government contractors, the media, and individual members of the public. We also regularly provide technical assistance to Congressional committees in connection with legislation directly or indirectly related to ethics issues. Similarly, we provide support for the State Department's international anti-corruption work. Since OGE's last authorization, OGE has briefed hundreds of delegations comprised of thousands of foreign officials about the executive branch's ethics program at the request of the State Department. OGE also regularly provides the State Department with substantial support for the United States' participation in anti-corruption mutual evaluation mechanisms designed to monitor compliance with international anti-corruption standards.

In my time as Director, OGE has also undertaken a significant effort to improve stakeholder awareness and communications. Internal to the government, OGE has directed communications efforts toward officials whose activities intersect with the ethics program. OGE initiated a forum of ethics officials from the four supervising ethics offices of the three branches of the federal government, which now meets regularly to share expertise and address common issues. OGE also recently actively engaged with the employee relations community, who are key partners in the administrative enforcement of ethics violations. Externally, OGE has been focusing on ensuring that its communications through social media, its website, and the media are carefully tailored for our external stakeholders. These communications provide stakeholders with a greater understanding of OGE's work and help create opportunities for coalition-building and collaboration with key external partners such as government watchdogs and private sector compliance practitioners. In support of these efforts, I have personally posted 30 articles to educate the public about OGE's work in a section of our website called "Director's Notes."

6. Ethics Education

A fundamental way that OGE ensures uniformity and helps agencies prevent conflicts of interest and other ethics concerns is by training the community of roughly 4,500 executive branch ethics officials. This work is of vital importance and has been a focus of mine as Director. OGE teaches them how to review financial disclosure forms for conflicts of interest, provide advice and counseling on the ethics rules, train their agencies' employees on applicable ethics obligations, and promote an ethical culture within their organizations. For example, OGE faced the challenges of a large and geographically dispersed audience with limited resources. As a result, OGE pursued an aggressive reinvention of its approach to delivering training. Since I became Director, we have leveraged technology to steadily increase our reach from an average of about 1,400 registrations per year in the first five years after OGE's last authorization to more than 7,500 registrations in fiscal year 2015. In addition, OGE has innovated by helping agency ethics officials provide critical ethics training to the millions of employees in the executive branch. OGE hosts training development workshops to bring ethics officials together to create relevant, targeted, and effective ethics training products. We then share those and other agency and OGE-created products through a variety of means including our virtual training products library, and distance learning events. In turn, the approximately 4,500 agency ethics officials provide annual ethics training to approximately 450,000 federal employees, as well as ethics orientations to all new employees. This exchange improves the efficiency, effectiveness and uniformity of training while reducing redundancy and minimizing costs.

During my tenure, OGE has also found ways to reinvent its traditional training conference. By leveraging federal space and technical support offered by agency partners, we held our first National Government Ethics Summit in 2014 for approximately 500 in-person and 4,000 virtual attendees for only about \$10,000, or less than 1% of the cost of previous traditional ethics conferences. This event and many of our routine training efforts are also more transparent than ever. The National Government Ethics Summit and dozens of our regular training courses have been streamed live on our YouTube and Google+ channels, where they remain available as on-demand training courses to any ethics official or citizen with an internet connection. The Summit presentations alone have been viewed more than 5,500 times. Even in the area of traditional classroom instruction, OGE has found opportunities to increase efficiency. OGE has implemented a certification program that allows agency ethics officials, at no cost to their agencies, to teach OGE's courses to other ethics officials and to employees in their agencies. This program reduces redundant course and training material development while promoting accuracy and consistency in the ethics training across government.

We have not only expanded the reach of our ethics education program, cut costs, and enhanced transparency; we have also made sure that these educational efforts meet the highest standards of quality. More than 90% of respondents consistently report being better able to do their jobs as a result of attending our training events.

7. Engaging Senior Leaders on the Importance of Compliance and Ethical Culture

OGE has a unique role and responsibility in bringing visibility and awareness of the importance of ethics to the highest levels of leadership of the government. We accomplish this in

a number of important ways. Since I became Director, OGE has recognized the value of leveraging its work with nominees and supporting Presidential transitions to introduce incoming agency leaders to the executive branch ethics program. We continue to underscore with these leaders the necessity of a strong ethics program through our oversight activities, such as program reviews, as well as through direct communications, such as our annual reports to agency leaders on the status of each agency's annual financial disclosure program. But our work does not end there. During my tenure we have continued to seek new opportunities to engage leadership on ethics and to explore emerging trends. For example, I have offered to meet personally with new agency heads to encourage them to take an active role in their agencies' ethics programs and to inform them about the support OGE can provide in that endeavor. I have also tasked OGE's education group to continue creating innovative tools and products that can be used by agency ethics officials to reinforce the message with their leadership that an ethical culture must be supported at the very top echelons of government in order to be successful. OGE has also begun offering training that incorporates emerging trends in ethics, such as enterprise risk management and the role of a strong ethics program in reducing risk.

OGE helps to create a management culture across government that incorporates values-based decision making. For example, OGE has provided recommendations to the Office of Management and Budget to incorporate ethics and ethics officials in their guidance to agencies for establishing Enterprise Risk Management (ERM) frameworks. These recommendations have already created opportunities for ethics officials to engage with their agency leadership through the ERM process. Whenever we see these opportunities, we communicate them to senior ethics officials through a variety of means including traditional and distance learning events. OGE's two most recent distance learning events on ERM reached more than 250 ethics officials.

At its heart, the executive branch ethics program is a values-based program. The fourteen principles of ethical conduct, first set out by President George H. W. Bush in Executive Order 12674, are the shared values of public service that capture the spirit of public service in the nation. Building on these principles, OGE has actively promoted an ethical culture and public confidence through transparency and communications. OGE has consistently encouraged agencies to innovate in pursuit of stronger ethical culture and to share with the executive branch ethics community the results of their innovations. OGE has also conducted training sessions and live-streaming broadcasts to disseminate these innovations. Through collaboration, communication, and transparency, OGE aims to sustain a government in which ethical values are embodied by leaders, integrated into agency management, supported by organizational cultures, and safeguarded by enforceable rules.

II. Reauthorization

As you can tell from this discussion of our work, OGE is a small agency with a big mission of prevention. OGE's purpose is to bring uniformity, continuity and transparency to the executive branch ethics program through enforceable standards, financial disclosure, advice and counsel, education, and oversight. The agency's success in carrying out this wide range of activities is the product of hard work and exemplary dedication of our staff of 70 employees. At one point in its history, OGE's funding enabled it to carry out the same work with over 100 employees. Nevertheless, our more streamlined staff has excelled by taking on cross-functional

responsibilities that reach across branches and divisions. We deploy our resources to the functions needing the most attention. As with the financial disclosure cycle and the Presidential transition cycle, these shifting demands are often predictable and can be managed through careful planning. Other times, the ebb and flow of work is less predictable, but we have shown that we can adapt to changing circumstances. I think OGE's results speak loudly to that point.

With this background on OGE's important prevention work and the framework in which we operate, I ask that the U.S. Office of Government Ethics be reauthorized for a period of seven years, from 2016 through 2022. This seven-year timing would avoid the risk of the next reauthorization effort coinciding with a Presidential transition, a time when OGE's resources will be stretched thinnest. In addition, I ask that OGE be authorized such amounts as needed to carry out the Ethics in Government Act, as has been the case over the past two decades since 1996. OGE is also seeking a limited number of technical corrections to the Ethics in Government Act to more accurately reflect current law and practice. A draft of our proposed reauthorization bill and summary has been provided informally to your staff. I thank you for the opportunity to testify today about OGE's unique role and important work in preventing conflicts of interest in the executive branch. I am happy to answer any questions you may have.

Mr. MEADOWS. Thank you for your testimony.
 Ms. Lerner, you are recognized for 5 minutes.

STATEMENT OF THE HONORABLE CAROLYN N. LERNER

Ms. LERNER. Thank you, Chairman Meadows, Ranking Member Connolly, and members of the subcommittee.

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel. I also want to thank Chairman Chaffetz for your being here today and for your ongoing interest in OSC's work. Under your leadership and with Ranking Member Cummings, we reformed the Hatch Act in 2012 and, last year, in response to whistleblower disclosures and your oversight, prompted changes to overtime at the Department of Homeland Security, saving hundreds of millions of dollars a year. So thank you for being here.

I am also pleased to be here today with Chairman Grundmann and Director Shaub. I appreciate the committee's interest in reauthorizing OSC. The Office of Special Counsel provides a safe and secure channel for government whistleblowers who report waste, fraud, and abuse, and threats to public health and safety.

OSC also protects veterans and servicemembers from discrimination under the Uniformed Services Employment and Reemployment Rights Act, or USERRA, and we enforce the Hatch Act, which keeps partisan political activity out of the workplace.

By nearly every statistical measure, OSC is operating more efficiently and effectively than at any time in its history. For example, in 2015, OSC received and resolved approximately 6,000 cases, a 55-percent increase since I took office in 2011.

We are also getting better results for whistleblowers. For instance, in 2015, OSC secured 268 favorable actions, up from only 29 favorable actions a few years ago.

Beyond statistics, our successes in individual, high-impact cases show how OSC promotes better and more efficient government. For example, our work with whistleblowers has prompted improvements at VA medical centers across the country. It has saved hundreds of millions of dollars every year in overtime payments at the Department of Homeland Security. And we helped the Air Force fulfill its sacred mission on behalf of fallen servicemembers and their families.

We are promoting integrity through a robust enforcement of the Hatch Act, and we are protecting the jobs of returning servicemembers and members of the Reserves and Guard.

Many of our recommendations for OSC reauthorization would help to ease the burden resulting from the increased demand for our services. In addition to reauthorizing OSD for 5 years, we have some recommendations.

First, we ask Congress to streamline OSC's access to agency information. This will assist our investigations of retaliation and reviews of whistleblower disclosures. Statutory access to agency records would be similar to the authorities provided to the inspectors general and the Government Accountability Office. It will help avoid unnecessary and duplicative government investigations and lead to quicker and better results.

Second, we ask that Congress increase agency accountability in whistleblower disclosure cases. Over the last 3 years, agencies sub-

stantiated 90 percent of the allegations that we referred to them for investigation. Typically, the agency will commit to taking corrective actions to remedy the misconduct. But sometimes the corrective plans are insufficient or their actions are incomplete at the time that I send my final report to the President and to Congress.

When there is substantiated misconduct, we recommend that Congress require agencies to provide an explanation if they fail to take an action, including disciplinary action. And for any agency action that is planned but not yet implemented, OSC should have statutory authority to request detailed followup information.

Third, Congress should consider reducing the procedural requirements imposed on OSC in certain prohibited personnel practice cases. The current requirements are onerous and unnecessary. In every case, regardless of the merits, title V requires OSC to take several procedural steps before closing a file. These requirements are unique to OSC and use a large amount of our resources. The proposed changes would allow us to generate more positive outcomes on behalf of whistleblowers and the American taxpayers.

Fourth, OSC recommends that Congress eliminate the annual survey requirement that was passed as part of a prior OSC reauthorization. In addition to having little statistical or informational value, the survey is costly and time-consuming, and it takes away from our other duties. We recommend that Congress eliminate this requirement so OSC can dedicate our limited resources to actual case work.

Finally, my written testimony includes some additional proposals that are of a technical nature.

I want to thank you for considering these options to improve OSC's authorities. I would be very happy to answer any questions that the committee may have.

[Prepared statement of Ms. Lerner follows:]

**Testimony of Special Counsel Carolyn N. Lerner
U.S. Office of Special Counsel**

**U.S. House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Government Operations**

Reauthorization of the U.S. Office of Special Counsel

December 16, 2015, 10:00 A.M.

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC). I am pleased to be here today with Chairman Grundmann and Director Shaub. I greatly appreciate the Committee's interest in reauthorizing OSC and strengthening our ability to carry out our good government mission.

I. The Office of Special Counsel

OSC promotes accountability, integrity, and fairness in the federal workplace. We protect federal employees from "prohibited personnel practices" (PPPs), including retaliation for whistleblowing. We provide a safe and secure channel for government whistleblowers to report waste, fraud, abuse, and threats to public health and safety. Further, OSC protects veterans and service members from job discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA). And, we enforce the Hatch Act, which keeps partisan political activity out of the federal workplace. OSC also prioritizes outreach and education to federal employees and managers to prevent violations of these merit systems laws before they occur.

As Congress considers reauthorizing OSC for the first time in many years, I am pleased to report that this office is operating more efficiently and effectively than at any time in its history. For example, OSC received and resolved approximately 6,000 cases in 2015, a 55 percent increase in case volume and productivity from when I took office in 2011. By eliminating unnecessary expenses and implementing efficiency measures, we cut our cost to resolve a case to historic lows. In 2010, OSC's cost per case was \$5,174. In 2015, we dropped that number to \$3,696, allowing us to review and process thousands of additional cases each year with comparable resources, and without compromising quality or results. As summarized below, in each of OSC's program areas, we have achieved remarkable successes on behalf of whistleblowers and the taxpayers, while cutting costs and adapting to record-setting levels of cases.

A. Investigations of prohibited personnel practices

OSC's primary mission is to investigate allegations of whistleblower retaliation, one of the thirteen PPPs that federal employees may challenge with our office. After receiving a retaliation complaint, we conduct an investigation to determine whether the employee has been fired, demoted, suspended, or subjected to some other personnel action because the employee blew the

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whistle. If OSC can demonstrate that a personnel action was retaliatory, we work with the agency to provide relief to the employee. OSC also commonly works with the agency involved to implement systemic corrective actions, such as management training on whistleblower protections. Frequently, we resolve cases through alternative dispute resolution, including mediation. If the agency does not agree to provide the requested relief to the employee, either through mediation or based on our investigative findings, we have the authority to initiate formal litigation on behalf of the whistleblower before the Merit Systems Protection Board (MSPB). In egregious cases, we can also petition the MSPB for disciplinary action against a subject official.

In 2015, we were able to secure 278 “favorable actions” for whistleblowers and other employees. Only seven years ago, the total number of favorable actions was 29. These victories for whistleblowers include reinstatement, back pay, and other remedies, such as stays of improper removals or reassignments and disciplinary actions against those who retaliate. Helping courageous public servants maintain successful careers after facing retaliation is a central role for OSC, and each year, we have been able to generate more of these important actions. In recent years, OSC secured relief for these and hundreds of additional courageous whistleblowers:

- Dr. Katherine Mitchell blew the whistle on critical understaffing and inadequate triage training in the Phoenix Department of Veterans Affairs’ Medical Center (VAMC). Dr. Mitchell disclosed that Phoenix VAMC leadership engaged in a series of targeted retaliatory acts that included removing her as Emergency Room director. Working with OSC, the VA settled Dr. Mitchell’s claim and agreed to, among other things, assign her to a new position in the VA that allows her to oversee the quality of patient care.
- Bradie Frink is a disabled Army veteran who was hired at the Baltimore Regional Office of the Veterans Benefits Administration in February 2013. The VA mismanaged Mr. Frink’s benefits claims, delaying his ability to receive care for him and his family. Mr. Frink sent a request for assistance to Senator Barbara Mikulski. Shortly thereafter, the VA terminated Mr. Frink during his probationary period. OSC investigated and submitted a report with our findings to the VA. The VA agreed to provide full corrective action for Mr. Frink, including reemployment with the agency, back pay for the months of unemployment, and compensatory damages for emotional distress. OSC further recommended that the VA consider disciplinary action against two of Mr. Frink’s supervisors.
- Franz Gayl, a Marine Corps civilian scientist, blew the whistle about delays in the military’s procurement of blast-resistant trucks known as Mine Resistant Ambush Protected vehicles. Mr. Gayl raised congressional awareness of the problem at a time when U.S. troops were increasingly vulnerable to death and injury from improvised explosive devices in Iraq. Mr. Gayl alleged retaliation for his whistleblowing. OSC investigated his claims, and Mr. Gayl and the Marine Corps successfully resolved his complaints through OSC’s alternative dispute resolution program.
- Teresa Gilbert, an Army civilian infection control analyst at Womack Army Medical Center in Fort Bragg, North Carolina, disclosed violations of infection control policies

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and regulations that created a significant threat to the health and safety of patients. Her disclosures resulted in improved hospital conditions and significant disciplinary action against senior leaders at Womack. In response to OSC's investigation, the Army reached a settlement with Ms. Gilbert.

These are important victories for employees who risked their professional lives to improve government operations, promote accountability, and protect the taxpayers.

B. Whistleblower disclosures

OSC provides a safe channel through which federal employees may allege violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Unlike its role in retaliation and other PPP cases, OSC does not have investigative authority in disclosure cases. Rather, OSC evaluates disclosures of information to determine whether there is a "substantial likelihood" that wrongdoing has been disclosed. If OSC makes a "substantial likelihood" determination, I transmit the information to the head of the appropriate agency. The agency head, or their designee, is required to conduct an investigation and submit a written report on the investigative findings to my office.

Upon receipt of the agency's report, I am required by law to determine whether the report contains the information mandated by the statute and whether the findings of the agency head appear reasonable. I then transmit the report with my office's determination and the whistleblower's comments to the President and the congressional committees with oversight responsibility for the agency involved. OSC is also required to place the report and whistleblower comments in a public file.

Through this process, Congress has tasked OSC with a critical oversight role in reviewing allegations of potential government misconduct. The system helps improve government operations in three key ways. First, if an agency is reluctant to investigate possible wrongdoing raised internally by a whistleblower, OSC can require the agency to conduct an investigation. Second, OSC provides an important accountability and quality control function in the investigative process. The whistleblowers, who are commonly the experts on the subject matter of the allegations, are allowed to comment on the quality of the investigation and corrective actions. OSC also maintains a dialogue with the investigating agency throughout the process to make sure that the actions taken are reasonable and address the concerns raised by the whistleblowers. Finally, the process is transparent. At the conclusion, OSC posts the results on our website, creating a public record of all cases which have been referred for investigation.

In recent years, the OSC disclosure process has prompted significant changes in government operations. Our cases have saved lives and millions of taxpayer dollars. For example:

- Whistleblowers at the Air Force's Port Mortuary in Dover, Delaware, disclosed misconduct regarding the improper handling of human remains of fallen service members. After OSC reviewed the allegations and made recommendations, the Air Force took important, wide-scale corrective action. OSC's work helped to ensure that problems

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were identified and corrected, and the Air Force is now better able to uphold its sacred mission on behalf of fallen service members and their families.

- In addition, OSC's work with whistleblowers at the Department of Homeland Security (DHS) exposed the department's longstanding failure to manage hundreds of millions of dollars in annual overtime payments. The lack of adequate safeguards in these overtime payments resulted in a significant waste of taxpayer dollars over many years. Repeated investigations in response to OSC referrals confirmed that overtime payments were routinely provided to individuals who were not eligible to receive them. This work resulted in a series of reforms within DHS, multiple congressional hearings, and bipartisan support for legislation to revise the pay system for Border Patrol agents that will result in \$100 million in annual cost savings at the Department of Homeland Security—an amount roughly five times the size of OSC's annual appropriation.
- Finally, in a report to the President and Congress last year, OSC documented severe shortcomings in Department of Veterans Affairs' (VA) investigations of threats to patient care at VA hospitals. This work with VA whistleblowers led to an overhaul of the VA's internal medical oversight office, drastically improving the reports now issued in response to OSC referrals. Just recently, a VA report confirmed an egregious threat to the health and safety of veterans at a medical center in Beckley, West Virginia. In order to meet budget goals, the facility altered prescriptions for veterans over the objections of their mental health providers, with no medical reason for the substituted drugs, in violation of VA policies. The VA investigated, determined that the substitutions created medical risks for the impacted veterans, and recommended both corrective steps to be taken and disciplinary actions for those responsible. It is this type of accountability that the OSC disclosure process promotes.

Through OSC's review of hundreds of VA whistleblower disclosures, OSC has played a pivotal role in the efforts to promote confidence and restore accountability at the VA.

C. OSC's Hatch Act program

OSC's Hatch Act Unit enforces and investigates complaints of unlawful political activity by government employees under the Hatch Act, and represents OSC in seeking disciplinary actions before the MSPB. In addition, the Hatch Act Unit is responsible for providing legal advice on the Hatch Act to federal, Washington, D.C., state, and local employees, as well as to the public at large. OSC issues thousands of informal and formal advisory opinions during a typical presidential election cycle, and we expect the number of requests for advice and formal complaints to increase sharply over the coming months.

In general, the Hatch Act prohibits all federal employees from soliciting, accepting, or receiving political contributions from any person and, with limited exceptions, engaging in any political activity while on duty or in the federal workplace. Federal employees, including high-ranking officials, may not engage in political activity in their official capacity or otherwise use their official authority for the purpose of interfering with or affecting the result of an election. Some

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federal employees are further restricted under the Hatch Act, meaning they may not take an active part in partisan political management or partisan political campaigns. Recent cases that illustrate these important restrictions include the following:

- In January 2015, OSC filed a complaint with the MSPB, alleging that a career senior executive service (SES) official at the Department of Agriculture (USDA) approached a subordinate and outlined the official's proposal to establish a political action committee (PAC) in support of President Barack Obama's 2012 reelection campaign. The official told the subordinate that the official hoped to obtain a political appointment by contributing a large sum of money to President Obama's campaign and that if the subordinate contributed to the official's proposed PAC and the official received a political appointment, the official would help the subordinate obtain a career SES position. OSC alleged that the official asked the subordinate for a \$2,400 contribution and twice in October 2011 suggested that the subordinate contribute their performance bonus to the proposed PAC. The official solicited the subordinate again in January 2012. OSC also alleged that in September 2011, the official informed another USDA coworker of the proposed PAC, asked the coworker to contribute \$2,000, and told the coworker that donating to PACs is how federal employees advance their careers. Shortly after OSC filed its complaint, the USDA official retired from federal employment. The MSPB dismissed the case without prejudice, allowing OSC to refile within five years if the official returns to federal service.
- In a recent case, OSC investigated allegations involving a GS-15 Federal Emergency Management Agency employee who hosted a partisan political fundraiser and used his personal email account to invite others to attend and make a contribution. The employee also forwarded fundraising invitations for other candidates, sometimes while he was at work. He also recruited campaign volunteers, planned candidate events, and posted partisan messages to Facebook while at work. In addition to the Hatch Act information his agency provided him, his supervisor specifically warned him about engaging in prohibited political activity. Despite this warning, the employee continued to engage in activity that violated the Hatch Act. As disciplinary action for his admitted violations, the employee agreed to accept a 112-day suspension without pay.

In addition to these types of enforcement actions, to better educate the federal workforce and prevent Hatch Act violations from occurring in the first place, OSC conducts training and outreach sessions for employees, as detailed below.

D. Uniformed Services Employment and Reemployment Rights Act

OSC protects the job rights of members of the Armed Forces employed by the federal government. OSC's USERRA Unit protects service members and veterans from employment discrimination and allows them to regain their civilian jobs and benefits upon their return from service. OSC's jurisdiction is limited to USERRA cases filed by service members and veterans who hold jobs (or apply for jobs) with federal Executive agencies. OSC receives USERRA cases from the Department of Labor (DOL) following an initial investigation and attempted resolution

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by DOL. Some examples of USERRA cases OSC successfully resolved during the last fiscal year are:

- An Army Reservist sustained injuries during military service, rendering him unable to perform his former duties as a Federal Air Marshal after his discharge. OSC intervened and negotiated a settlement whereby the agency agreed to place the Reservist on paid light duty for approximately six months while his disability retirement application was processed.
- The Air Force refused to allow the reemployment of an Army National Guard member as a federal contractor following his return from active duty. As a result, he was unemployed for several months before finding a new job. OSC informed the Air Force that it could be liable for improperly interfering with the Guardsman's reemployment rights under USERRA. After OSC's intervention, the Air Force agreed to pay the Guardsman \$18,500 in lost wages as compensation.
- A National Guardsman alleged that his federal agency threatened him with termination because the agency believed his military service made him "unreliable." His agency also denied him other benefits of employment, including overtime, temporary overseas duty assignments, promotion, and training. OSC's Alternative Dispute Resolution (ADR) Unit mediated the case. As a result, the Guardsman agreed to withdraw his USERRA claim in exchange for both monetary and time off awards, an assigned mentor to help prepare him for advancement, and the opportunity for a temporary overseas duty assignment. The agency also agreed to conduct USERRA training for supervisors and managers to reduce the risk of future USERRA violations.

E. Outreach and education

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. Since my tenure as Special Counsel began in 2011, OSC has expanded its education and outreach efforts in all of our program areas, including prevention of PPPs, whistleblower disclosures, Hatch Act, and USERRA. OSC provides formal and informal outreach sessions, including making materials available on the agency website. OSC provided 104 outreach sessions during FY 2014 and 118 in FY 2015.

In addition, federal agencies have a statutory obligation to inform their workforces about the rights and remedies available to them under whistleblower protection 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 Whistleblower Protection Act, and the Whistleblower Protection Enhancement Act; and display a link to OSC's website on the agency's website or intranet.

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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. To date, we have certified 46 agencies or agency components under our program and 20 agencies or components are currently registered to become certified.

Similarly, OSC continues to proactively engage with Offices of Inspector General across the federal government. For example, as Special Counsel, I am a member of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) and its Integrity Committee. Senior OSC leadership also participate in the Offices of Inspector General Whistleblower Protection Ombudsman working group, as well as DOL's Whistleblower Protection Advisory Committee.

II. OSC Reauthorization

The demand for OSC's limited resources, in each of the program areas described above, has skyrocketed since 2013. OSC has approximately 135 employees and, as stated, we received approximately 6,000 cases in 2015. Our dedicated employees have responded admirably to this surge in cases. But the rapidly growing caseload places enormous strains on our small staff and is not sustainable. For example, in our Complaints Examining Unit, which does the initial review and attempted resolution in PPP cases, each employee currently handles a docket of 70 cases, up from 31 in 2012. In our Disclosure Unit, which receives and evaluates whistleblower disclosures, each employee carries a docket of over 40 cases, up from 13 in 2012.

The recommendations to the Committee for OSC reauthorization would help ease the burden resulting from the increased demand for our services. The recommended changes would also allow OSC to better fulfill its good government mission. In addition to reauthorizing OSC for a period of five years, OSC has the following recommendations.

A. Clarifying and streamlining OSC's access to agency information

OSC recommends that Congress establish statutory authority for the Special Counsel to seek information, including certain privileged information, from government agencies. This will assist OSC in its independent investigations of whistleblower retaliation and other PPPs and in our reviews of whistleblower disclosure cases. Statutory access to agency records would be much like the authorities Congress has provided to Inspectors General and the Government Accountability Office.

Currently, OSC's authority to request documents is regulatory. An Office of Personnel Management (OPM) regulation directs agencies to comply with information requests from OSC. While agencies typically comply with our OPM civil service rule 5.4 requests, we have had some difficulty in our investigations where agencies do not provide timely or complete responses or claim common law privileges as a basis for withholding documents.

Congress has tasked OSC with determining the legality of personnel actions taken against whistleblowers. Our investigations typically assess whether an agency acted for legitimate, non-retaliatory reasons, or whether agency justifications are really a pretext for retaliating against an

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employee. To make these assessments, it is often necessary to review communications between management officials and agency counsel. In fact, these communications can demonstrate that management officials acted responsibly, sought legal advice, and had a legitimate basis for disciplining a purported whistleblower. Yet, agencies frequently assert that these communications are privileged and withhold this information from OSC. In such cases, OSC must engage in prolonged disputes over access to information or attempt to complete our investigation without the benefit of highly relevant communications. This undermines the effectiveness of the whistleblower law and prolongs OSC investigations.

We recommend that Congress clarify OSC's ability to receive all information from agencies, including information that may be protected by common law privileges in other contexts. It is inconsistent with the historical intent of the attorney-client and deliberative process privileges to assert them in the course of an intra-Executive branch investigation. This is particularly true where OSC must step into the shoes of the agency to determine whether the agency allowed illegal conduct to occur. The public interest in a transparent and accountable government is best served by allowing OSC access to all information, including potentially privileged information. More important, the privileges should not be used to shield government managers from accountability for their actions, or to hide potentially retaliatory conduct.

In addition to providing better access to information in our reprisal investigations, we also recommend that Congress clarify OSC's ability to receive information to assist in our review and resolution of whistleblower disclosure cases. This will help OSC to avoid unnecessary and duplicative government investigations. In both our retaliation investigations and our review of whistleblower disclosures, direct and clear access to agency records will help us resolve disputes over documents more quickly, resulting in faster relief for employees, and better enabling OSC to respond to the increased demand and case levels.

B. Increasing agency accountability and oversight in whistleblower disclosure cases

As described above, OSC provides a safe channel through which federal employees may allege violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

Over the last three fiscal years, OSC formally referred nearly 200 whistleblower disclosures for investigation. In response, agencies substantiated, in whole or in part, approximately 90 percent of the allegations. Typically, the agency will commit to taking corrective actions to remedy the identified misconduct. Nevertheless, sometimes the corrective action plans are insufficient or incomplete at the time OSC submits the report and whistleblower comments to the President and Congress.

To further strengthen the whistleblower disclosure process, we recommend that Congress enhance OSC's ability to ensure that agencies take action to correct substantiated claims of misconduct. Specifically, we ask that Congress require agencies to provide an explanation if they fail to take action, including disciplinary action, in the case of substantiated misconduct. And, for any agency action that is planned but not yet implemented, OSC should have the statutory authority to request and receive detailed follow-up information.

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OSC also recommends that Congress amend section 1213 to allow 45 days for the initial review of disclosures. This is a more realistic benchmark, given the increase in disclosure cases filed in recent years.

C. Modifying onerous procedural requirements on OSC in prohibited personnel practice cases.

In light of the steadily increasing workload, and to bolster OSC's ability to focus on meritorious claims, Congress should consider reducing the procedural requirements imposed on OSC in all PPP cases.

In 1994, the last time Congress considered significant changes to OSC's authorities and mandates, OSC received a total of 1,837 PPP allegations. In 2015, we received over 4,000. Accordingly, our PPP case intake more than doubled during that period, but staffing has remained relatively flat. It is important to note also that the rate of PPP cases accelerated significantly over the last five years. In 2010, the year before I took office, OSC received 2,415 PPP cases, which was consistent with the steady but slow increase of cases since 1994. But since 2010, OSC has absorbed a remarkable 1,600 case increase. We expect this total to further increase in 2016.

The requirements on OSC to close a PPP case, developed in 1989 and 1994, when OSC had far fewer cases and a comparable staff size, are extremely onerous. Summarized briefly, section 1214 of title 5 requires OSC to provide an employee with repetitive status reports, a detailed, fact-based letter, the legal reasons for terminating the investigation, and an opportunity to comment before OSC may close a complaint file. All of these steps are required, regardless of the complaint's merits. The steps are required even if OSC does not have jurisdiction over the allegations, if the same allegations had been filed previously with OSC, if the MSPB or another judicial or administrative forum is already considering the claim, and even if the case is 10 years old, as there is no statute of limitations on cases brought to OSC.

These requirements cause us to devote significant resources to *closing* non-meritorious, repetitive complaints, or ones in which OSC has no jurisdiction, instead of focusing on prosecuting and resolving meritorious cases. These requirements are unique to OSC, and hinder our ability to use our prosecutorial discretion to allocate resources to strong cases.

