REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
OFFICE OF INSPECTOR GENERAL

Case No. OIG-494A

Allegations of Retaliatory Personnel Actions

Introduction and Summary of Investigation

On July 24, 2008, the Office of the Inspector General (OIG) opened an investigation upon receipt of a written complaint sent by an Employee in the Regional Office of the U.S. Securities and Exchange Commission (SEC or Commission). The Employee alleged that he suffered retaliation following his submission of a memorandum to SEC senior management disclosing what he believed to be mismanagement of the Program; mistreatment of his immediate supervisor, and a violation of Federal Travel Regulations by a Supervisor. The Employee asserted that following his disclosures to they engaged in a series of retaliatory personnel actions consisting of a performance management counseling, abusive daily monitoring, and a Letter of Reprimand. After the OIG initiated its investigation, Employee voluntarily resigned his employment with the SEC.

Subsequent to the complaint, another Employee also made a complaint to the OIG, alleging that she was retaliated against because it was not supporting a new examination program, known as the program. Specifically, Alleged that she was excluded from the program, mistreated by during meetings, issued a retaliatory Letter of Reprimand, and involuntarily transferred to non-supervisory duties.

The OIG investigation found that had a history of conflict well before the introduction of the program, which began when was selected for the position rather than . The OIG also found that this conflict was exacerbated when introduced the program and expressed her opposition to the program in a manner that could be described as hostile. Accordingly, in light of this reaction to the program, the OIG does

OIG report.
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not find that the decision to exclude Employee 1 from that program to be inappropriate or an abuse of authority.

With respect to the meetings in which Employee 1 alleged she was mistreated, the OIG found that Employee 1 and Supervisor 2 were somewhat harsh in these meetings, and should not have made such a public display of their frustration with Employee 1. While the OIG did not find that Employee 1 was a whistleblower per se, as her dissatisfaction was merely voiced to her superiors, and there was no evidence that she made actionable disclosures beyond her supervisors in the SEC, the investigation revealed that opposition to the program did contribute to the issuance of her Letter of Reprimand, as well as the involuntary transfer of Employee 1 to non-supervisory duties.

With respect to the OIG investigation found that the performance counseling memorandum, daily monitoring, and the Letter of Reprimand were issued shortly after he complained about his supervisors, and in fact, the Letter of Reprimand actually cited the memorandum to senior SEC officials in describing his inappropriate conduct.

In addition, the OIG found that, unlike communication with SEC senior staff would constitute disclosures to authorities in a position to correct improper activity, which would be a prerequisite for a finding of retaliation of a whistleblower. The record showed that Employee 1 filed a grievance based upon his claim that the Letter of Reprimand was retaliatory in nature and in a settlement, the Letter of Reprimand was rescinded.

The OIG investigation determined that both Employee 1 and Employee 2 complaints about their supervisors and the program improperly led to actions taken against them. While the OIG also found that that the manner in which Employee 1 and Employee 2 expressed their opposition may have also been a factor in the actions taken against them, we found that the complaints themselves and Employee 1’s opposition to a substantive program were a more significant contributing factor in the disciplinary actions. Accordingly, the OIG is referring this report to management for consideration of performance-based or disciplinary action against both Employee 1 and Employee 2.

Scope of Investigation

This investigation focused on whether the adverse personnel actions taken by Employee 1 and Employee 2 against Employee 1 and Employee 2 were inappropriate and retaliatory in nature. To that end, the OIG interviewed nine current employees and one former employee of the SEC, three employees from the Office of Compliance, Inspection, and Evaluation (OCIE); and two current employees as well as one former employee of the SEC Office of Human Resources. Subsequent to the interviews, the OIG analyzed testimony, relevant employee performance records from 2004 through 2008, the Letters of Reprimand issued to Employee 1 and Employee 2, the counseling memorandum given to Employee 1.
and applicable agency policy and laws which are reflected in the Relevant Laws, Policies and Procedures section of this report.

