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on

“Whistleblower Protections for Government Contractors”

Madam Chairman McCaskill, Ranking Member Portman and distinguished members of this Subcommittee, thank you for the opportunity to appear before you this morning to discuss whistleblower protections for Government contractor employees.

Summary of DoD Inspector General's whistleblower protection program

Since the late 1980s, Congress has passed a series of laws giving the Department of Defense Inspector General (DoD IG) the authority to investigate or oversee investigations of allegations of whistleblower reprisal conducted by the DoD component inspectors general, allegations made by members of the armed forces, appropriated and non-appropriated fund employees, and DoD contractor employees. Under these statutes, DoD IG is charged with providing whistleblower protections to these individuals. Additionally, pursuant to the American Recovery and Reinvestment Act of 2009, DoD IG has the authority to investigate complaints of reprisal filed by employees of non-federal employers who make disclosures relating to possible fraud, waste or abuse of Recovery Act funds.

We are proud of the role that Congress has assigned to our agency, to objectively and thoroughly investigate whistleblower reprisal complaints. For over 20 years, we have maintained a robust whistleblower protection program, which has been a top priority of the DoD IG. Whistleblowers perform an important public service -- often at great professional and personal risk -- by exposing fraud, waste, and abuse within the programs and operations of the Department.

DoD IG has overall responsibility for the whistleblower protection program across the Department. A strong whistleblower protection program is characterized by providing a confidential channel for the disclosure of wrongdoing, reliable protection against reprisal for making protected disclosures, and ensuring that everyone understands their rights and

responsibilities under the law, which we strive to achieve by conducting outreach to our stakeholders.

Until recently, two separate directorates within DoD IG were responsible for investigating civilian and military reprisal investigations. Two months ago, we combined those two directorates into the Whistleblower Reprisal Investigations Directorate (WRI), which is now responsible for conducting or overseeing investigations of all DoD related whistleblower reprisal complaints.

Over the past several years, DoD IG has aggressively reviewed its whistleblower reprisal investigation program to identify areas for improvement. For instance, WRI has implemented process improvements in response to internal and external reviews and dedicated more resources to the investigations of whistleblower reprisal complaints, with the goal of transforming the Department's program into the model for the Federal government. In addition, the Inspector General recently met with the military service IGs and urged them to identify and implement ways to improve their whistleblower protection processes, to include dedicating additional resources to improve the timeliness and quality of their investigations.

The Inspector General Act of 1978, as amended, entrusts us with responsibility for improving the economy, efficiency, and effectiveness of the Department's operations through prevention and detection of fraud, waste, and mismanagement. DoD IG conducts audits, evaluations, and investigations -- many of which arise from disclosures brought to light by whistleblowers -- in its efforts to promote accountability, integrity, and efficiency in DoD programs and operations. Under the broad authority of Sections 7(a) and (c) of the Act we may investigate any matter of concern. DoD IG is somewhat unique among IG offices. Our responsibility to investigate whistleblower reprisal complaints derives not only from the Inspector General Act of 1978, but also from several other statutory provisions applicable to specific classes of individuals.

WRI receives most of its complaints through the Defense Hotline, which is the principal channel through which military service members, DoD civilians, contractor employees, and the public report fraud, waste, mismanagement, abuse of authority, and threats to homeland defense. WRI reviews the reprisal allegation, contacts the whistleblower, and decides whether the complaint should be handled in-house or by a DoD component agency or military service IG. We also ensure that no IG investigation duplicates an investigation already open (for example, in the U.S. Office of Special Counsel (OSC)). Disclosure of wrongdoing, whether made to the Hotline or during the course of investigating a reprisal complaint, is routed to the appropriate OIG component or DoD agency for action. Let me briefly describe the statutory protections afforded to DoD whistleblowers.

Members of the Military

Title 10, United States Code, Section 1034, the "Military Whistleblower Protection Act," was enacted in 1988. Over the years Congress has amended the Statute to strengthen protections for military members. Title 10 U.S.C. §1034 prohibits the taking of unfavorable personnel actions, the threatening of such actions, or the withholding of favorable personnel actions against members of the Armed Forces who make or prepare to make protected communications. It also prohibits the restriction of members' communications with a Member of Congress or an Inspector General. Protected communications are defined as lawful communications to a Member of Congress, an Inspector General, or any member of a DoD audit, inspection, investigative or law enforcement organization, and any other person or organization (including any person or organization in the chain of command) designated under Component regulations or other established administrative procedures for such communications concerning a violation of law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public safety. The implementing regulation is DoD Directive 7050.06, "Military Whistleblower Protection."