OSC recommends changes to section 1214 of title 5 that would allow OSC to spend its limited resources on the investigation and prosecution of strong cases. Quite simply, we believe the onerous procedural requirements should not apply in certain categories of cases, such as old claims, repetitive claims, and those in which OSC does not have jurisdiction or the employee has sought relief elsewhere. Such changes would also provide OSC with the ability to generate more positive outcomes on behalf of whistleblowers, the merit system, and the taxpayers.

D. Updating public reporting requirements to correspond to OSC's current practice.

Congress may want to consider requiring OSC to make more information available to the public in whistleblower disclosure cases. These recommended changes are consistent with OSC's

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current practice, which is to post to OSC's public file the whistleblower's comments on the agency's investigative report (where appropriate and with the consent of the whistleblower), and OSC's analysis of the completeness and reasonableness of the agency's investigation and corrective actions.

E. Annual survey

OSC recommends that Congress eliminate the annual survey requirement that was passed as part of an OSC reauthorization in the 103rd Congress. Under this provision, OSC is required by statute to conduct a survey of the employees who sought OSC's assistance during the previous fiscal year. The survey was intended to evaluate OSC's "customer service." In reality, however, the survey results change little from year to year, no matter how effectively OSC is resolving complaints. The information adds little value to the public understanding of OSC's work, as it suffers from an irreparable response bias—the survey is largely completed by employees whom OSC was not able to assist. For example, in 2014, only 10 percent of recipients responded, and only 9 out of 199 respondents stated that they "obtained the result they wanted from OSC." In addition to having little statistical or informational value, the survey is costly and time-consuming for OSC to carry out. We recommend that Congress eliminate the requirement.

I also note that we are taking practical steps to improve the customer experience at OSC. For example, I recently established a new project, the Retaliation and Disclosure Team, which implements a common sense and potentially more efficient model for handling whistleblower cases. OSC's historical practice has been to assign several attorneys to review the same set of facts in cases in which an employee files both a whistleblower disclosure and a retaliation complaint. In addition to improving our agency's efficiency, the new model improves the customer experience at OSC, as one person can review, assist, and resolve all aspects of an employee's case. Complainants have expressed relief at not having to dissect their story to provide only the retaliation side to one attorney and only the disclosure components to another. The facts are often interwoven, and complainants find it helpful to be able to tell one person the full story. Having a single point of contact with OSC also improves the experience from the agency's perspective.

F. Technical amendment to Hatch Act penalties

In 2012, Congress passed the Hatch Act Modernization Act, which provided for a range of penalties for Hatch Act violations. In 2012, Congress also passed the Whistleblower Protection Enhancement Act (WPEA). A provision in the WPEA provided that the MSPB could impose a "combination" of penalties for PPP violations. For consistency, the Hatch Act penalty language in section 7326 of title 5 should mirror the PPP penalty language in section 1215 of title 5, and also allow for a "combination" of penalties or sanctions.

* * * * *

I thank you for the opportunity to testify today and for considering these options for improving OSC's authorities. I would be happy to answer the Committee's questions.

Mr. MEADOWS. Thank you, Ms. Lerner.

The chair will recognize himself for 5 minutes for a series of questions.

Thank you for the invitation. I can tell you we'll take note of that. One of the things that the ranking member and I enjoy doing is actually reaching out to a number of the Federal agencies. I've been concerned, I guess, and very surprised to find that many times as we have made the visit, it is sometimes the first time a Member of Congress has ever shown up at an agency. So shame on us. I am committed, along with my ranking member, to make sure we change that. So thank you for the invitation.

Let me focus real quickly on the whistleblower aspect because I think we've got, Ms. Grundmann and Ms. Lerner, two different kinds of areas that address that. But as we look at whistleblowers, one of the reoccurring themes that has been very disconcerting to me has been the retaliation against whistleblowers and, in even in highlighting that, that it continues to go on. And so what happens is it has a chilling effect on those who are willing to speak up. We did an email address here which was a "Tell Mark" email address, and we started getting all kinds of whistleblower information, but the overriding concern, in fact, I've gotten from the Secret Service, a number of agents who have called me from New York to California and in between, is that they want to do it anonymously because there has been retaliation in real terms, whether it be with lack of promotion—sometimes it is more subtle. How do we work with your two agencies to make sure that we correct that? Anybody want to weigh in on that?

Ms. Lerner?

Ms. LERNER. Sure, well, they would start with us. And if an employee has a complaint, either a disclosure of waste, fraud, or abuse, or a health or safety issue, which we've been seeing in greater increasing amounts from the VA especially, they can come to us and say they want to do it anonymously.

Mr. MEADOWS. But here is what I'm finding is, is as they do that, the minute they raise that profile, what happens is, is somehow the information leaks out. I guess my question is, is there any special intervention that the special counsel does when we see it trying to undermine the very rules that we have in for whistleblower protection?

Ms. LERNER. Sure. We have a very robust Investigation and Prosecution Division that if there is any instance where a whistleblower believes that they are being retaliated against after having come to our agency and making disclosure, we can start with the agency by requesting an informal stay of any personnel actions. So if someone is threatened with their job or even threatened with like a demotion or a move, we can go to the agency and say: You need to stop; we think there is a basis here.

If they won't agree voluntarily to stop the adverse action, we can go to the Merit Systems Protection Board and formally ask them to do it.

I should tell you: Whenever we make a disclosure or send a disclosure over to an agency, we include in our referral sort of a warning that says, "You need to make sure and take active steps to make sure there is no retaliation against the whistleblower."

Mr. MEADOWS. So which agencies would you say have the worst track record as it relates to protecting whistleblowers.

Ms. LERNER. Well, in terms of pure numbers, we get the most complaints—in the last 2 years—from the Veterans Administration.

Mr. MEADOWS. But they feel a protection because it has been high profile. So outside of Veterans, who would it be?

Ms. LERNER. Our second—well, I'm not sure that they do feel protection. I mean—I'm sorry, the whistleblowers feel protection, or the VA does?

Mr. MEADOWS. No. Which agencies have the poorest record of protecting the whistleblowers? For example, giving retaliation in such a way that may not be direct retaliation, but it's indirect retaliation in that they get transferred or they don't get to move up because the retaliation is a lot more subtle a lot of times than what we're seeing. How do we address that?

Ms. LERNER. I think the first way is to send a strong message, has to start from the top of the agency that says: Retaliation isn't going to be—

Mr. MEADOWS. I guess what I am looking for is for this committee, what would be the three agencies we would need to look at closest as it relates to whistleblower retaliation?

Ms. LERNER. In terms of pure numbers, the VA is first.

Mr. MEADOWS. Okay. Who's second?

Ms. LERNER. Second is the Department of Defense. And I should note that the Department of Defense has double the number of civilian employees as the VA.

Mr. MEADOWS. And who would be third?

Ms. LERNER. Department of Homeland Security is probably—

Mr. MEADOWS. So all big, big—

Ms. LERNER. The large agencies have the largest numbers. I should say that the one agency where we have received a surprisingly small number of complaints is from the Secret Service.

Mr. MEADOWS. I can tell you that's very troubling because they have found my phone number, and I'm getting—you may get the smallest amount, but I can tell you also—and I know that he slipped you the note that you have got the smallest amount. I can give you a plethora of complaints as it relates to that.

One of the instances that I'm very concerned about is that once a whistleblower had made one particular comment, that there was an interview of almost every single employee trying to find out who that person was, and that's the kind of draconian management style that this committee is not going to adhere to. I'll go ahead and recognize the ranking member for 5 minutes for his questions, a generous 5 minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Ms. Grundmann—if we can hold on time.

Ms. Grundmann?

Ms. GRUNDMANN. Yes. I just want to chime in very quickly. We have essentially two answers for you. The first is we come on the back end after OSC has done their work. So we are the adjudicator in this process. The front end part is actually in our studies program, and if you look at our report on whistleblowing and barriers to whistleblowing, we actually ask people: Are you seeing prohibitive personnel practices? What happens when you see them? And

what happens if you disclose? Is there retaliation? So through the studies program, we get a plethora of answers—some of them multiple choice, some of them essay—that will talk about this anonymously and that we can analyze and then we can also publish. Thank you.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Chairman Grundmann, why has it taken 8 years to get to the point where we're hopefully going to consider reauthorization?

Ms. GRUNDMANN. There was an attempt previously to do, so it just sort of fell off the wagon, I guess, and was forgotten.

Mr. CONNOLLY. Congress fell off the wagon?

Ms. GRUNDMANN. Not Congress, but it never came to fruition, if you will.

Mr. CONNOLLY. Director Shaub, same question, from your perspective.

Mr. SHAUB. I don't actually have an answer for that. We have not had an authorization hearing since 2006.

Mr. CONNOLLY. 2007.

Mr. SHAUB. That's right. It ran out at the end of 2007. We have requested that from time to time. So I'm very pleased that you're holding the hearing this year, and we're thankful for being here.

Mr. CONNOLLY. Well, we didn't rush into it. We have 2-1/2 days left in this session, but all right.

Special Counsel Lerner, your perspective.

Ms. LERNER. When I was nominated in 2011, I was told that the agency hadn't been reauthorized.

Mr. CONNOLLY. I can't hear you. I'm sorry.

Ms. LERNER. Sorry. My mic is on.

Mr. CONNOLLY. Yeah, but you've got to speak into it.

Ms. LERNER. When I was nominated to be special counsel in 2011, I was told that the agency hadn't been reauthorized in a few years. And, frankly, it gave me a little bit of a pause to take the job because not knowing whether the agency was going to be around. But I was assured that it would be; we just needed to have a reauthorization process started. And it's something that we've been asking for periodically since I became special counsel. I'm really pleased that we're here today. Thank you.

Mr. CONNOLLY. Well, we've got sort of a different spirit on this committee, the leadership of Mr. Chaffetz, and hopefully we'll use that spirit on a bipartisan basis to try to rectify that situation. I mean, there is just no excuse for going 8 years without a reauthorization.

Chairman Grundmann, in your testimony, you raised concerns about the Veterans Access, Choice, and Accountability Act of 2014 that allows the VA Secretary, at his or her discretion, to fire a senior executive without prior notice or the opportunity to respond if the Secretary determines performance of the individual warrants its action. The act provides an expedited appeal process but after the determination.

What's the nature of your concern about that?

Ms. GRUNDMANN. On the constitutional side?

Mr. CONNOLLY. Whatever you want to share with us.

Ms. GRUNDMANN. In the operations?

Mr. CONNOLLY. Speak as colorfully as you have already; Congress falling off the wagon is a great image.

Ms. GRUNDMANN. That's dangerous.

Mr. CONNOLLY. Cartoonists heed. All right.

Ms. GRUNDMANN. Twofold. The constitutionality of that particular law is being litigated right now in the Federal circuit. No doubt we will have a decision in some course of—

Mr. CONNOLLY. And that is about due process.

Ms. GRUNDMANN. It is about due process. It is also about the appointments clause in the Constitution. The argument is that if you eliminate three Presidentially appointed board members from the process all together and delegate that authority to a, quote, "not a principal employee" and have that decision be final without board review, without court review, that is a violation of Article II, Section 2, of the appointments clause.

There is the constitutional argument on due process as well, and due process is prior notice and an opportunity to respond. That is also being litigated.

Mr. CONNOLLY. Well, is that a constitutional issue, or is that just a practice? I mean, in the private sector, you're not entitled to those protections. I mean, if the boss decides you're not performing, you're an at-will employee, and you can be terminated.

Ms. GRUNDMANN. You're absolutely right. But according to Supreme Court case law, *Loudermill* has told us repeatedly that Federal employees have a property interest in continued employment, the deprivation of which must be accompanied by opportunity—advanced notice and opportunity to respond, nothing more, nothing less.

You raise a really good point, and this gives me an opportunity to talk about how that act has impacted our operations. So far, we've only seen seven cases under the VA Accountability Act.

Mr. CONNOLLY. So abuse of that new authority is not yet a problem holding in abeyance the merits of those seven.

Ms. GRUNDMANN. Well, two of them were withdrawn. It's not the abuse of the authority; it is how it impacts our operations. What the law says is that once an employee files, he or she is entitled to a full hearing. And that hearing for us means discovery, motions, the opportunity to raise affirmative defenses, a full hearing, prehearing conferences, along with a written decision. And if you look at some of the decisions that we have issued—and we have only issued two written decisions—they are about 60 to 70 pages long. It is not a summary decision.

Mr. CONNOLLY. But let's remember the genesis of the bill: It was a growing frustration on the part of veterans, of the public, of this Congress. And the inability to assign accountability to Veterans Administration officials—everyone was kind of pointing somewhere else, and meanwhile, the backlog grows; falsification of medical records expanded; treatment was inadequate and, in some cases, nonexistent; getting an appointment became, in some places, very difficult. And these are our veterans. And there was deep outrage up here, and we had to weigh expediting the process determination to hold people accountable against process. And while no one wants to make light of due process, that was the balancing act we were looking at. Your comment on that?

Ms. GRUNDMANN. Yeah, I understand completely the genesis of this bill. And let me just share with you a question, a thought. When these cases come to us, and this is not just the VA, but any case, the employee is off the payroll. They are not being paid during the time they are litigating before us. We wonder—and it's a question—whether or not the bill is actually doing what it's supposed to do. Agencies may act—the VA, I don't know this, may actually be taking longer to prepare for these cases because they have to finish the case in essentially 18 days.

Mr. CONNOLLY. Yeah.

Ms. GRUNDMANN. During the time they are investigating and preparing their case on the front end, the employee is still on the payroll. So is it having the same effect? Shortening the processing period doesn't get rid of the employee faster; they've already been removed. It just determines whether or not the removal was proper.

Mr. CONNOLLY. Well, we look forward to working with you on this. I think it is a conundrum.

Ms. GRUNDMANN. Yes.

Mr. CONNOLLY. And no one wants to trample overdue process and the rights of Federal employees, but we do not want to sacrifice accountability, especially in the case of men and women who put on the uniform and serve the country.

Ms. GRUNDMANN. In order for us to get involved, an agency has to act first.

Mr. CONNOLLY. Yeah. Okay. I wish I had more time because I think this is a very important issue.

Thank you, Mr. Chairman.

Mr. MEADOWS. I thank you.

The chair recognizes the chairman of the full committee, Chairman Chaffetz, for a series of questions.

Mr. CHAFFETZ. Thank you. I thank—to all three of you for your good and important work.

Mr. Shaub, I want to direct my comments to you, if I could. You work with some very important issues dealing with ethics. You work with some 4,500 ethics officials in more than 130 different agencies. I want to focus on honorarium, particularly as it relates to public appearances and speaking. Can a government official act as an official agent for a charity or a foundation?

Mr. SHAUB. There's no specific prohibition on the types of outside employment you can have in that regard, but we have to distinguish between the types of government official we're talking about.

Mr. CHAFFETZ. If it is a Senate-confirmed position, can you act as an agent for a foundation?

Mr. SHAUB. Certainly not for pay and certainly not as a representative to the government. There's an outside earned-income prohibition in a longstanding executive order so they can't earn honoraria, and they can't represent anyone back to the government, so it would have to be an outside activity where they would speak for free, but they—

Mr. CHAFFETZ. But what if there is compensation to a foundation?

Mr. SHAUB. A government official themselves—I—could not speak for any compensation without violating the earned-income ban, even if they subsequently donated it to someone else.

Mr. CHAFFETZ. What if somebody went and spoke and then that money was directed or given to a foundation—

Mr. SHAUB. Right.

Mr. CHAFFETZ. Do they have to disclose that?

Mr. SHAUB. The disclosure depends on whether the money was paid to them as an individual speaker and then they chose to donate it to a charity, or whether you're acting as an agent of some sort of charity. A comparable example would be, for instance, if you were working for a car dealership and you sold a car, you would not report the income from the sale of the car because that's income of the car dealership.

Mr. CHAFFETZ. Let's go back. Can you be an agent, a Senate-confirmed person, can they be an agent of a foundation?

Mr. SHAUB. Not if they are representing the foundation to the Federal Government, but there is no legal prohibition on serving as an agent for an outside entity in an outside activity.

Mr. CHAFFETZ. Do you have to disclose that?

Mr. SHAUB. Your role as an agent?

Mr. CHAFFETZ. Yeah.

Mr. SHAUB. If you have a position with an outside entity, that would be disclosable on the form.

Mr. CHAFFETZ. So you have to disclose that.

I want to bring up—there have been—there has been a lot of controversy with Secretary Clinton and the lack of candor in her financial disclosures. I will go back to the Wall Street Journal article in May of this year. The spokesperson, Mr. Salamone, who works for you, commented directly on that case. Did you review that case?

Mr. SHAUB. I'm hoping I'm remembering the correct one. The one I recall was a question not about Secretary Clinton's speaking activities but about her husband—the former President's speaking activities. The question Mr. Salamone was asked, if I'm recalling correctly, was, would he be—would she be required to report honoraria paid in compensation for his speaking if he was acting as an agent for a foundation as opposed to acting in a personal capacity. And Mr. Salamone correctly answered, consistent with our long-standing view of government financial disclosure requirements, that that would not be required to be disclosed if he was acting as an agent for the foundation, in contrast to a situation where he went out on his own, gave a speech, and then donated the funds to a charity.

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Mr. CHAFFETZ. How could he not be an agent for the Clinton Foundation? It is under his own name.

Mr. SHAUB. I think our understanding was he was an agent, so that's why it was not required to be disclosed.

Mr. CHAFFETZ. So where is that found in the rules?

Mr. SHAUB. The statute is a very long, very detailed statute.

Mr. CHAFFETZ. I have it in front of me, and I went on your Web site. He is what your Web site says, "Do I report payments donated or directed to charity?" Yes, you must report honoraria as usual.

Mr. SHAUB. Right.

Mr. CHAFFETZ. And then if You look at the code, it goes on saying that filers are expected to, and I quote, “the source, date, amount of honoraria from any source received during the preceding calendar year aggregating \$200 or more in value, effective January 1st, 1991. The source, date, amount of payments made to charitable organizations in lieu of honoraria. And the reporting individual shall simultaneously file with the applicants supervising ethics office.”

Mr. SHAUB. Right. So that’s interpreting section 102(a) of the appendix to Title V under the Ethics in Government Act.

Mr. CHAFFETZ. Correct.

Mr. SHAUB. That is a provision that applies to your own earnings if you go out and speak on behalf as your own individual, on your own behalf, earn it and subsequently donate it. And we have been very consistent in requiring. But it is not even a close call as to whether it would be reportable if you’re acting as an agent of a foundation. It is not even a close call. I can tell you unambiguously, that’s not reportable.

Mr. CHAFFETZ. Why isn’t it reportable? I don’t understand.

Mr. SHAUB. Well, it is for the same reason as the car dealership example. Another example is, we’ve had nominees—you know, I’ve handled nominee reports personally under both the Bush administration and the Obama administration. I have been doing this for a long time. We’ve had a lot of nominees over the years who have been attorneys. They have to follow nominee incoming financial disclosure reports. So although while they are an appointee, they would be covered by outsider and income ban, and there would be no income or honoraria to report; nominees are the perfect comparison to a Presidential candidate or the appointee who has a spouse doing outside speaking, as in this case, where they do have income to report. And, so, they report their earnings from the law firm, but they do not report each individual payment from each individual client. It is simply not required by the financial disclosure laws. Now you have within, you know, within your power to change those laws, but it is not—

Mr. CHAFFETZ. I’m not understanding where the rule or where you can point to in the law, where you have this distinguished—Mr. Salamone said, quote, “Disclosure of speaking fees is not required when the public filer or the filer’s spouse is acting as agent of an organization, and payment it made directly to that organization.” Where is that found in the rule?

Mr. SHAUB. 5 U.S.C. appendix section 102(a).

Mr. CHAFFETZ. Okay. We may be looking at that differently than you are, but I would really love to have some details. Why wouldn’t we have that disclosed? I just—if you’re trying to maintain the maximum amount of transparency which you report to do, it says the OGE makes sure that the nominees and Presidential candidates have complied with extensive requirements for financial disclosure under the Ethics in Government Act. Have you investigated this situation with Secretary Clinton?

Mr. SHAUB. The—so that’s a two-part question. I’ll answer the first question first, why don’t we pursue maximum disclosure?

Mr. CHAFFETZ. Yeah.

Mr. SHAUB. Anything that could be potentially relevant or interesting to anyone. And it is simply because we're a Nation of laws, and OGE is specifically regulated by an extremely detailed, highly prescriptive statute. Congress left us almost no discretion in terms of interpreting this statute. We apply it uniformly to everyone across the board, highly detailed. It's not the statute that I would have written, as evidenced by the fact that OGE has a confidential financial disclosure system where Congress left us the ability to write our own rules. We wrote very different rules for those.

But we are bound by the laws as they are written, this has been OGE's long-standing interpretation across the board, whether you're a car salesman, an attorney, a Member of Congress. Anybody coming into the executive branch, you disclose income paid to you that you earned yourself, act in your own capacity, or you disclose income from an entity, but you don't disclose every payment to that entity. We've been absolutely uniform, it is not even a close call.

Mr. CHAFFETZ. So when you show up and give a speech, is that—I mean, that seems like a direct payment. There is a reason why the University of California, Los Angeles, paid \$250,000 to the Clinton Foundation it is because Secretary Clinton showed up and gave a speech.

Mr. SHAUB. I have no doubt that they paid that money because he gave a speech?

Mr. CHAFFETZ. She gave that speech, she gave a speech.

Mr. SHAUB. Sorry, I misunderstand.

Mr. CHAFFETZ. She did. She was Secretary of State.

Mr. SHAUB. Okay.

Mr. CHAFFETZ. And that's why I'm curious: Is she an agent for the Foundation? Is she the Secretary of State? How do you determine what's what?

Mr. SHAUB. Well, I can say for sure she did not have a position, but that does not preclude—

Mr. CHAFFETZ. She didn't have a position what?

Mr. SHAUB. She did not have—she did not hold a formal position with the Foundation while she was in the government but—

Mr. CHAFFETZ. But—so she wasn't an agent?

Mr. SHAUB. No. Those are different questions. The question of whether somebody holds a formal position, Vice President, President—

Mr. CHAFFETZ. Right.

Mr. SHAUB. —Secretary, is very different from whether you're acting as an agent. There is an entire—

Mr. CHAFFETZ. So was she an agent or not an agent?

Mr. SHAUB. Well, we don't investigate their reports so I can tell you if—

Mr. CHAFFETZ. Wait. Why don't you investigate their reports?

Mr. SHAUB. Well, we don't have the authority.

Mr. CHAFFETZ. That's not what you said in your testimony.

Mr. SHAUB. Well, I believe it was.

Mr. CHAFFETZ. Your testimony said, OGE makes sure that the nominees and Presidential candidates have complied with the extensive requirements for financial disclosure under the Ethics in Government Act.

Mr. SHAUB. That's exactly what we do.

Mr. CHAFFETZ. Well, how do you do that if you don't investigate it?

Mr. SHAUB. We have to take the facts as they are asserted at face value, and then using those facts, we determine whether they've complied with requirements. The reason Congress made these reports public——

Mr. CHAFFETZ. How can you do that without investigating? You don't ask any questions?

Mr. SHAUB. It is the same practice as the House Committee on Ethics when they review your financial disclosure report. They don't bring you in for an audit and conduct an investigation. We don't do that either. We follow the industry standards of the Senate Ethics Committee, the House Ethics Committee, the Office of Congressional Ethics, the Ethics Office for the judicial branch.

Mr. CHAFFETZ. Do you do any investigations?

Mr. SHAUB. In the 37 years that OGE has existed, it has not done a specific investigation. We haven't had, to, because we have a 14,000-member inspector general community. We work extremely closely with them. We have been involved in investigations, though not leading them. We assist them, in great detail, in understanding these highly complex ethics laws, the conflicts of interest laws, the standards of conduct, we work closely with them.

We also get calls frequently from prosecutors when they prosecute these cases. We work with them to help them understand it. We also conduct training for both of them.

So as I said, OGE gets part of the larger framework for integrity in the executive branch. We have our role to play, which is strictly laid out by statute and we adhere to our role, but it is one important piece in a framework consisting of multiple executive branch entities.

Mr. CHAFFETZ. And I'm just suggesting that you're just shuffling paperwork. If you are just taking everything at face value and then reprinting it and putting it up on the shelf—what good are you? Why should we even have you if you're not going to actually review them, hold people accountable, and do any investigation? I mean, what is it that they would actually do? Let me read what you had written. This is your testimony today.

OGE makes sure that the nominees and Presidential candidates have complied with the extensive requirements for financial disclosure under the Ethics in Government Act. These requirements are highly complex, and ensuring full compliance is labor intensive. OGE's goal, with regard to a nominee's disclosure, is to ensure that the Senate receives a complete accounting of relevant financial interest in order to facilitate its advice and consent role in considering the President's nominees.

The goal as to Presidential candidate is to provide the electorate with similar information. That's a bit of a stretch, isn't it?

Mr. SHAUB. It is not a stretch at all. This is——

Mr. CHAFFETZ. You do no investigations. You—I question, Mr. Chairman, why we have such an agency, because if they are just taking it at face value, and then putting it in a file, what if you saw something that was askew?

The Wall Street Journal said that Secretary Clinton's disclosure—not included in the disclosure were payments for at least five speeches that Mrs. Clinton directed to her family's Foundation. So——

Mr. SHAUB. Unfortunately, the House is not involved in our Senate confirmations work, so you're not as familiar with it.

Mr. CHAFFETZ. It's a Presidential candidate, it's different. There is if no Senate confirmation. We understand that.

Mr. SHAUB. Well, it was a multipart question. I was answering the earlier question about what we do with nominees.

Mr. CHAFFETZ. I'm asking about Presidential candidates. And there is a lot of controversy swirling around here, and you're trying to parse words by saying, well, if you're an agent, you have to disclose, if you're not an agent, you don't have to disclose it. I don't know how you distinguish whether somebody is an agent or not, because on the one hand, the Foundation's in Secretary Clinton's name. On other hand, she, definitively, according to you, is not an agent of a Foundation, or she doesn't have a title within that organization. I don't know what good you are if you don't do this kind of work.

Mr. SHAUB. Well, that's an incorrect characterization of my statement. I did not say we concluded she is not an agent. We said she did not hold a formal position within. Those are two different things.

Your question on how you determine whether someone's an agent, there is an entire body of law and the law of agencies that's well-established in the common law.

Mr. CHAFFETZ. I've gone way over my time. In the case of Secretary Clinton speaking, for instance, at UCLA, did you do any sort of investigation to figure out whether or not she was an agent?

Mr. SHAUB. We did not investigate the factual circumstances that she reported.

Mr. CHAFFETZ. So, and the problem I have is, you go out and comment as the authority leading one to believe that, quote, "disclosure of speaking fees is not required when a public"—and to comment on a specific case when you have not investigated it, I think is wrong.

Mr. SHAUB. We reported on the legal requirement and where you've compared factual analysis with legal analysis. You have to take the facts at face value, that's why the reports are public, so that they can be challenged. This is a good decision for the public to have. It is a good conversation——

Mr. CHAFFETZ. It is good information to have.

Mr. SHAUB. —for Congress to have. But our role is legal in this respect; we can tell you that if the facts are that they are an agent, the information is not disclosable on part A of the form.

Mr. CHAFFETZ. Help us understand what an agent actually is.

Mr. SHAUB. An agent?

Mr. CHAFFETZ. Yeah.

Mr. SHAUB. An agent is someone who acts on behalf of another. That's the simplest statement; the body of law fills treatises, but the simplest statement is someone acting on behalf of another.

Mr. CHAFFETZ. So it says, quote, "the rule is different when the speaking is done in a personal capacity and the fees that are di-

rected are donated to a charity, in which case disclosure would be required.”

Mr. SHAUB. These are the same rules that applied to Members of Congress and to Senators and to Presidential——

Mr. CHAFFETZ. Don’t confuse your branches here for a second. We’re talking about executive here.

Mr. SHAUB. There is one statute that applies to all three branches. Congress has been very firm in wanting parity among the branches, so they passed only one statute that is applicable to all three branches. We have regular meetings with our colleagues in the House and Senate and the Judicial Ethics Office to make sure we’re all on the same page and we are interpreting these. We have a regular three-branch forum. It is three branches, but it is actually four offices, because you also have the Office of Congressional Ethics.

We meet as a group, we talk about the interpretations of laws and regulations. And OGE has a great deal more experience than they do, simply because we handle a much higher volume. So we often take the lead in helping others to understand how we interpret——

Mr. CHAFFETZ. You shuffle paperwork. There is no consequence. There is no accountability. There is no review and there is no investigation. Why do we need you? If the law is crystal clear, you know, I—well, if you’re an agent, you don’t have to disclose; if you’re not an agent, you do have to disclose. Your name’s on the Foundation, and yet, they weren’t disclosed. Does that really add up to you?

Mr. SHAUB. Sir, I don’t think we just push papers. The work of reviewing these financial disclosures——

Mr. CHAFFETZ. What do you do when you review it? Is there an analysis?

Mr. SHAUB. There is an intensive analysis of every——

Mr. CHAFFETZ. Where is the conclusion of that analysis?

Mr. SHAUB. The conclusion is the certification by the director of the Office of Government Ethics, or the chair of Senate Ethics Committee, or the chair of the House Ethics Committee.

Mr. CHAFFETZ. In the case of a Presidential candidate, do you certify?

Mr. SHAUB. I certify the reports. And I can tell you, there isn’t a major party candidate whose reports we didn’t require substantive changes on. Our detailed analysis we went back to every single Republican or Democrat who was running for Congress right now and made them make significant changes on their——

Mr. CHAFFETZ. I’m talking about Presidential candidates, I’m talking about Presidential candidates, you keep trying to get—you said congressional candidates.

Mr. SHAUB. No, I’m sorry, if I said congressional——

Mr. MEADOWS. I think you just misspoke.

Mr. SHAUB. I’m sorry. I apologize. I was talking Presidential candidates. There isn’t a major party candidate whose reports we haven’t gone back to. And it is a very intensive back-and-forth process. We ask them questions. We say, have you fully disclosed this? Is there more information on this? Do you understand that the law requires that? These are very detailed interactions. I don’t

think there is a Presidential candidate out there right now who has great love for us, because we've made them do so much work on their reports.

Mr. CHAFFETZ. And is all that information, if somebody submitted a FOIA, can they get all that information?

Mr. SHAUB. You don't even have to submit a FOIA. They're on our Web page. And we have them annotate—we made the candidates themselves initial each change on the report. So every page that has changes, you can see the initials. You could see the reports as they were certified by the Federal Election Commission, which receives the reports. They do the first line review. Their focus is mostly on getting the right people to file the right reports by the right deadline. Then they get them to us, and we get involved in the substantive work. We roll up our sleeves. We spend a lot of time. I'm sure these candidates are appreciative of the work we do, but I'm sure they also would have rather spent their money on something other than having to make all the changes we've sent them back to do. But we felt we were obligated by the law to hold them accountable to meet the financial disclosure requirements.

Now, if there are factual discrepancies, that's the reason they're publicly available. So that they can go through the rigorous scrutiny of the press, the American people, Congress. There are plenty of eyes looking at these reports. And some of them may have information that they can contradict the factual assertions. But we make sure they're legally compliant.

Mr. CHAFFETZ. I have lots more questions, but I will yield back.