**Relevant Laws, Policies and Procedures**

I. Whistleblower Protection Act

A. Reprisal for Whistleblowing (Corrective Action)

Under the Whistleblower Protection Act of 1989 (WPA), as amended, 5 U.S.C. § 2302(b)(8), it is a prohibited personnel practice to take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee or applicant because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: (1) a violation of law, rule, or regulation; (2) gross mismanagement; (3) a gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety.

To establish a violation of § 2302(b)(8), the [U.S. Office of Special Counsel] OSC, or the aggrieved employee, must show the following four elements by a preponderance of the evidence:

1. **Disclosure of Information**

The test for whistleblowing is whether a reasonable person in the employee's position would believe that the disclosure evidenced a violation of law, rule or regulation; an actual violation need not be proven. *Garst v. Dep't of the Army*, 60 M.S.P.R. 514 (1994). See also *Reid v. MSPB*, 508 F.3d 674 (Fed. Cir. 2007) (finding that an allegation of a reasonable belief of a potential violation is sufficient).

The disclosure of information may be made to "any" person; there is no requirement that the whistleblowing occur through any specific channel. See, e.g., *Sirgo v. Dep't of Justice*, 66 M.S.P.R. 261 (1995). However, discussions and even disagreements with supervisors over job-related duties are considered to be a normal part of most occupations, and the WPA was not intended to extend that far. *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001.) The Federal Court has also found that when "[i]n complaining to his supervisors, [complainant] has done no more
than voice his dissatisfaction with his superior's decision... and has taken no action to bring an issue to the attention of authorities in a position to correct fraudulent or illegal activity,” the disclosures were not protected under the WPA. *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998)

2. **Personnel Action**

Personnel actions covered by the WPA include, among other things, “adverse action covered by chapter 75 or other disciplinary or corrective action,” and “any other significant change in duties, responsibilities, or working conditions.” 5 U.S.C. § 2302(a)(2)(A)(iii) & (xi).

3. **Knowledge of the Protected Disclosure**

The official responsible for the personnel decision being challenged must have knowledge (either actual or constructive) of the disclosure at the time the decision was made. *McClellan v. Dep't of Defense*, 53 M.S.P.R. 139 (1992). However, a mistaken belief that the employee engaged in protected whistleblowing is sufficient. *Special Counsel v. Dep't of the Navy*, 46 M.S.P.R. 274 (1990)(“[a]n employee who does not engage in protected activity may nonetheless be covered by the WPA where a retaliatory personnel action is taken against him based upon the belief that he had engaged in protected activity”). *See also Sirgo*, 66 M.S.P.R. 261 (employee might be entitled to the protection of the WPA if he could show that the agency official who allegedly retaliated against him perceived him as a whistleblower).

4. **Contributing Factor**

In order to establish a prima facie case under the WPA, the OSC or an individual pursuing an action must establish by preponderant evidence that the protected disclosure was a “contributing factor” to the challenged personnel action, although “any ‘weight’ given to the protected disclosure, either alone or even in combination with other factors, can satisfy the ‘contributing factor’ test.” *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140-41 (Fed. Cir. 1993). A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Id.*, (quoting 135 Cong. Rec. 5033 (1989)(Explanatory statement on S. 20)).

The October 1994 Amendments to the WPA amended §1221(e) to provide that an employee may satisfy the contributing factor test merely by demonstrating a time connection between the protected disclosure and the personnel action. “The [complainant] may show that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing

Once an employee has met the contributing factor test, the burden of proof shifts to the agency. “[T]he agency must bear the burden of proving by clear and convincing evidence that the personnel action would have been taken in the absence of the protected disclosure.” *Marano*, 2 F.3d at 1143. “When determining whether the agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board considers the following factors: the strength of the agency’s evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated.” *Simmons*, 99 M.S.P.R. at 38. In *Yunus v. Dep’t of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001), the Court found that where the evidence the agency had before it to remove complainant was strong, the agency’s motivation to retaliate was slight, at best, and the evidence did not show that the agency treated complainant differently than it treated similarly situated employees who were not whistleblowers, the agency was able to show by clear and convincing evidence that it would have removed complainant even in the absence of the protected disclosure. See also *Redschlag v. Dep’t of the Army*, 89 M.S.P.R. 589 (2001) (finding that although agency officials had a substantial motive to retaliate against the complainant, the motive was outweighed by the strength of evidence the agency had before it when it took the removal action and by the lack of evidence to suggest that complainant was treated differently than similarly situated non-whistleblowers).