Employees of Non-appropriated Fund Instrumentalities (NAFI)

Protections for NAFI employees derive from Title 10, United States Code, Section 1587, "Employees of Non-appropriated Fund Instrumentalities: Reprisals." The Statute prohibits the taking or withholding of a personnel action as reprisal for disclosing information that a NAFI employee reasonably believes evidences a violation of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Regulations implementing the Statute are set forth as DoD Directive 1401.3, "Reprisal Protection for Non-appropriated Fund Instrumentality Employees/Applicants."

DoD Civilian Employees

In 2003, under the authority of the Inspector General Act, DoD IG began to provide, in some cases, an alternate means by which DoD civilian appropriated-fund employees could seek protection analogous to protection from reprisal provided by the Whistleblower Protection Act, Title 5, United States Code, Section 2302 (5 U.S.C. §2302). DoD Directive 5106.01 implements the program whereby DoD IG receives and investigates complaints of reprisal made by civilian appropriated-fund employees, in coordination with the OSC.

OSC receives and has primary jurisdiction to investigate a majority of the civilian whistleblower cases across the Federal government, pursuant to the "Whistleblower Protection Act." Because DoD IG's jurisdiction over civilian employees is secondary to that of OSC, we have historically reserved our investigative resources for those cases that involve employees not protected under other statutes, specifically, employees in the intelligence and counter-intelligence community; cases involving security clearance

actions, because OSC does not have jurisdiction over these actions; or matters of high-level interest or warfighter safety.

Non-Federal Employees of Recipients of Recovery Act Funds

The American Recovery and Reinvestment Act of 2009, Section 1553, as implemented by Federal Acquisition Regulation 3.9, provides whistleblower protection to employees of non-federal entities receiving Recovery Act funds. This may include employees of State and local governments, contractors, subcontractors, and grantees or professional membership organizations acting in the interest of recovery fund recipients. Section 1553 also covers disclosures made to courts, certain state officials, and certain other company employees.

Employees of Defense Contractors

Title 10, United States Code, Section 2409, "Contractor Employees: Protection from Reprisal for Disclosure of Certain Information," as amended in 2008 and implemented by Defense Acquisition Regulation Systems (DFARS) Subpart 203.9, protects employees reporting "information that the employee reasonably believes is evidence of gross mismanagement of a Department of Defense contract or grant, a gross waste of Department of Defense Funds, a substantial and specific danger to public health or safety, or a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant." Section 2409 provides that an employee of a Defense contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a DoD contract. Further, it protects disclosures made to a Member of Congress or to or an authorized official of an agency, the Department of Justice, a representative of a committee of Congress, an Inspector General,

the Government Accountability Office, or a Department of Defense employee responsible for contract oversight or management. These amendments significantly improved whistleblower protections for Defense contractor employees.

Since 1986 the Statute has been amended on multiple occasions. Prior to 2008, §2409 limited the definition of protected disclosure to "information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract) and protected only those disclosures made to a Member of Congress or to an authorized official of an agency, or the Department of Justice.

The 2008 amendment strengthened protections for Defense contractor whistleblowers in other ways as well, such as by imposing additional deadlines for agency heads to resolve reprisal complaints. We welcomed those enhancements to protections for Defense contractor whistleblowers.

Defense Federal Acquisition Regulation (DFAR) "Subpart 203.9, Whistleblower Protections for Contractor Employees," which implements the amendment, was not published until January 2009. Nearly three years later, we have yet to receive a §2409 complaint that involves a contract that incorporated the provisions of the amendment or post dates the DFAR provision. As a result, we have not yet been able to apply the 2008 amendment in a single §2409 case.

We have been concerned that contractor employees, who are often required to sign employment agreements that they will not divulge certain information outside the company, may not know that regardless of those agreements, they are protected under 10 U.S.C. §2409 for reporting wrongdoing to Government officials. Therefore, in 2008 we recommended legislation to require Defense contractors to inform their employees in writing of their whistleblower protections under the Statute. Our recommendation resulted in the inclusion in the DFARs of that requirement.