Mr. MEADOWS. I thank the chairman.

Let me go ahead and follow up on a little bit of this.

Ms. Grundmann, one of the things that I would like, as we look at the reauthorization of your particular agency, is if you would look quantitatively, and maybe a little bit more forward thinking in terms of what are the type of reforms that you say: Golly, I wish this were happening, or that were happening. Because as we relate to that, sometimes we get used to the laws and the rules that we have grown up under. And just like Director Shaub was just talking about a few things that he would have written differently, those are the kind of things that as we look to reauthorize what we'd like to do is not only look at the reauthorization, but perhaps other legislation that needs to accompany that.

And before the ranking member left, we agreed we're going to let him take the lead on one of those. I think he chose your particular group that he's going to take the lead on. I'm going to take the lead on the other two, as we start to work towards that. But are you willing to provide that to the committee?

Ms. GRUNDMANN. We are always willing to provide assistance, with one tiny caveat. That—

Mr. MEADOWS. Those little caveats are always the troubling pebble in the shoe. But go ahead.

Ms. GRUNDMANN. Kind of like a footnote. If these laws would come to us for interpretation, you know, we're the adjudicator in the case. That's the only caveat.

Mr. MEADOWS. We understand that. And so we'll keep that in mind—

Ms. GRUNDMANN. Call us.

Mr. MEADOWS. —and be sensitive to that.

Ms. Lerner, I want to come back. You mentioned earlier about getting rid of a survey. Which survey were you talking about?

Ms. LERNER. Sure. It's an annual survey that was put into effect during a prior reauthorization. It requires that we——

Mr. MEADOWS. What's the name of it?

Ms. LERNER. Hold on.

Mr. MEADOWS. It's not the employee satisfaction survey, is it?

Ms. LERNER. No. No. It's—I don't have the—I have a copy——

Mr. MEADOWS. Okay. You can get that to me later. I can see them, you know, with puzzled looks behind you. And so as we look at that, and I say that in a kind way. What I'd love to do is you said it was statistically not valid.

Ms. LERNER. Yeah.

Mr. MEADOWS. Why is that?

Ms. LERNER. Because it has an incredibly low response rate.

Mr. MEADOWS. Does it have an incredibly low response rate because you do nothing with it?

Ms. LERNER. No. No. No. We have to, by statute. We send it to——

Mr. MEADOWS. I know, but you only fill out surveys if you think that they're making a difference. So I guess that's what I'm saying is, is do the people who will fill them out see no value in it because nothing happens with it, it just gets put on a shelf?

Ms. LERNER. Not sure why they fill it out or why they don't. I can tell you that we mailed out 3,500—over 3,500 in fiscal year 2014. Three hundred and fifty-five people returned them. These are folks who have come to our agency and asked for help. And we can't help everybody who comes to us. And the fact is that, you know, the folks who returned the survey, we had a 10 percent response rate. And of the 10 percent who responded, very few of them feel like they got what they asked for. And it's not statistically significant if we're only getting a 10 percent response rate.

Mr. MEADOWS. Well, statistically some would argue contrary in terms of that response rate, but in terms of what you do with that. Here's what I would ask for. If you would get us the survey that you're talking about. Obviously, what has happened historically and what has not happened historically with that. If you would get that to the committee, and we'll look at that as we look at the reauthorization. I'm one that, you know, if you're just doing busy work, I'm all for streamlining. I think that was in your testimony about streamlining some of that. And I'll be glad to look at that.

Ms. LERNER. We are taking some actual concrete steps to be responsive and be better about customer service. We just finished a study of everyone who participated in our mediation and alternative dispute resolution program.

Mr. MEADOWS. So do you participate, as Ms. Grundmann—and congratulations on being fifth most improved, did you say?

Ms. GRUNDMANN. Fifth most improve in small agencies.

Mr. MEADOWS. Okay. Do you participate in the public/private partnership surveys?

Ms. LERNER. Yes.

Mr. MEADOWS. Okay. All right. And so——

Ms. LERNER. That's a different—that's completely different. This is the folks—this survey is the folks who come to OSC with——

Mr. MEADOWS. And they're evaluating you?

Ms. LERNER. Yes. The agency. The results that they got at the agency.

Mr. MEADOWS. And so you're saying that those results, they say they don't get helped. Is that what you said?

Ms. LERNER. Well——

Mr. MEADOWS. Is that 10 percent of the people say that they don't get helped. Is that your testimony?

Ms. LERNER. No. We get a response rate of 10 percent.

Mr. MEADOWS. But the majority of those I think you said feel like they didn't——

Ms. LERNER. That's right. They did not get what they were seeking when they came to our agency. That's right.

Mr. MEADOWS. So based on that 10 percent response rate and those survey results, what have you changed operationally?

Ms. LERNER. What we've done is tried to actually get some concrete feedback from the people who come to our agency. For example——

Mr. MEADOWS. All right. So if we were to do away with the survey and say that's no longer a requirement, how would you evaluate whether you're doing a good job or not? How would you know whether you're getting a A or an F?

Ms. LERNER. Well, I think our results really speak for themselves in terms of the number of corrective actions that we've gotten. Before I came, they were in around 20 a year corrective actions for complainants. Last year they were around 280.

Mr. MEADOWS. So would you be willing——

Ms. LERNER. I would say that those are pretty substantial——

Mr. MEADOWS. So would you be willing to put forth a matrix, kind of a dashboard of sorts, so we can evaluate? Because, you know, it's one thing with you there and you're taking it on personally. It would be another when there's a new special counsel there. How do we compare apples to apples and——

Ms. LERNER. Look at our actual results. Look at—look at the cases that we are bringing to you.

Mr. MEADOWS. Right. And I guess that's what I'm saying. I'm willing to look at that matrix if you can come up with a reporting standard that reports to this committee and says: Okay. Here is a matrix on how we decide whether we're getting—you know, doing a good job or a bad job. And we're willing to look at that. I'll get with minority staff and see about changing that. But I want to make sure it's quantifiable. You know, it's kind of like we've done with FITARA. You know, most of the agencies got Fs and Ds. But that was a good start. It set a benchmark for where we needed to go. And I guess what I'm needing is the same thing from you on how we determine whether you're doing a good job or not.

Ms. LERNER. Yeah. Look at our cost per case, which has gone down significantly.

Mr. MEADOWS. That's what I'm saying. If you'll get that to committee, we're willing to evaluate that.

Ms. LERNER. Very happy to work with you on that.

Mr. MEADOWS. Does that make sense?

Ms. LERNER. Sure thing.

Mr. MEADOWS. So Director Shaub, let me finish with you. Because you've mentioned the inspector generals in CIGIE and your close relationship, I guess, is the way that you just characterized it with Chairman Chaffetz in terms of working with them. How, in that passing of the baton, between you and the inspector general, or inspectors general, who do you leave it up to for enforcement? Because we get an IG's report, and it depends on, you know, what chairman, what subcommittee chairman, whether there's a hearing, and whether it gets highlighted. How do you pass the baton? Because I think in your testimony with Chairman Chaffetz, you said that you don't investigate. You leave that up to the IG. Is that correct?

Mr. SHAUB. That's correct.

Mr. MEADOWS. All right. So if the IG finds something that is egregious, what happens?

Mr. SHAUB. Well, at that point, assuming it was a criminal violation, we would—

Mr. MEADOWS. No. Let's say it's ethical. Let's say it's ethical and not criminal.

Mr. SHAUB. Okay.

Mr. MEADOWS. Okay? So what happens?

Mr. SHAUB. So if, for example, it was the standard of conduct and it was a violation of a provision that was not criminal, the next mechanism that would need to come in place would be disciplinary action. IGs will write reports. Sometimes they'll recommend action. Other times they'll state conclusions, and those will go back to the agency—

Mr. MEADOWS. So how many IG reports have you gotten to have action? Would you be the one that would do the action?

Mr. SHAUB. No. The agencies each have the authority to take individual action against the employees.

Mr. MEADOWS. All right. Then let's assume it's the head of the agency.

Mr. SHAUB. Right.

Mr. MEADOWS. What happens?

Mr. SHAUB. Well, if it's the head of the agency, then a decision's not going to be made by the agency. The President's the only one with the authority to—

Mr. MEADOWS. All right. Well, let me—so how often is the President going to do that with one of his nominees?

Mr. SHAUB. Well, I hope every time that—

Mr. MEADOWS. Yeah. I would hope so, too, but I'm not as confident as you are that that would happen. So let me quit beating around the bush and share one particular issue that I'd like you to look into and report back to this committee.

It was an IG report that was done by an Inspector General Roth. It was a very scathing report of Mr. Mayorkas as it relates to EB-5, the potential ethical bounds of interference in terms of visa applications. You know, there were some allegations of interference at the very highest level, which would include some elected officials in very nearby States.

I read it. I could not believe it, because normally, the inspectors general are not that scathing in their report. And as I read this

particular issue, it really is something that was troubling. Obviously, Mr. Mayorkas didn't agree with that. But being where he is in that particular agency, so the only person that could hold him accountable would be the President? Is that what you're saying? So you don't have the authority to do that?

Mr. SHAUB. You know, I have to beg your pardon. I remember reviewing Mr. Mayorkas' financial disclosure report—

Mr. MEADOWS. Yeah, and this is not financial disclosures. This really has to do with the fact that he was intervening on behalf GreenTech Automotive, one where Mr. Clinton, President Clinton, had given a speech. All of a sudden, there was money that came over. I mean, it was—you know, I'm not a conspiracy theory kind of guy, but when you look at connecting the dots, it was very troubling. And the fact that the inspector general would look at that and have employees, whistle blowers, within the agency that said they felt like Mr. Mayorkas had acted improperly, where does that go? Because the inspector general felt like he had done his job. And so does it come to us, or who would investigate that?

Mr. SHAUB. So the reason I mention his report is I was going to tell you I can't remember his exact position, his position title. Was he assistant secretary? Under Secretary?

Mr. MEADOWS. I don't recall either. So—

Mr. SHAUB. In any event, he works, then, for the State Department and would report—

Mr. MEADOWS. Well, this would—well, so who—

Mr. SHAUB. It wouldn't be the President. It could be—the head of the agency could take some action.

Mr. MEADOWS. So your agency has no role in that whatsoever? Should you have?

Mr. SHAUB. When an IG is conducting an investigation, we don't want to step on the IG's toes. We're very respectful of IG jurisdiction. So during the investigative phase, absolutely not.

Mr. MEADOWS. Yeah, I was passed a note. He was then the director of USCIS. Now he's the DHS deputy director.

Mr. SHAUB. Okay. So either the President or somebody who's in charge of his agency at a higher level can take some action. Only the President could take removal action. So something like that actually would be well within your jurisdiction if you're asking whether you could, obviously.

Mr. MEADOWS. Well, we've got all these other ethics groups out there, Congressional Ethics. You mentioned some of those that they're your sister—they actually take action. Are you the only one that just does financial disclosure with no actions?

Mr. SHAUB. No. We don't just do financial disclosure. But we're the prevention piece of the framework. This is a broad framework—

Mr. MEADOWS. So who's the enforcement piece? Because it's not the IG.

Mr. SHAUB. No. That would come to agency management or the White House to take action against a Presidential appointee.

Mr. MEADOWS. Do you not see an ethical dilemma that you put yourself in when you have someone that is a nominee having to be held accountable by the person who nominated them?

Mr. SHAUB. Well, that's the framework the Ethics in Government Act established. But we do have the separation of powers issue where Congress has the ability to ask the very questions you're asking about an individual. And you could certainly have a hearing on that investigative——

Mr. MEADOWS. So do you think that your agency needs to have expanded authority to be able to investigate?

Mr. SHAUB. I don't think so. I think that there——

Mr. MEADOWS. You don't want it?

Mr. SHAUB. Well, I don't think we should have it. What I might want one way or the other is not as relevant as what would be the right thing. And what's the right thing is that we have a broad framework with a number of different, very specialized entities that perform very important roles. The inspectors general have investigative authority. Agencies can take disciplinary action. In whistle blower cases, you mentioned whistle blower in this example, the Office of Special Counsel can initiate an action against them. And I won't speak for what's within your power, but they then take a case before the MSPB.

So there are——everybody has their individual roles. We, for instance, don't adjudicate the disciplinary cases. The MSPB has the authority to do that. So ours is the prevention piece of the program.

Mr. MEADOWS. So if the employees——what you're saying, is if the employees in that particular situation feel like that they have been thwarted, then either special counsel or—I guess it would be special counsel first?

Ms. LERNER. No. I don't believe we would have jurisdiction over these matters.

Ms. GRUNDMANN. Are we talking about——

Mr. MEADOWS. I'll tell you what I'll do, is let me do this: I'll get that particular IG's report. I'll get it to all of you and then let you weigh in before we go forward. How about that?

Ms. GRUNDMANN. Are you talking——just to be clear, you're talking about a political appointee who's not the head of the agency?

Mr. MEADOWS. Right. Yeah, he would have been. That's correct.

Ms. GRUNDMANN. Okay. We wouldn't have jurisdiction.

Mr. MEADOWS. But there was employees that felt like they were wronged that were rank-and-file employees underneath.

Mr. SHAUB. Yeah. I'm sorry. I was talking about the whistle blower complaints of the individual level employees——

Mr. MEADOWS. Okay. All right. So basically other than our oversight, we need to have a hearing on that if I care about it.

Mr. SHAUB. Well, the Constitution has set up Presidential appointments, Senate confirmation process. I think I saw talk of an impeachment proceeding in the news about one Federal official. So there are constitutional mechanisms. But at the level you're talking, that's——we're getting into the constitutional area.

Mr. MEADOWS. Okay. Well, I want to thank each one of you for your testimony. I know that this is sometimes like going to the dentist and you're just glad it's over. And so——but I would say this, is if you will get those follow-ups that counsel's been taking notes, if you would get those follow-ups, we'll be expeditious in our return in terms of information to you, and hopefully work with you on the

reauthorization language, or any caveats that might need to be addressed legislatively.

And if there's no further business, the subcommittee stands adjourned.

[Whereupon, at 12:24 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

**Post-Hearing Questions for the Record
Submitted to Susan Tsui Grundmann
Chairman, Merit Systems Protection Board**

**From Rep. Mark Meadows
Chairman, Subcommittee on Government Operations
Committee on Oversight and Government Reform
U.S. House of Representatives**

***Merit Systems Protection Board, Office of Government Ethics,
and Office of Special Counsel Reauthorization
December 16, 2015***

- 1. Have there been significant problems from the experiment in “all circuit” judicial review of whistleblower rulings? Do you oppose making that reform permanent?**

Under the Whistleblower Protection Act (“WPA”), the Merit Systems Protection Board (“MSPB”) has jurisdiction to hear claims from federal employees when a personnel action was taken, or proposed to be taken, against such employee as a result of a protected disclosure. With the exception of cases involving certain discrimination claims (*see* 5 U.S.C. §§ 7702, 7703(b)(2)), the U.S. Court of Appeals for the Federal Circuit had been the exclusive forum for judicial review of final decisions of the MSPB since the Federal Circuit’s creation in 1982. *See United States v. Fausto*, 484 U.S. 439, 449 (1988).

Section 108 of the Whistleblower Protection Enhancement Act (“WPEA”), which amended the WPA, included the so-called “all circuit review” provision, under which individuals – for a period of two years – could appeal certain final orders or decisions of the MSPB to the United States Court of Appeals for the Federal Circuit or “any other court of appeals of competent jurisdiction.” 5 U.S.C. § 7703(b)(1)(B). On September 26, 2014, Congress extended this provision for three additional years. Pub. L. No. 113-170, 128 Stat. 1894 (2014).

The MSPB is not aware of any “significant problems” resulting from all-circuit review. According to the legislative history of the WPEA, the purpose of the all-circuit review provision of the WPEA was to allow Congress the opportunity to evaluate whether decisions of courts other than the Federal Circuit in whistleblower cases are consistent with congressional intent and the Federal Circuit’s interpretation of WPA protections, guide congressional efforts to clarify the laws if necessary, and determine if all-circuit review should be made permanent.

As of the date of this submission, MSPB is aware of a total of 6 decisions in whistleblower cases issued by the following federal courts other than the Federal Circuit:

US Courts of Appeal for the Fourth, Fifth, Ninth, Tenth, Eleventh, and D.C. Circuit. In each decision, the court affirmed the final decision of the MSPB. The only precedential decision was issued by the Fifth Circuit in *Aviles v. MSPB*, Case No. 14-60645.

MSPB takes no position on whether all-circuit review should be made permanent. This is a policy decision for Congress in light of its intent in enacting the all-circuit review provision of the WPEA.

2. Approximately how many furlough appeals were filed, when were they filed, and what is the current status of those appeals? How did government-wide sequestration and the furlough appeals impact MSPB's operations and the non-furlough appeal workload? What are the challenges and long-term implications to MSPB from the receipt of a large number of furlough appeals?

A total of 33,141 furlough appeals were filed in MSPB's regional and field offices during the spring and summer of calendar year 2013. Almost 32,000 of those appeals were filed during July and August 2013. For perspective, typically between 5,000 and 6,000 appeals are filed in MSPB's regional and field offices in a given year. As of the date of this submission, MSPB has processed and decided more than 97% of those appeals.

Regarding the impact of these appeals on MSPB's operations and non-furlough appeal workload, it was severe and long lasting. The receipt of such a high volume of appeals in such a short period of time wreaked havoc on MSPB's electronic filing system. The electronic filing system quickly became overloaded – and in one instance, more than 1,600 furlough appeals were filed on a single day¹ – causing breakdowns and delays which led to many appellants choosing to refile their furlough appeals on paper, and prohibiting appellants who were filing non-furlough appeals from accessing the system. Simply put, MSPB's electronic filing system was not built to receive such a high volume of appeals.

Once received, the influx of furlough appeals led to an overwhelming amount of initial administrative work, including docketing each furlough appeal and inputting required case information so that MSPB records would be complete and accurate. Once docketed, each furlough appeal had to be acknowledged; an operation that was shared by *all* MSPB offices nationwide. Once the acknowledgment process was completed, MSPB staff in the regional and field offices began the work of consolidating similar furlough appeals, so that they could be adjudicated as efficiently as possible. Only after all of this initial work was completed were MSPB administrative judges in the position to begin the

¹ For context, prior to the influx of these furlough appeals in 2013, a day on which 25 appeals were filed electronically at MSPB would have constituted a busy electronic filing day.

adjudication process. It should be noted that under statute, appellants in these cases had the right to a formal hearing. *See* 5 U.S.C. § 7701(a)(1) (“An appellant shall have the right ... to a hearing for which a transcript shall be kept.”) As stated above, 97% of these appeals have been processed and adjudicated by MSPB’s administrative judges.

The impact of these furlough appeals on MSPB’s non-furlough appeal workload has also been severe and long lasting. Because of the lack of any established MSPB or federal court law on this issue – and the uncertainty at the time of future budget sequestration-related furloughs – MSPB leadership decided to process the furlough appeals immediately. As a result, the processing and adjudication of many non-furlough appeals was significantly delayed. These delays continue to affect the processing of appeals that were filed in FY 2014 and 2015 and are still pending.

Finally, MSPB believes that the issues discussed above illustrate the challenges and long-term implication of budget sequestration both to MSPB and the entire federal workforce. It should not be forgotten that – in addition to MSPB’s efforts to adjudicate these appeals – federal agencies named in these appeals were required to prepare and defend their decision to furlough employees in the MSPB litigation process. While it is impossible to determine the total amount of government time and resources used during this process, MSPB believes that Congress should consider whether the government-wide sequestration and the resulting mass number of furlough appeals truly achieved significant savings to American taxpayers.

3. Has MSPB seen an increase in the number of non-furlough adverse action appeals over the last few years? Has a change in law led to an increase in appeals (e.g., Veterans Access, Choice, and Accountability Act of 2014) and what is the impact/expected impact on MSPB’s workload?

From fiscal year 2008 through fiscal year 2015, the number of non-furlough adverse action appeals received by MSPB varied between about 2,500 and 2,800 per year. The average number of non-furlough adverse action appeals received each year during this period was about 2,660. So, the number of non-furlough adverse action appeals received by MSPB has remained relatively stable over recent years.

As of the date of this submission, the Veterans Access, Choice and Accountability Act of 2014 (“the 2014 Act”) has not led to an increase in the number of appeals filed at MSPB. To date, MSPB has received ten separate appeals filed under provisions of the 2014 Act. The 2014 Act made significant changes to the appellate process at MSPB for covered employees, but we cannot say that the law will lead to any significant increase in the number of appeals received.

Regarding the impact of the 2014 Act on MSPB, I can confidently state that it has placed dramatic, and nearly impossible, burdens on MSPB staff. Simply put, requiring MSPB to

fully adjudicate an appeal within 21 days makes proper adjudication extremely difficult. In our limited experience adjudicating appeals filed under the 2014 Act, MSPB has observed that the appeals tend to be high profile in nature, involve complicated issues, and generally include a variety of disciplinary charges, employee defenses, and witnesses. An MSPB administrative judge could be required to address numerous discovery issues, hold a hearing, and issue a written decision, all within 21 days. Because there is no review by either the Board or a United States federal court, MSPB administrative judges understandably will feel pressured to address each and every aspect of the appeal in as thorough a manner as possible, especially given that these appeals involve federal employees who have been removed from the civil service or demoted from the Senior Executive Service. For instance, in an appeal involving a VA senior executive service employee in Phoenix, Arizona, the administrative judge in MSPB's Denver Office issued a written decision that totaled 61 pages. In another recent appeal involving the demotion of a VA senior executive, the administrative judge in MSPB's Philadelphia Office held a hearing *and* issued a written decision totaling 60 pages, both within 21 days. Plainly stated, it is difficult to imagine the same effort being sustainable in the time frames provided if this process is applied to a significant number of federal employees. If Congress deems it wise to do so, MSPB would likely need to consider significant changes to the manner in which it adjudicates such appeals.

Another significant recent change of law came with the enactment of the Whistleblower Protection Enhancement Act of 2012 ("WPEA"). In the three years since the enactment of the WPEA, the average number of Individual Right of Action (IRA) appeals filed with MSPB was 427 cases per year. This compares to an average of 246 IRA appeals filed in the three years prior to passage of the WPEA (2010-2012). In addition to the increase in the number of IRA appeals, The WPEA has led to more and lengthier hearings in these cases, and potentially more supplemental proceedings involving damages. This is, in part, because the WPEA broadened the definition of the term "protected disclosure," which has led to more appeals surviving the jurisdictional stage and proceeding to a hearing on the merits of allegations.

- 4. MSPB's legislative proposal includes a reauthorization for a five-year period as well as a provision that would provide MSPB with authority to obtain information concerning applicants for federal employment from OPM and other executive branch agencies. MSPB indicates this information would assist in conducting studies. What specific type of information are you seeking about applicants and how do you normally request and receive such information?**

Current law provides that, in studying the extent to which the civil service is managed according to the merit system principles and is free of prohibited personnel practices, *see* 5 U.S.C. § 1204(a)(3), MSPB "shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information

collected by the Office of Personnel Management and may require additional reports from agencies as needed.” 5 U.S.C. § 1204(e)(3). Without question this authority allows MSPB to obtain records and information concerning current and former federal employees. Nevertheless, the merit system principles apply to hiring, and applicants for employment are protected from prohibited personnel practices. See 5 U.S.C. §§ 2301(b)(1) & (2), 2302(a)(2)(A), (b). Thus, the requested statutory amendment is consistent with existing law. At the same time, the extent to which existing law allows MSPB to obtain records and information regarding applicants is unclear. As a result, MSPB has not attempted to gather the detailed information about applicants needed to support research into how job applicants view the accessibility, fairness, and integrity of the federal hiring process. The requested statutory amendment would provide MSPB with an important tool for understanding how ordinary citizens perceive and experience the federal recruiting and application system and would ensure that federal agencies provide MSPB the assistance it needs in fulfilling this statutory responsibility.

- 5. In May 2015, MSPB issued a report titled “What is Due Process in Federal Civil Service Employment?” In the report, MSPB notes that from FY 2000-2014, over 77,000 full-time, permanent, Federal employees were discharged as a result of performance and/or conduct issues. As you are aware, there is a perception that is difficult to remove a federal employee as removal is an extremely difficult and lengthy process. Can MSPB tell us of the 77,000 discharged federal employees what percentage was removed during a probationary period?**

Of the 77,093 non-temporary employees removed from 2000 - 2014 because of misconduct or poor performance, 31,533, or 41%, were serving a probationary period at the time of removal.

Additionally, the question states that “there is a perception that it is difficult to remove a federal employee as removal is an extremely difficult and lengthy process.” In this regard, the Committee may be interested in the following MSPB research findings:

- More than 90% of managers who took an adverse action against a tenured employee applied a higher standard of proof in reaching their decision than is required under the law.
- More than half of managers who supervised a probationary employee whose performance or conduct was unsatisfactory took no action during the probationary period -- when the removal process is simple and the employee's rights are very limited -- and instead allowed the unsatisfactory employee to gain tenure and full MSPB appeal rights.

- Most managers who have been involved in taking an adverse action based on poor performance or misconduct did *not* agree with the statement: “Federal employees have too many rights.”

For a more detailed discussion of these and other findings related to managers’ comprehension and use of the disciplinary system, please see MSPB’s August 2015 publication, entitled “Adverse Actions: The Rules and the Reality,” which can be found at:
<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1205509&version=1210224&application=ACROBAT>

6. Kaplan v. Conyers

a. What has been the effect of the U.S. Court of Appeals for the Federal Circuit decision in Kaplan v. Conyers since 2013?

In *Kaplan v. Conyers*, the Federal Circuit ruled *en banc* that MSPB has no jurisdiction to review the merits of a personnel action resulting from a determination that an employee in a “non-critical sensitive position” is ineligible to hold such a position. The Supreme Court declined to review the Federal Circuit’s decision in *Conyers*. As a result, since 2013, MSPB administrative judges and/or the full Board cannot address the merits in such appeals, and are limited to a cursory review of the procedures used by the employing agency.

b. Please provide MSPB’s view of this decision.

The Federal Circuit’s decision in *Conyers* represents the law on this matter. It can only be changed by the U.S. Supreme Court or congressional action.

7. Do MSPB staff, including administrative judges, complete certifiable training in the WPA and merit system principles? If not, should they?

The Office of Special Counsel conducts a “2302(c) Certification Program” which assists federal agencies in informing their workforces about the rights and remedies available under the WPA and related civil service laws. In 2014, the White House directed agencies to take affirmative steps to complete OSC’s Certification Program. In order to meet the certification requirements, training on whistleblower protections and prohibited personnel practices for MSPB supervisors was conducted at MSPB Headquarters in Washington, D.C. on October 22, 2014 and the MSPB is currently certified. The PowerPoint slides and videotape of the training are available on the MSPB portal for all MSPB employees.

8. The 1994 WPA amendments required MSPB administrative judges to forward any case to the OSC to consider disciplinary action if the employee established a prima facie case of whistleblower retaliation. How many referrals, by year, has MSPB sent to OSC since this provision was enacted?

MSPB's records of referrals to OSC go back only to 2008. Referrals broken down by calendar year were as follows:

| YEAR | NO. OF REFERRALS |
|--------------|------------------|
| 2008 | 1 |
| 2009 | 0 |
| 2010 | 3 |
| 2011 | 8 |
| 2012* | 5 |
| 2013 | 4 |
| 2014 | 4 |
| 2015 | 14 |
| 2016** | 1 |
| TOTAL | 40 |

* The Whistleblower Protection Enhancement Act was passed in 2012.

** Year-to-date as of 2/3/16

The question states that MSPB must refer a case to OSC “to consider disciplinary action if the employee established a prima facie case of whistleblower retaliation.” The relevant statute provides, however, that a referral to OSC must be made “[i]f, based on evidence presented to it under this section, [MSPB] determines that there is reason to believe that a current employee may have committed a prohibited personnel practice.” 5 U.S.C. § 1221(f)(3). A “prima facie case of retaliation” is automatically deemed to have been established when a whistleblower presents limited circumstantial evidence. See *Kewley v. Department of Health & Human Services*, 153 F.3d 1357 (Fed. Cir. 1998). Based on a prima facie showing alone MSPB will not necessarily conclude that “there is reason to believe that a current employee may have committed [whistleblower retaliation].” See *Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 16 n.3 (2005).

**Post-Hearing Questions for the Record
Submitted to Susan Tsui Grundmann
Chairman, Merit Systems Protection Board**

**From Rep. Gerald Connolly
Ranking Member, Subcommittee on Government Operations
Committee on Oversight and Government Reform
U.S. House of Representatives**

*Merit Systems Protection Board, Office of Government Ethics,
and Office of Special Counsel Reauthorization
December 16, 2015*

- 1. There is legislation introduced and pending in Congress that would apply a post-termination process similar to that mandated in the Veterans Access, Choice, and Accountability Act of 2014 to all Department of Veterans Affairs (VA) employees, and some Members of Congress are considering applying these provisions of to all federal employees.**
- a. If these proposals were enacted into law, would you anticipate a substantial increase in new appeals?**

There is no way of knowing whether the enactment of these proposals into law would result in a substantial increase in new appeals. This would depend on the occurrence of two actions: 1) the agency taking a personnel action; and 2) the employee filing an appeal at MSPB.

- b. What would this increased workload do to the quality and timeliness of the Merit Systems Protection Board's decisions?**

As stated above, it unknown whether enactment of these proposals would result in an increased workload in the form of appeals filed. I can confidently state, however, if these proposals were enacted and MSPB received a significant number of appeals under these new laws, it would place dramatic burdens on MSPB staff. Simply put, requiring MSPB to fully adjudicate an appeal within 21 days makes proper adjudication² extremely difficult.

² Because of the strict timeline provided for in the statute, and because the statute provides that the VA's decision automatically becomes final if an MSPB administrative judge cannot render a timely decision, MSPB administrative judges are not in a position to grant extensions of time, even in cases where an appellant or representative experiences a serious medical issue, as was recently the case in a VA SES appeal adjudicated in MSPB's New York office. Additionally, factors such as weather can complicate matters under this time frame. For instance, as a result of the recent blizzard in Washington, D.C., securing testimony from federal employee witnesses

In our limited experience adjudicating appeals filed under Section 707 of the 2014 Act, MSPB has observed that the appeals tend to be high profile in nature, involve complicated issues, and generally include a variety of disciplinary charges, employee defenses, and witnesses. An MSPB administrative judge could be required to address numerous discovery issues, hold a hearing, and issue a written decision, all within 21 days. Because there is no review by either the Board or a United States Federal court, MSPB administrative judges understandably feel duty-bound to address each and every aspect of the appeal in as thorough a manner as possible, especially given that these appeals involve federal employees who have been removed from the civil service. For instance, in an appeal involving a VA senior executive service employee in Phoenix, Arizona, the administrative judge in MSPB's Denver Office issued a written decision that totaled 61 pages. In another recent appeal involving the demotion of a VA senior executive, the administrative judge in MSPB's Philadelphia Office held a hearing *and* issued a written decision totaling 60 pages, both within 21 days. Plainly stated, it is difficult to imagine the same effort being sustainable in the time frames provided if this process is applied to a significant number of federal employees. If Congress deems it wise to do so, MSPB would likely need to consider significant changes to the manner in which it adjudicates such appeals.