B. Reprisal for Whistleblowing (Disciplinary Actions)

Under 5 U.S.C. § 1215, the OSC may request disciplinary action against an employee for committing a prohibited personnel practice, including engaging in reprisal for whistleblowing. However, the burden of proof is different in a disciplinary action than when corrective action is sought. To establish a violation of 5 U.S.C. § 2303(b)(8) in a disciplinary action proceeding, the OSC must prove:

1. the acting official has the authority to take, recommend, or approve any personnel action;

2. the aggrieved employee made a disclosure protected under section 2303(b)(8);

3. the acting official used his authority to take, or refuse to take, a personnel action against the aggrieved employee; and

4. the acting official took, or failed to take, the personnel action against the aggrieved employee because of the protected disclosure.
Eidmann v. MSPB, 976 F.2d 1400 (Fed. Cir. 1992).

The “contributing factor” test does not apply to disciplinary actions against employees for engaging in reprisal for whistleblowing. Rather, the OSC must show by a preponderance of the evidence that “retaliation was a significant factor in the action or actions at issue” in order to discipline the retaliator. Special Counsel v. Santella & Jech, 65 M.S.P.R. 452, 458 (1994). The term, “significant factor,” refers only to factors “that played an important role in the allegedly retaliatory action . . . .” Id. Moreover, the significant factor test is not met unless the motivation for the action was improper. Id. Evidence that the allegedly retaliatory action was merely tangentially related to the protected conduct will not meet the significant factor test. Id. See also Special Counsel v. Costello, et. al, 75 M.S.P.R. 562, 612 (1997) (finding that even if the evidence establishes that the agency would have taken the personnel action in the absence of the protected disclosures, the protected disclosures would be considered a “significant factor” in the agency’s decision where the agency reasons for its actions are unpersuasive and unsupported by the record).

C. Commission Table of Penalties

The Commission’s Table of Penalties, SECR 6-10, Attachment 3 (Nov. 12, 1990), provides that the typical penalty for “[r]eprisal against an employee for providing information to an Office of Inspector General (or equivalent), the Office of Special Counsel, to an EEO investigator, or for testifying in an official proceeding” is reprimand to removal for the first offense, and removal for the second or third offense.

The Commission’s Table of Penalties SECR 6-10, Attachment 3 (Nov. 12, 1990), further provides that the typical penalty for “Violation of prohibited personnel practices,” which include engaging in reprisal for whistleblowing, i.e., to take, fail to take, or threaten to take or fail to take a personnel action with respect to any employee . . . because of any disclosure of information by the employee that he or she reasonably believes evidences a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority, is reprimand to removal for the first offense, and removal for the second or third offense.

II. SECM 6-1, Personnel Operating Policies and Procedures (POPPS)

Chapter 751.A, titled “Disciplinary Actions and Adverse Actions,” sets forth the “Commission’s policies and procedures for maintaining discipline and taking disciplinary actions and adverse actions against non-probationary employees in the competitive service and certain employees in the excepted service.” The relevant sections of Chapter 751.A are as follows:
Section B. Procedures for Taking Disciplinary and Adverse Actions.


a. Counseling. Employees are entitled to be advised promptly by their supervisor when deficiencies in their conduct or performance are observed. Where deficiencies involve work performance, the performance standards and expectations must serve as the basis for counseling. The initial counseling may be oral or written and should cover at a minimum:

(1) Exactly what is deficient in the employee's conduct or performance.

(2) The effect of this deficiency on the work of the office; and

(3) What the employee must do to bring performance or conduct up to the desired standard. The supervisor should ensure that the employee has every opportunity to comment on the deficiency and reason for occurrence, as well as to ask any related questions he or she may have.

b. Letter of Reprimand. Should the deficiency persist or recur, the employee should be issued a written reprimand which incorporates the items in paragraph 9a. The written reprimand should refer to prior discussions concerning the deficiency and should clearly indicate the consequences to the employee if the deficiency continues.

