Statement of

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of the

Committee on Oversight and Government Reform

House of Representatives

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Good afternoon, Chairman Farenthold, Ranking Member Lynch, and other distinguished members of the Subcommittee on the Federal Workforce, the U.S. Postal Service, and the Census ("Subcommittee"). Thank you for the opportunity to appear before you today on behalf of the Merit Systems Protection Board ("MSPB" or "Board") and testify at this very important hearing. I would like to acknowledge my distinguished colleagues and fellow Board Members – Vice Chairman Anne Wagner and Member Mark Robbins – and thank them for their strong contributions to fulfilling the Board's mission. It has been a great personal honor for me to serve with these two dedicated individuals.

I have been asked to discuss the Board's role in defending the federal merit principles and specifically, the role the Board plays in the appellate review process as it relates to whistleblowers. In addition, I will provide information with respect to the number of whistleblower appeals filed at the Board over the past decade, discuss the impact of the Whistleblower Protection Enhancement Act of 2012, and address other issues that I believe will be of interest to the Subcommittee.

The MSPB And Its Role in Appeals Involving Whistleblowing

The MSPB is an independent, quasi-judicial agency within the executive branch of the federal government. The MSPB has four statutory functions:

1. To hear, adjudicate, or provide for the hearing or adjudication of all matters within the Board's jurisdiction, and to take final action on any such matter;
2. To order any federal agency or employee to comply with any order or decision issued by the Board, and to enforce compliance with any such order;
3. To conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the president and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and
4. To review rules and regulations of the Office of Personnel Management.

The Board is composed of three members, each appointed by the president, by and with the advice and consent of the Senate, not more than two of whom may be adherents to the same political party. It also employs numerous administrative judges at field offices around the county, who conduct first level review of appeals filed at the MSPB.

The mission of the MSPB is to protect the merit system principles and promote an effective federal workforce free of prohibited personnel practices. The most well-known statutory function of the Board is its role in adjudicating appeals of adverse personnel actions filed by federal employees.

Under the Whistleblower Protection Act, the Board exercises jurisdiction over two types of appeals filed by whistleblowers. The principal difference between the two is the manner in which they reach the Board for review:

Otherwise Appealable Action: In the first type of case, the individual is subject to an adverse personnel action that is directly appealable to the Board (e.g., removal), and the individual claims that the action was taken in retaliation for whistleblowing. This type of case is referred to by the Board as an "otherwise appealable action," and the individual may file an appeal directly with the Board after the action has been taken. In such an appeal, both the merits of the appealable matter (e.g., the removal action) and the claim of reprisal for whistleblowing will be reviewed by the Board.

Individual Right of Action: The second type of case was created by the Whistleblower Protection Act of 1989 and is referred to as an "Individual Right of Action." In this type of case, the individual is subject to a personnel action (e.g., denial of a promotion, or negative performance evaluation) and claims that the action was taken because of whistleblowing, but the action is not one that is directly appealable to the Board. The individual can appeal to the Board only if he files a complaint with the Special Counsel first and the Special Counsel does not seek corrective action on the individual's behalf.

In either type of whistleblower appeal, the Board must determine whether an agency illegally retaliated against a federal employee for making a "protected disclosure." A protected disclosure is one that the employee reasonably believed was:

- A violation of any law, rule, or regulation; or
- Gross mismanagement or a gross waste of funds; or
- An abuse or authority; or
- A substantial and specific danger to public health or safety.

Upon a final decision by the Board, an appellant is statutorily entitled to appeal to federal court for further review. In most instances, an appellant is required to appeal to the United States Court of Appeals for the Federal Circuit. Indeed, until the passage of the Whistleblower Protection Enhancement Act of 2012 ("WPEA"), the Federal Circuit retained exclusive jurisdiction over all whistleblower appeals from the Board. However, under section108 of the WPEA, appeals from the Board may now be filed in either the Federal Circuit "or any court of appeals of competent jurisdiction." This "all circuit review" provision of the WPEA is set to expire in December 2014. The House of Representatives has passed legislation extending this provision for an additional three years, but the Senate has yet to act.

We are currently aware of only four whistleblowing decisions by the Board that have been appealed to courts other than the Federal Circuit under section 108:

- ***King v. Department of the Army***, 2014 WL 2898536 (11th Cir. June 27, 2014) (No. 13-10301). The Eleventh Circuit affirmed the Board's decision denying Ms. King's request for corrective action under the Whistleblower Protection Act ("WPA") based on her allegation that she was not selected for positions with the Department of the Army because of a perception that she was a whistleblower.