- 2. The Veterans Access, Choice, and Accountability Act of 2014 does not allow the administrative judge's decision to be appealed, and if the administrative judge is not able to meet the deadline, the agency's decision is final.**
 - a. Do you believe it would raise fairness or due process concerns if an agency decision is deemed final because the administrative judge is not able to meet an arbitrary deadline?**

MSPB is prohibited from issuing advisory opinions under law. 5 U.S.C. § 1204(h) ("The Board shall not issue advisory opinions."). Accordingly, it would be inappropriate for me to answer this question, as it raises an issue that could come before an MSPB administrative judge or the Board. I can state that the constitutionality of Section 707 of the 2014 Act is currently the subject of litigation at the United States Court of Appeals for the Federal Circuit. *Helman v. Dep't. of Veterans Affairs*, Case No. 15-3086 (Fed. Cir. 2015). The plaintiff in that litigation is alleging that Section 707 is unconstitutional primarily on two grounds:

who were scheduled to testify via video conferencing on a day when the federal government in Washington, D.C. was closed presented severe logistical problems for the presiding MSPB administrative judge in MSPB's Chicago office.

- By permitting the Department to remove a tenured federal employee without any pre-removal notice or an opportunity to respond, and by severely limiting post-removal appeal rights, Section 707 violates an employee's right to constitutional due process as articulated by the Supreme Court; and
 - By removing the Board from the MSPB appellate review process and permitting MSPB administrative judges to make a final decision binding an executive branch agency which is not reviewable by a presidential appointee, Section 707 violates the Appointments Clause contained in Article II, Section 2 of the United States Constitution.
- 3. Does MSPB monitor how long it takes administrative judges to act or rule on whistleblower cases that have been remanded after appeal to the Board?**

No.

- a. If so, what is the average amount of time it takes for an administrative judge to act on remand?**

See answer to Question 3.

- b. If not, should this be something that the MSPB tracks and monitors?**

MSPB would be open to further discussions with Members of Congress and/or their staffs on this topic. I would note that the adjudication time periods of many current whistleblower appeals, whether initial appeals or appeals which have been remanded back to administrative judges by the Board, have been adversely affected by the need for MSPB administrative judges to devote time and energy to the adjudication of the more than 33,000 furlough appeals filed at MSPB during fiscal year 2013 as a result of budget sequestration. Additionally, whistleblower appeals generally raise complex issues that require review of extremely lengthy records and a great deal of legal research and consequently take longer periods of time to adjudicate.

- c. What resources does the Board have to ensure the timeliness of actions or decisions of administrative judges on cases that have been remanded?**

Generally, MSPB recognizes that the oldest appeals should receive priority over the more recently-filed appeals.

- 4. As the head of an employing agency, do you believe that MSPB has sufficient tools and authorities under existing law to discipline employees for misconduct or performance issues when necessary?**

Yes.

5. Based on your agency's experience, do you think that statutory change is needed to streamline the federal employee disciplinary process?

With respect to MSPB, I do not think that such changes are needed. Whether statutory changes are needed to streamline the employee disciplinary process government-wide, I cannot say. MSPB does not become involved in the disciplinary process until two things happen: 1) an agency takes disciplinary action; and 2) the employee files an appeal at MSPB. The amount of time it takes an agency to discipline an employee before an appeal at MSPB is filed is not a matter that MSPB typically considers. I will note that, as a matter of statutory law, and in accordance with Supreme Court precedent, federal employees are generally entitled to notice and an opportunity to respond prior to being disciplined. This is based on a tenured federal employee's property interest in their federal employment. More information on this issue can be found in a recent report MSPB issued entitled: *What is Due Process in Federal Civil Service Employment?* A copy of this report can be found on MSPB's website at: <http://www.mspb.gov/studies/browsestudies.htm>

Questions for The Honorable Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics

Questions from Chairman Mark Meadows
Subcommittee on Government Operations

Hearing: "Merit System Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization"

RESPONSE TO QUESTION 1

1. When it passed the Ethics in Government Act of 1978, Congress gave the Director of the Office of Government Ethics responsibility for "monitoring and investigating compliance with the public financial disclosure requirements of title II of this Act by officers and employees of the executive branch and executive agency officials responsible for receiving, reviewing, and making available financial statements filed pursuant to such title" (5 U.S.C. app. § 402(b)(3)). The Director is also tasked with "monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch" (5 U.S.C. app. § 402(b)(5)). What does OGE do to investigate such compliance?

As the supervising ethics office for the executive branch, the U.S. Office of Government Ethics (OGE) works with the Designated Agency Ethics Official (DAEO) of each of the more than 130 agencies to ensure that public financial disclosure requirements of the Ethics in Government Act (Act) are uniformly implemented across the executive branch, as required by 5 U.S.C. app. § 402(b)(3). OGE also works with the DAEO of each agency to ensure that the requirements of the supplemental confidential financial disclosure reporting system, established pursuant to 5 U.S.C. app. § 107, are uniformly implemented in accordance with 5 U.S.C. app. § 402(b)(5). With regard to the highest level of filers, the process involves direct review of all reports by OGE. With regard to other filers, the process involves direct review by agency ethics officials of the more than 400,000 public and confidential reports filed in the executive branch each year and programmatic monitoring through OGE's program reviews of agency ethics programs. As discussed in more detail below, OGE's program reviews include examination of a sampling of financial disclosure reports for compliance with the requirements, and OGE posts the program review reports on its website.

For the highest level of filers, whose official duties implicate the greatest potential risk for the ethics program, OGE requires that agencies submit, at the beginning of the filing cycle each year, updated lists identifying every Presidentially-appointed, Senate-confirmed public

financial disclosure filer and DAEO whose report is subject to certification by OGE.¹ Given the challenges of tracking personnel in over 130 agencies across the executive branch, these lists support OGE's efforts to ensure that agencies collect annual financial disclosure reports from all of these filers and transmit them in a timely manner to OGE. OGE uses the updated lists to track the agencies' collection and processing of the financial disclosure reports of these filers.² If a delay is the result of a filer's failure to file a financial disclosure report, disciplinary or civil penalties can be imposed. The Act expressly indicates that authority to take disciplinary action rests with the head of each agency or, in the case of Presidential appointees, the President.³ Authority to seek civil and criminal penalties for willful failure to file rests with the Department of Justice.⁴

OGE's review of an individual financial disclosure report is a two-stage process. Each report is reviewed first by a staff-level reviewer and then by a supervisor. In analyzing these financial disclosure reports, both agency and OGE reviewers are required to use the procedures and review standard set forth in § 106 of the Act.⁵ Under that section, a reviewer is required make all determinations "on the basis of information contained in such report."⁶ Congress specifically considered and rejected alternate provisions that would have authorized OGE and the Comptroller General to audit a limited number of reports.⁷ Therefore, the 24-year old regulation implementing the Act incorporates this standard, providing that, "The reviewing official need not audit the report to ascertain whether the disclosures are correct. Disclosures shall be taken at 'face value' as correct, unless there is a patent omission or ambiguity or the official has independent knowledge of matters outside the report."⁸ Accordingly, OGE and agency ethics officials do not audit the reports under this longstanding standard. Nonetheless, the reviews of these financial disclosure reports often involve multiple exchanges between filers and reviewers.

¹ See U.S. OFFICE OF GOV'T ETHICS, PA-15-03: DEADLINES AND PROCEDURES FOR ANNUAL PUBLIC FINANCIAL DISCLOSURE REPORTS REQUIRED TO BE FILED WITH THE U.S. OFFICE OF GOVERNMENT ETHICS (2015).

² See *id.*

³ 5 U.S.C. app. § 104(c).

⁴ 5 U.S.C. app. § 104(a).

⁵ 5 U.S.C. app. § 106; see also 5 U.S.C. app. § 402(f)(2)(B)(iv) (reiterating that OGE is to use the procedures contained in 5 U.S.C. app. § 106, as opposed other procedures, for investigating financial disclosure reports and ordering corrective action on the basis of information submitted in such reports); 5 C.F.R. §§ 2638.504(a), 2638.505(a). OGE and agency ethics officials apply these review procedures in connection with both public and confidential reports. See 5 C.F.R. §§ 2634.605, 2634.909.

⁶ 5 U.S.C. app. § 106(b)(2).

⁷ The Act's review standard establishes that determinations as to compliance with the law are to be based on the information submitted by the filer in the financial disclosure report. 5 U.S.C. app. § 106. Earlier proposals that would have required auditing of the data and documentation supporting the financial information presented in the financial disclosure reports were rejected. See, e.g., Financial Disclosure Act, H.R. 9, 95th Cong. § 7(f) (1977) (rejected provision requiring the Comptroller General to randomly audit 5% of public financial disclosure reports each year, to audit at least one report of the President and Vice President per term, and to audit at least one report of each Member of the House and the Senate every six years); Ethics in Government Act of 1977, H.R. 6954, 95th Cong. § 201(a) (as reported by the H. Comm. on Post Office and Civil Service, September 28, 1977) (rejected provision that would have required OGE to randomly audit public financial disclosure reports); Watergate Reorganization and Reform Act of 1976, S. 495, 94th Cong. § 306(f) (as reported by the S. Comm. on the Judiciary, June 15, 1976).

⁸ 5 C.F.R. § 2634.605(b)(2).

When OGE needs additional information or has a question about the conflicts of interest analysis, OGE contacts the ethics office for the employing agency. OGE has advised agencies that, “Agency ethics officials are required to respond to requests from OGE for additional information regarding these reports as soon as practicable but not later than 30 days after the request.”⁹ After reviewing the requested information, the OGE reviewer may direct the agency reviewer to work with the filer to make appropriate corrections to the financial disclosure report. In most cases, the correction of the report resolves the issue and no further action is required.¹⁰

If, however, the OGE reviewer is of the opinion, on the basis of the information in the financial disclosure report, that further action is needed in order to comply with applicable laws and regulations, the OGE reviewer will notify the filer, through the agency. In that event, the OGE reviewer will identify the corrective actions that the filer can take to comply.¹¹ These include such actions as recusal, reassignment, and divestiture.¹² If the filer fails to take such actions, the filer’s failure is to be referred to the appropriate authority for action. In the case of Presidentially-appointed, Senate-confirmed appointees, that authority is the President; for other employees, that authority is the head of the employee’s agency.¹³ If a filer, including a Senate-confirmed appointee, misses a filing deadline the agency is authorized to impose a \$200 late fee,¹⁴ and if the filer willfully fails to file a financial disclosure report the Department of Justice can seek civil or criminal penalties.¹⁵

In addition, if information contained in a financial disclosure report indicates a possible violation of conflicts of interest laws or that a filer has falsified a financial disclosure report, the filer may face criminal prosecution, civil penalties, or disciplinary action.¹⁶ Investigations of such issues are generally conducted by the 14,000-member Inspector General community, and OGE can request that Inspectors General conduct investigations when necessary.¹⁷ OGE is statutorily prohibited from making any finding that any criminal law has been violated.¹⁸ If OGE or an agency has “reasonable cause to believe” that a filer has “willfully falsified or willfully failed to file information required to be reported” on a public financial disclosure report, OGE or the agency is required to refer the matter to the Attorney General.¹⁹ The same requirement

⁹ U.S. OFFICE OF GOV’T ETHICS, PA-15-03: DEADLINES AND PROCEDURES FOR ANNUAL PUBLIC FINANCIAL DISCLOSURE REPORTS REQUIRED TO BE FILED WITH THE U.S. OFFICE OF GOVERNMENT ETHICS (2015).

¹⁰ This practice is consistent with the practice of the House of Representatives Committee on Ethics, which is subject to the same review standard at 5 U.S.C. app. § 106, with regard to Members of Congress. HOUSE COMM. ON ETHICS, IN THE MATTER OF ALLEGATIONS RELATING TO REPRESENTATIVE VERNON G. BUCHANAN, H.R. REP. NO. 112-588, at 5 (2012) (“[E]rrors and omissions in Financial Disclosure Statements are an ordinary part of the process for many filers, and in the normal course of review and amendment of Financial Disclosure Statements, the fact of errors and omissions are typically not the subject of an investigation or Report by the Committee, but rather are disclosed publicly by the filing of the amendment itself.”).

¹¹ 5 U.S.C. app. § 106(b)(3).

¹² *Id.*

¹³ 5 U.S.C. app. § 106(b)(4)-(5).

¹⁴ 5 U.S.C. app. § 104(d).

¹⁵ 5 U.S.C. app. § 104(a).

¹⁶ *See, e.g.*, 18 U.S.C. § 216; 5 U.S.C. app. §§ 104, 504; 5 U.S.C. § 7513.

¹⁷ *See* 5 U.S.C. app. §§ 4(a)(1), 403(a).

¹⁸ 5 U.S.C. app. § 402(f)(5).

¹⁹ 5 U.S.C. app. § 104(b).

applies in the case of apparent violations of criminal conflict of interest laws.²⁰ The Department of Justice has authority to seek criminal²¹ or civil penalties²² for willfully submitting false information in a financial disclosure report. OGE's recent prosecution surveys highlight some of the Department of Justice's work in this area.²³

Following the close of the calendar year, OGE issues a letter directly to the head of each agency, with a copy to the agency's DAEO, regarding OGE's review of the annual financial disclosure reports of the highest level of financial disclosure filers. In the letter, OGE identifies by name any filer whose report has not received certification by OGE and indicates whether certification has been denied because the report has not been received, whether additional information needed for certification has not been received, and whether the filer's report was not compliant with applicable requirements.²⁴

With regard to employees at other levels in the executive branch, the public and confidential financial disclosure reports are reviewed by the ethics office for the employing agency. Counting both public and confidential financial disclosure reports, the executive branch collects over 400,000 reports each year. OGE has instituted a programmatic approach to monitoring and investigating compliance with regard to this massive annual undertaking. Accordingly, OGE focuses on agencies' programs for collecting and reviewing these 400,000 financial disclosure reports. OGE has directed each DAEO in the executive branch to establish "[a]n effective system and procedure for the collection, filing, review, and, when applicable, public inspection of the financial disclosure reports."²⁵ To this end, OGE has required that DAEOs ensure that "[a]ll financial disclosure reports submitted by employees ... are properly maintained and effectively and consistently reviewed for conformance with all applicable laws and statutes."²⁶ The review of these financial disclosure reports by agency ethics officials are subject to the same review requirements described above with regard to the reports of the highest level of filers whose reports are transmitted to OGE for certification. In addition, the same potential exists in individual cases for involvement of Inspectors General and for disciplinary,

²⁰ 28 U.S.C. § 535.

²¹ See, e.g., 5 U.S.C. app. § 104(a)(2), 18 U.S.C. §§ 1001, 1018.

²² 5 U.S.C. app. § 104(a)(1).

²³ For example, the Department of Justice reported 10 criminal prosecutions involving false statements or omissions in financial disclosure reports in five of OGE's recent prosecution surveys. See U.S. OFFICE OF GOV'T ETHICS, LA-15-10: 2014 CONFLICT OF INTEREST PROSECUTION SURVEY (*United States v. Kenneth H. Nix and Velma Salinas-Nix*); U.S. OFFICE OF GOV'T ETHICS, LA-13-12: 2012 CONFLICT OF INTEREST PROSECUTION SURVEY (2013) (*United States v. Shih Chi Liu; United States v. Cheng Yi Liang*); U.S. OFFICE OF GOV'T ETHICS, LA-12-06: 2011 CONFLICT OF INTEREST PROSECUTION SURVEY (2012) (*United States v. Jeffrey Williams; United States v. Robert Barry Adcock*); U.S. OFFICE OF GOV'T ETHICS, LA-11-08: 2010 CONFLICT OF INTEREST PROSECUTION SURVEY (2011) (*United States v. Martin Lieb; United States v. Joseph McCloskey; United States v. Frank Davis*); U.S. OFFICE OF GOV'T ETHICS, DO-09-029: 2008 CONFLICT OF INTEREST PROSECUTION SURVEY (2009) (*United States v. Hardrick Crawford, Jr.; United States v. Jack W. Snyder*).

²⁴ For the calendar year 2015 filing cycle, all agencies have successfully completed the review process as to filers requiring OGE certification.

²⁵ 5 C.F.R. § 2638.203(b)(2).

²⁶ 5 C.F.R. § 2638.203(b)(4).

civil, and criminal penalties in connection with false filings or with conflicts of interest identified through the review of financial disclosure reports.²⁷

OGE monitors agencies' compliance with these requirements through program reviews conducted by OGE's Compliance Division.²⁸ These reviews involve the collection and analysis of agency documentation, onsite fieldwork, interviews with ethics officials and agency staff, and examination of agency training, advice and counsel, and tracking systems. During these program reviews, OGE also examines a sampling of financial disclosure reports for compliance with the requirements. At the close of a program review, OGE's Compliance Division issues a report detailing its findings and, when appropriate, making specific recommendations for improvement. When the report includes recommendations, OGE conducts a follow-up program review, usually six months after the initial program review, to assess the agency's progress. OGE posts its program review reports, including its follow-up program review reports, on its website.

In addition, OGE issues its Annual Agency Ethics Program Questionnaire each year to collect a comprehensive report from each agency regarding its ethics program. The questionnaire gathers information about a range of program activities, including the agency's financial disclosure operations. OGE analyzes this information for trends, and seeks follow-up information from agencies when there are significant year-to-year statistical discrepancies in information provided by the agency. OGE's Compliance Division also reviews this information in connection with its program review activities, using the data either to select agencies for program reviews or to develop the program review strategy for individual agencies already selected for review. OGE's current policy is to post the agencies' responses to the questionnaire on its website.

RESPONSE TO QUESTIONS 2 & 10, QUESTIONS 3 & 11, QUESTIONS 4 & 12, AND QUESTION 5²⁹

2. How does OGE confirm that commitments are made to resolve any potential conflicts of interest?

(corresponding question) 10. What is OGE's role with developing and monitoring ethics agreements for current and former executive branch leaders who have been appointed by the President and confirmed by the Senate?

3. What does OGE do to follow up to ensure that such commitments are timely met and appropriately resolved?

²⁷ See, e.g., 5 U.S.C. § 7513; 5 U.S.C. app. §§ 4(a)(1), 104, 402(f)(5), 403(a), 504; 18 U.S.C. §§ 208, 216, 1001, 1018; 28 U.S.C. § 535.

²⁸ A list of criteria used by OGE to determine whether an agency has complied with the requirements of having an effective system for public and confidential financial disclosure can be found on OGE's website. *Ethics Program Review Guidelines*, U.S. OFF. GOV'T ETHICS, <http://www.oge.gov/Program-Management/Program-Review/Ethics-Program-Review-Guidelines> (last visited Jan. 25, 2016).

²⁹ Because Questions 2, 3, and 4 overlap with Questions 10, 11, and 12, respectively, the responses to all of these questions, as well as the response to related Question 5, are combined here.

(corresponding question) 11. How does OGE ensure continued compliance with ethics agreements?

4. What, if any, enforcement authority does OGE have to ensure compliance in this area?

(corresponding question) 12. What oversight and enforcement authority does OGE have over ethics agreements?

5. If OGE does not have enforcement authority to ensure compliance, who has that responsibility?

As part of the financial disclosure review process for all Presidentially-appointed, Senate-confirmed (PAS) nominees whose reports are subject to certification by OGE, OGE and the agency perform a comprehensive conflicts analysis of the PAS nominee's financial interests. The analysis focuses on 18 U.S.C. § 208 and other applicable legal authorities, such as 18 U.S.C. §§ 203, 205 & 209; 5 C.F.R. §§ 2635.502, 2635.503, 2635.807, 2636.305 & 2636.306; Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990); and Executive Order 13490 (2009).

Based on that analysis, an ethics agreement, which prescribes the steps that will be taken by the PAS nominee to resolve any conflicts of interest, is developed as a joint product of the agency and OGE. OGE provides expert guidance and model language, and determines whether the commitments outlined in the ethics agreement are sufficient to ensure compliance with applicable laws and regulations. The PAS nominee must agree to comply with all terms specified in the ethics agreement for the duration of the appointment to the position to which he or she is nominated. OGE's approval of the actions specified in the ethics agreement is a precondition for certification of the PAS nominee's financial disclosure report, which has to occur before OGE forwards the certified report and ethics agreement to the Senate.

OGE conducts follow-up to ensure that PAS appointees timely comply with the ethics agreements they signed as PAS nominees. To facilitate this follow-up, OGE tracks the Senate confirmation dates of PAS nominees. Unless a date for compliance is indicated in the ethics agreement, the individual must comply within three months of confirmation with commitments specified in the ethics agreement.³⁰ Extensions for compliance with any element of an ethics agreement can be granted in cases of unusual hardship.³¹

Upon confirmation, OGE sends a notice to ethics officials at the employing agency reminding them of the importance of working with the individual to ensure compliance with the ethics agreement by applicable deadlines. OGE sends additional notices to the ethics officials throughout the 90-day compliance period until OGE has been notified that the PAS appointee has provided agency ethics officials with evidence of compliance with commitments in the ethics

³⁰ 5 C.F.R. § 2634.802(b).

³¹ *Id.*

agreement. Agency ethics officials notify OGE of any issues that may delay full compliance, in which case OGE staff and agency ethics officials coordinate either to ensure timely compliance by the PAS appointee or, if appropriate, grant an extension. After a PAS appointee has complied with the ethics agreement, OGE continues to monitor the appointee's subsequent public financial disclosure reports to ensure that the appointee continues to comply with the ethics agreement.

OGE's monitoring of ethics agreement commitments is grounded in the understanding that the ethics agreement is a prophylactic measure designed to avoid potential conflicts of interest and to ensure compliance with specific legal authorities. Because the primary risk presented by noncompliance with an ethics agreement is that an employee could violate conflicts of interest laws, OGE insists that agencies require PAS appointees to comply with ethics agreements. If a PAS appointee fails to comply with an ethics agreement and the noncompliance were to result in a violation of the conflicts of interest laws, OGE would refer the matter to an appropriate Inspector General for possible investigation or to the Department of Justice for possible criminal or civil prosecution based on the violation. Irrespective of whether or not the noncompliance were to result in violation of the conflicts of interest laws, OGE would require the agency to ensure compliance with the ethics agreement. Agency ethics officials are not authorized to modify these ethics agreements without OGE's approval. If a PAS appointee were to decline to comply with an ethics agreement, OGE would escalate the matter to the agency head and, if necessary, the White House.³² If a regulation were violated as a result of the noncompliance, OGE would also request information regarding any follow-up action, such as an order from the agency head compelling compliance or removal of the PAS appointee from government service. Note, however, that the United States Constitution limits authority to remove a Senate-confirmed Presidential appointee to the President under Article II, Section 2, clause 2.

The ethics agreement covers the entire period of appointment to the particular position. When a PAS appointee leaves government service and becomes a private citizen, the PAS appointee is subject to post-employment restrictions, pursuant to 18 U.S.C. § 207. Agency ethics officials provide guidance to former PAS appointees concerning their post-employment activities. However, enforcement of 18 U.S.C. § 207, which is a criminal statute, is within the purview of the U.S. Department of Justice, which has the authority to prosecute private citizens.

With regard to the millions of non-PAS employees, the decentralized executive branch ethics program assigns each agency's DAEO responsibility for reviewing financial disclosure reports, identifying potential conflicts of interest, and addressing those potential conflicts. As discussed in response to Question 1, OGE monitors the processes put in place by the DAEOs through its reviews of agency ethics programs. As part of the program review process, OGE examines both an agency's financial disclosure program and a sampling of financial disclosure reports. In addition, OGE examines whether agency ethics officials provide employees guidance with regard to conflicts of interest and implement remedies to address them. If OGE identifies issues in the course of a program review, OGE will make recommendations in its program

³² OGE has not generally had to take such action to obtain a PAS appointee's compliance. Early in OGE's history, a compliance question involving the ethics agreement of a cabinet official was escalated to an independent counsel when it could not be resolved informally. See OGE Informal Advisory Opinion 88 x 13 (1988).

review report and will conduct a follow-up program review to assess the agency's remediation of the issues. OGE posts its program review reports, including its follow-up program review reports, on its website.

RESPONSE TO QUESTION 6

6. Congress gave OGE the responsibility for "ordering corrective action of the part of agencies and employees which the Director deems necessary" (5 U.S.C. app. § 402(b)(9)), as well as various authorities to execute that responsibility (5 U.S.C. app. § 402(f)). Please provide a list of all instances since OGE's creation in which OGE has:

- a. Ordered corrective action pursuant to 5 U.S.C. app. § 402(b)(9);
- b. Submitted a notification to the President and the Congress, pursuant to 5 U.S.C. app. § 402(f)(1)(B), of agency noncompliance;
- c. Recommended an investigation pursuant to 5 U.S.C. app. § 402(f)(2)(A)(ii)(I);
- d. Recommended disciplinary action pursuant to 5 U.S.C. app. § 402(f)(2)(A)(ii)(I);
- e. Submitted a notification to the President pursuant to 5 U.S.C. app. § 402(f)(2)(A)(ii)(II);
- f. Submitted a notification to an agency head pursuant to 5 U.S.C. app. § 402(f)(2)(A)(iii)(II);
- g. Submitted a notification to the President pursuant to 5 U.S.C. app. § 402(f)(2)(A)(iv)(II); and
- h. Conducted an investigation pursuant to 5 U.S.C. app. § 402(f)(2)(B)(i).

With regard to individual employees, the formal procedures in § 402(f) are inapplicable to any matters involving either conflicts of interest provisions, which are criminal in nature, or financial disclosure provisions, which are addressed solely under § 106 of the Act.³³ As for other types of matters not involving conflicts of interest or financial disclosure, OGE has not needed to invoke formal procedures for corrective action against an individual employee. OGE has found that direct communication with agency officials, including the Designated Agency Ethics Officials and agency Inspectors General, has been effective and a more efficient approach for obtaining action by agencies to remediate issues that arise. The approach of using direct communication with relevant officials produces quicker results than invoking the formal procedures would permit. In addition, invoking those procedures would have unnecessarily increased the transaction costs in obtaining compliance, due to the time and resources that OGE and the agency would have had to devote to the formal steps outlined in the statute and its implementing regulation.

In addition to OGE's direct communication with agency officials, two other processes have proven highly effective. First, with regard to high level officials, the process at § 106 of the

³³ 5 U.S.C. app. § 402(f)(2)(B)(iv), (f)(5).

Act has been effective in resolving potential conflicts of interest. In the PAS nominee program in particular, OGE has leveraged its authority to certify financial disclosure reports as a means to require individuals to enter into ethics agreements containing commitments to eliminate conflicts of interest. The prospect that OGE would not certify a nominee's report that reveals an unresolved conflict is sufficient to induce ethics officials to obtain the necessary information and commitments from filers to resolve conflicts of interest. OGE then monitors compliance with the ethics agreements and reviews subsequent annual financial disclosure reports for continued compliance. Second, the more than 4,500 professional ethics officials embedded in agencies, who are generally closer to factual information than OGE, are able to work within their agencies to address issues as they arise. Agency ethics officials also communicate directly with Inspectors General, who have a combined staff of approximately 14,000 employees across the executive branch, and with agency managers, who have authority to take disciplinary actions, in connection with matters arising at their agencies. OGE supports these agency ethics officials through training and access to OGE desk officers.

At the agency program level, the practice has been much the same as for individual employees. OGE has invoked formal procedures, rather than using the traditional approach of direct communication with agency officials, on only a few occasions in its 38-year history: (1) OGE issued a notice of deficiency in 1991 after a program review of the U.S. Agency for International Development and escalated the matter to the agency head in 1992 when remedial action remained incomplete, but OGE closed the matter in 1993 when the agency completed remediation; (2) OGE issued a similar notice in 1994 after a program review of the National Credit Union Administration but closed the matter that same year when the agency completed remediation; (3) OGE issued a notice in 1997 after a program review of the Small Business Administration (SBA) but closed the matter four months later when the agency completed remediation; (4) OGE issued another notice to SBA after a program review in 2003 but closed the matter in 2004 when the agency completed remediation; (5) OGE issued a notice in 1996 after a program review of the U.S. Commission on Civil Rights but closed the matter in 1997 when the agency completed remediation; (6) OGE issued a notice in 1997 after a program review of the Advisory Council on Historic Preservation but closed the matter in 1998 because the agency's written response resolved the concern; (7) OGE issued a notice in 1997 after a program review of the Council of Economic Advisers but closed the matter a month later because the agency's written response resolved the concern; (8) OGE issued a notice in 1997 after a program review of the Department of the Interior but closed the matter in 1998 when the agency completed remediation; (9) OGE issued a notice in 1997 after a program review of the Department of Agriculture and closed the matter in 2000 when the agency remediated identified issues but issued another notice in 2002, as a result of another program review, and closed the matter again in 2004 when the agency completed remediation; and (10) OGE issued a notice in 1999 after a program review of the National Transportation Safety Board but closed the matter in 2001 when the agency completed remediation.

In each of those instances, the matter did not proceed beyond the preliminary phases because OGE found that either the agency's written response resolved the concern or the agency completed its remediation of the deficiencies. Each of those matters arose as the result of the findings of OGE's routine program reviews, yet OGE's invocation of formal procedures triggered additional steps that OGE had to take before it could obtain satisfactory outcomes. For

this reason, OGE has generally found that these formal procedures are less efficient than its traditional approach of escalating the matter through direct communication with the agency in order to correct program deficiencies. OGE's program reviews generally achieve the same outcomes, without triggering the additional steps. In fact, OGE has recently refined its processes for conducting program reviews, making recommendations, and conducting follow-up program reviews to evaluate agencies' correction of deficiencies. In contrast to the formal procedures, these refined measures have produced needed changes more quickly and have conserved taxpayer resources.

When OGE identifies program deficiencies through its program reviews, OGE issues recommendations directing the agency to take action to address the deficiencies and bring its ethics program into compliance with applicable laws and regulations. OGE has issued thousands of recommendations and, with few exceptions, has been able to document that agencies have taken appropriate action to address the underlying deficiencies. By way of example, OGE issued 122 recommendations in fiscal year 2015. Within that same fiscal year, better than 89% of those recommendations were successfully closed, and OGE is continuing to coordinate with agencies on the remaining recommendations. In comparison, during recent Congressional testimony the Comptroller General stated that approximately 80% of recommendations issued by the General Accountability Office are closed four years after issuance.³⁴

RESPONSE TO QUESTION 7

7. Congress also gave OGE the responsibility for "requiring such reports from executive agencies as the Director deems necessary" (5 U.S.C. app. § 402(b)(10)). Please provide a list of all such reports the Director has required since OGE's creation.

As the supervising office for the executive branch ethics program, OGE obtains information from agencies in a variety of ways. For example, OGE collects information and documents from individual agencies in connection with its reviews of agency ethics programs. Reporting requirements over the years have included other one-time requests for particular types of information directly related to specific program operations, such as data calls regarding government ethics training needs and the information technology used by agency ethics programs.

Based on its years of experience overseeing the executive branch ethics program, OGE has consolidated much of the data it collects each year into a comprehensive Annual Agency Ethics Program Questionnaire. Authority to conduct this consolidated data collection was made expressly available to OGE by the enactment of 5 U.S.C. app. § 402(e), which was added to the Ethics in Government Act as part of OGE's reauthorization in 1988.³⁵ OGE transmits this

³⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-272T, GOVERNMENT EFFICIENCY AND EFFECTIVENESS: IMPLEMENTING GAO RECOMMENDATIONS CAN ACHIEVE FINANCIAL BENEFITS AND STRENGTHEN GOVERNMENT PERFORMANCE 2, tbl.1 (2015) (statement of Gene L. Dodaro, Comptroller General of the United States, before the Subcomm. on Regulatory Affairs and Federal Management of the S. Comm. on Homeland Security and Governmental Affairs).