Section D. The Discipline Process and General Guidance for Supervisors.

Paragraph 17. Supervisory Responsibilities. The application of timely and effective discipline is an important supervisory responsibility. In fulfilling that responsibility supervisors:

b. Should immediately address employee deficiencies when problems first arise. At this point, constructive counseling or training may be all that is needed to correct the problem. If the employees conduct or work
performance does not improve to an acceptable level
despite these efforts, and disciplinary action becomes
necessary, supervisors must ensure that standards and
procedures are equally applied to all employees.

c. Must support all disciplinary and adverse actions with
specific facts outlining the nature and extent of the
problem and efforts to correct it. For example, dates and
content of counseling, examples of deficient work
products, and/or the specific conduct problem are
necessary to fulfill procedural requirements.

Results of the Investigation

I. Alleged Retaliation Against:

Employee 1

alleged that she and Employee 2 suffered retaliatory adverse
personnel actions at the hands of Supervisor 1.

Employee 3 alleged that the retaliation was caused by her opposition to the
program, which was proposed by Supervisor 2
during an August 2007 planning meeting.

A. Supervisor 2 and Employee 1 History of Conflict

The OIG investigation found that the conflict between Employee 1 and Supervisor 2 began
over a year before Supervisor 2 had introduced the program. Employee 3
was selected for the Regional Office
Transcript of interview of Employee 3 on November 20, 2008 (“Employee 3 Tr.”) at
stated: “It started … when [Employee 2] was promoted to the Supervisor
position … Employee 3 was a [interlocutor] … [and] Employee 1 was applying for the
job too. I think they both wanted the job but [Employee 2] got the job.” Id. at 6.
Employee 3 also believed that both Supervisor 2 and Employee 1 were to blame for the conflict, stating:

It’s not a one way conflict either way. I don’t know if it’s 50/50… there’s
two people, Supervisor 2 and Employee 1 going at each other it’s not
one person involved… It’s such a conflict… that filtered throughout the
staff and it’s almost became a thing of choosing sides… that’s why we’re
sitting here talking about it. Id. at 11-12.

Employee 3 was so concerned about Employee 1 and Supervisor 2 conflict that he said he went,
“to” Supervisor 1 on two separate occasions… the first time was in October of ‘07. The
second time was January of ‘08,” and asked her to intervene, noting that it was such “a
problem between Employee 1 and Supervisor 2 that needed to, "do something about it." \textit{Id.} at 12. Employee 1 even suggested "mediation" and believed that "this [conflict] has affected the whole operation, [and] we need[ed] to address this." \textit{Id.} at 12.

Supervisor 1 also believed the conflict between Employee 1 and Supervisor 2 originated because he was not selected for the position of [redacted] in the program. \textit{Id.} at 10. Supervisor 1, however, chose not to intervene because she "thought that it would work itself out... [and stated she] was hopeful that things would smooth out and that we would move on, but we didn't." \textit{Id.} at 8-9.

B. Introduction of the [redacted] Program

The record shows that the conflict between Employee 1 and Supervisor 2 was exacerbated when Supervisor 2 proposed the [redacted] program in the summer of 2007 and Employee 1 asserted her opposition to the new program.

The investigation found that in late August 2007, at a year-end planning meeting, introduced the [redacted] program to the program. \textit{Id.} at 11. The [redacted] program

There was significant opposition to the new program voiced at the planning meeting. Employee 1 stated that she opposed the [redacted] program for the following reason:
Deliberative Process

Testified that during the meeting, she, and others voiced their opposition to the program. *Id.* at 10, confirmed that he and others were also against the program stating, "Well, all three of us... and myself, all strenuously objected to this..." Transcript of interview of *Employee 1* on November 17, 2008 ("*Tr.*") at 16. However, indicated that he did not feel strongly either way, stating, "I just did not have too much of an opinion about whether it was a good idea or a bad idea." Transcript Interview of *Employee 3* on November 19, 2008 (*Tr.*") at 17.

