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Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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WASHINGTON, DC 20515–6301

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August 26, 2014

Mr. Todd J. Zinser
Inspector General
Office of Inspector General
Department of Commerce
1401 Constitution Avenue N.W.
Washington, DC 20230

Dear Mr. Zinser,

Thank you for your response to our letter dated July 16, 2014. In the time since we sent that correspondence, the Committee has received numerous credible and highly disturbing allegations that you, as well as senior officials operating in your name, including your newly appointed Deputy Inspector General, Morgan Kim, have made efforts to identify individuals who you believed were either contacting the Office of Special Counsel (OSC) or congressional investigators working for this Committee. This effort has been tied to subsequent initiatives to remove those individuals from employment with your office or otherwise seek to intimidate them into silence. Such conduct, if true, is intolerable.

By this letter we ask that you make no further moves to hire or fire staff from your employ until the Committee has completed its investigation into your office. However, this request does not apply to the pending termination of Mr. Rick Beitel and Mr. Wade Green for the egregious and reprehensible actions the OSC determined they took against Commerce Office of Inspector General (OIG) whistleblowers.

Effective Inspectors General encourage whistleblowers to come forward to report cases of perceived waste, fraud, abuse, mismanagement or other unethical behavior and an Office of Inspector General in any agency is obligated to help shield those who do from retaliation. Congress plays a key role in helping to both promote an environment in which whistleblowers are free to bring these issues forward to the appropriate authorities and prevent reprisals against them when they do. Support for whistleblowers in the United States can be traced back to the Continental Congress, which passed the following in 1778:

> *Resolved*, That it is the duty of all persons in the service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or

> persons in the service of these states, which may come to their knowledge.[1]

Your own website reflects an awareness of the critical role an IG plays in cultivating a culture in which whistleblowers are protected by declaring:

> A core value of OIG is protecting from unlawful reprisal the diligent employees of the Commerce Department and its contractors and grantees who step forward to identify potential wrongdoing in their organizations.[2]

As you are aware, under both 5 U.S.C. 2302 and 5 U.S.C. 7211, it is a prohibited personnel practice to interfere with federal employees' ability to communicate with or provide documentation to Congress, unless that material is classified. U.S.C. 7211, "Employees' right to petition Congress," states:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.[3]

U.S.C. 2302, "Prohibited personnel practices," says, in part:

> This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress. (c) The head of each agency shall be responsible for the prevention of prohibited personnel practices....[4]

Earlier this year, Representative Darrell Issa, Chairman of the Committee on Oversight and Government Reform and Senator Charles Grassley, Ranking Member of the Committee on the Judiciary, released a joint staff report titled: "Limitless Surveillance at the FDA: Protecting the Rights of Federal Whistleblowers." The report concluded:

> The Committees' investigation has shown that agencies need clearer policies addressing appropriate monitoring practices to ensure that

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[1] "Journals of the Continental Congress 1774-1789," Edited from the original records in the Library of Congress by Worthington Chauncey Ford, Chief, Division of Manuscripts, Volume XI, 1778, May 2-September 1, Government Printing Office, 1908, accessed here: http://www.whistleblowersblog.org/2014/08/articles/news/senate-approves-national-whistleblower-appreciation-day-for-second-year.

[2] "OIG's Whistleblower Protection Program," Department of Commerce, Office of Inspector General, accessed here: http://www.oig.doc.gov/Pages/Whistleblower-Protection-Program.aspx.

[3] "Employees' right to petition Congress," 5 U.S. Code § 7211, accessed here: http://www.law.cornell.edu/uscode/text/5/7211.

[4] "Prohibited personnel practices," 5 U.S. Code § 2302, accessed here: http://www.law.cornell.edu/uscode/text/5/2302.

> agency officials do not order or conduct surveillance beyond their legal authority or in order to retaliate against whistleblowers, especially in such a way that chills whistleblower communications with Congress, the OSC, and Inspectors General. Congress has a strong interest in keeping such lines of communication open, primarily as a deterrent to waste, fraud, and abuse in Executive Branch departments and agencies.[5]

Most IG offices have few whistleblowers since a fundamental duty and practice of Offices of Inspector General is to help protect whistleblowers from retaliation. However, we understand from the Office of Special Counsel that in FY2012 and FY2013 your office had six employees who filed complaints with OSC regarding retaliation from senior Commerce OIG leaders. Comparatively, the Department of Energy's Office of Inspector General and the OIG at the Department of Housing and Urban Development (HUD) have had no employees file any allegations of retaliation during the same period. During this same time frame, the Department of Health and Human Services (HHS) OIG had one case of alleged retaliation filed. It is worth noting that the HHS OIG employs more than 1,200 people, nearly seven times the number of staff employed by your office.