- ***Carson v. Merit Systems Protection Board***, No. 13-1273 (D.C. Cir. July 30, 2014). The D.C. Circuit affirmed the Board's decision dismissing for lack of jurisdiction Mr. Carson's whistleblower claim because he failed to make a non-frivolous allegation that the agency took a personnel action against him for making a protected disclosure.

- ***Daniels v. Merit Systems Protection Board***, No. 13-73913 (9th Cir.). This case has been fully briefed and is pending before the Ninth Circuit. The issue is whether Mr. Daniel's disclosure that an administrative adjudicator's decision was legally erroneous was a protected disclosure of a violation of law, rule or regulation or a gross waste of funds within the meaning of the WPA.

- ***Smith v. Merit Systems Protection Board & Department of Veterans Affairs***, No. 14-72578 (9th Cir.). This appeal was filed on August 18, 2014, and the case has not been briefed. The Board's decision dismissed for lack of jurisdiction Mr. Smith's whistleblower appeal because he failed to make a non-frivolous allegation that the agency took a personnel action against him for making a protected disclosure.

Whistleblower Appeal Data

From Fiscal Years ("FY") 2003 through 2006, the number of whistleblower appeals received by the Board decreased steadily, from 424 in FY 2003 to 319 in FY 2006. However, since FY 2007, the number of whistleblower appeals received by the Board has increased; from 391 in FY 2007 to 657 in FY 2013. The most notable increase occurred in the number of individual right of action appeals (IRAs) that were received in FY 2013. In that year, the Board received 418 IRA appeals, compared to 249 IRAs received in FY 2012. Whether this is a result of WPEA passage and enactment, we cannot say.

In accordance with Section 116(b) of the WPEA, the Board has begun to track the numbers and outcomes of whistleblower cases received and decided by the Board at the regional and headquarters levels. Inasmuch as the WPEA became effective in December 2012, this data represents only nine months of post-WPEA data for FY 2013. FY 2014 will be the first full year of data for appeals received and processed after enactment of the WPEA. Data for FY 2014 will be compiled and made available to Congress shortly after the end of the current fiscal year on September 30, 2014.

Of the 657 whistleblower initial appeals (both "IRA" and "OAA" appeals) the MSPB received in FY 2013, 103 were settled and 78 were adjudicated on the merits. In 32% of the appeals that were adjudicated (both "IRA" and "OAA" appeals), the appellants withdrew their allegations of whistleblowing. The Board did not rule in favor of the whistleblower in 63% of the appeals because: (1) the appellant had not made a protected disclosure under the law;(2) it determined that the protected disclosure was not a contributing factor in the personnel action; (3) it determined that the agency would have taken the same action in the absence of the protected disclosure; or (4) the appeal did not

involve a "covered personnel action" under the law. Appellants were granted corrective action in 4 initial appeals (both "IRA" and "OAA" appeals) during FY 2013.

One noticeable trend that we have observed in these types of appeals is the increasing complexity of the allegations in the appeals. This increased complexity is the result of a combination of many factors, among them the WPEA, which broadly expanded the definition of a "protected disclosure," and the application of still good Federal Circuit precedent. The typical whistleblower appeal involves multiple allegations of several instances of alleged whistleblowing and several alleged retaliatory personnel actions. Thus, whistleblower appeals are often very difficult and time-consuming to analyze and decide.

Whistleblower Decisions by the Federal Circuit and the Board

We are aware of this Subcommittee's interest in the Federal Circuit's August 2013 *en banc* decision in *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013). The issue in *Conyers* was straightforward – does the MSPB have jurisdiction to review an agency's determination that an employee is not eligible to occupy a position that is classified as noncritical sensitive? *Id.* at 1150-51. The Federal Circuit ruled that the Board lacks jurisdiction to review the merits of such an agency determination, and instead may only review whether the employee received the procedural rights to which he or she was entitled under law. The MSPB, as a respondent in that case, argued that such a holding could preclude either review by the Board or a federal court of whistleblower claims by covered employees. The Federal Circuit dismissed this argument.

The full impact of the *Conyers* decision on whistleblowing in the federal government is not presently known. However, because the Supreme Court declined to review this case, any change to the law – as established by the Federal Circuit in *Conyers* – rests in the hands of Congress, not the MSPB. The Board is required to, and will, follow the decision of the Federal Circuit in this case.