*Employee 2* explained he objected to the program because said she was, "surprised at the reaction [to the program] ... it was very hostile. I would say on the brink of being... insubordinate...to our supervisor...and maybe even to me." *Tr.* at 10. *Employee 3* acknowledged the opposition, but stated she believed, "they were just expressing their views about it." *Tr.* at 10.

C. Exclusion from the Program

*Employee 2* claims that *Supervisor 1* purposely excluded her from involvement with the program in retaliation of *Employee 1*’s opposition to the program. *Supervisor 1* alleged that *Employee 1* did not want her involved, stating, "We’re just sort of completely left out... didn’t really want us to participate." *Tr.* at 30, 35. *Employee 2* stated that she believed *Employees 1 and 2* were not supporting the program and were, "consistently resistant...and seemed to... make repeated attempts to, what I will say, to undermine what we were doing..." *Supervisor 2* at 27-28. *Supervisor 2* did not, "recall specific discussions with them individually," asking them to participate but said *Employees 1 and 2* were, "repeatedly invited in management meetings...[to] participate...productively in the process." *Tr.* at 20, 28.
D. Treatment During Meetings with Supervisor 1 and Supervisor 2

1. January 16, 2008 Meeting

Employee 1 said that on January 16, 2008, she decided to meet alone with Supervisor 1 to discuss her frustration that she would not take any advice from her, indicating that her motivation was simply “trying to help her do the job better.” Tr. at 33. Employee 1 said the only thing she took from the meeting was that Supervisor 1 wanted, “me and [employee] to get along.” Id. at 33. Supervisor 1 recalled, “...there were a lot of meetings where she was counseled about her behavior...” Tr. at 24. A letter of Reprimand later issued to Employee 1 characterized the meeting as counseling for, “disrespect of [her] immediate supervisor and disregard for the success of the programs and initiatives of the Exam Program.” Letter of Reprimand from Employee 1, dated April 15, 2008 (Employee 1 Reprimand Letter) at 1, attached as Exhibit 1. Employee 1 denied that she was counseled in this January 16, 2008 meeting. Tr. at 73.

2. February 5, 2008 Meeting

Employee 1 said on February 5, 2008, she was called to a second meeting with Supervisor 1 and stated to Supervisor 1 that she wanted to “act like an employee and do as asked.” Id. at 40. Employee 1 was unable to provide any specific examples of how she should act like an employee, other than indicating that she “was sending leave slips to her willy-nilly and was not asking permission in advance like everybody else.” Id. Employee 1 characterized the meeting as “extraordinarily irrational and contradictory” and said she believed anger was caused by Supervisor 1 failing to “agree with all of her opinions and her ideas on how to execute projects.” Id. at 40-41. Employee 1 said although she specifically asked Supervisor 1 for examples of misconduct, Supervisor 1 provided her with no examples of misconduct, and actually, only mentioned that she was considering demoting Employee 1 for using an “unpleasant tone of voice during a meeting...” Id. at 41.

The Letter of Reprimand, later issued to Employee 1 and authored by Supervisor 2, described the following occurrence at the February 5, 2008 meeting; “on February 5, 2008, and I directed you once again to desist from disparaging your immediate supervisor and impeding the initiatives supported by the Regional Director.” Reprimand Letter at 1.

Recalled a meeting in which demoting was discussed but she could not recall the date. Tr. at 33-39.

Recalled the meeting as one in which demoting was discussed. Discussed at length the reasons they were considering demoting, saying he had disrupted management meetings and was
“insubordinate to...[a], and so we were discussing whether we should keep him...” Tr. at 20.

3. April 7, 2008 Meeting

On April 7, 2008, [redacted] was called to a meeting with [redacted] and [redacted] for one of two Investment Advisor Groups at the conference call. According to [redacted], the meeting started off very hostile towards [her]. Id. at 63-64. [Redacted] stated that [redacted] became very hostile towards [her]. Id. at 63-64.

[Redacted] began lecturing [her], showing irrational anger towards [her] and threatening [her] employment in front of [redacted] and [redacted]. Id. at 66. According to [Redacted], the lecturing lasted for about fifteen minutes, and at least three times [Redacted] threatened [her] employment if she did not start supporting the program. Id. at 64.