³⁵ Act of Nov. 3, 1988, Pub. L. No. 100-598, § 6, 102 Stat. 3031, 3032.

questionnaire to agencies in January every year. Agency responses to the questionnaire give OGE an understanding of each agency's individual ethics program, while the compiled data provides OGE with an overview of the entire executive branch ethics program. Topically, the questionnaire requires agencies to submit information about how they administer the elements of their ethics programs, as well as to provide data demonstrating compliance with regulatory training and financial disclosure requirements. In its current form, the questionnaire directs agencies to provide information on the following topics: (1) Organizational Structure; (2) Program Administration; (3) Education and Training; (4) Advice and Counseling; (5) Public Financial Disclosure; (6) Confidential Financial Disclosure; (7) Remedies and Enforcement of Standards of Conduct, Criminal, and Civil Statutes; and (8) Advisory Committees and Special Government Employees. Agency questionnaire responses are due to OGE in February each year, and OGE staff review the data collected. Recognizing the value of this material to a wider audience, in 2014, OGE published on its website a summary of aggregate data from the agencies' responses. In 2015, OGE also began posting all of the raw data from agency responses in order to be even more transparent.

Outside of the questionnaire, OGE conducts certain other annual data collections. These include: a collection from agencies of lists of employees occupying certain categories of positions for financial disclosure purposes; a collection of agency component designations for purposes of applying post-employment restrictions; a survey of all U.S. Attorney offices and other offices in the Department of Justice regarding prosecutions related to conflicts of interest laws; and a survey of ethics officials to collect information from OGE's "customers" about the services OGE provides.

OGE has also made information requests pursuant to specific legal authorities, such as a request for information pursuant to the Presidential Transition Act of 2000, which required OGE to conduct a study and submit a report on improvements to the financial disclosure process for Presidential nominees. Examples of other categories of information or reports that OGE requires on an ongoing basis under other legal authorities include: the Annual Ethics Pledge Survey, which provides information about agency compliance with the President's Executive Order on Ethics (Executive Order 13490); the OGE Form 202, which, pursuant to 5 U.S.C. app. § 402(e)(2), collects information regarding referrals to the Department of Justice related to violations of conflicts of interest laws; and the OGE Form 1353 which, pursuant to 31 U.S.C. § 1353(d)(1), collects information from agencies twice per year regarding payments for travel, subsistence, and related expenses received from non-Federal sources in connection with the attendance of employees at certain meetings or similar functions.

RESPONSE TO QUESTIONS 8 AND 9

8. If OGE does not believe factual assertions made in a Presidential candidate's financial disclosure paperwork, who in the federal government would have responsibility for making a factual determination?

9. Who in the federal government has enforcement authority to ensure that Presidential candidates comply with financial disclosure requirements?

Under the Ethics in Government Act, Presidential candidates file their financial disclosure reports with the Federal Election Commission (FEC).³⁶ The FEC has responsibility for collecting late filing fees in the event that candidates miss the applicable deadlines for filing their financial disclosure reports.³⁷ If a candidate willfully fails to file a financial disclosure report, the FEC is required to refer the candidate to the Attorney General, who has authority to seek civil penalties for failure to file.³⁸

After reviewing and certifying a financial disclosure report, the FEC forwards the report to OGE for additional review.³⁹ The Ethics in Government Act requires OGE to make a certification determination on the basis of information contained in the report.⁴⁰ In reviewing the report, OGE communicates with the candidate's representative to answer any questions that may arise in the course of the review of the report.⁴¹ As part of this process, the candidate's representative ensures that the candidate amends the report as needed to reflect the correct information.

Willfully making a false factual assertion in the financial disclosure report would implicate criminal law,⁴² and OGE is statutorily precluded from making a finding that a criminal law has been violated.⁴³ Therefore, OGE may not make a factual determination that a filer has willfully made false factual assertions in a financial disclosure report. If reasonable cause exists to believe that a candidate has willfully made false factual assertions, however, the Ethics in Government Act provides for referral of the candidate to the Attorney General.⁴⁴ In cases of inadvertent errors, OGE will usually work with a candidate to ensure that the report is amended to reflect the correct information.⁴⁵

³⁶ 5 U.S.C. app. § 103(e).

³⁷ 5 C.F.R. § 2634.704(c).

³⁸ 5 U.S.C. app. § 104(b).

³⁹ 5 U.S.C. app. § 103(c).

⁴⁰ 5 U.S.C. app. § 106(b)(1).

⁴¹ See 5 U.S.C. app. § 106(b)(2).

⁴² See, e.g., 5 U.S.C. app. § 104; 18 U.S.C. §§ 1001, 1018.

⁴³ 5 U.S.C. app. § 402(f)(5).

⁴⁴ 5 U.S.C. app. § 104(b).

⁴⁵ In this regard, it is notable that the House of Representatives Committee on Ethics, which is subject to the same review standard at 5 U.S.C. app. § 106 and the same requirement of referral to the Attorney General at 5 U.S.C. app. § 104(b), has explained that, in the vast majority of cases, appropriate action is limited to requiring a filer to correct an incorrect financial disclosure report:

[L]ess substantial errors and omissions on Financial Disclosure Statements are not uncommon. In fact, between 30% and 50% of all Financial Disclosure Statements reviewed by the Committee each year contain errors or require a corrected statement. For over 95% of these inaccurate Financial Disclosure Statements, the filer appears to be unaware of the errors until they are notified by the Committee. Some filers also appear to become aware of errors after being notified by members of the media or outside groups who review the statements and other public records. Generally, unless there is some evidence that errors or omissions are knowing or willful, or appear to be significantly related to other potential violations, the Committee notifies the filer of the error

RESPONSE TO QUESTIONS 10, 11, AND 12

This response has been combined with the response to Questions 2, 3, 4, and 5, as discussed above.⁴⁶

RESPONSE TO QUESTION 13

13. In the context of honoraria disclosure, you stated in your testimony that the Ethics in Government Act is “not the statute that I would have written, as evidenced by the fact that OGE has a confidential financial disclosure system where Congress left us the ability to write our own rules.” What changes would you recommend to the statute?

If Congress were to focus on revising the disclosure requirements for honoraria, I would consider recommending expansion of the reporting requirements of 5 U.S.C. app. § 102(a)(6)(B). That section currently requires disclosure of the source of any payments during the reporting period that exceed \$5,000 in a calendar year for a filer’s services. This reporting requirement, which applies to honoraria and other types of payments, applies without regard to whether the payment is made to the filer or another, and it applies whether or not the filer is acting in a personal capacity. Under the Ethics in Government Act, however, this requirement applies only to filers who are new entrants (*i.e.*, new hires) or nominees—it does not apply to filers who are current employees filing annual reports, former employees filing termination reports, elected officials (*i.e.*, the President, the Vice President, and Members of Congress), or candidates. I would consider recommending the extension of this requirement to all of the excluded filers in the executive and legislative branches with regard to both honoraria and other types of payments.

It also bears noting that two independent organizations have recently issued recommendations for changes to the financial disclosure system for executive branch employees. In March 2013, the National Academy of Public Administration (NAPA) conducted a congressionally mandated and funded study of financial disclosure issues related to the STOCK Act, and the report of that study makes several general recommendations related to tailoring public financial disclosure requirements in the executive branch to correspond with information

and requires that he or she submit an amendment, which is then publicly filed. Once the amendment is properly submitted, the Committee takes no further action. Accordingly, errors and omissions in Financial Disclosure Statements are an ordinary part of the process for many filers, and in the normal course of review and amendment of Financial Disclosure Statements, the fact of errors and omissions are typically not the subject of an investigation or Report by the Committee, but rather are disclosed publicly by the filing of the amendment itself.

HOUSE COMM. ON ETHICS, IN THE MATTER OF ALLEGATIONS RELATING TO REPRESENTATIVE VERNON G. BUCHANAN, H.R. REP. NO. 112-588, at 5 (2012).

⁴⁶ Because questions 2, 3, and 4 overlap with questions 10, 11, and 12, respectively, the responses to all of these questions are combined in the earlier section above.

needed to perform conflicts of interest analysis.⁴⁷ Without taking a position on them, NAPA's report also includes a list of specific recommendations for improving public financial disclosure requirements in the executive branch.⁴⁸ In another congressionally mandated study, the Working Group on Streamlining Paperwork for Executive Nominations, on which I served as a member, made a number of similar recommendations concerning the public financial disclosure system.⁴⁹ Should the subcommittee wish to consider these recommendations, OGE would be available to provide technical assistance at the subcommittee's request.

RESPONSE TO QUESTIONS 14 AND 15

14. What do you do to ensure that each federal agency has a Designated Ethics Official?

15. What do you do to ensure that such ethics officers dedicate the proper amount of time to ethics work?

OGE desk officers provide agencies with a dedicated point of contact for overall ethics program support, including issues such as vacancies to key ethics program positions and access to program resources. Agency interaction with OGE desk officers allows OGE to assist agencies in transitional situations when a Designated Agency Ethics Official (DAEO) position becomes vacant. Desk officers also review and follow-up on agencies' responses to the Annual Agency Ethics Program Questionnaire that identify any vacant DAEO positions. In addition, OGE program review staff review formal DAEO designation letters during ethics program reviews to ensure these positions are staffed and the designations are current. To provide additional coverage, OGE also works with agencies to appoint Alternate DAEOs (ADAEOs).

With regard to program resources, OGE desk officers also review and follow-up on agency questionnaire responses that identify the percentage of time the DAEO and ADAEO of an agency dedicate to ethics-related work. In addition, OGE program reviews generate objective ethics program performance results, which can expose situations where sufficient time does not appear to be dedicated to ethics work and result in recommendations for improvement.

RESPONSE TO QUESTIONS 16, 17, 18, AND 19

16. What is OGE's process for conducting plenary reviews and inspections of agency ethics programs?

17. How often does OGE review an agency's program, and how are recommendations resolved?

⁴⁷ NAT'L ACAD. OF PUB. ADMIN., *THE STOCK ACT: AN INDEPENDENT REVIEW OF THE IMPACT OF PROVIDING PERSONALLY IDENTIFIABLE FINANCIAL INFORMATION ONLINE* 63-64 (2013), available at <http://www.napawash.org/wp-content/uploads/2013/03/STOCKactFinal1.pdf>.

⁴⁸ *Id.*

⁴⁹ WORKING GRP. ON STREAMLINING PAPERWORK FOR EXEC. NOMINATIONS, *STREAMLINING PAPERWORK FOR EXECUTIVE NOMINATIONS* 18-33 (2012), available at <http://whitehousetransitionproject.org/resources/briefing/appointments/Report%20of%20S679%20Working%20Group-Final.pdf>.

18. If a deficiency is discovered in an agency's ethics program, what is the process for correcting?

19. If an agency refuses to correct, does OGE have enforcement authority to seek correction? If not, who is responsible for enforcing correction?

OGE's Compliance Division is currently reviewing agencies on a five-year cycle, which is the same length as the statutory term for an OGE Director. Although OGE generally schedules reviews based on the time elapsed since an agency's last review, OGE also considers other factors including input from OGE desk officers, the involvement of other OGE divisions and branches in issues arising at individual agencies, and prior reviews when selecting agencies for program reviews.

OGE conducts three types of program reviews: inspections, plenary reviews, and follow-up reviews. The first two types of reviews, inspections and plenary reviews, are generally conducted in much the same manner. They consist of several distinct phases, which are discussed below. OGE conducts follow-up reviews only after an inspection or plenary review in order to assess an agency's implementation of recommendations in the program review report. This type of review is discussed below after the discussion of inspections and plenary reviews.

The first phase of an inspection or plenary review is the engagement phase. During this phase, an agency is notified that OGE has selected its ethics program for review and is asked to produce specified information and documents relevant to program operations. In the case of inspections, the information and document requests generally focus on program compliance, meaning the focus is on the results of the efforts of the agency's ethics program with respect to compliance with applicable statutory and regulatory requirements. In the case of plenary reviews, the information and document requests generally focus on program compliance as well as on program operations, meaning the focus is on results but also on the processes and procedures by which the agency obtains those results. Therefore, the requests with regard to plenary reviews are more extensive, and response time is somewhat longer. In the case of both inspections and plenary reviews, OGE is actively engaged in ensuring that the agency produces the requested information and documents, clarifying the scope of the request if needed.

The next phase is the pre-review phase. The pre-review phase is the same for inspections and plenary reviews. During this phase, OGE's assigned program reviewers evaluate relevant information and documents to assess the agency's ethics program. This evaluation includes the information and documentation that the agency produced during the engagement phase in response to OGE's request. It also includes information and documentation that OGE has acquired through other processes, such as the Annual Agency Ethics Program Questionnaire discussed in response to Question 7 above, the ethics agreement tracking process, and the financial disclosure process for high level officials whose reports OGE certifies. OGE's program reviewers assess this compilation of information and documents for compliance with statutory

and regulatory requirements applicable to agency ethics programs,⁵⁰ and they seek to preliminarily identify program strengths and vulnerabilities. Next, they develop questions to probe further into aspects of the agency's ethics program, obtain responses to the questions from the agency, evaluate the responses, and inquire further if necessary. They then coordinate with the agency to schedule dates for site visits to conduct fieldwork.

The next phase is the fieldwork phase. During the fieldwork phase, OGE's program reviewers work onsite at the agency's ethics offices. This phase is procedurally the same for inspections and plenary reviews. The work takes longer for plenary reviews, however, because, while both focus on results, the plenary reviews also focus on work processes. In either case, the program reviewers begin with an entrance meeting to introduce themselves to ethics officials and agency leadership. They conduct interviews of ethics officials and, as necessary, other agency personnel involved with the ethics program. They also meet with the agency's Office of Inspector General. They collect additional information, resolve any outstanding questions that remain from the pre-review phase, and identify any additional documents needed for the program review. Among other documents reviewed during this phase, they review a sampling of financial disclosure reports filed by individual agency employees and appointees. During this process, the program reviewers routinely discuss their observations with agency ethics officials. These discussions sometimes lead agency ethics officials to begin remediating issues that reviewers have observed.

If possible, OGE works with the agency during the review process to immediately correct deficiencies as they are identified. This type of correction during the review is most common for administrative and documentation issues, such as updating procedures, destroying expired records, or amending ethics training materials to meet compliance requirements. An agency's correction of an issue during the program review will not cause OGE to refrain from addressing the issue in its final program review report. OGE will, however, acknowledge the agency's remediation of the deficiency in the report. The final program review report will note both the deficiency and the specific corrective actions taken, and it will indicate whether a recommendation is closed as a result of the agency's remediation efforts.

The next phase is the report drafting phase. The report drafting phase is more extensive for plenary reviews than for inspections. The format for inspection reports is highly prescriptive, employing a specific format that facilitates comparison of agencies inspected. In contrast, the format for plenary reviews is largely narrative, with more discussion of individual agency work processes that led to the outcomes identified. In the cases of both inspections and plenary reviews, OGE's program reviewers finalize their analysis of the agency's program and draft the program review report during this phase. The first step is usually to transcribe their notes from the fieldwork they conducted. After reviewing all material related to the program review, they formulate their findings and recommendations. They also carefully index and reference work papers, in order to substantiate their findings. They then prepare a draft report, which they discuss with agency officials in order to afford the agency an opportunity to present any additional information needed to resolve potential factual errors and to begin drafting a response

⁵⁰ See, e.g., 5 C.F.R. pt. 2638.

to OGE's findings and recommendations. The program reviewers will then prepare a final draft for formal agency comment.

If the agency was not able to remediate a deficiency during the program review, the program review report will include a recommendation for the agency to correct the deficiency. For plenary reviews, OGE typically provides an agency six months to complete corrective actions, at which time OGE will conduct a follow-up program review to assess the implementation of those actions. The six-month window may be extended for certain corrective actions that require additional time to either correct or assess, including corrective actions to an agency's financial disclosure program which typically requires the completion of an annual filing cycle prior to reassessment. For inspections, OGE and the agency will jointly establish a date for completion of corrective actions, after which OGE will conduct a follow-up program review.

The next phase is the publication phase. This phase is the same for both inspections and plenary reviews. After OGE has issued a final program review report, OGE provides copies of the report to the agency's leadership, ethics officials, and Inspector General. OGE also posts the report on its website in order to make it available to the public.

The final phase for an inspection or plenary review is the post-review phase. If the program review report generated as a result of the inspection or plenary review includes recommendations, program reviewers conduct a follow-up review to assess the agency's remediation of issues identified. In order to ensure that these issues are resolved quickly and accurately, OGE makes itself available to consult with agencies prior to a follow-up review to ensure any proposed corrective actions meet the established compliance criteria. Alternatively, if an inspection has revealed significant results-based compliance issues program, program reviewers may conduct a plenary review in order to assess the agency's work processes and identify possible causes of the unsatisfactory results. If the program review report does not include recommendations, the agency's ethics program will return to the pool of agencies awaiting the next cycle of program reviews. Whether or not the report makes recommendations, the program reviewers consult with the OGE desk officer assigned to support the agency in order to discuss their findings.

As noted above, the third type of program review is a follow-up review. As the name suggests, OGE conducts this type of program review to assess an agency's progress in implementing recommendations made in the program review report generated as a result of an inspection or plenary review. The timing of a follow-up review after an inspection varies, but the follow-up review typically occurs one to six months after issuance of the program review report for the inspection, unless the Deputy Director schedules an agency for a plenary review instead of a follow-up review after an inspection. A follow-up review after a plenary review typically occurs approximately six months after issuance of the program review report for the plenary review, except when circumstances warrant a different timeframe. After a follow-up review is completed, OGE issues a program review report on the findings of the follow-up review. If significant recommendations remain outstanding, OGE will schedule subsequent follow-up reviews as needed.

Nearly all recommendations are closed as a result of this follow-up review process. The Ethics in Government Act provides certain formal steps that can be used in the event that an agency fails to sufficiently address a deficiency. As discussed in more detail in response to Question 6, however, OGE has found it more efficient to communicate directly with agency officials and escalate as necessary to the agency head. OGE has issued thousands of recommendations and, with few exceptions, has been able to document that agencies have taken appropriate action to address the underlying deficiencies.

RESPONSE TO QUESTIONS 20, 21 AND 22

20. What type of information does OGE collect from the Annual Agency Ethics Program Questionnaire and how does OGE utilize that information?

21. Are the results shared with the ethics community and the public?

22. Based on the data from the questionnaire, has OGE identified any common issue areas? If so, how does OGE plan to address such areas?

OGE collects information from each executive branch agency regarding several categories of topics in its Annual Agency Ethics Program Questionnaire (questionnaire):

- First, the questionnaire collects information about each agency's organizational structure. Questions related to this topic seek information about the resources that each agency devotes to its ethics program. This includes information about the Designated Agency Ethics Official and Alternate Designated Agency Ethics Official, such as the amount of ethics experience each possesses, the amount of time each devotes to managing their agency's ethics program, the grade level of each, and the political or career appointment status of each. Also covered is information about the ethics officials' eligibility for retirement for succession planning purposes. In addition, agencies are asked to provide information about the number of ethics officials who perform ethics program duties, as well as the amount of time that they devote to ethics duties. Agencies are also asked about the distribution of ethics officials inside and outside of the Washington, D.C. area and about the supervisory status of the DAEO over agency officials performing ethics duties.
- Second, the questionnaire collects information about each agency's ethics program administration. Specifically, agencies are asked to rank the amount of time devoted to administering specific program elements, to indicate whether the ethics program has leadership support, to identify which tools they use to ensure the short- and long-term continuity of their ethics programs, and to indicate whether they have required standard operating procedures in place. Agencies are asked about the use of technology and any internal quality controls, as well as about the need for additional resources for the ethics

program. They are also asked about significant accomplishments and challenges during the year.

- Third, the questionnaire collects information about education and training. Questions focus on compliance statistics with regard to the number of employees required to receive initial and annual ethics training and the number who actually received the required training within the calendar year. Questions also focus on the allocation of responsibility for developing the required training content, the offices responsible for conducting training sessions, and the means of delivering the required training.
- Fourth, the questionnaire collects information about an agency's ethics advice and counseling activities. Agencies are asked to indicate what steps they take to ensure that they provide timely and consistent ethics advice to their employees. They are asked to identify and rank the particular ethics subjects that are most frequently at issue in their advice and counseling activities. They are also asked about post-employment counseling to ensure that former employees remain compliant with post-employment restrictions.
- Fifth, the questionnaire collects information about public financial disclosure. Collectively, the more than 130 executive branch agencies collect and review approximately 26,000 public financial disclosure reports each year. Questions in this section focus on compliance statistics with regard to the number of new entrant, annual, and termination public financial disclosure reports that were required to be filed in the calendar year, as well as the number of each type that were actually filed. Additionally, the questionnaire collects information about the number of filing extensions granted, the number of late fees assessed, and the timeliness of report filings and reviews. The questionnaire also asks agencies about the number of periodic transaction reports filed. In addition, it poses a series of questions about the ways each agency implements programmatic requirements for public disclosures, and about whether an agency requires supervisory review as part of the conflicts of interest review.
- Sixth, the questionnaire next seeks information about confidential financial disclosure. Collectively, the more than 130 executive branch agencies collect and review approximately 380,000 confidential financial disclosure reports each year. Questions in this section focus on compliance statistics with regard to the number of new entrant, annual, and termination confidential financial disclosure reports that were required to be filed in the calendar year, as well as the number of each type that were actually filed. Questions focus on filing extensions and timeliness issues. Questions also focus on the programmatic requirements for confidential disclosures.
- Seventh, the questionnaire collects information about remedies and enforcement of the Standards of Conduct and the ethics-related criminal and civil statutes. Agencies are asked to provide information about the number of remedial actions taken each year and the number of disciplinary actions taken based on violation of the Standards of Conduct regulations or the criminal and civil statutes. Agencies are also asked to specify the number of such actions taken on the basis of specific issues listed in the questionnaire. They are asked about waivers of regulatory or statutory ethics provisions issued during

the year. In addition, they are asked in this section about referrals to the Department of Justice for potential prosecution.

- Finally, the questionnaire seeks information about advisory committees and special government employees. Specifically, the questionnaire seeks information about the number of advisory committees each agency maintains, as well as information about other types of committees, boards, and commissions that each agency maintains. Agencies are also asked about the number of special government employees they employ, the procedures for designating employees as special government employees, and the offices that are responsible for determining that an employee is a special government employee. Agencies are also asked about ethics training for, and financial disclosures collected from, special government employees. In addition, agencies are asked to specify how many special government employees are federal advisory committee members and how many are employed in other specified roles.

The Annual Agency Ethics Questionnaire is a critical source of information for OGE in its work overseeing the executive branch ethics program. OGE uses the data collected through the questionnaire to develop knowledge about individual programs, as well as about the state of the executive branch ethics program as a whole. This information is also used to make determinations about resource allocation, such as the amount of resources devoted to OGE's desk officer function, its program review function, its ethics official training function, and its electronic filing system for public financial disclosure. In addition, OGE's program reviewers use the questionnaire data in connection with selecting agencies for program reviews, identifying strengths and weaknesses of specific agency ethics programs in the course of conducting program reviews, and targeting aspects of agency ethics programs for closer examination during the fieldwork phase of program reviews.

With regard to sharing the information with the ethics community and the public, OGE is now posting on its public website each individual agency's response to the questionnaire, in addition to a summary report with aggregate data, and an overview document with key highlights from the data excerpted from the questionnaire. Further, OGE presents highlights of the aggregate results of the questionnaire to the ethics community each year in a learning environment, as part of its Advanced Practitioner Series. OGE takes these steps to increase transparency and share information about the program with interested stakeholders, such as the public, the ethics community, and Congress.

OGE has also used the information from the questionnaire to identify and address common issue areas based on data received in agency responses. For example, issues related to succession planning and continuity of ethics program operations are a consistent area of concern as much of the federal workforce has approached or reached retirement eligibility in recent years. In calendar year 2015, agencies' responses to the annual questionnaire revealed that two-thirds of Designated Agency Ethics Officials possess less than four years of experience in the position.

OGE is taking a number of actions to address this issue. OGE will continue providing training targeted to new ethics officials and to develop targeted training products. OGE will continue conducting its quarterly meetings for agency ethics officials, at which OGE presents

information about ethics program processes and activities, recent developments, and upcoming events. OGE will also dedicate a portion of its Advanced Practitioner Series training sessions and sessions at the 2016 National Government Ethics Summit to the topic of ethics program management in order to bolster agency ethics programs during the period of Presidential transition. In addition, OGE will address making risk assessment and mitigation practices a routine part of an agency's ethics program, creating standard operating procedures to ensure program continuity, developing techniques for briefing new leaders, and instituting self-assessment programs to ensure preparedness for staff turnover.

OGE has also begun developing written materials that agencies can distribute to new employees, along with model training modules that agencies can use and tailor to their own needs. With the assistance of agency ethics officials, OGE is also developing a repository of targeted scenarios for use in conducting annual ethics training for employees whose responsibilities place them at increased or unique risk of facing certain ethical dilemmas. In addition, OGE has provided ethics officials with a high-quality template for their agency's annual ethics training plans. The template prompts ethics officials to think strategically about how they will deliver ethics training throughout the year.

Through OGE's Institute for Ethics in Government (IEG) virtual online store, OGE makes these and other materials, such as practical job aids and reference guides, available to ethics officials at no cost. The IEG store is also where members of the ethics community can share similar products that they themselves have created, including materials to assist with annual employee ethics training. This is an efficient way for agency ethics officials to obtain the educational materials that are most pertinent to their agencies' particular needs. In addition to the products available in the IEG Store, OGE makes available to ethics officials the video and audio recordings of the distance learning events that OGE sponsors, along with the informational slide decks, job aids, and reference materials used in those training events. OGE has made all of these materials permanently available to agency ethics officials, who are routinely encouraged to use these on-demand courses and materials to train their own staffs.

RESPONSE TO QUESTIONS 23 AND 24

23. How will the upcoming Presidential election impact your workload and how does OGE prepare for the transition?

24. Explain how OGE is working with GSA, OPM and NARA to prepare for the upcoming Presidential transition.

OGE expects that its workload in support of the Senate confirmation process for Presidential nominees (PAS nominees) will triple during the Presidential transition. Given the critical importance of the Presidential transition to national security and the continuity of our nation's representative form of government, it is imperative that the process be carried out effectively and in a wholly non-partisan manner to support the Presidential transition team of whichever candidate is successful in the general election in November 2016. OGE is fully committed to its ongoing preparations for the Presidential transition, and we and our fellow

transition support providers aspire to make the upcoming Presidential transition the most efficient one in the modern era.

For its part, OGE anticipates that it will be called upon to complete ethics reviews for up to 700 or more PAS nominees between November 2016 and the end of 2017, which will require that a substantial portion of OGE's staff be assigned to review the financial disclosure reports of PAS nominees for compliance with disclosure requirements, evaluate their financial interests for potential conflicts of interest, and work with agency ethics officials to develop ethics agreements to resolve those potential conflicts of interest. The financial disclosure reports of PAS nominees and the conflicts of interest issues they present are typically more complex at the beginning of an administration than at other times, due to the level of positions being filled, the breadth of the financial interests held, and the degree of uncertainty on the part of agency ethics officials as to the incoming administration's plans for the activities of the nominees and their agencies.

This massive transfer of power from one Presidential administration to the next requires intensive preparation. With an election coming in November 2016, OGE's transition preparations are already well under way. OGE has streamlined its processes, and the nominee program is currently operating at an unprecedented level of efficiency. One innovation since the time of OGE's last reauthorization is a comprehensive 75-page ethics agreement guide that has sped up the process of resolving potential conflicts of interest and increased the uniformity of nominee ethics agreements across the executive branch. In 2014, OGE issued an updated version of that guide based on its real-world experiences using the original guide for nominee ethics agreements. This innovation, coupled with OGE's ethics agreement tracking efforts, increases accountability for Presidential nominees coming into the government. OGE has sought and obtained input on best practices and suggestions for ways to improve transition efforts from individuals who were active in Presidential transitions following the elections of President Bush and President Obama, respectively. OGE has also developed a complex workflow feature in its electronic filing system, *Integrity*, that enables staff to review nominee packages electronically. OGE is now using this feature for nominees in the current administration, and OGE anticipates that this feature will enhance the efficiency of the nominee program during the Presidential transition.

OGE is also conducting extensive training of executive branch officials. Internally, OGE began preparing for the Presidential transition in calendar year 2014, by implementing a comprehensive training plan to build the knowledge and skills of its staff through formal training sessions, informal "brown bag" discussions, and staff mentoring. OGE increased the amount of internal training in 2015, in order to continue adding new reviewers to the nominee program and to increase the expertise of existing reviewers. Throughout the executive branch, OGE is also continuing its efforts to provide significant training for nominee financial disclosure reviewers at the agencies. Training activities include in-person training classes and distance-learning conducted through webinars.

Next month, OGE will convene a National Government Ethics Summit focused specifically on preparing the community of executive branch ethics officials for the Presidential transition. The Summit will consist of three full days of training, running from March 8 through March 10, 2016, with presentations occurring in various combinations of an auditorium and three

large training rooms. The onsite audience at the Summit will comprise 400 participants, mostly ethics officials with 15 slots reserved for Inspector General personnel and a few slots for other stakeholders. OGE will also be live-streaming the sessions in the auditorium and one of the training rooms, so that the public can participate virtually in many of the Summit's sessions online in real time. We will leave the recorded sessions online after the Summit for public viewing on OGE's YouTube channel.⁵¹

Prior to the Summit, on March 7, 2016, OGE will also present a full-day symposium on financial disclosure training for ethics officials. This event will include two separate tracks, one for beginners and one for advanced reviewers. OGE will be able to accommodate up to 400 beginners and up to 140 advanced reviewers, and OGE will not charge agencies for the event.

OGE will issue additional guidance and resource materials to address the executive branch ethics program's needs with regard to both outgoing and incoming officials. This material will include a comprehensive web-based guide to assist nominees in completing the new OGE Form 278e and periodic transaction reports. This new guide will also be a valuable resource for ethics officials because it updates and expands on the existing guide, which is one of OGE's most popular resources among ethics officials in both the executive and legislative branches. OGE is also preparing a guide book for prospective nominees and a separate guide book for the Presidential transition team. These guide books will be available in both paper and electronic formats. OGE has contributed material for a similar guide being prepared by the Partnership for Public Service to be used by Presidential campaigns and the Presidential transition team. OGE also provided substantive content for the GSA-hosted Presidential Transition Directory website. In addition, OGE is preparing legal guidance to address topics related to seeking employment and post-employment restrictions to support agencies' counseling of outgoing administration officials.