Additionally, the Board has issued decisions in a number of appeals involving whistleblower allegations since the enactment of the WPEA. Among those decisions:

- ***Day v. Department of Homeland Security***, 119 M.S.P.R. 589 (2013): The administrative judge ruled that the provisions of the WPEA providing protection to (1) disclosures made in the course of an employee's normal duties, and (2) disclosures made to the alleged wrongdoer did not apply to cases that were pending before the effective date of those provisions. The administrative judge reasoned that, under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), Congress had not clearly expressed an intention that the WPEA apply retroactively, and the WPEA standard for whether a disclosure is protected should not apply retroactively because doing so would have retroactive effect, i.e., would attach new legal consequences to events completed before its enactment. On interlocutory appeal, and after consideration of amicus briefs, the Board reversed, holding that the WPEA did not have an impermissible retroactive effect with

respect to the above provisions of section 101 because it did not alter the parties' respective liabilities as Congress initially contemplated in enacting the WPA. The Board explained that the provisions of the WPEA at issue clarified, rather than effected substantive changes to, existing law, and thus did not raise concerns of retroactivity.

- ***King v. Department of the Air Force***, 119 M.S.P.R. 663 (2013): The administrative judge ruled that the provisions of the WPEA providing for compensatory damages (section 107(b)) did not apply to cases pending on the effective date of the WPEA. On interlocutory appeal, and after consideration of amicus briefs, the Board affirmed the ruling, applying *Landgraf* and finding that (1) Congress did not expressly define the temporal reach of section 107(b), and (2) retroactive application would be impermissible under *Landgraf* because it would alter the parties' respective liabilities as Congress initially contemplated them in enacting the WPA, and thus attaching new legal consequences for events completed before its enactment. The Board also held that section 107(b) cannot be applied retroactively because Congress did not expressly waive sovereign immunity for pre-enactment conduct, and that section 107(b) did not clarify the WPA.

- ***O'Donnell v. Department of Agriculture***, 120 M.S.P.R. 94 (2013): Applies section 101 of the WPEA in accordance with *Day* in finding that the appellant did not make a nonfrivolous allegation that his disclosure was protected. The Board held that the appellant's vague objections to an ineligibility ruling constituted a fairly debatable policy dispute that did not constitute gross mismanagement or a violation of law.

- ***Rumsey v. Department of Justice***, 120 M.S.P.R. 259 (2013): Applies section 101 of the WPEA to a pending case per *Day* in finding that the appellant's disclosures to her coworkers – that the state of Wisconsin submitted fraudulent data – were protected, even though they concerned matters within her job responsibilities. The Board ultimately ordered corrective action regarding the appellant's claims that the agency retaliated against her for her whistleblowing by cancelling her telework agreement and providing her with an improperly low performance rating.

- ***Schoenig v. Department of Justice***, 120 M.S.P.R. 318 (2013): Applies section 101 of the WPEA to a pending case per *Day* in finding that the appellant's disclosures – regarding potential fire code and workplace safety rule violations – were protected even though they appeared to be part of her normal duties and made through normal channels. After finding that the appellant also made a nonfrivolous allegation that her protected disclosures were a contributing factor in termination, the Board reversed the initial decision dismissing the appeal for lack of jurisdiction and remanded the appeal for adjudication on the merits.

- ***Mudd v. Department of Veterans Affairs***, 120 M.S.P.R. 365 (2013): Finds that, although the WPEA extended the Board's IRA jurisdiction to claims arising under 5 U.S.C. § 2302(b)(9)(A)(i), i.e., the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to remedying a violation of 5 U.S.C. § 2302(b)(8), the substance of the appellant's grievance did not concern remedying an alleged violation of subparagraph (b)(8). Thus, the Board lacked jurisdiction to consider an allegation that the agency took personnel actions in reprisal for the grievance.

- ***Nasuti v. Department of State***, 120 M.S.P.R. 588 (2014): Applies section 101 of the WPEA to a pending case per *Day* and holds that under section 101 there is no requirement that the employee make a disclosure to a person who is in a position to remedy the matter disclosed. Finds jurisdiction over the IRA appeal and remands for adjudication on the merits upon finding that the appellant made a nonfrivolous allegation of a protected disclosure (substandard body armor being furnished to employees on route to Iraq) and that the disclosure was a contributing factor in his termination.

- ***Clarke v. Department of Veterans Affairs***, 121 M.S.P.R. 154, ¶ 19 n.10 (2014): Notes that the WPEA amended 5 U.S.C. § 1221(e)(2) to provide that corrective action cannot be ordered if, "after a finding that protected disclosure was a contributing factor," the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. Holds that under this amendment the Board may not proceed to the clear and convincing evidence test unless it has first made a finding that the appellant established his prima facie case.