[Redacted] stated that toward the end of the meeting, [Redacted] joined in and the two of them chastised [her] for putting up roadblocks and being negative toward the program. Id. at 65-66. [Redacted] said she protested and was in the presence at one point during the lecture. Id. at 66. [Redacted] responded to the objection by claiming that her objections were included in the meeting because her actions were negatively impacting the program. Id. at 66-67. Eventually in response to the objection, [Redacted] did dismiss [her] from the rest of the meeting. Id.

[Redacted] said during the meeting she was “admonishing all of them” and stated that “[fingers were not pointing]” and tempers were not flaring. Tr. at 28-29.

[Redacted] acknowledged that toward the end of the meeting, it was about [Redacted] stating, “[a]nd so, yeah, you’re right. It was naturally about...” Id. at 30.

[Redacted] testified about the April 7, 2008 meeting as follows: “I believe at the conclusion of that meeting, we suggested that this was wasting time, this was wasting productivity and time of -- of her fellow managers and of her. That’s my recollection of it.” Tr. at 31. When asked specifically if she recalled thinking about asking the other managers to leave the room or if there was finger-pointing or anger at the meeting, [Redacted] replied, “I recall the meeting. I don’t recall specifically what you’re referring... I recall that it started out as one thing and sort of morphed into something else.” Id. at 32.

[Redacted] also stated, “I think it got a little bit off track. That’s how I would characterize it. I don’t recall specifically thinking about whether or not to have other managers leave or stay.” Id. at 33.

[Redacted] recollection of the meeting was more consistent with [redacted] version of events. [Redacted] recalled both and [redacted] “chastising” that she’s not a team player.” Taylor Tr. at 14. [Redacted] further said he “thought [the chastising] was inappropriate to do in front of...” and [him]. He also said:
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[I]t quickly became very accusatory and finger shaking ...and I think it went over the line ... I remember finger shaking and raised voices... it’s not something I’ve experienced in the 15 years I’ve been here. *Id.* at 14-15.

Employee 3 further stated that Employee 1 and Employee 4 had issued a “sort of a veiled threat that wasn’t very veiled.” *Id.* at 17. Employee 2 characterized the end message of the meeting as, “[y]ou need to get on board or we’ll change the management team” and indicated that “they were talking to Employee 1 ... they weren’t talking to us...” *Id.* at 15, 17.

Employee 3 explained she felt that she and Employee 1 should not have been there, noting that “it was something that [she] and I had paid a price for as well...I was uncomfortable... And I felt bad for Employee 1...” Transcript of Interview of Employee 3 Tr. at 49.

E. Other Retaliation Alleged by Employee 1

Employee 1 also alleged that Employee 2 retaliated against her by asking to review a report she had worked on, explaining, “In the year and a half I’ve been working for her ... up to that point, she never before asked to do that.” Employee 1 Tr. at 36. Employee 2 recalled the report and stated that typically when Examiners complete an examination, their Branch Chief is the first level of review followed by an Assistant Director. Employee 2 Tr. at 48. Employee 1 noted, “In this case, since Employee 1 did the exam and [was] writing up the examination report, I asked to review that one before it went out ... because there ... was not the regular level of review.” *Id.* at 48.

F. Letter of Reprimand

1. The Letter of Reprimand

The record shows that Employee 2 issued Employee 1 a Letter of Reprimand, dated April 15, 2008, which stated as follows: “I am, officially reprimanding you for unprofessional conduct as evidenced by your numerous efforts to undermine management authority and for your failure to follow the clear and unambiguous directives of your superiors.” *Reprimand Letter* at 1.

The Letter of Reprimand further provided the following examples of inappropriate conduct on the part of Employee 1:

- “On January 16, 2008, ... *Supervisor 1* advised you that further efforts to undermine management’s authority and frustrate the implementation of key initiatives would not be tolerated.” *Id.* at 1.
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- “Immediately subsequent to receiving the above-described counseling, in remarks to an Exam Branch Chief, you characterized the exam program initiatives as “stupid.”” *Id.* at 1.