In connection with these efforts, OGE has been actively participating in the Transition Service Providers Council, which is a roundtable led by the non-partisan Partnership for Public Service. Members of this group include representatives of the General Services Administration (GSA), the Office of Personnel Management, the National Archives and Records Administration, the Department of Justice, and the National Academy of Public Administration. One activity of this council has been to develop a detailed process map of transition services, activities, and deadlines. OGE has contributed to this process map, participated in meetings, and provided feedback on important transition-related issues. OGE and GSA have also made arrangements for OGE to have onsite office space adjacent to transition space that GSA is preparing for the campaigns prior to the election and for the Presidential transition team after the election. This will enable OGE staff to provide onsite support to the campaigns and transition teams in connection with technical aspects of electronic financial disclosure and with the ethics review of prospective PAS nominees.

⁵¹ OGE Inst. for Ethics in Gov't, YOUTUBE, <https://www.youtube.com/user/OGEInstitute> (last visited Feb. 8, 2016).

OGE is also coordinating with representatives of Presidential campaigns. OGE plans to send representatives to an event that the Partnership for Public Service will present this spring to encourage Presidential campaigns to prepare for the Presidential transition. Separately, OGE will contact representatives of Presidential campaigns prior to the election and offer briefings on the nominee process, electronic filing, and establishing effective ethics programs.

RESPONSE TO QUESTION 25

25. In working with the Partnership for Public Service, what recommendations were provided to assist with the transition?

As described above, OGE is currently in the process of working closely with the Partnership for Public Service, transition service provider agencies, and other interested stakeholders to develop recommendations to ensure a smooth transfer of power from one Presidential administration to the next. A Presidential transition is a critical time when the nation is vulnerable, with the potential for manmade, natural, or economic disasters to strike while the government's top leadership positions are vacant. OGE has invested significant effort in documenting its processes through the Partnership's service provider timeline project as well as serving on the Transition Service Provider Council. Through these efforts, OGE continues to actively participate in the ongoing development of consensus recommendations that are being developed and published through the Partnership's newly launched Center for Presidential Transition.⁵² In particular, OGE has contributed its expertise with regard to the nominee financial disclosure requirements and processes within the executive branch. This includes ideas about how campaigns and transition teams might better prepare themselves and their prospective nominees to more accurately and efficiently complete these important required disclosures so that OGE may assist them in identifying and resolving any potential conflicts of interest.

The subcommittee may also be interested in reviewing the related recommendations of two congressionally mandated studies on this topic. The Presidential Appointment Efficiency and Streamlining Act of 2011 directed the Presidentially-appointed Working Group on Streamlining Paperwork for Executive Nominations to submit to Congress two reports on streamlining the executive nomination and confirmation process. These reports make a number of recommendations for improving the nominee process, which is a critical component of any Presidential transition.⁵³ In 2013, Congress also directed the National Academy of Public Administration (NAPA) to conduct an independent study of financial disclosure issues in connection with amendments to the STOCK Act of 2012. Without taking a position on the recommendations, NAPA shares in Appendix B of the report of that study a list of recommendations for improving public financial disclosure requirements in the executive

⁵² CENTER FOR PRESIDENTIAL TRANSITION, <http://presidentialtransition.org> (last visited Feb. 8, 2016).

⁵³ These reports were submitted to Congress in November 2012 and May 2013. A copy of the first report is available online. See WORKING GRP. ON STREAMLINING PAPERWORK FOR EXEC. NOMINATIONS, STREAMLINING PAPERWORK FOR EXECUTIVE NOMINATIONS 18-33 (2012), available at <http://whitehousetransitionproject.org/resources/briefing/appointments/Report%20of%20S679%20Working%20Group-Final.pdf>. The second report does not appear to be available online, but OGE would be able to provide a copy to the Chairman.

branch.⁵⁴ Should the subcommittee wish to consider these recommendations, OGE would be available to provide technical assistance at the subcommittee's request.

RESPONSE TO QUESTION 26

26. Please discuss any lessons learned or best practices from the last transition that will be incorporated into this upcoming transition.

OGE continually evaluates and refines the nominee process. OGE began preparations in 2014 for the upcoming transition, incorporating a number of lessons learned and best practices from the previous transitions.

One area in which OGE has experience is with understanding the staffing required, particularly with regard to the nominee financial disclosure review process, for a Presidential transition. OGE's experience over several transitions is that the process runs most effectively when adequate attention is paid to developing a sufficient number of experienced nominee reviewers. This consideration applies equally to the staff of the Presidential transition team, OGE's own staff, and the staffs of agency ethics offices.

With regard to Presidential transitions, I observed first-hand noteworthy planning on two separate occasions: one after the 2008 election and one prior to the 2012 election. First, in November 2008, I was asked to participate in the first meeting between the outgoing administration of President Bush and the incoming Obama-Biden Presidential transition team in my role as OGE's career-level Deputy General Counsel. At that meeting, held at GSA's headquarters the morning after the election, the transition team asked for a seasoned ethics official to be detailed from the Department of Treasury to the transition team for the purpose of assisting with the financial disclosure and conflicts of interest reviews of prospective nominees. This detailee quickly became OGE's primary contact at the transition team in connection with the ethics review of nominees, and her expertise contributed greatly to OGE's success in processing an extraordinary volume of PAS nominees in record-breaking time. The next occasion was in 2012, when the Presidential campaign of Governor Romney contacted OGE even before the election and asked whether OGE would be able to detail to the transition team a highly experienced ethics official who had overseen the White House's ethics reviews of nominees in the administration of President Bush. OGE was more than willing to detail this individual to the possible transition team of this candidate in order to provide the expertise necessary to support the nominee financial disclosure process in the event of a Presidential transition. OGE plans to encourage Presidential campaigns to continue this tradition of seeking to acquire the services of a current or former senior ethics official to assist the transition team. Likewise, OGE plans to advise the campaigns that the transition is most effective when the White House ethics official in the early days of the new administration has a working knowledge

⁵⁴ NAT'L ACAD. OF PUB. ADMIN., *THE STOCK ACT: AN INDEPENDENT REVIEW OF THE IMPACT OF PROVIDING PERSONALLY IDENTIFIABLE FINANCIAL INFORMATION ONLINE* 63-64 (2013), *available at* <http://www.napawash.org/wp-content/uploads/2013/03/STOCKactFinal1.pdf>.

of executive branch ethics laws and regulations and is familiar with executive branch financial disclosure.

OGE also knows the value of preparing its staff for the Presidential transition. OGE began increasing the capacity of its staff to manage the 2009 transition two years before the 2008 election. Since that time, OGE has been internally evaluating and refining its approach to the nominee financial disclosure program. Specifically, OGE has developed a cross-functional approach to staffing the nominee program, particularly during peak workload periods. In addition to OGE staff dedicated full-time to the nominee program, OGE has trained additional staff in other divisions to support the nominee financial disclosure function during the upcoming Presidential transition following the 2016 election. This approach ensures both short-term capacity for its nominee work in the high-volume post-election period and long-term continuity of OGE's capability to perform mission-critical work.

In previous transitions, not all executive branch agencies have had a sufficient number of experienced ethics staff available to review the increased volume of nominee financial disclosure reports, which resulted in protracted reviews. In preparation for the upcoming transition, leadership at all agencies must ensure that they have a sufficient number of experienced ethics staff and that these ethics officials have ready access to other program officials to assist in identifying potential conflicts. As described in response to Questions 23 and 24, OGE is providing significant training for nominee financial disclosure reviewers at the agencies, including in-person training classes, distance learning through webinars, a National Government Ethics Summit focusing on the Presidential transition, and a full-day symposium dedicated exclusively to financial disclosure.

Another area in which OGE has experience relevant to Presidential transitions is the review of financial disclosure reports. The review of financial disclosure reports in the executive branch is necessarily more complex than in the legislative branch, due to the conflicts of interest requirements applicable to executive branch officials.⁵⁵ A complex nominee financial disclosure report with many assets and business relationships can take weeks to review, refine, and analyze for conflicts of interest. For this reason, OGE encourages campaigns, Presidential transition teams, and White House ethics office to impress upon potential nominees the importance of the financial disclosure and conflicts of interest requirements. OGE also encourages them to emphasize the need to respond quickly to OGE and agency questions regarding financial disclosures, explaining the complexities and expectations of the nomination process and the expedited procedure for nominee financial disclosure reports.

Transition team members focusing on personnel recruitment and selection should coordinate with those focusing on the ethics reviews. Their goals should include identifying prospective nominees early, collecting financial disclosure reports and initiating the ethics review as soon as possible, and looking out for potential conflicts of interest issues that may be hard to resolve or that may delay nomination if not addressed early in the process. OGE will

⁵⁵ Compare 18 U.S.C. § 208(a), with H. COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., HOUSE ETHICS MANUAL 248 (2008) ("No federal statute, regulation, or rule of the House absolutely prohibits a Member or House employee from holding assets that might conflict with or influence the performance of official duties.").

encourage the Presidential transition team to transmit the financial disclosure reports of nominees to OGE as early as possible. To this end, one option OGE will discuss with the Presidential transition team is the possibility of OGE conducting an initial “blind” review of a financial disclosure report if the Presidential transition team is otherwise reluctant to share an individual’s financial disclosure before it has made a final decision to pursue that individual’s nomination. OGE can conduct an initial review of a report for technical legal compliance with disclosure requirements without knowing the identity of the filer or the position for which the filer is being considered. Additional review will be necessary later after the identity of the filer and the position are known in order to fully evaluate certain disclosure and conflicts of interest issues. While not an ideal arrangement because a blind review is merely preliminary, a blind review can advance the ethics process considerably by resolving technical issues, which are often the most time-consuming part of the process.

OGE has also found that strong communication and coordination are key elements for a successful transition. OGE is currently working with the Partnership for Public Service on a transition plan to recommend to the campaigns. OGE is also coordinating with GSA transition staff and has arranged for office space in transition facilities that OGE staff can use to support the campaigns and the transition team. In addition, OGE personnel will be available to the Presidential transition team and White House ethics office to discuss financial disclosure and ethics issues at any time.

OGE has also found that written guidance can expand the availability of OGE’s support to transition team members, nominees, and agency ethics officials during a transition when OGE’s resources are stretched thinnest. The response to Questions 23 and 24, above, describes a variety of written materials that OGE has issued or is developing, as well as the new electronic filing system, that will support the transition efforts.

RESPONSE TO QUESTION 27

27. How does OGE support agencies with succession planning in executive branch ethics programs?

OGE has established a strategic objective to support succession planning in the executive branch ethics program in order to minimize the impact of the departure from the federal workforce of employees who possess specialized ethics knowledge. Succession planning can involve the documentation of current processes, transfer of institutional knowledge, and availability of personnel prepared to assume ethics official positions at all levels. OGE addresses each of these aspects of succession planning through its various programs.

OGE supports the documentation of current processes both directly and indirectly. To communicate to agencies the importance of documenting current processes and to track their efforts in this regard, OGE’s Annual Agency Ethics Program Questionnaire asks questions about the use of standard operating procedures. Certain program review processes also focus on agencies’ use of standard operating procedures, and the program review reports for plenary reviews include recommendations for establishment or enhancement of procedures when they are lacking. In addition, OGE conducts training on model program practices that emphasizes the

importance of agency ethics offices documenting current processes. OGE has also encouraged agencies to use a sample of the program report form that OGE uses for inspections as a checklist to conduct self-assessments of the state of their ethics programs and to take any necessary steps to address issues they identify.

OGE supports the transfer of institutional knowledge through a variety of means. OGE issues written guidance that is available on OGE's website. OGE convenes quarterly meetings for the leadership of agency ethics offices to disseminate information uniformly throughout the executive branch. OGE prepares job aids and training material for use by agency ethics officials, which OGE makes available through a forum on OGE's MAX.gov site. OGE also hosts an electronic site on MAX.gov where agency ethics officials share their own written products with one another. OGE also conducts program management training sessions that emphasize the importance of transferring institutional knowledge internal to an agency's ethics office. In addition, OGE's Instructor Development Program is a certificate program for agency ethics instructors through which they can become qualified to deliver OGE-developed ethics training to their own agencies. By expanding the number of instructors available to provide ethics training, OGE better equips agencies to provide quality internal professional development to their own ethics professionals. OGE has also actively encouraged agencies to develop knowledge libraries through intranet sites, videos, and shared network drives.

To ensure the availability of personnel prepared to assume ethics official positions at all levels, OGE provides extensive training to agency ethics officials. OGE teaches ethics officials how to review financial disclosure forms for conflicts of interest, provide advice and counseling on the ethics rules, train their agencies' employees on applicable ethics obligations, and promote an ethical culture within their organizations. As discussed in my written testimony, this work is of vital importance and has been a focus of mine as Director. Starting in 2013 when I was appointed, OGE has pursued an aggressive reinvention of its approach to delivering training in order to address the challenge of reaching a large and geographically dispersed audience of ethics officials with limited resources. We have leveraged technology to steadily increase the reach of our education program in the past three years from an average of about 1,400 registrations per fiscal year in the first five years after OGE's last authorization, 2008 to 2013, to now more than 7,500 registrations in fiscal year 2015.

With regard to the professional development of ethics officials, OGE has developed several specialized programs to address specific needs. For example, the Intensive Curriculum for New Ethics Officials program, which targets new ethics officials with a critical need for intensive and rapid professional development because they have been, or will soon be, assigned new ethics responsibilities as Designated Agency Ethics Officials or ethics program managers. By focusing on those officials with the greatest responsibilities, OGE provides targeted, timely support to ensure continuity of operations in agency ethics programs. OGE also offers regular, monthly distance learning events aimed at developing the skills and knowledge base of ethics officials at all levels. OGE's Ethics Fundamental Series provides monthly training on topics geared to new or less experienced ethics officials. OGE's Advanced Practitioner Series deals with more complex topics and ethics policy issues more suitable for experienced ethics officials. OGE also regularly offers financial disclosure training for ethics officials of all skills levels, with a particular focus more recently on preparing for a Presidential transition. This training is offered

via the “Google+” platform, which allows OGE to broadcast to hundreds of attendees in a single session, and to record and post trainings on OGE’s YouTube channel for on-demand access. Finally, through its detailee program, OGE invites ethics practitioners from other agencies to serve as desk officers and financial disclosure reviewers at OGE. This program supports succession planning by providing detailees valuable hands-on experience with support from OGE’s knowledgeable staff, and they bring that experience back to their home agencies.

Through all of these programs, OGE ensures agencies are focusing on succession planning. One of the means by which OGE measures the success of its efforts is through agency responses to the Annual Agency Ethics Program Questionnaire. Responses to the 2015 questionnaire indicated that 95% of agencies are actively engaged in succession planning to ensure long-term continuity of ethics programs. The top two tools agencies reported using to address this critical need were structured training and the establishment of knowledge libraries (intranet, videos, and shared drives).

RESPONSE TO QUESTION 28

28. Please describe your agency’s restructuring involving the Program Counsel and the General Counsel, including all former and current responsibilities for each.

As a longtime career employee of OGE prior to my appointment as Director, I was familiar with the agency’s operations at the time of my appointment and initiated the restructuring in January 2013 in order to increase its efficiency and effectiveness, reduce duplication and fragmentation, and strengthen the agency’s overall performance. With regard to the General Counsel and Program Counsel Divisions, OGE was restructured partly to separate the legal policy office from the agency legal compliance office, as is the case in most agencies. Some of the Program Counsel Division’s responsibilities were also drawn in part from the former Office of Agency Programs.⁵⁶

Among other changes, the reorganization consolidated agency legal compliance functions traditionally performed by an agency general counsel’s office into a newly-created Program Counsel Division, while focusing the General Counsel and Legal Policy Division on the agency’s ethics policy mission. The head of the Program Counsel Division serves both as the agency’s Program Counsel and as its Chief of Staff, with programmatic responsibility that reaches beyond legal compliance issues as described in more detail below. These changes resulted in rapid and measurable successes, as noted in the response to Question 29. The current work of these two Divisions is described more fully below.

⁵⁶ Other responsibilities of the former Office of Agency Programs were absorbed by the Compliance Division. While the Program Counsel absorbed the desk officer and functions, which are agency support programs, the Compliance Division absorbed the program review function and the financial disclosure function, which are agency oversight programs.

GENERAL COUNSEL AND LEGAL POLICY DIVISION

The head of the General Counsel and Legal Policy Division (GCLPD) serves as the General Counsel. The General Counsel has executive branch-wide responsibility for the substantive legal requirements and policy of the government ethics program. GCLPD is responsible for: (1) establishing and maintaining a legal framework for the executive branch ethics program; and (2) providing assistance to the President and Senate in connection with the process for Presidential nomination and Senate confirmation. This Division consists of two branches: the Ethics Law and Policy Branch and the Presidential Nominations Branch.

Ethics Law and Policy Branch

The Ethics Law and Policy Branch (ELPB) is responsible for the substantive legal and policy work of the executive branch government ethics program. ELPB develops, drafts, and issues all executive branch ethics regulations. ELPB also reviews agency-specific regulations supplementing the standards of conduct for employees of the executive branch. When appropriate, ELPB drafts recommendations for changes in the conflicts of interest statutes and other ethics statutes. ELPB sets forth executive branch-wide policy and interpretive guidance of the ethics laws and regulations applicable to the executive branch. To promote consistent interpretation and application of the ethics laws, regulations, and policy guidance across the entire executive branch, ELPB publishes written guidance in the form of Legal Advisories.

Presidential Nominations Branch

The Presidential Nominations Branch (PNB) supports the President and the Senate in connection with Presidential nominees requiring Senate confirmation. PNB works closely with the White House and agency ethics officials to help prospective Presidential nominees to Senate-confirmed positions comply with the extensive financial disclosure requirements of the Ethics in Government Act. PNB carefully evaluates the nominee's financial disclosure report and works with the agency ethics official to prepare an individualized ethics agreement to avoid and resolve potential conflicts of interest before the nominee enters government service. PNB coordinates with the relevant Senate committees to transmit nominee packages for consideration through the Senate's confirmation process. PNB also reviews the financial disclosure reports of the most senior White House staff members.

PROGRAM COUNSEL DIVISION

The head of Program Counsel Division (PCD) serves as both the Chief of Staff and the Program Counsel. The Chief of Staff has agency-wide responsibility for all OGE staff, strategic planning, performance management, and budget. PCD is responsible for: (1) coordinating and conducting outreach between OGE and its many stakeholders, including Congress, the Office of Management and Budget, good government groups, and the public; (2) developing and providing training to agency ethics officials across the executive branch; (3) carrying out initiatives that reach across executive branch agencies, such as the operation of OGE's electronic filing system for public financial disclosure, *Integrity*; (4) providing agency-specific legal support to OGE; (5) managing OGE's budget, performance, and legislative affairs programs; and (6) through its

desk officer program, supporting agency ethics officials in carrying out the executive branch ethics program. PCD consists of two branches: the Legal, External Affairs and Performance Branch and the Agency Assistance Branch.

Legal, External Affairs and Performance Branch

The Legal, External Affairs, and Performance Branch (LEAP) supports OGE through a range of cross-cutting programmatic responsibilities. LEAP provides agency-specific legal support to OGE. LEAP manages OGE's strategic initiatives, including the Annual Agency Ethics Program Questionnaire, the development and operation of OGE's electronic filing system for public financial disclosure, performance management, budget, communications, and legislative affairs programs. LEAP serves as OGE's liaison to the Federal Register and the Office of Information and Regulatory Affairs within the Office of Management and Budget, and oversees OGE's Freedom of Information Act, Privacy Act, and records management programs. LEAP develops and provides substantive training to agency ethics officials throughout the executive branch and to OGE staff in order to help them attain the knowledge and skills necessary to carry out the duties of their positions.

Agency Assistance Branch

The Agency Assistance Branch (AAB) provides vital services and support to agency ethics officials throughout the executive branch. Through its desk officer program, AAB provides timely and accurate advice to ethics officials in response to questions regarding unique or emerging ethics-related issues. In addition to responding to requests for advice, AAB's desk officers actively reach out the ethics community to address issues and challenges that are of common interest in order to arrive at and share collaborative solutions.

RESPONSE TO QUESTION 29

29. Please describe all problematic issues which arose in the course of restructuring.

Rather than producing problems, OGE's restructuring has proven to be highly successful both in terms of OGE's performance and in terms of employee engagement. Within GCLPD and PCD, the restructuring was largely carried out through the reassignment of existing staff, the majority of whom continued to perform much of the same types of functions they had performed prior to the restructuring. The positive results of the reorganization on OGE's programs are measurably demonstrated through a wide variety of outcomes.

Consolidating agency administrative law and compliance functions into PCD has allowed for necessary focus on such issues by employees specializing in these fields rather than by ethics attorneys carrying them out on a part-time basis. This focus has created a culture of performance and innovation that has enabled OGE to excel in many areas, including: improved external and internal communications; improved budget process and fiscal law analysis; more efficient records management, including a rapid transition to becoming a paperless agency; and improved accountability, which is ultimately reflected in agency performance. OGE's education program,

in particular, has become more agile and effective since the restructuring. Operating with a small core staff and leveraging technology, OGE has steadily increased its reach from an average of about 1,400 registrations per year in the first five years after OGE's last authorization to more than 7,500 registrations in fiscal year 2015.

Since the restructuring, OGE has been recognized by external stakeholders for its leadership role and success in areas under the purview of PCD's Legal, External Affairs and Performance Branch (LEAP) branch. For example, OGE's FOIA program has been recognized by the Department of Justice Office of Information Policy for model practices in a small agency program. OGE has been recognized by the Office of Management and Budget and in news articles for innovations in cost-effective "conference" planning, with respect to OGE's 2014 National Government Ethics Summit. The Performance Improvement Council (PIC) has recognized OGE for its performance management efforts. In addition, PCD has enhanced OGE's transparency by increasing public access to agency-generated information, for example, through publication on OGE's website of the results of the Annual Agency Ethics Program Questionnaire and the summary of OGE's annual performance highlights.

PCD's LEAP also led the highly successful development and deployment of OGE's executive branch-wide electronic filing system, *Integrity*, which was a remarkable achievement for a component of an agency as small as OGE. As indicated in my written testimony, on January 1, 2015, we successfully launched *Integrity*, a secure, web-based electronic filing system for the executive branch, which is used by thousands of public filers in the executive branch. OGE contributed its own extensive financial disclosure expertise to develop a system that significantly enhances the filing, review, and program management aspects of the executive branch public financial disclosure program. A combination of smart data-entry tables and context-dependent questions helps filers disclose all of their reportable financial interests with increased accuracy. *Integrity* enables agency ethics officials to assign, review, track, and manage reports electronically. OGE also focused on ensuring the security of user access and maintaining data. Notably, *Integrity* is hosted in a secure government cloud and has successfully undergone a full, independent security assessment. Both *Integrity*'s authentication provider and host are authorized under GSA's Federal Risk and Authorization Management Program (FedRAMP). Using a shared-services model with operational funding in OGE's budget, OGE is continuing to make *Integrity* available to executive branch agencies without charge, thereby reducing duplication and fragmentation within the executive branch. Since the date when I submitted my written testimony, the number of agencies and registered in *Integrity* has continued to grow. As of today, 13 months after *Integrity*'s launch, we have registered 120 agencies and over 11,000 filers in the system. *Integrity* also received a 90% favorable rating from agency administrators who responded to a satisfaction survey in its first year of operation.

PCD's Agency Assistance Branch has continued the success of OGE's desk officer program. The desk officers assist agency ethics officials in evaluating complex issues, provide information about how other agencies are implementing ethics requirements, and give guidance on OGE's policies regarding program activities. The desk officers are also able to assist agencies in implementing the recommendations that OGE makes through its program reviews. To enhance OGE's staff expertise to perform this complex work, I launched an aggressive Employee Development Program after I was appointed to the Director position. As a result, feedback about

desk officer responses to the nearly 2,000 requests for assistance received this year was very favorable: 91% of respondents to OGE's executive branch-wide customer satisfaction survey indicated that the assistance provided by OGE's desk officers has been effective in helping them do their jobs.

We have enjoyed equally positive results in GCLPD. The ability of GCLPD to focus exclusively on government ethics law and policy has resulted in the Division reviewing and drafting significant revisions to four of OGE's substantive ethics regulations, while continuing to issue helpful legal advisories and other guidance to the ethics community. The streamlining of functions within GCLPD has enabled its Ethics Law and Policy Branch (ELPB) staff to develop highly specialized knowledge and skills with regard to the substantive legal and policy requirements of the executive branch ethics program and has strengthened OGE's nominee program. In response to a survey conducted this year, over 98% of DAEOs and Alternate DAEOs, as well as over 95% of agency ethics officials who responded, indicated that OGE's legal advisories help them perform their jobs.

GCLPD's Presidential Nominations Branch (PNB) has successfully led OGE's well-regarded nominee program and has contributed to OGE's preparations for the upcoming Presidential transition. PNB has been particularly effective in streamlining OGE's nominee processes and is currently operating at an unprecedented level of efficiency. In 2014, PNB issued an updated version of OGE's ethics agreement guide based on its real-world experiences using the original guide for nominee ethics agreements. PNB actively participated in the design of the highly complex workflow feature in our electronic filing system, *Integrity*, which enables us to review nominee packages electronically. We are now using that feature for nominees in the current administration, and we anticipate that it will help us greatly during the Presidential transition. PNB is currently finalizing a comprehensive web-based guide to assist nominees in completing the new OGE Form 278e and periodic transaction reports. This new guide will also be a valuable resource for ethics officials because it updates and expands on the existing guide, which is one of OGE's most popular resources among ethics officials in both the executive and legislative branches. PNB is also preparing a guide book for prospective nominees and a separate guide book for the Presidential transition team. In addition, PNB is training executive branch officials on the review of nominee reports. This training effort has included a comprehensive internal training plan to build the knowledge and skills of OGE staff through formal training sessions, informal "brown bag" discussions, and staff mentoring. PNB is also preparing a full-day symposium on advanced nominee financial disclosure for up to 140 advanced nominee financial disclosure reviewers, which PNB will present on March 7, 2016, the day before the National Government Ethics Summit begins.

Although the subcommittee's questions focus only on PCD and GCLPD, it also bears noting that the establishment of OGE's Compliance Division (CD) has also produced positive results. CD's Financial Disclosure Branch (FDB) has significantly enhanced OGE's financial disclosure program for annual financial disclosure reports, which is one of OGE's oversight mechanisms for agency ethics programs. When I became Director, I focused on improving this important mechanism because timely review is necessary to detect and resolve conflicts of interest. Since my appointment, OGE has improved its efficiency by going paperless and reducing its average review time for annual and termination reports from over 180 days to less

than 30 days. Notably, these improvements were achieved at a time when, due to new STOCK Act reporting requirements, OGE also received approximately 900 periodic transaction reports per year. OGE's second-level review of these reports is a quality control mechanism to ensure that agencies are timely reviewing these reports for conflicts of interest and to ensure the filers' compliance with their ethics agreements. In January 2015, we also began to issue year-end status reports to agency heads regarding the status of their agency's efforts to review the financial disclosure reports of Senate-confirmed appointees. These "report cards" generally resulted in agencies getting annual filings to OGE earlier in 2015 than in prior years.

Likewise, CD's Program Review Branch (PRB) has had success in carrying out OGE's oversight mechanisms through program reviews. As part of OGE's process of conducting program reviews, we routinely make specific recommendations for improving individual agency ethics programs, and we monitor their efforts to implement our recommendations. I took a new approach to this work by establishing a methodology that allows us to more regularly and timely conduct these important reviews. We have also refined our review processes in order to provide increased support to agencies in making program improvements. This past year, OGE issued 59 reports on its reviews of agency programs and is on pace to review all executive branch agencies during my five-year term. We make every one of these program review reports available to the public on OGE's website.

Another notable indicator of the agency-wide success of the restructuring is the measurable increases in the engagement of OGE employees as reflected in OGE's scores on the "employee engagement index" compiled through the annual Federal Employee Viewpoint Survey. Overall, OGE's scores on this important index, which includes employees' perceptions of agency leadership, supervisory relationships, and feelings of motivation and competency related to their work, rose 14% after the restructuring (from 2013 to 2015). OGE currently ranks 5th among the small and independent agencies with regard to the employee engagement index score. In fact, with an employee engagement index score of 80%, OGE was one of 11 executive branch agencies to score above 75% and one of only five to score 80% or better in 2015.

RESPONSE TO QUESTIONS 30, 31, AND 32

30. The statute on special government employees specifically states that they are "not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days" (18 U.S.C. § 202(a)). What gives OGE the authority to interpret this provision in a different manner than that indicated by the plain language passed by Congress?

31. What steps does OGE take to ensure that this time limit for special government employees is followed?

32. What are the consequences for failing to follow the law with regard to the length of time an individual may be considered a special government employee?

The executive branch's longstanding interpretation, established in a Presidential memorandum and opinions of the Department of Justice's Office of Legal Counsel (OLC), that section 202 requires a prospective determination at the time of appointment is consistent with the plain language of the statute. Paragraph (a) of section 202 provides the following definition of the term "special government employee":

[T]he term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis....⁵⁷

OLC has held, in opinions that are binding on OGE and executive branch agencies,⁵⁸ that application of this definition requires the employing agency to make a prospective determination at the time the employee is appointed:

The designation of an officer or employee of the United States as a special Government employee, as that term is defined in 18 U.S.C. § 202, depends on a good faith estimate by the employing agency, made at the time of appointment, that the individual concerned will not actually perform services on all or part of more than 130 of the succeeding 365 days. The designation of a special Government employee remains in effect for the entire 365 days, even if it should turn out that the individual in fact serves for more than 130 days.⁵⁹

The interpretation that section 202 requires a prospective determination actually predates both OLC's opinions and the creation of OGE. More than a half century ago, shortly after enactment of 18 U.S.C. §§ 202-209, President John F. Kennedy issued a memorandum describing the provisions of the new conflict of interest provisions and their effect on special government employees.⁶⁰ That 1963 memorandum provided instructions as to the application of 18 U.S.C. § 202, including the following: "Even if it becomes apparent, prior to the end of a period of 365 days for which an agency has made an estimate with regard to an appointee, that

⁵⁷ 18 U.S.C. § 202(a).

⁵⁸ See, e.g., Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney Gen., to Attorneys of the Office of Legal Counsel 1 (May 16, 2005) ("[S]ubject to the President's authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch.").

⁵⁹ Federal Advisory Committee Act (5 U.S.C. App. I)—United States-Japan Consultative Group on Economic Relations, 3 Op. O.L.C. 321, 323 (1979); see also Merit Systems Protection Board—Special Counsel—Employment of Temporary or Intermittent Attorneys and Investigators (31 U.S.C. § 686), 3 Op. O.L.C. 451, 454 (1979).

⁶⁰ Memorandum on Preventing Conflicts of Interest on the Part of Special Government Employees, 28 Fed. Reg. 4539 (May 2, 1963). Note also that the Civil Service Commission incorporated this instruction in the Federal Personnel Manual more than a decade before OGE was created. U.S. CIVIL SERV. COMM'N, FEDERAL PERSONNEL MANUAL, ch.735, app. C (1965).

he has not been accurately classified, he should nevertheless continue to be considered a special Government employee or not, as the case may be, for the remainder of the 365-day period.”⁶¹

The prospective nature of the determination as to special government employee status is established by the language of the statutory definition, which applies to any employee who is “retained, designated, appointed, or employed *to perform ... for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties.*”⁶² This language indicating that the employee is appointed *to perform for 130 days or less* signals that the definition applies when an employee is appointed for the purpose of serving for that number of days.⁶³ That purpose is necessarily established at the time of appointment. This interpretation is further reinforced by the differences in the language of section 202(a), which is based on a prospective determination, and sections 203(c)(2) and 205(c), which are based on the number of days actually served.⁶⁴ In addition, because section 202 is a definitional provision, it does not restrict the number of days an employee can serve. In other words, an employee who meets this definition is a special government employee, and an employee who does not meet this definition is a regular employee.