Additionally, there are other features of §2409 that may have prevented substantiation of all but a few defense contractor reprisal allegations since the early 1990s. First, §2409 fails to protect Defense contractor employees from reprisal for reporting wrongdoing to company management. Many whistleblowers will first attempt to resolve their concerns within their own chains of command before, or instead of, reaching out to a government official. As a result, reprisal for an internal complaint frequently may occur even before a disclosure to the government is made. In fact, recent amendments to contracting law that require contractors to report fraud to the government also require either that they inform employees of their right to disclose fraud, waste or abuse to Inspectors General, or that they implement company-internal reporting channels such as hotlines. Ironically, because §2409 does not protect internal disclosures, employees who suffer reprisal for making internal hotline complaints are left without protection. Other statutes under which the DoD IG investigates reprisal complaints, such as the Military Whistleblower Protection Act and the Recovery Act, expressly protect internal communications or disclosures, as do most other whistleblower protection statutes.

Second, §2409 does not protect employees from actions directed by government officials. Rather, it only prohibits contractors from reprising against employees for making protected disclosures. Finally, §2409 only extends protection from reprisal to employees of Defense contractors, but not to employees of their subcontractors. Thus, the realities of contractual relationships have excluded employees of Defense subcontractors, who may be well positioned to report waste, fraud, or abuse to the government, from protection from reprisal. This stands in contrast to other private sector whistleblower protection statutes, such as the Sarbanes-Oxley Act, which expressly extend whistleblower protection to employees of subcontractors.

I would like now to share with you several examples of investigations conducted under various statutes in which the DoD IG has substantiated whistleblower reprisal allegations.

- An employee of a Defense contractor was suspended for five days without pay and given an unfavorable performance evaluation in reprisal for alleging to a base IG that the company violated Army regulations by not properly managing the base Family Advocacy Program. As a result, program employees were not reporting allegations of child and spouse abuse to military police as required by Army regulation. The Defense contractor employee eventually entered into a settlement with the company.

- An Army Reserve captain threatened to suspend a staff sergeant's security clearance in reprisal for the staff sergeant's complaint to her chain of command and an IG that unescorted U.S. Army soldiers, who were not U.S. citizens, and did not have appropriate security clearances, were allowed to enter a secure facility housing detainees in Afghanistan.

- A civilian mechanic received a lowered performance evaluation in reprisal for making protected disclosures pertaining to improper installation of a key component in an air monitoring system used in chemical munitions igloos at an Army depot.

WRI's caseload has grown over the years, most notably in the area of military whistleblower reprisal allegations. For instance, in FY 2006 we received 357 complaints of military whistleblower reprisal. That number increased to 436 by FY 2011, a 22% increase.

We receive far fewer whistleblower reprisal complaints from NAFI and Defense contractor employees each year. However, they, too, have increased. NAFI reprisal complaints numbered just 6 in FY 2006. Five years later we received 28, a greater than four-fold increase. We received 18 complaints of reprisal from Defense contractor employees in FY 2006; that more than tripled to 68 by FY 2011. These Defense contractor complaints include the single ARRA §1553 reprisal complaint we have

received and investigated. See attached Exhibit for a detailed summary of all reprisal cases received and closed by DoD IG over the past 6 years.

False Claims Act Complaints

Another vehicle by which DoD IG receives tips from whistleblowers is via the *qui tam* process under the False Claims Act. Since January 1, 2006, the Defense Criminal Investigative Services (DCIS) has conducted 115 investigations involving *qui tam* matters. These *qui tam* investigations did not necessarily arise from reprisal complaints from DoD contractor employees. Nonetheless, the "relator" -- that is, the person filing the complaint -- does contribute to the mission of the Inspector General and is considered a whistleblower in his or her own right.

Between 2006 and the present, *qui tam*-related investigations resulted in 60 indictments, 51 convictions, 24 suspensions, 30 debarments, over $2.7 billion in restitution; $3.7 billion in civil recoveries, and $14.8 million in administrative recoveries. The top five *qui tam* cases resulting in monetary recovery involved healthcare fraud. Over $73.5 million in recoveries were returned to the U.S. government by Pfizer, Incorporated; Eli Lilly & Company; Tenet Health System Desert, Incorporated; Comprehensive Cancer Center; and GlaxosmithKline Holdings, Incorporated; and Allergan Incorporated.