It is our duty as Members of Congress to help ensure that federal employees are not retaliated against in their attempts to divulge waste, fraud, abuse, mismanagement or unethical behavior by agency officials. However, we are deeply concerned that there has been a practice of retaliation against your employees that has continued unabated since the Office of Special Counsel (OSC) issued its last report in September 2013 into the prohibited personnel practices of your senior staff. In fulfilling our oversight duty outlined in Rule X of the U.S. House of Representatives, we ask that you produce the following records (as defined in Attachment 1):

1. Copies of all manuals, guidelines or other records related to the policies, procedures and conduct of internal Commerce OIG investigations, commonly known as "X cases."

2. Complete records for all internal investigations of your own staff from January 1, 2012 to the present. This should include, but not be limited to, all X cases, and related records as well as investigations carried on outside the formal policies for internal investigations.

3. Complete records of all efforts to capture any and all communications among and between staff members (former or current) of your office and any outside parties, for the time frame listed above. This should include, but not be limited to, any records approving or authorizing the collection of this data by OIG staff or leadership. This request shall not be construed as a license to engage in a fishing expedition to identify any communications between staff in your office and outside parties, including this Committee.

4. All records associated with any formal or informal effort to analyze communications of

[5] "Limitless Surveillance at the FDA: Protecting the Rights of Federal Whistleblowers," Joint Staff Report by Representative Darrell Issa, Chairman, Committee on Oversight and Government Reform and Senator Charles Grassley, Ranking Member of the Committee on the Judiciary, February 26, 2014, accessed here: http://oversight.house.gov/report/14216/.

OIG employees related to all internal OIG investigation(s), or any effort to analyze metadata from OIG employees not related to a specific internal investigation or specific employee. This should include a list of all search terms utilized in each individual analysis of this data, including which terms were used to identify or analyze which data.

5. Copies of any and all digital logs that identify the capture or copy of individual Commerce OIG employees' e-mails or OIG e-mail databases or directories. This should include all records related to the individual who pulled the data and those who authorized it.

6. Please provide all records of any discussion of any of the types of communications identified above or analysis of those communications, as well as all records associated with discussing and authorizing the identification, capture, retention or analysis of such communications. This should include all requests for the identification and production of any records, e-mails, telephone records, cell phone records, text messages, blackberry communications or any other digital data of any current or former Commerce OIG employee by any other Commerce OIG employee since January 1, 2012.

7. At a minimum, an effort to provide all of the records requested above should include a thorough search of the e-mail and data files of **all** employees in the Immediate Office of the Inspector General, Counsel to the Inspector General, Office of the Chief Information Officer (CIO), Office of Investigations, including but not limited to the Office of Special Investigations, Office of Complaint Inquiry and Analysis (recently renamed the Office of Compliance and Ethics), the Office of the Assistant Inspector General (AIG) for Investigations, office of Human Resources Management, OIG Executives, OIG Supervisors and OIG Managers. Please ensure that all e-mails of the relevant Commerce OIG employees referenced above are fully searched. The Committee is aware, for instance, that you use at least two Commerce e-mails: tzinser@oig.doc.gov and todd@oig.doc.gov.

8. If your office has retained the services of any outside parties as contractors, subcontractors, consultants or in any other manner who have played any role in the identification, capture, copy, retention or analysis of any communications by any current or former Commerce OIG employee, copies of that data and all relevant records, including specific contracts and all authorizations to engage in these activities, should be provided to the Committee as part of this request.

8. The Committee has also learned from several sources that you and your new Deputy Inspector General Morgan Kim appear to use personal communications devices to communicate between yourselves, and perhaps with others, regarding official business. We ask that you and your Deputy IG provide all personal devices, and access to personal e-mail accounts, to your Acting Counsel, or other senior Member of your Counsel's office if no Acting Counsel has been named. The Acting Counsel should work with your information office to identify, capture, copy and retain any records that are produced through messaging, texting, e-mailing or using other private communications systems to conduct the business of your office. To the degree those records would be responsive to this request, or to our prior request, we ask that copies of those records be produced for the

Committee. We ask that the Acting Counsel identify and retain all other work-related records found on these systems as they represent official records of your office and may be of interest in future investigative work by this Committee or be found to be responsive to existing or future personnel cases involving your office.

9. Please provide copies of any and all reviews, analysis, summaries, investigations, reports, memorandums or other actions or proposed recommendations by Mr. Tae L. Kim your newly hired "Employee Relations Specialist," regarding potential or actual disciplinary action, warning, reprimand, termination or other proposed or tangible steps taken by your office against any Commerce OIG employee in 2014. This request should include copies of all relevant records based on any of the actions described above, including the review you indicated Mr. Kim provided to you regarding the proposed termination of Rick Beitel and Wade Green.

10. Additionally, please provide all records regarding any and all communications concerning the Committee's investigation of your office from April 1, 2014 to present and any and all communications regarding your office's potential and ultimate response to the Committee. This search should be limited to the e-mails and data files of the following individuals:

* Todd Zinser
* Dave Smith
* Morgan Kim
* Rick Beitel
* Ann Eilers
* Wade Green
* Mark Greenblatt
* Susan Braunstein
* Tae Kim
* Justin Marsico
* Sonia Brown
* Brianne Jones
* Clark Reid

Please provide two copies of these materials (in both digital form and hard copy) by September 9, 2014. The hard copies of this material should be produced on single-sided copies of paper. Your staff may contact Raj Bharwani of the Majority staff at (202) 225-6371 or Doug Pasternak of the Minority staff at (202) 225-6375, to make arrangements for delivery of these records.