This prospective determination is done so that employees are on notice with respect to the ethics laws and rules that will apply to them.⁶⁵ Accordingly, as provided in the OLC opinions and the 1963 Presidential memorandum, the fact that an individual actually works 131 days in a 365-day period would not change that individual’s status as a special government employee if a good faith estimate was made at the time of appointment that the individual would work 130 days or less in that period. It should be noted, however, that special government employees are covered by many of the government’s ethics laws and regulations. Most notably, they are covered by the primary criminal conflict of interest law, 18 U.S.C. § 208. The potential consequences to a special government employee who violates this criminal law include criminal prosecution.⁶⁶ This sweeping criminal law prohibits each executive branch employee, including a special government employee, from participating in any “particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial

⁶¹ Memorandum on Preventing Conflicts of Interest on the Part of Special Government Employees, 28 Fed. Reg. at 4541. In connection with this Presidential interpretation of 18 U.S.C. § 202, it should be noted that the language in that section was originally proposed by the President. See Special Message to the Congress on Conflict-of-Interest Legislation and on Problems of Ethics in Government, 1961 Pub. Papers 326 (Apr. 27, 1961); see also Executive Employees’ Standards Act, H.R. 7139, 87th Cong. § 2 (1961) (“[T]he term ‘special Government employee’ shall mean a Government employee . . . who is retained, designated, appointed, or employed (i) to perform, for a term not to exceed one hundred and thirty days during any consecutive period of three hundred and sixty-five days, temporary duties . . .”).

⁶² 18 U.S.C. § 202(a) (emphasis added).

⁶³ *Id.*

⁶⁴ Compare 18 U.S.C. § 202(a) (applying the definition of special government employee to any employee who was retained, designated, appointed, or employed “to perform . . . for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days”), with 18 U.S.C. § 203(c)(2) (limiting an exception based on the number days a special government employee actually “has served”), and 18 U.S.C. § 205(c) (same).

⁶⁵ OGE Informal Advisory Opinion 00 x 1 (2000).

⁶⁶ 18 U.S.C. §§ 208, 216.

interest.” 18 U.S.C. § 208(a). Thus, for example, section 208 would bar a special government employee from participating in any particular matter affecting the interests of an outside employer.

As a further clarification, it bears reiterating that 18 U.S.C. § 202 is not a hiring or appointment authority. That section provides a definition used exclusively for the purpose of determining the coverage of certain ethics requirements but has nothing to do with the authority to appoint an employee.⁶⁷ Inasmuch as a special government employee is in every case an “employee,” the employing agency must have authority—independent of 18 U.S.C. § 202(a)—to appoint that individual.⁶⁸ Therefore, the broader questions as to whether an individual should be appointed as an employee, how long an appointment that individual should be given, and what types of duties that individual should be assigned to perform, are questions that relate to the specific authorities used to appoint the individual. OGE has no authority over an agency’s exercise of appointment authorities, which are wholly separate from the agency’s application of 18 U.S.C. § 202(a).

OGE has taken a variety of steps to assist agency ethics officials in applying ethics laws and regulations applicable to regular and special government employees. OGE has issued guidance on ethics matters involving special government employees, including the applicability of criminal conflicts of interest laws and the proper method of day-counting.⁶⁹ OGE’s desk officers also regularly respond to questions from agency ethics officials. In addition, OGE offers training to agency ethics officials on topics related to special government employees.

⁶⁷ 18 U.S.C. § 202(a).

⁶⁸ See U.S. OFFICE OF GOV’T ETHICS, ATTACHMENT TO DO-00-003: SUMMARY OF ETHICAL REQUIREMENTS APPLICABLE TO SPECIAL GOVERNMENT EMPLOYEES (2000) (“The first and perhaps most important point to emphasize is that SGEs *are* Government employees, for purposes of the conflict of interest laws.”).

⁶⁹ See, e.g., U.S. OFFICE OF GOV’T ETHICS, LA-12-01: POST-EMPLOYMENT NEGOTIATION AND RECUSAL REQUIREMENTS UNDER THE STOCK ACT (2012) (including discussion of applicability to special government employees); U.S. OFFICE OF GOV’T ETHICS, 08 x 3a: BOOK DEALS INVOLVING REGULAR EMPLOYEES AND SPECIAL GOVERNMENT EMPLOYEES (2008); U.S. OFFICE OF GOV’T ETHICS, 07 x 3: OPINION OF OFFICE OF LEGAL COUNSEL ON SGE DAY-COUNTING (2007); U.S. OFFICE OF GOV’T ETHICS, 07 x 1: COUNTING DAYS OF SERVICE FOR SPECIAL GOVERNMENT EMPLOYEES (2007); U.S. OFFICE OF GOV’T ETHICS, 05 x 4: FEDERAL ADVISORY COMMITTEE APPOINTMENTS (2005); U.S. OFFICE OF GOV’T ETHICS, 04 x 9: SGEs AND REPRESENTATIVES ON FEDERAL ADVISORY COMMITTEES (2004); U.S. OFFICE OF GOV’T ETHICS, 03 x 7: 60-Day Thresholds for SGEs (2003); U.S. OFFICE OF GOV’T ETHICS, DO-03-021: FINANCIAL DISCLOSURE REPORTING REQUIREMENTS FOR SPECIAL GOVERNMENT EMPLOYEES (SGEs) (2003); U.S. OFFICE OF GOV’T ETHICS, 03 x 5: Appointment to Advisory Committee as “Representative” versus SGE (2003); U.S. OFFICE OF GOV’T ETHICS, 01 x 2: ETHICAL REQUIREMENTS APPLICABLE TO POTENTIAL PAS APPOINTEES EMPLOYED AS “ADVISORS” OR “COUNSELORS” (2001); U.S. OFFICE OF GOV’T ETHICS, DO-00-003: SUMMARY OF ETHICAL REQUIREMENTS APPLICABLE TO SPECIAL GOVERNMENT EMPLOYEES (2000); U.S. OFFICE OF GOV’T ETHICS, DO-95-019: CONFIDENTIAL FINANCIAL DISCLOSURE AND SPECIAL GOVERNMENT EMPLOYEES SERVING IN A POSITION FOR MORE THAN ONE YEAR (1995); U.S. OFFICE OF GOV’T ETHICS, 94x17: IMPACT OF 60-DAY THRESHOLD ON SPECIAL GOVERNMENT EMPLOYEES FILING SF 278s AND SF 450s (1994); U.S. OFFICE OF GOV’T ETHICS, 93 x 14: STATUS OF INDIVIDUALS APPOINTED TO A FEDERAL ADVISORY COMMITTEE (1992); U.S. OFFICE OF GOV’T ETHICS, DA-10-20-92: ADDITIONAL GUIDANCE ON CONFIDENTIAL FINANCIAL DISCLOSURE (1992); U.S. OFFICE OF GOV’T ETHICS, 91 x 17: ETHICS RESTRICTIONS APPLICABLE TO SPECIAL GOVERNMENT EMPLOYEES (1991); U.S. OFFICE OF GOV’T ETHICS, 82 x 22: Members of Federal Advisory Committees and the Conflict-of-Interest Statutes (1982); U.S. OFFICE OF GOV’T ETHICS, 81 x 24: SPECIAL GOVERNMENT EMPLOYEES AND 18 U.S.C. §§ 202, 203, AND 205 (1981); U.S. OFFICE OF GOV’T ETHICS, 81 x 8: DETERMINING WHO IS CONSIDERED A SPECIAL GOVERNMENT EMPLOYEE (1981).

RESPONSE TO QUESTIONS 33 AND 34

33. What are some of the trends and emerging issues you have identified through your Agency Information Management System (AIMS)?

34. How have you worked with agencies on understanding and addressing those issues?

The Agency Information Management System (AIMS) has enabled OGE to track its external interactions based on the topic, complexity, source, and volume of questions OGE receives from agencies and other stakeholders, such as the public, the media, and Congress. Based on this information, OGE has identified the following trends and emerging issues in government ethics.

With regard to the topics raised, the most frequently asked questions from agency ethics officials related to financial disclosure, the criminal conflicts of interest prohibition at 18 U.S.C. § 208, administration of the ethics program, and gifts from outside sources. With regard to the complexity, OGE determined that a high percentage of the complex questions it received related to a criminal conflict of interest statute barring government employees from certain representational activities involving the United States. With regard to the volume and sources of contacts, OGE has identified two trends. First, within the ethics community, OGE receives the most calls from the cabinet agencies. Second, outside of the ethics community OGE receives the most calls from private citizens, federal employees, and the media.

OGE has used the data gathered in AIMS to work with agencies in a variety of ways to increase their understanding of government ethics requirements and to address the trends identified through the system. Specifically, OGE has developed new job aids, made agencies aware of relevant training courses, developed new training courses, and drafted regulatory changes.

For example, in response to the high volume of financial disclosure questions OGE receives from agencies, OGE has been developing a comprehensive web-based guide that will provide ethics officials with instructions on financial disclosure requirements and processes. In addition, OGE has been offering training to agency ethics officials regarding financial disclosure on a regular basis. As discussed earlier, OGE is also holding a free, full-day, in-person training event next month for beginner and advanced financial disclosure reviewers. This training will enable agency ethics officials to successfully manage the surge in financial disclosure filings related to the anticipated high volume of departing employees in 2016 and incoming nominees and other new hires in 2017 and 2018. The beginner financial disclosure track will prepare ethics officials to review the new OGE Form 278e generally with regard to most of the executive branch's public financial disclosure filers. The advanced financial disclosure track will prepare ethics officials to review the complex issues specifically presented by nominee financial disclosure reports.

With the knowledge that questions about gifts from outside sources generate more questions than any other area of the Standards of Conduct, OGE has focused on the gift rules when targeting which subparts of the Standards of Conduct to revise. As these proposed regulatory revisions continue through the regulatory process and afterward, OGE will continue to assist agency ethics officials in providing consistent and accurate counseling to their employees in order to prevent or remedy conflicts of interest related to gifts.

OGE desk officers regularly use the data in AIMS to gain insight into the agencies to which they are assigned so that they may provide those agencies with tailored support. For example, OGE desk officers use the data about the topics of the inquiries they receive from their agencies' ethics officials in order to recommend upcoming OGE training offerings tailored to the issues that are generating the ethics officials' questions. This data increases the ability of OGE desk officers to provide useful, direct support to their agencies.

As noted above, a significant percentage of the interactions recorded in AIMS relate to agency administration of the ethics program. One of the primary roles of OGE's program review function is to ensure the proper administration of the ethics program at the agency under review through evaluating the agency's processes and procedures for carrying out its program. If procedural deficiencies are identified, the OGE program review team will recommend the agency take corrective action and will work with the agency to implement the recommendations, often drawing upon model practices identified during prior reviews of other agencies.

Finally, the trends identified in AIMS have resulted in the development of new training courses. For example, after an analysis of the data revealed that a high volume of complex calls related to a criminal conflict of interest statute barring government employees from certain representational activities involving the United States, OGE developed an in-depth course on the topic to address the identified need for training. The course was delivered during OGE's 2014 National Government Ethics Summit. Based on feedback from the session, 94% of surveyed ethics officials responded that the training improved their understanding of this criminal law and that they were better able to provide their agency's employees with quality advice on its requirements. The course was also subsequently recorded and made permanently available online as a training tool for future use.

RESPONSE TO QUESTION 35

35. Please describe your new electronic filing system, *Integrity*. How does the system work, how many agencies are currently using the system, approximately how many filers are registered?

Integrity is OGE's secure, web-based system for the collection and review of public financial disclosure reports (OGE Form 278e and OGE Form 278-T) in the executive branch. OGE developed the system pursuant to requirements in the STOCK Act of 2012.⁷⁰ Launched on

⁷⁰ Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 11(b), 126 Stat. 291, 299, amended by Act of Apr. 16, 2013, Pub. L. No. 113-7, § 1(b)(2), 127 Stat. 438, 439.

January 1, 2015, the system currently has 120 executive branch agencies and over 11,000 filers registered. As of January 1, 2016, OGE is using *Integrity* to collect reports from Designated Agency Ethics Officials and Senate-confirmed Presidential appointees whose reports come to OGE for final review and certification. In November 2015, OGE completed and launched the nominee functionality of the system, and in December 2015 the White House began directing nominees to submit nominee financial disclosure reports through *Integrity*. OGE briefed more than a dozen Senate committees regarding the new look of the rendering, the OGE Form 278e, in order to prepare them for nominees' submissions of the new form. Some of the key features of *Integrity* include:

- **Filer Wizards and Intelligent Tables:** *Integrity* increases filing accuracy through use of wizards that prompt filers to provide information through variable sets of context-dependent questions relevant to an individual filer. OGE limited this targeted assistance feature to areas involving financial interests related to outside employment of filers and their spouses, where mistakes and omissions most often occur in initial submissions of reports. For other types of financial interests, OGE developed intelligent data entry tables that guide filers to provide the correct information the first time. A benefit of increasing the accuracy of initial submissions is the efficiency that can be achieved by reducing the level of effort required during the review process to amend and finalize filer submissions.
- **Asset Name Assistance:** An asset name auto-complete feature suggests possible matches for over 13,000 assets as the filer types either the asset name or ticker symbol. This can increase accuracy and uniformity of entries.
- **Comment and Endnote Features:** The comment and endnote features allow filers to submit comments and questions to reviewers about their reports and to add endnotes that provide explanatory information about their assets. Through the comment feature, agency reviewers can also instruct filers to make corrections, or add information, to their reports.
- **Compare feature:** *Integrity* enables agency ethics officials to compare current filings with past filings, in order to focus on changes in filers' financial interests from year to year. This feature enhances the conflicts of interest analysis by highlighting new financial interests.
- **Import feature:** *Integrity* enables filers to select and import transactions from periodic transaction reports into annual and termination reports. *Integrity* also enables filers to import data from previous new entrant and annual reports into subsequent annual and termination reports in order to prepopulate their forms with data that can be updated during the filing process.
- **Variable Workflows:** *Integrity* provides a variety of workflow options so that agencies can tailor the report review processing sequence from initial report assignment to final report certification in the manner that best accommodates the agency's processes.

- Direct Submission to OGE: For those public financial disclosure reports that require a second-level review by OGE,⁷¹ *Integrity* routes the reports directly to OGE immediately upon certification of the report by the agency.
- Notices and Reminders: *Integrity* can send notices and reminders through agencies' email systems to assist ethics officials in managing their agencies' financial disclosure programs by sending out notices and reminders to both filers and reviewers.
- Easy Access: Users can access *Integrity* anywhere over the internet by going to www.integrity.gov and signing on through the authentication services of MAX.gov by entering their MAX user name and password or by swiping their PIV or CAC cards.

RESPONSE TO QUESTION 36

36. In light of the recent data breaches at federal agencies, what has OGE done to ensure the new filing system complies with all government security and privacy requirements?

Integrity meets rigorous standards for information security and privacy. OGE leadership continuously monitors *Integrity* operations and regularly evaluates security best practices for application to *Integrity*. *Integrity* is a web-based application housed at the U.S. Department of Agriculture's National Information Technology Center (NITC) in a secure government cloud. *Integrity* was authorized to operate after the system successfully underwent a full, independent security assessment. *Integrity* uses the authentication services of an existing government system, Max.gov, operated by the Budget Formulation and Execution Line of Business (BFELoB) of the Office of Management and Budget. This existing platform currently provides secure authentication for about 170,000 users. Both *Integrity*'s authentication provider, MAX.gov, and host, NITC, are authorized under GSA's Federal Risk and Authorization Management Program (FedRAMP). To ensure that NITC complies with the Federal Information Security Management Act (FISMA), NITC follows the National Institute of Standards and Technology (NIST) Risk Management Framework for categorization, selection, development, implementation, assessment, authorization, and monitoring of security controls.

The public financial disclosure reports collected through *Integrity* are publicly available without redaction to any requestor who completes and submits an OGE Form 201 to request a copy of a report. Nevertheless, OGE treats these reports as private until requested. OGE's launch of *Integrity* involved a thorough assessment to ensure that privacy requirements are observed, and that appropriate processes are put in place to protect personally identifiable information and sensitive information maintained in the system. For example, prior to launching the application, OGE prepared a Privacy Impact Assessment specific to *Integrity*. OGE also updated its Breach Policy and prepared a separate Incident Response Plan for *Integrity*. In addition, OGE requires that all agencies registered in the system sign a Memorandum of Acknowledgement (MOA)

⁷¹ See 5 U.S.C. app. § 103(c).

delineating each agency's responsibility to coordinate with OGE, as well as to comply with the user agency's own breach policies, in the event of a security incident involving *Integrity*. The MOA also reminds user agencies of their responsibilities to provide Privacy Act training to agency employees; to enforce user behaviors designed to protect the security of the system and the information contained in it; to limit administrator access to the system only to those with a "need to know"; and to comply with all laws, policies, and procedures regarding public access to information maintained in the system.

Questions for The Honorable Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics

Questions from Ranking Member Gerald E. Connolly
Subcommittee on Government Operations

Hearing: "Merit System Protection Board, Office of Government
Ethics, and Office of Special Counsel Reauthorization"

RESPONSE TO QUESTION 1

1. As the head of an employing agency, do you believe Office of Government Ethics (OGE) has sufficient tools and authorities to discipline employees for misconduct or performance issues when necessary?

Yes. As the head of an employing agency, I believe the Office of Government Ethics (OGE) has sufficient tools and authorities to discipline its employees for misconduct or performance issues when necessary.

RESPONSE TO QUESTION 2

2. Based on your agency's experience, do you think statutory change is needed to streamline the federal employee disciplinary process?

No. My general concern as the head of an executive branch agency is that stripping oversight through merit systems principles could risk eventually increasing the sort of whistleblower retaliation and politically-motivated personnel actions against career employees that the merit systems principles were implemented to prevent. Instead, I would be interested in congressional proposals to streamline the federal hiring process.

Questions for The Honorable Carolyn Lerner
Special Counsel
U.S. Office of Special Counsel

Questions from Chairman Mark Meadows
Subcommittee on Government Operations

Hearing: “Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization”

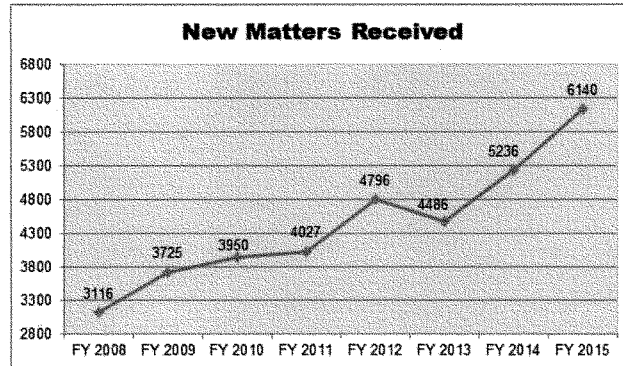
1. What criteria do you believe are best to measure OSC’s success over time and to continue to identify areas of improvement?

We have identified six criteria that best measure OSC’s success over time. The trends in these data sets also help us to identify areas for improvement. For each area, we explain why the category is significant in evaluating OSC’s work and accomplishments. For context, we provide information for the last eight fiscal years—a period that covers the last year of the prior Special Counsel (FY2008), an interim period with no Senate-confirmed Special Counsel (FY2009–FY2011), and my current term (FY2012–FY2015).

1) Total Cases Received

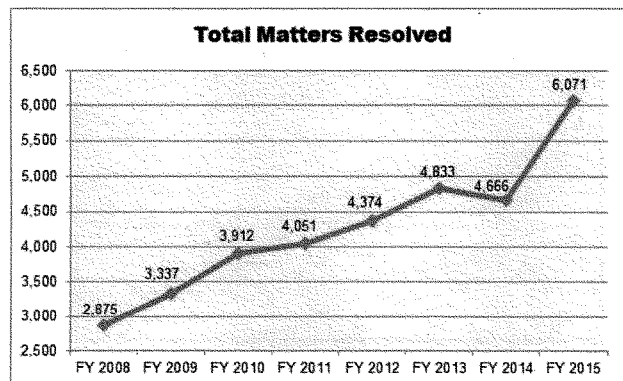
The total number of cases OSC receives in a year allows us to measure the federal workforce’s confidence in OSC and whether our efforts to increase visibility are effective. If employees are confident in our ability to produce results and are aware that OSC is an option for seeking relief or reporting a concern, then this number should steadily increase over time.¹

¹Each year, OSC receives a number of cases that are inadvertently filed by federal employees as disclosures of wrongdoing, and properly should have been filed as prohibited personnel practice complaints. In order to process these cases, OSC must open a disclosure file, read the information provided, and determine that the individual is only seeking relief to address a possible prohibited personnel practice, and not separately making a disclosure of wrongdoing. After making a determination that the case was improperly filed as a disclosure, OSC’s Disclosure Unit forwards the case to OSC’s Complaints Examining Unit, which reviews the claim as a prohibited personnel practice complaint. In 2014, the number of these misfiled disclosure cases increased by an estimated 9 percent over the historical average because of changes in OSC’s online complaint filing system. OSC is in the process of modernizing its online complaint filing system to make it more user-friendly and intuitive. OSC anticipates that the changes to the online system will be completed by the middle of FY 2016. The changes will address not only the current, elevated number of misfiled disclosure cases, but, with the smarter, more user-friendly interface for federal employees, should greatly diminish the historical problem of wrongly-filed disclosure forms. By diminishing the number of wrongly filed disclosure cases, the new system should also provide a more accurate, but likely lower number of actual disclosure cases received in FY 2016 and beyond.



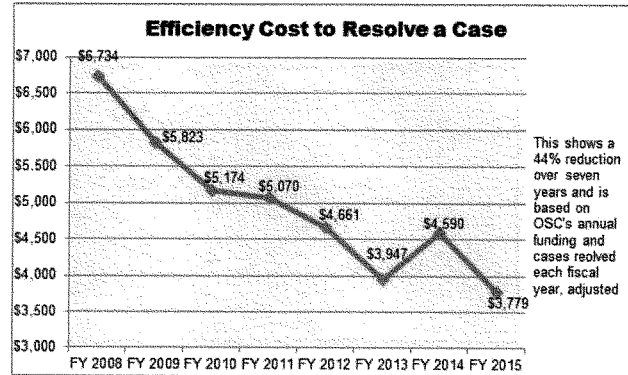
2) Cases Resolved

The number of cases resolved in a year allows us to measure our productivity. If the number of cases received is increasing, our organization must increase productivity by increasing the number of cases resolved over time to keep up with demand.



3) Cost Per Case

OSC's cost to resolve a case allows us to measure our efficiency. To resolve more cases with limited resources, we must find innovative and more efficient ways to deploy our staff and resolve cases quickly without compromising results. In reducing the cost per case, we are finding new ways to limit overhead expenses and putting more of our fixed appropriation toward core mission work and the resolution of cases.



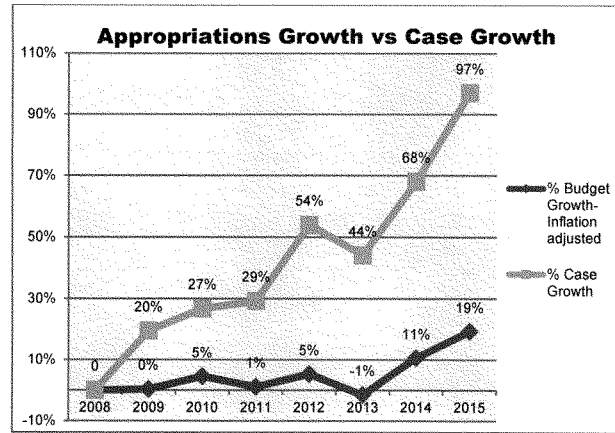
4) Backlog of cases

OSC's case backlog allows us to measure whether our resources are keeping pace with demand for our services. If OSC's efficiency and productivity indicators are positive, but the case backlog continues to increase, then OSC's resources are not sufficient to keep pace with the demand in terms of case volume. OSC needs adequate resources to control spiraling backlogs. A growing backlog is likely to undermine confidence gains in OSC, as employees will inevitably have to wait longer for OSC to process their case, even if OSC is operating more efficiently and effectively.

Total Number of Cases Pending at End of Fiscal Year

| FY2008 | FY2009 | FY2010 | FY2011 | FY2012 | FY2013 | FY2014 | FY2015 |
|--------|--------|--------|--------|--------|--------|--------|--------|
| 937 | 1324 | 1361 | 1331 | 1729 | 1397 | 1969 | 2129 |

Another method for evaluating whether resources are consistent with demand is to compare OSC's growth in cases with our budget. As the chart below demonstrates, cases have increased by 97 percent since 2008 while resources (in real values) have increased by 19 percent.



5) Number and Rate of Favorable Actions

The total number of favorable actions for whistleblowers and other employees is a key indicator of OSC's effectiveness. While it is important to be efficient, opening and closing an increased number of cases, even at a reduced cost, does little to promote merit system values and advance OSC's mission if we do not secure relief for whistleblowers and other employees in the process.

This metric measures the quality of OSC investigations and our ability to have an impact. Favorable actions for whistleblowers and other employees include reinstatement, back pay, stays of improper removals or reassignments, disciplinary actions against those who retaliate, and systemic corrective actions, such as changes in agency policies that allow for prohibited practices to occur. If OSC is operating effectively, then both the number and rate of favorable actions we achieve for complainants should steadily increase over time.

Percentage of OSC prohibited personnel practice (PPP) cases that resulted in favorable actions for the employee, and the total number of favorable actions OSC secured²:

FY2008—33 favorable case outcomes, 58 favorable actions overall, 1.6% of cases

FY2009—53 favorable case outcomes, 62 favorable actions overall, 2.2% of cases

FY2010—76 favorable case outcomes, 96 favorable actions overall, 3.1% of cases

² Some cases may include multiple favorable actions, such as 1) a stay of a personnel action followed by 2) a settlement that permanently resolves the retaliatory personnel action, and 3) a disciplinary action against the manager who engaged in retaliation.

cases

FY2011—65 favorable case outcomes, 84 favorable actions overall, 2.5% of cases

FY2012—128 favorable case outcomes, 159 favorable actions overall, 4.3% of cases

FY2013—124 favorable case outcomes, 173 favorable actions overall, 4.2% of cases

FY2014—165 favorable case outcomes, 201 favorable actions overall, 4.9% of cases

FY2015—212 favorable case outcomes, 278 favorable actions overall, 5.2% of cases³

6) Outreach and Training Sessions

The number of outreach and training sessions OSC conducts measures our efforts to promote awareness of the agency and to prevent future violations of merit systems laws by educating managers about their responsibilities. OSC's whistleblower and PPP certification program provides an important avenue for raising awareness about these rights and preventing violations. In 2015, I reassigned a senior OSC attorney to the newly created position of Director of Training and Outreach. This is the first time OSC has had a full-time employee dedicated to these duties. The Director of Training and Outreach is responsible for increasing outreach as part of our efforts to prevent retaliation and increase awareness of whistleblower protections.

Total number of outreach and training sessions:

| FY2008 | FY2009 | FY2010 | FY2011 | FY2012 | FY2013 | FY2014 | FY2015 |
|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| 60 | 60 | 57 | 33 | 121 | 64 | 104 | 118 |

2. What obstacles have you seen to OSC obtaining access to agency information with the current OPM regulatory authority which directs agencies to comply?

OSC historically has faced a range of obstacles in accessing agency information under OPM's civil service rule 5.4. Rule 5.4 is not specific to OSC and has no enforcement mechanism. The obstacles include nonresponses, untimely responses, incomplete responses, and, in limited instances, unambiguous refusals to comply.

3. Common law privileges

³ Approximately 15 percent of PPP claims each year involve allegations of discrimination under 5 U.S.C. § 2302(b)(1), matters that OSC generally closes after initial review, to not duplicate the well-established processes for addressing claims of discrimination through the EEOC. In addition, the same employee may file multiple cases that are resolved through one favorable action. When these and other factors are considered, the percentage of favorable actions may increase.

1) What are the most frequent common law privileges that have been invoked to prevent OSC from getting the information it needs?

The most frequent common law privilege OSC encounters is the attorney-client privilege, by a large margin. OSC sometimes will encounter the deliberative process privilege and the criminal law enforcement privilege. The latter can be particularly troublesome because it means OSC cannot access information that another entity has obtained until that investigation has been completed. In one case, we waited four years for the investigation to be completed without indication that the agency had made any progress.

2) Which agencies invoked them?

We do not maintain statistics on this, but our staff reports that the following agencies have recently invoked privileges in response to OSC requests for information: Department of Justice, Department of Defense, Department of Homeland Security, Environmental Protection Agency, and the Federal Mediation and Conciliation Service. In addition, I testified last year before this Committee and expressed concerns about blanket assertions of attorney-client privilege by the Chemical Safety Board.

3) Have you had success in educating agencies to the fact that such privileges are inapplicable?

Our success has been mixed. First, agencies generally believe they can invoke the attorney-client privilege to protect communications between management officials and counsel in personnel disputes. Agencies do not uniformly agree that rule 5.4 requires them to provide privileged material. Indeed, agencies commonly argue that production is not required because of rule 5.4's exception, which permits agencies to withhold information prohibited by law or regulation from disclosure, claiming that a common law privilege falls within the term "law."

Likewise, agencies fear that production to OSC will waive the privilege for the future, when they are litigating against the individual challenging the personnel action. OSC's proposal would clarify that the production of potentially privileged material to OSC would not constitute a waiver of the privilege by the agency in any other context or forum. This would obviate the need in most circumstances for OSC to spend significant time and resources negotiating with agencies prior to document productions.

Second, OSC lacks independent authority to enforce rule 5.4. The only mechanism to compel disclosure derives from our statutory authority to subpoena. 5 U.S.C. § 1212. That authority, however, requires OSC to apply to the Merit Systems Protection Board (MSPB) each time it seeks to enforce a subpoena. The MSPB, not OSC, ultimately decides whether to enforce an OSC subpoena in district court under 5 U.S.C. § 1212(b)(3). This process is indirect and cumbersome, while a statutory right to access the information is direct and clear.

By law, agencies share an interest in protecting the merit system and preventing prohibited personnel practices. 5 U.S.C. § 2302(c). This interest includes protecting the merit system through fair and impartial investigations that weigh all the facts in a timely manner. On this important principle, OSC's interests should align with the interests of any agency it investigates. OSC has and will continue to educate the agencies on their statutory responsibilities, but given a lack of clarity surrounding the attorney-client privilege, room to disagree will persist. Congressional action would clarify the law, promote merit system principles, and better protect employees from retaliation.

4. Agency responses to disclosures

1) How closely do agencies stick to the 60-day timeframe required by 5 U.S.C. § 1213(c)(1)(B) for providing a written response to OSC?

When the Special Counsel refers a disclosure of information to an agency head for investigation under 5 U.S.C. § 1213(c), the agency is required investigate the allegations and submit a written report within 60 days of the referral. However, this 60-day time frame is typically insufficient for agencies to conduct a thorough investigation and prepare a report that meets the statutory requirements. Agencies adhere to the statutory 60-day time frame in less than 1 percent of cases.