Some examples of *qui tams* specific to DoD contractors are:

- Northrop Grumman $325 Million Settlement for Defective Transistors

  A *qui tam* lawsuit was filed by an employee of The Aerospace Corporation. The government investigated the allegations and intervened in the lawsuit against Northrop in November 2008. In April 2009, Northrop Grumman Corporation agreed to pay the U.S. government $325 million, of which $48.7 million went to relators, to resolve a *qui tam* lawsuit. The investigation found Northrop failed to properly test and qualify certain microelectronic parts, known as heterojunction

bipolar transistors (HBTs) that were found to be defective. The defective HBTs were integrated into National Reconnaissance Office satellite equipment as a result of the company's failure to test them. This was a joint investigation with DCIS, the Federal Bureau of Investigation, and National Reconnaissance Inspector General.

- Boeing Company $25 Million for Defective Work on KC-10 Aerial Refueling Aircraft

  In August 2009, the Boeing Company agreed to pay the U.S. government $25 million to resolve allegations in a *qui tam* lawsuit that the company performed defective work on the entire KC-10 Extender fleet. The KC-10 Extender is a mainstay of the Air Force's aerial refueling fleet in the Iraq and Afghanistan war theaters. Administratively, Boeing also spent an additional $750,000 to redesign and install new smoke barriers across the fleet of KC-10 aircraft. The investigation focused on allegations Boeing defectively installed insulation blanket kits in KC-10 aircraft while performing depot maintenance at the Boeing Aerospace Support Center in San Antonio, TX. The settlement also resolved allegations that Boeing overcharged the government for installation of the blanket kits. The relators, two former Boeing employees, received $2.6 million as their share of the proceeds of the settlement. The $25 million settlement consists of a cash payment by Boeing of $18,400,000 and $6,600,000 worth of repair work to be done at the aircraft manufacturer's expense on the defective blankets. The settlement also resolves Boeing's potential liability under the False Claims Act. This was a joint investigation with DCIS, Air Force Office of Special Investigations, and the Defense Contract Audit Agency.

- American Grocers, Inc. $15 Million in Civil Settlement

  A logistics manager for American Grocers, Inc. (AGI) filed a *qui tam* lawsuit alleging the owner of American Grocers, Inc. (AGI), deliberately purchased

expired or near expired foods from food manufacturers at discounted prices and changed the expiration dates on the packages before shipping, resulting in $20 to $30 million in gross profits from the sale of foods to DoD. The food was sent to troops and DoD personnel in the Middle East. AGI created inflated invoices with bogus freight charges of $2.3 million. AGI also concealed discounts from food manufacturers that were not passed on to DoD of approximately $1.5 million. On November 8, 2010, the owner of AGI agreed to pay $15 million for violations the False Claims Act. The owner was also sentenced to two years imprisonment; three years supervised release; ordered to pay over $2 million in restitution and a fine of $100,000.

In closing, I would like to thank the Subcommittee for the opportunity to discuss the important topic of whistleblower protections for Government contractor employees. I look forward to answering any questions you may have.

Exhibit

Complaints Received and Investigated, by Fiscal Year

	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11
Military Reprisal						
Received	357	371	373	319	342	436
Substantiated	47	34	26	16	26	27
Not Substantiated	114	123	87	57	91	70
Total Investigated	161	157	113	73	117	97
Non-appropriated Fund Instrumentality Reprisal						
Received	6	16	18	23	16	28
Substantiated	1	0	0	0	0	0
Not Substantiated	3	1	0	2	2	3
Total Investigated	4	1	0	2	2	3
Defense Contractor Reprisal						
Received	18	29	37	44	51	68
Substantiated	1	0	0	0	0	0
Not Substantiated	2	0	3	0	1	4
Total Investigated	3	0	3	0	1	4
Civilian Reprisal (Appropriated Fund)						
Received	32	42	32	62	92	123
Substantiated	0	1	1	2	4	4
Not Substantiated	0	3	1	4	6	8
Total Investigated	0	4	2	6	10	12
Total Complaints Received	413	458	460	448	501	655
Substantiated Complaints	49	35	27	18	30	31
Total Complaints Investigated	168	162	118	81	130	116
Substantiation Rate	29%	22%	23%	22%	23%	27%