- “On February 5, 2008, and I directed you once again to desist from disparaging your immediate supervisor and impeding the initiatives supported by the Regional Director.” *Id.*

- “On March 12, 2008, in contravention of directives, you sent a particularly inappropriate email addressed to your immediate supervisor, and copying other senior Exam personnel. The text of your email suggested that the Program should be terminated.” *Id.*

- “Most troubling, however, was your baseless assertion that your immediate supervisor had been ‘deceptive’ in providing advice to OCIE. This contention was unwarranted, untrue and clearly insubordinate.” *Id.* at 1-2.

- “On March 14, 2008, you again undermined the authority of your immediate supervisor who had directed the completion of an examination report and deficiency letter in a manner consistent with prior discussions with OCIE.” *Id.* at 2.

- “On April 1, 2008, during a performance management training session, you commented to members of the enforcement staff that a new performance management system would not work, as long as you had a boss who was “out to screw” you.” *Id.*

2. Allegations by *Employee* of Inaccuracies in Letter of Reprimand

*Employee* claims that the characterizations in the Letter of Reprimand were inaccurate. In her view, she did not receive any specific counseling of inappropriate conduct and noted that the meetings that referred to counseling in the Letter of Reprimand were mischaracterized because the description of the meetings in the Letter of Reprimand differed substantially from what actually had occurred at the meetings. *Employee* *Tr.* at 73.

The Letter of Reprimand stated, in pertinent part: “On March 12, 2008, in contravention of directives, you sent a particularly inappropriate email addressed to your immediate supervisor, and copying other senior Exam personnel. The text of your email suggested that the Program should be terminated. Most troubling, however, was your baseless assertion that your immediate supervisor had been ‘deceptive’ in providing advice to OCIE. This contention was unwarranted, untrue and clearly insubordinate.” *Employee* *Reprimand Letter* at 1-2. *Employee* acknowledged that she copied other senior Exam personnel on her March 12, 2008 e-mail, but explained that she
had met with [redacted] as a group and was tasked to gather information and once she compiled it, she sent it to the group (Supervisor 2, Employee 1, Employee 3, and Employee 4). Tr. at 74. However, disputed assertion that was saying in the e-mail that was deceptive, explaining that she was saying that the manner in which the information was presented to OCIE was deceptive because it represented the examinations as "affiliated or duly [sic] registered BDs...[and] did not take into account these [were] completely unrelated entities." Id. at 75.

The relevant text of the e-mail follows:

I think it is deceptive to advise OCIE that these are dually registered/affiliated entities that the fa/bd group are examining [emphasis added].

would make more sense. [E-mail, Employee 1 to Supervisor 2, Employee 8, Employee 2, Employee 3, dated March 12, 2008 at p. 1 (emphasis added), attached as Exhibit 2.]

The OIG found that e-mail was making a substantive point about the types of entities that were being examined. e-mail noted that the entities did not and it was deceptive to consider them in that vein. Her e-mail was not attacking her supervisor as being deceptive in an insubordinate manner as depicted in the Letter of Reprimand.

also responded to the claim in the Letter of Reprimand that she undermined authority in connection with an examination report, explaining that it was related to a situation where called OCIE concerning . Tr. at 58-60. explained that in OCIE had advised at the mid-year manager’s meeting that the company had disregarded this instruction and directed an examiner to Id. at 58. According to , she contacted OCIE to verify that they had
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Examination Operations

**Id.** at 60. Following

**Id.** at 66. Following

this interaction, OCIE explained her actions as follows:

"I don’t know what the right thing is for me to do... I knew that... I felt I was in a very difficult position. I don’t know what the right thing is to do when will not speak with me about it. [Employee 1] will not speak with me about it, and I have different information from the people that are leading the program.” **Id.** at 75-76.

Employee 1 indicated she was suspicious when she was called to the meeting, so she asked an attorney, who was in the Enforcement Division of Regional Office, to accompany her because, “[She] didn’t want to sit through another meeting where [she was] getting yelled at or lectured or finger-pointing or alone.... [and] wanted to have a witness...” **Id.** at 72. felt that some parts of the Letter of Reprimand were “inaccurate,” but decided not to file a grievance or ask for mediation because she feared retaliation. Instead, she agreed to work with an “executive coach.” **Id.** at 77-78.