- ***Hooker v. Department of Veterans Affairs***, 120 M.S.P.R. 629 (2014): Finds that section 101(b)(1)(A) of the WPEA, as it pertains to the prohibited personnel practice set forth at 5 U.S.C. § 2302(b)(9)(B) – the prohibition on taking a personnel action because of testifying for or otherwise lawfully assisting any individual in the exercise of a right referred to at 5 U.S.C. § 2302(b)(9)(A) – would not be applied to a case that was pending when the WPEA was enacted because under *Landgraf* doing so would increase a party's liability for past conduct as compared to pre-WPEA liability. Although no new duties were imposed, because such conduct was previously prohibited under the WPA, the WPEA did increase a party's liability for past conduct by creating a new Board appeal right in IRA appeals alleging such conduct.

- ***Carney v. Department of Veterans Affairs***, 2014 WL 3845217 (Aug. 6, 2014): Finds that the appellant engaged in protected activity under the WPEA, 5 U.S.C. § 2302(b)(9)(b), based on a claim of retaliation for representing a coworker in a grievance proceeding. Because all of the actions relevant to consideration of whether the agency retaliated against the appellant in violation of 5 U.S.C. § 2302(b)(9)(B) occurred after the December 27, 2012 effective date of the WPEA, the Board did not have to address the retroactivity of that provision in

light of *Hooker*. Finds jurisdiction over the appeal and remands for a hearing on the merits.

- ***Benton-Flores v. Department of Defense***, 121 M.S.P.R. 428 (2014): Finds that when an appellant has made a protected disclosure in the normal course of her duties, the WPEA at 5 U.S.C. § 2302(f)(2) now requires her to prove that the personnel action taken was in retaliation for the disclosure, i.e., that the agency took the personnel action with an improper retaliatory motive. Thus, there is an additional evidentiary burden for appellants who have raised such claims. Remands for further adjudication on this issue after finding jurisdiction over the IRA appeal and finding that the appellant is entitled to a hearing on the merits.

Board Reports on Whistleblowing

In addition to the MSPB's adjudication function, which is discussed above, MSPB is statutorily required to conduct studies relating to the civil service and other merit systems in the executive branch. We are pleased to report that since 2010, MSPB has issued a series of reports on the topic of whistleblowing:

- **Whistleblower Protections for Federal Employees**. September 2010. This report addresses the legal challenges that whistleblowers face, including case law of the MSPB and the Federal Circuit, and describes the requirements for a Federal employee's disclosure of wrongdoing to be legally protected as whistleblowing under current statutes and case law.

- **Prohibited Personnel Practices: Employee Perceptions**. August 2011. This report describes what each "prohibited personnel practice," including illegal retaliation for whistleblowing, means as a practical matter, how frequently federal employees perceive each practice occurring, and the consequences for an agency when its employees believe that management is committing one or more prohibited personnel practices.

- **Blowing the Whistle: Barriers to Federal Employees Making Disclosures**. November.2011. This report compares data from Merit Principles Surveys conducted in 1992 and 2010 to describe the extent to which perceptions of retaliation against federal employees who report wrongdoing remains a serious problem. The report also explains why agencies should do more to ensure that employees receive quality training about how they can disclose wrongdoing and how they can exercise their rights if they perceive that they have experienced retaliation for whistleblowing activities.

Finally, the MSPB will be holding an open "Sunshine Act" meeting next week to discuss MSPB's proposed research agenda and to determine which issues it will report on over the next four years. One topic that the Board is currently considering for a future report, and which will be discussed at the Sunshine Act meeting, is the state of whistleblowing after the enactment of the WPEA in 2012. If selected, this study would

build on previous MSPB research and examine changes in whistleblower case law since 2010, with a focus on how the WPEA has changed the landscape.

This concludes my written statement. I thank the Subcommittee for the opportunity to testify and look forward to answering your questions.

Susan Tsui Grundmann
Chairman, U.S. Merit Systems Protection Board

Susan Grundmann was nominated by President Obama in July 2009 to serve as a Member and Chairman of the U.S. Merit Systems Protection Board. She was confirmed by the Senate in November 2009. Her term will expire in March 2016.

Prior to her appointment as MSPB Chairman, Ms. Grundmann was General Counsel to the National Federation of Federal Employees (NFFE). At NFFE, she successfully litigated cases in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia.

Ms. Grundmann served previously as General Counsel to the National Air Traffic Controllers Association. From 2003 to 2009, Ms. Grundmann also instructed on Federal sector law at the William W. Winpisinger Education Center in Placid Harbor, Maryland.

Ms. Grundmann earned her undergraduate degree at American University and her law degree at Georgetown University Law Center. She began her legal career as a law clerk to the judges of the Nineteenth Judicial Circuit of Virginia, and then worked in both private practice and at the Sheet Metal Workers National Pension Fund.