2) Which agencies are the more delinquent in responding?

The agency most delinquent in responding is the Department of Veterans Affairs (VA) followed by the Department of Homeland Security. It is worth noting that the majority of OSC's referrals have been to these two Departments.

3) What is the average timeframe for such responses government-wide?

The average time frame for agency responses to § 1213(c) referrals government-wide is 387 days.

4) Do agencies ever completely fail to conduct investigation of the disclosures that OSC transmits? If so, how often?

It is extremely rare that an agency fails altogether to conduct an investigation or to submit a report to OSC. Since OSC was established, OSC has transmitted only two cases to the President pursuant to § 1213(e)(4), reporting that the agency head failed to submit the required report. OSC strives to work with agencies to ensure that allegations are fully investigated and resolved, as we believe this better serves the government and public interests.

5. Follow-up action on agency response to disclosures

1) How often do agencies substantiate the allegations that OSC transmits, but then nevertheless fail to take any follow-up action, such as changing their practices, restoring employees who have been wronged, or disciplining employees who commit misconduct?

In most cases where an agency investigation has substantiated some or all of the allegations, the investigative component recommends that the agency take some form of corrective action. Pursuant to § 1213(d)(5), the agency report must include a description of any action taken or planned as a result of the investigation. However, there have been numerous instances in which an agency report fails to clearly explain the basis for failing to take sufficient follow up action after substantiating the whistleblower's concerns. For instance, in a recent case at the Carl T. Hayden VA Medical Center in Phoenix, Arizona, the VA confirmed gross mismanagement of the Medical Center's emergency room. For a period of several years, the ER had no nurses on staff who were properly trained to conduct triage of incoming patients. This created a threat to patient safety, yet no VA officials were held responsible for the misconduct, as required by § 1213.

2) Does OSC have any ability to compel action in such a situation?

OSC does not have authority to compel agencies to take corrective action. OSC's current authority is limited to reporting a deficient finding if the agency fails to take adequate action to address problems or issues substantiated by the investigation. In these cases, OSC conducts follow-up with the agency, through a request for supplemental information, to determine whether the recommended and any other corrective action has been taken. OSC seeks to ensure that the necessary action is taken, or is in the process of being taken, before transmitting the agency reports and whistleblower comments to the President and Congress and closing the matter.

3) Currently, if an agency says it is going to take a certain action, what does OSC do to follow up and ensure the promised action gets taken?

In a limited number of cases, typically where the corrective action may require a significant period of time for completion, OSC will close the matter under the condition that the agency report back to OSC upon completion of the corrective action. In those cases, OSC will conduct additional follow-up with the agency to ensure that the action is completed and forward a final closure letter and any supplemental reports submitted by the agency to the President and Congress.

6. Statute of Limitations

1) How often does OSC receive prohibited personnel practice allegations where the facts and circumstances involved are more than three years old?

Approximately three percent of PPP allegations involve allegations where the disclosure and all of the personnel actions are more than three years old.

2) What limitations does OSC experience in investigating such allegations?

It is often difficult to obtain evidence in these cases. We are faced with the following obstacles: 1) witnesses are more difficult to locate; 2) memories fade; and 3) agency records and physical evidence are often lost or destroyed.

3) How did OSC arrive at the proposal of a 3-year limitation?

The proposal for a 3-year limitation is consistent with the statute of limitation that was recently passed for employees of government contractors. See 10 U.S.C. §2409 and 41 U.S.C. § 4712.

4) What if an individual doesn't learn about a prohibited personnel practice until after the time when the underlying conduct has occurred?

Under OSC's proposal, we would have the discretion to review a PPP allegation after the statute of limitations has passed. If an employee makes a strong case that OSC should review the claim, we will initiate an investigation, notwithstanding the proposed statute of limitations.

5) Would you be open to OSC having discretion to investigate older cases if OSC determines there is good cause to review the allegation?

Yes, we believe it is important to have the authority to review any strong claim presented to OSC even if the allegations are older.

7. Previous action by MSPB

- 1) How does OSC typically learn whether a matter has already been previously filed with the MSPB or adjudicated by them?**

This information is obtained in one of three ways: 1) filers are asked on OSC complaint forms whether they have filed an appeal with the MSPB; 2) the assigned examiner obtains this information during an initial interview with the filer; or 3) the assigned examiner may obtain this information directly from the MSPB.

- 2) How often does OSC receive such complaints that have already been filed with the MSPB?**

Approximately five percent of the PPPs complaints we receive have already been filed with the MSPB.

- 3) How often does OSC receive such complaints that have already been adjudicated by the MSPB?**

Approximately one percent of the PPP complaints we receive have already been adjudicated by the MSPB.

8. Previous action by OSC

- 1) How often does OSC receive repeat complaints whereby OSC has already investigated a set of facts and circumstances but gets a second complaint on the matter?**

Approximately six percent of the PPP complaints we receive are considered "repeat complaints."

- 2) What are OSC's current practices with regard to these circumstances?**

OSC's current practice is to issue a letter explaining that we are closing the complaint because the facts and circumstances have previously been addressed. If the filer submits additional information in support of the same facts and circumstances, we may review it as a request for reconsideration.

- 9. Per 5 U.S.C. § 1214(b)(2)(A), OSC is required to make a final determination on prohibited personnel practice complaints within 240 days, unless the complainant agrees to extend the period. Although being thorough in order to obtain proper outcome is critical, it is also important that individuals who have filed with OSC don't have to wait an unreasonable period of time for an ultimate determination.**

- 1) How closely does OSC track the progress on staying within these required timeframes?**

OSC tracks individual case age and average case age for both existing and closed matters. This allows us to monitor the agency's overall success rate regarding the statutory

timeframes. We track individual case progress within ten days of receipt, after 90 days, and every 60 days thereafter, and notify the complainant of case progress. If a matter is not resolved within 240 days, OSC's case tracking system sends the assigned examiner a notice to contact the complainant consistent with section 1214(b)(2)(A) to request permission to continue the investigation.

2) What is the best way to quantify how closely OSC is to sticking to its statutorily mandated timeframes?

Monitoring the average age of open cases and average age of cases at time of closure shows how closely OSC is sticking to its statutorily mandated timeframe for resolution of PPP complaints.

3) What is within OSC's control to trend in a positive direction there, versus what is outside OSC's control?

We are continually working to improve efficiencies in case processing to reduce the time for case completion. For example, we have initiated cross-training across program units. This has allowed OSC's Investigation and Prosecution Division (IPD) to assist our Complainants Examining Unit in screening PPP complaints. OSC also looks for cases that are appropriate for early settlement without a full investigation. Early settlement uses fewer agency resources and takes less time than full investigation. When appropriate, IPD refers cases to OSC's Alternative Dispute Resolution Unit, where they may be settled more quickly.

Case examiners also receive reminders from our case tracking system when a case has been open for 90 days and every 60 days thereafter, as well as when the 240-day timeframe has been reached. This encourages case examiners to focus on resolving those cases that are reaching the 240-day deadline. Examiners also receive reminders to speak to their supervisors about cases that are reaching the statutory timeframes.

Other factors, however, are outside our control.

- Our growing caseload, and the corresponding increase in each examiner's docket, makes it increasingly difficult to meet the 240-day timeframe.
- Under section 1214(a)(1)(D), before OSC closes a PPP case, it must send the complainant a report with its factual findings and legal conclusions, and give the complainant an opportunity to provide written comments. The time it takes to prepare the report, receive comments, and address those comments, adds significant time to the process, making it more difficult to complete all cases within the statutory timeframes.
- Complex retaliation or discrimination investigations often will go well beyond the 240-day statutory requirement because, for example, complex allegations require extensive investigations; after investigation, OSC is engaged in protracted settlement negotiations, or OSC is preparing to file a formal complaint for disciplinary or corrective action. Successful advocacy and enforcement efforts sometime require

investigations significantly longer than 240 days.

- Agency delays in responding to OSC's requests for information under rule 5.4 frequently contribute to matters extending beyond the 240-day timeframe. Delays can extend for months and can severely hamper investigation and prosecution efforts. These delays are often due to claims of insufficient resources. For example, agencies assert that they lack sufficient IT resources to timely perform requested email searches. Agencies send encrypted e-discovery, sometimes asserting they are unable to decrypt their own documents. Claims of privilege over agency information lead to additional disputes and delays. Because OSC lacks a meaningful enforcement mechanism for failures to comply with our rule 5.4 requests, we have little recourse when agencies fail to fully and timely respond. These barriers to obtaining information are among the greatest challenges OSC faces in meeting statutory timeframes for investigations.

While OSC constantly searches for ways to increase efficiency, factors outside our control prevent us from consistently resolving cases within 240 days.

10. Have there been significant problems from the experiment in "all circuit" judicial review of whistleblower rulings? Do you oppose making that reform permanent?

No, there have been no problems from the experiment in "all circuit" judicial review from OSC's perspective. OSC supports making that reform permanent.

11. Please describe the impact to date of having whistleblower ombudspersons at every inspector general office, as mandated by the Whistleblower Protection Enhancement Act of 2012.

From OSC's perspective, the whistleblower ombudsperson program has been extremely positive. In many agencies, the OIG whistleblower ombudsperson has taken the lead in educating employees about their rights and responsibilities under the whistleblower law. In addition, the ombudsperson program has led to more collaboration and information sharing among the various OIGs and with OSC. Increased cooperation allows our related offices to share best practices for investigation techniques and training, and to identify and resolve issues quickly and effectively.

12. OSC certification program

1) How many agencies out of what total universe have been certified as completing merit systems training in the OSC certification program?

There are approximately 172 agencies or entities that employ federal workers. This number includes OIGs. To date, 50 agencies or components have completed OSC's 2302(c) Certification Program (program), including 40 separate agencies and 10 agency components. An additional 17 agencies and components have registered to complete the OSC program. OSC keeps an updated list of certified agencies and pending certifications

on its web site. On February 4, 2016, I sent a reminder to all non-certified federal agencies and entities reminding them of their obligation to participate in OSC's program.

2) What impediments have you seen to all agencies becoming certified?

The very large agencies appear to have more difficulty coordinating the supervisory training requirement. One of the impediments is the coordination of the program among a large number of components or sub-agencies. Another impediment includes training large numbers of supervisors, sometimes located across the country and overseas. OSC has attempted to address these obstacles by providing expert trainers to train agency supervisors, including providing web-based training. Very recently, OSC developed a training quiz that will alleviate some of the issues that the larger agencies face in training all supervisors. (Nevertheless, OSC still recommends in person training for supervisors whenever possible.)

As to smaller agencies, there are still some that appear to lack awareness of the requirement to participate in OSC's program. As noted above, to address this challenge, I recently sent correspondence to remind all non-certified federal agencies and/or entities of their obligation to participate in OSC's program.

3) What is the realistic schedule for all government agencies and corporations to be trained in the WPA and merit system principles?

On OSC's website, we note, "It is our expectation that agencies will be able to complete the certification process within six months of registering with OSC and we are committed to assisting all federal agencies with meeting the requirements of 5 U.S.C. § 2302(c)." Accordingly, after an agency registers to complete the process, six months is a realistic schedule for completion. We expect to see an increase in registrations in response to our February 4, 2016 letter.

4) Do OSC staff, including administrative judges, complete certifiable training in the WPA and merit system principles? If not, should they?

OSC follows the relevant steps under the certification program, including providing information on civil service and whistleblower protection laws to all incoming staff in their written orientation materials. Additionally, OSC follows the supervisory training requirements of the program by ensuring that all supervisors are trained every three years on the civil service and whistleblower protection laws over which OSC has jurisdiction. OSC's program staff is comprised primarily of investigators, attorneys, and human resource professionals. We do not employ administrative judges.

13. Please detail how OSC has used its WPEA authority to file *amicus* briefs, including the number of times this authority has been exercised, the issue and apparent impact.

Since the WPEA was enacted in 2012, OSC has filed the following *amicus curiae* briefs in the following cases in federal court:

- *Department of Homeland Security v. MacLean* (Supreme Court), filed September 30, 2014. The case involved a former federal air marshal who blew the whistle on the Transportation Security Administration's decision to stop its air marshal coverage of long distance flights, even though there were heightened intelligence warnings that terrorists were targeting those flights. OSC argued that Robert MacLean's disclosures should be covered by the Whistleblower Protection Act.
- *Clarke v. Department of Veterans Affairs* (Federal Circuit), filed August 14, 2014. OSC argued that the MSPB's decision was erroneous because the MSPB's analysis of the exhaustion of administrative remedies requirement disregarded the plain language of the statute, conflicted with precedent barring the MSPB from relying on OSC's determinations in analyzing the exhaustion requirement, and encroached upon OSC's independence, thereby threatening future whistleblower claims.
- *Kerr v. Salazar* (Ninth Circuit), filed May 13, 2013. OSC argued that the WPEA should be applied to cases pending before the law's enactment. Specifically, OSC urged the Ninth Circuit to apply the WPEA to the case because: 1) it clarified 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.
- *Berry v. Conyers & Northover* (Federal Circuit), filed March 14, 2013. OSC urged the court to respect the due process rights of federal employees by allowing the MSPB and OSC to review adverse personnel actions based on sensitivity determinations, especially in whistleblower cases.
- *Day v. Department of Homeland Security* (Federal Circuit), filed February 21, 2013. The case concerned whether restrictive decisions by the Federal Circuit that barred certain recurring whistleblower claims from review should be applied to pending cases or only to cases filed after the WPEA's enactment. OSC urged that the statute should be applied retroactively to pending cases.

14. What has been the effect of the U.S. Court of Appeals for the Federal Circuit decision in *Kaplan v. Conyers* since 2013?

In *Kaplan v. Conyers*, the Federal Circuit Court of Appeals held that the MSPB could no longer review the merits of an agency decision to remove or significantly suspend federal employees when the asserted basis for the personnel action is the employee's alleged ineligibility to occupy "sensitive" positions. In so holding, the Court of Appeals unnecessarily expanded a decades-old Supreme Court holding in *Department of Navy v.*

Egan, 484 U.S. 518. *Egan* held that the MSPB could not review agency security clearance determinations. The expansion of the *Egan* decision was unnecessary because 1) the government unequivocally conceded that positions at issue in *Kaplan* did not require security clearances or involve access to classified information; and, 2) in enacting the Civil Service Reform Act, Congress already established a mechanism for removing or suspending employees when doing so is in the interest of national security. Thus, the *Kaplan* decision essentially sanctioned an agency's overreach into an area that Congress had explicitly addressed. The federal government has designated tens of thousands of positions as noncritical sensitive. The effect of *Kaplan* has been to deprive these individuals of guaranteed due process or judicial review when facing removal, even in cases involving discrimination and whistleblowing.

15. What is OSC's track record for each year of the Kaplan, Bloch, and Lerner administrations for litigating in a hearing to obtain corrective action for:

- 1) Whistleblowers.**
- 2) Any federal employee who has suffered from any other prohibited personnel practice. Please provide any necessary explanation of the results.**

From 1998–2003, under Special Counsel Elaine D. Kaplan's tenure, OSC filed one petition for corrective action, in 2003. OSC argued for MSPB jurisdiction under the whistleblower law for employees of the International Boundary and Water Commission.

From 2004–2008, under the tenure of Special Counsel Scott J. Bloch, OSC filed one corrective action petition in each year except for 2008. Two of the four petitions involved whistleblower retaliation. In the two whistleblower cases, the agency settled the case after OSC filed the petition.

From 2011–2015, under my tenure, OSC has filed two corrective action petitions, one in 2011 and one in 2015. The 2011 filing involved whistleblower retaliation, and the 2015 petition involved a Bureau of Alcohol, Tobacco, and Firearms (ATF) whistleblower who OSC argued was protected by the First Amendment for testimony he gave in Federal Court. After OSC prevailed on the decision on the scope of First Amendment protections for federal employees under the Civil Service Reform Act, the agency settled the claim.

OSC has not historically brought many cases to the MSPB. The main reason is that agencies typically settle when strong cases are presented, precluding the need for formal litigation. Because so many cases settle prior to litigation, OSC is publicizing more PPP reports, even after the agency has accepted OSC's corrective action request. We believe these reports deter future misconduct and educate agencies on the scope of the whistleblower law.

- 16. What is OSC's track record for seeking stays of prohibited personnel practices? Please provide the record for both formal and informal stays for each year of the Kaplan, Bloch and Lerner administrations, with any explanation for the results.**

Elaine D. Kaplan

Served: April 1998–June 2003

| | Informal Stays | Formal Stays |
|---------|-----------------------|---------------------|
| FY 1998 | 10 | 2 |
| FY 1999 | 12 | 3 |
| FY 2000 | 7 | 2 |
| FY 2001 | 13 | 1 |
| FY 2002 | 7 | 1 |
| FY 2003 | 6 | 1 |

Scott J. Bloch

Served: December 2003–November 2008

| | Informal Stays | Formal Stays |
|---------|-----------------------|---------------------|
| FY 2004 | 11 | 1 |
| FY 2005 | 3 | 1 |
| FY 2006 | 8 | 1 |
| FY 2007 | 7 | 3 |
| FY 2008 | 4 | 0 |

Carolyn N. Lerner

Served: April 2011–present

| | Informal Stays | Formal Stays |
|---------|-----------------------|---------------------|
| FY 2011 | 12 | 4 |
| FY 2012 | 27 | 8 |
| FY 2013 | 28 | 5 |
| FY 2014 | 23 | 2 |
| FY 2015 | 62 | 3 |

Under my tenure, OSC has more aggressively sought stays, especially informal stays. In fiscal year 2015, OSC obtained a large spike in the number of informal stays because of the influx of cases from the VA. In addition, I have instructed employees in our Complaints Examining Unit (CEU), which conducts the initial review of cases, to seek early resolution of complaints, including stays where appropriate. We are identifying cases that are appropriate for stays more quickly and preventing employees from suffering harm as OSC continues its review of their cases.

- 17. What is OSC's track record for litigating in a hearing to seek disciplinary action for prohibited personnel practices? What is the OSC's track record of obtaining discipline informally through persuading agencies to act?**

Elaine D. Kaplan*Served: April 1998–June 2003*

| | Disciplinary Actions Negotiated | Disciplinary Action Petitions Filed |
|---------|--|--|
| FY 1998 | 0 | 0 |
| FY 1999 | 4 | 0 |
| FY 2000 | 1 | 0 |
| FY 2001 | 4 | 0 |
| FY 2002 | 13 | 1 |
| FY 2003 | 12 | 2 |

Scott J. Bloch*Served: December 2003–November 2008*

| | Disciplinary Actions Negotiated | Disciplinary Action Petitions Filed |
|---------|--|--|
| FY 2004 | 11 | 0 |
| FY 2005 | 3 | 1 |
| FY 2006 | 4 | 0 |
| FY 2007 | 5 | 0 |
| FY 2008 | 3 | 3 |

Carolyn N. Lerner*Served: April 2011–present*

| | Disciplinary Actions Negotiated | Disciplinary Action Petitions Filed |
|---------|--|--|
| FY 2011 | 6 | 0 |
| FY 2012 | 19 | 0 |
| FY 2013 | 27 | 0 |
| FY 2014 | 23 | 3 |
| FY 2015 | 9 | 0 |

During my tenure, OSC has significantly increased the number of disciplinary actions obtained for whistleblower retaliation and other PPPs, and particularly violations of merit rules in the hiring process. We have active investigations in multiple VA facilities that may lead to further formal disciplinary action petitions with the MSPB.

18. The 1994 WPA amendments required MSPB administrative judges to forward any case to the OSC to consider disciplinary action if the employee established a *prima facie* case of whistleblower retaliation.

1) How many referrals has the OSC received during the Kaplan, Bloch and Lerner administrations?

Elaine D. Kaplan

Served: April 1998–June 2003

| | Referrals from MSPB |
|---------|----------------------------|
| FY 1998 | 4 |
| FY 1999 | 4 |
| FY 2000 | 4 |
| FY 2001 | 3 |
| FY 2002 | 1 |
| FY 2003 | 3 |

Scott J. Bloch

Served: December 2003–November 2008

| | Referrals from MSPB |
|---------|----------------------------|
| FY 2004 | 0 |
| FY 2005 | 1 |
| FY 2006 | 0 |
| FY 2007 | 1 |
| FY 2008 | 4 |

Carolyn N. Lerner

Served: April 2011–present

| | Referrals from MSPB |
|---------|----------------------------|
| FY 2011 | 6 |
| FY 2012 | 8 |
| FY 2013 | 4 |
| FY 2014 | 2 |
| FY 2015 | 11 |

2) How many have led to disciplinary action?

Based on a review of data in OSC's case tracking system, it appears that no referrals from MSPB led to disciplinary action from FY 1998 through FY 2009. In FY 2010, one referral led to discipline; in FY 2012, three referrals led to discipline; in FY 2013, one referral led to systemic corrective action (agency training); and, in FY 2014, one referral led to discipline. Many of the cases referred in FY 2015 are still active.

19. Please describe changes the OSC has made to its § 1213 whistleblowing disclosure program to make it more accessible and effective for whistleblowers. As part of this response, please describe and summarize the track record to date for the OSC's new unit combining action on disclosures and alleged prohibited personnel practices.

In the last two years, OSC has implemented the following measures to improve access and help whistleblowers who file disclosures with OSC.

- OSC has clarified that disclosures must be made based on credible information, such as first-hand observation or documents, and may be supported by sworn affidavits from witnesses. Previously, OSC required that referrals be based exclusively on first-hand knowledge.
- When OSC has jurisdiction over a whistleblower disclosure, OSC now calls each person who files a disclosure to ensure we understand their allegations and to explain our process for making a substantial likelihood determination.
- OSC now affords the whistleblower the opportunity to review the information OSC plans to refer to an agency for investigation to ensure accuracy in the referral and issues presented for investigation.
- OSC referral letters to agencies strongly recommend that the agency begin its investigation by interviewing the whistleblower, unless the whistleblower has requested that OSC keep their name confidential.
- In the absence of a substantial likelihood finding, OSC now makes discretionary referrals to agencies under § 1213(g), where a disclosure is of such danger or gravity that it warrants notification of the agency head, or where the information available to OSC is inadequate to make or decline to make a substantial likelihood determination.
- OSC's referral letters now detail the criteria that an agency's investigative report must address to be deemed complete under § 1213(e)(2)(B).
- In appropriate cases, OSC now exercises its discretion to post to its online public file agency findings, whistleblower comments, and the Special Counsel's determination in § 1213(g) matters.
- OSC is preparing to issue a new "smart" complaint form to help whistleblowers file disclosures that satisfy statutory requirements and standards.

In 2015, I established a pilot project called the Retaliation Disclosure Team (RDT). The purpose of the RDT is to evaluate the efficacy of having one attorney handle both the disclosure claim and a whistleblower retaliation complaint filed by one person. Currently, up to four staff members may work on the disclosure and PPP claim filed by one individual. The RDT model generates efficiencies because it allows one attorney to serve as 1) the intake examiner, 2) the formal investigation and prosecution attorney, 3) the disclosure attorney and 4) the mediator.

Another benefit of this model is that the RDT attorney has easier access to the full range of information available. For example, the attorney gains information from the disclosure review that informs the whistleblower retaliation complaint, and evidence from the retaliation complaint helps give a fuller picture of the disclosure. The RDT model also develops a team of cross-trained attorneys whose flexible skill-set allows OSC to meet its needs as they evolve. Finally, whistleblowers have praised the benefit of having one OSC point of contact, which helps improve OSC's customer service.

20. Classified disclosures

- 1) Please describe OSC's process with regard to accepting classified disclosures.
- 2) Does OSC have the facilities and staff it needs to continue to make the most use out of this authority?
- 3) How many times has OSC used this authority since receiving it?

OSC is authorized to receive classified disclosures of information and currently has the staff and facility resources to safeguard classified material. OSC has followed GSA guidelines for procuring appropriate storage units for this information. However, OSC does not have a Sensitive Compartmented Information Facility (SCIF). OSC has received very few cases, approximately two, that include documents classified at the Secret level. In the most recent case, OSC used a facility at another agency to conduct an interview. The low number of disclosures involving classified information does not support the purchase of a SCIF for the agency. Instead, OSC will arrange for the use of another agency's SCIF on an as-needed basis to accommodate the review of classified documents.

21. In terms of volume and results, please describe the track record of the OSC's Alternative Dispute Resolution (ADR) Program in obtaining resolutions, as well as the MSPB's mediation program.

The table below shows that the number of cases OSC has mediated increased from an average of nine per year in FY 2008–2011 to about 35 per year from FY2012–2014. OSC does not have data on the MSPB's ADR program

| | FY 2008 | FY 2009 | FY 2010 | FY 2011 | FY 2012 | FY 2013 | FY 2014 | FY 2015 |
|--|---------|---------|---------|---------|---------|---------|---------|---------|
| Number of completed mediations | 7 | 11 | 6 | 13 | 30 | 47 | 38 | 26 |
| Number of completed mediations that yielded settlement | 4 | 4 | 3 | 10 | 18 | 29 | 30 | 21 |
| Percentage of completed mediations that resulted in settlement | 57% | 36% | 50% | 77% | 60% | 62% | 79% | 81% |

Questions for The Honorable Carolyn Lerner
Special Counsel
U.S. Office of Special Counsel

Questions from Ranking Member Gerald E. Connolly
Subcommittee on Government Operations

Hearing: "Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization"

- 1. Based on the Office of Special Counsel's (OSC) experience in investigating and prosecuting cases involving prohibited personnel practices, do you believe agencies need more tools and authorities to discipline employees for misconduct, or do you think the current authorities are sufficient.**

Based on our review of dozens of whistleblower retaliation and disclosure cases, my concern is not that agencies are unable to take disciplinary actions. Rather, too often agencies may be motivated to take action for the wrong reason – to punish a whistleblower instead of holding poor performing employees or bad actors accountable.

On September 17, 2015, I wrote to the President and cited my concerns about disciplinary actions taken against whistleblowers at the Department of Veterans Affairs (VA). In that letter, I specifically noted:

The VA has attempted to fire or suspend whistleblowers for minor indiscretions, and, often, for activity directly related to the employee's whistleblowing. While OSC has worked with VA headquarters to rescind the disciplinary actions in these cases, the severity of the initial punishments chills other employees from stepping forward to report concerns.

As an example, I referenced a VA food services manager who blew the whistle on VA sanitation and safety practices. He was reassigned to clean a morgue and issued a proposed termination after being accused of eating four expired sandwiches worth a total of \$5.00 instead of throwing them away.

In my letter, I contrasted the disciplinary action in this and other whistleblower cases with the lack of accountability for VA officials who have engaged in confirmed wrongdoing that threatened the health and safety of veterans.

- 2. The numerous VA retaliation cases for which you helped whistleblowers obtain settlements seem to suggest that when an agency wants to dismiss someone, it has the ability to do so fairly quickly.**

- a. Special Counsel Lerner, do you agree? If so, please explain.**

See response to Question 1 above.

- b. **Based on your examination of the VA and other federal agencies, would it be fair to say that a delay in or failure to take appropriate disciplinary action against an employee for misconduct can be characterized as more of a management problem rather than a lack of sufficient tools or authority?**

Based on our review of VA and other whistleblower cases, we have seen instances in which the delay or failure to take appropriate disciplinary action can be characterized as a management problem. For instance, a whistleblower disclosed to OSC that an agency had placed a high level manager on paid administrative leave for over two years to delay acting on a proposed removal. This misuse of taxpayer dollars is evidence of a management failure, and was eventually corrected because of the whistleblower.

- c. **Could lack of training for managers also be a factor in any delay or failure to take appropriate disciplinary action?**

Yes, additional training for managers, particularly on documenting instances of poor performance, and how to promptly address performance issues with employees, could assist in agency efforts to take appropriate disciplinary action.

- d. **Are there ways that agencies can streamline their disciplinary process under existing law?**

The VA established an Office of Accountability Review (OAR) to centralize and streamline the disciplinary action process for high level officials. We believe this approach can be an effective model for streamlining the disciplinary action process, if staffed and resourced appropriately.

3. The following questions relate to OSC's proposal to modify the procedural requirements for certain prohibited personnel practice cases:

- a. **How many cases and what percentage of OSC's caseload do you anticipate this proposal would affect?**

OSC's proposal would remove unique procedural requirements imposed on OSC that prolong the process for closing a non-meritorious case. Our proposal would only apply to certain types of cases. These include: 1) cases that are older than 3 years, which account for approximately 3% of OSC cases; 2) cases which had previously been filed with OSC, which comprise approximately 6% of OSC cases; 3) cases that had previously been filed with the MSPB or another adjudicative body, which account for approximately 5% of OSC cases; and 4) cases in which OSC does not have jurisdiction, which account for approximately 12% of OSC cases.

In considering OSC's proposal, it is important to note that the proposal does not impact the ultimate decision by OSC in any of these cases. With or without the

burdensome procedural steps, OSC would rarely take action to assist the complainant in these categories of cases, and OSC would still have the discretion to do so. The proposal simply streamlines the process without changing the end result.

b. Would this proposal apply to cases where the Merit Systems Protection Board or another adjudicating body has issued a decision?

Yes. OSC is bound by MSPB decisions, so allowing OSC to process cases in which an MSPB decision has been reached will allow us to dedicate more of our limited resources to meritorious claims.

c. Would this proposal apply to cases that are pending with the MSPB or another adjudicating body?

Yes. Employees are already required by statute and MSPB rules to elect a remedy. If an employee chooses to bring their case to the MSPB, our current practice in most scenarios is to close the case based on the employee's election.

d. Under what circumstances would there be cases pending with both OSC and MSPB or other adjudicating body?

In almost all cases, under the election of remedy rules cited above, the same case should not be pending before OSC and the MSPB. In select cases, however, OSC may opt to keep a case open that is also pending at the Board if OSC determines systemic corrective action and/or discipline is necessary in addition to the individual corrective action the complainant may seek at the Board.

e. What other adjudicating bodies could be covered by this provision?

The provision applies primarily to the MSPB, but could also apply to the federal courts in "mixed" cases under Title VII and the whistleblower law, or other entities that hear federal employee appeals such as the Foreign Service Grievance Board.

f. What effect would this proposal have on an employee's rights?

The proposal will not impact the adjudication of any employee's rights. It will simply streamline the process for issuing decisions, allowing OSC to dedicate more of our limited resources to meritorious claims.

g. Would this proposal prevent an employee from pursuing a remedy in more than one forum?

The proposal does not impact existing law, which already prevents employees from pursuing a remedy in more than one forum under most circumstances.

4. **As the head of an employing agency, do you believe OSC has sufficient tools and authorities to discipline employees for misconduct or performance issues when necessary?**

Yes. With our drastically increasing case levels, OSC's staff is working at full capacity, often going above and beyond to ensure timely and fair review of whistleblower and other claims. There is simply no room for underperforming individuals. To the extent individual employees have needed to improve their performance, I have instructed managers to give prompt feedback on areas that need improvement and provide the employee an opportunity to appropriately respond. Fortunately, OSC is staffed with dedicated public servants who care deeply about the agency's mission.

5. **Based on your agency's experience, do you think statutory change is needed to streamline the federal employee disciplinary process?**

OSC's experience is generally reflected in the examples and responses above. I do not have a position on whether statutory change in this area is needed, but hope the examples are instructive as Congress considers these important issues.