Finally, in light of the growing and serious allegations of misconduct that go right to the top of your organization, we ask that you instruct the staff listed below to make themselves available for interviews with Committee staff beginning in September 2014. Our staff will contact your office with a proposed schedule of interviews. Because of the current atmosphere that is clearly present within your office and the fear by many that they will become victims of reprisal if they cooperate with this Committee or other official investigations into your office we would like each of the individuals listed below to appear alone, without OIG congressional affairs, OIG counsel or other Commerce OIG staff. It is likely that this list will be revised as we move forward with our investigation.

* David Smith
* Sonia Brown
* Brianne Jones
* Justin Marsico
* Jennifer Nobles
* Susan Braunstein
* Tae Kim
* Abdil Salah
* Benjamin Bergersen
* Adam Corbett
* Mark Greenblatt
* John Pizzurro
* Duane Townsend
* Dan Coney
* Julia Lehning

* Caitlin Rogalski	* Toan Pham	* Morgan Kim
* Jennifer Bryan	* Roger Leung	* Todd Zinser
* Ann Eilers	* John Webb	* Gelitza Reyes

Given the serious and credible allegations the Committee has been made aware of regarding recent actions of potential retaliation against OIG staff and efforts that appear intended to intimidate staff into silence, we ask that you e-mail the attached letter (Attachment 2) signed by us, to all Commerce OIG employees, contractors and consultants, and that you post it in a prominent public location, including on any internal online communications forum reserved for and accessible by DOC OIG employees. The Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act includes requirements to post on an agency's website federal employees' whistleblower rights and protections.[6] Posting the attached letter would supplement the posting requirements from the No FEAR Act. Federal employees need to be assured that if and when they blow the whistle on what they perceive as unethical behavior or mismanagement that they will be heard and not intimidated into silence.

Sincerely,

Lamar Smith

Rep. Lamar Smith
Chairman
Committee on Science, Space
and Technology

Eddie Bernice Johnson

Rep. Eddie Bernice Johnson
Ranking Member
Committee on Science, Space
and Technology

Paul C Broun

Rep. Paul Broun, M.D.
Chairman
Subcommittee on Oversight

Dan Maffei

Rep. Dan Maffei
Ranking Member
Subcommittee on Oversight

[6] The Notification and Federal Employee Antidiscrimination and Retaliation Act, Public Law 107-174, 116 STAT. 569, accessed here: http://www.gpo.gov/fdsys/pkg/STATUTE-116/pdf/STATUTE-116-Pg566.pdf.

Attachment 1

ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to , the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.

2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

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Attachment 2

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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August 26, 2014

To all Department of Commerce Office of Inspector General Staff:

As Members of Congress the protection of federal employees who report instances of unethical behavior, waste, fraud, abuse or mismanagement by leaders in their own offices is an issue that we take very seriously. Oversight of federal agencies is an important function of Congress and our Committee. As you are probably aware, our Committee has been investigating several management issues in the Department of Commerce's Office of Inspector General (OIG). We want to assure all Commerce OIG staff that we take allegations of mismanagement and especially retaliation against employees by management extremely seriously and we have repeatedly emphasized this to the current leadership of your office.

Most often allegations of this sort are investigated by the Inspector General of the agency involved, who by statute has a key role in helping to protect federal whistleblowers. However, when that system is hindered or intentionally impeded, Congress often serves as a vehicle for disclosure as well. Congress relies upon Inspectors General to perform a critical oversight function and we admire and value the work of OIG staff in carrying out those efforts. It is part of our responsibility to ensure that dedicated public servants can work without fear of reprisal for doing the right thing. If you have information that you would like to disclose in confidence to the Committee we ask that you contact our staff listed below:

Raj Bharwani, Staff Director, Subcommittee on Oversight, Majority staff may be reached at (202) 225-6371 or Rajesh.Bharwani@mail.house.gov. Doug Pasternak, Chief Investigator, Subcommittee on Oversight, Minority staff may be reached at (202) 226-8892 or Doug.Pasternak@mail.house.gov.

We thank you for your devotion to public service and commitment to the principles that will help ensure effective management and a positive work environment moving forward.

Sincerely,

Lamar Smith

Rep. Lamar Smith
Chairman
Committee on Science, Space
and Technology

Eddie Bernice Johnson

Rep. Eddie Bernice Johnson
Ranking Member
Committee on Science, Space
and Technology

Paul C Broun

Rep. Paul Broun, M.D.
Chairman
Subcommittee on Oversight

Dan Maffei

Rep. Dan Maffei
Ranking Member
Subcommittee on Oversight