3. **Supervisor 1** and **Supervisor 2** Explanations

**Supervisor 1** explained that the Letter of Reprimand was issued to only after efforts were made to counsel, indicating that she felt never got over not being selected for the position that ultimately obtained. **Tr.** at 33. **Supervisor 1** testified as follows:

"I even took some of the people -- to talk this through. I mean, we kind of went over the same ground every single time... [Employee 1] would keep going back to [her] wasn’t the right person to select for the job... So we never made any progress... After she had been counseled orally, what led to the letter of reprimand is there was a training session that was held on the new performance review program [and]... after that training session broke up, she was in that group that was talking to some of the managers from the enforcement program who came to me and said that she was bad mouthing and going on and on and on. And so that was it... we do the letter. **Id.** at 33.

**Supervisor 2** said the decision to issue a Letter of Reprimand was made “shortly before [they] gave it to her.” **Tr.** at 42. **Supervisor 2** indicated that “the course of action with was sort of a series of events over the two-year history... Initially the issues were addressed through her performance evaluations... many informal discussions... [for her] resistance to my leadership... It involved a[n]... action that she had taken that
was insubordinate and -- and disrespectful of management … what I would generalize as insubordinate [actions].” Id. at 42-44.

However, a review of performance evaluations found nothing to indicate that the employees were dissatisfied with performance, as both her 2006-07 and 2007-08 evaluations reflected she was acceptable in all areas. Additionally, the OIG found no written documentation reflecting employee 1 was counseled by employee 2 or employee 3 with the exception of a March 2007 letter in which she was cautioned for making an inappropriate comment.

4. The Perspectives of Co-Workers on the Letter of Reprimand and Its Contents

Employee 5 testified that he believed that neither employee 1 nor employee 2 alone caused the problems between them—in that they both were culpable—and that he had gone to two separate occasions to address the issue. See Subsection A.

Employee 5 stated that he constantly made derogatory comments about employee 1 throughout the review. Notes of interview of employee 5 on April 13, 2008 at 1. Employee 5 provided the following examples of statements made by employee 1: she is ruining morale; she is pushing a program that Washington rejected; she is spiteful and trying to ruin my life; no one respects her; she will not listen to anyone and does as she pleases; and it was a big mistake to hire her as employee 1. Id.

Employee 6 Enforcement Division Regional Office said he had never heard employee 1 say anything overtly disrespectful or insubordinate about employee 2, but said she did not like him or her management style. Notes of interview of employee 6 on April 13, 2008 at 1. Employee 6 recalled hearing employee 1 on multiple occasions say that she focused on making herself look good instead of focusing on the mission. Id. Employee 6 characterized the situation as two people who didn’t like one another. Id. Employee 6 also explained he felt like employee 1 was “blowing off steam” because she was selected for employee 1 instead of her. Id. Employee 6 said he had heard on multiple occasions saying she didn’t care for employee 1 or her management style, adding that “she didn’t have a lot of respect for what a manager” Id. Employee 6 concluded that he definitely disagreed with employee 1’s management style but he had never heard her engage in any personal attacks against her. Id.

Employee 7 Enforcement Division Regional Office said that he recalled stopping by his office and making a comment that, “She was stupid and her ideas were stupid.” Notes of interview of employee 7 on April 14, 2009 at 1. Employee 7 thought it was unusual for him to make that kind of remark about anyone and believes he told either employee 2 or employee 1 about it. Id.
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Employee 8 testified that she had not heard make any disparaging comments about but that she was still angry and had not moved on from her disappointment at being passed over for the position. Notes of Interview on April 15, 2009 at 1 also asserted that employee 8 had been very resistant to the program and felt it should not move forward. Id.

G. Involuntarily Transfer to Non-Supervisory Duties

Employee 1 stated that she was involuntarily transferred to non-supervisory duties on June 19, 2008. Employee 1 Tr. at 6, 80. Employee 1 believed that even though she transferred her, Supervisor 2 was responsible for the transfer, indicating that: "I had been working on [her transfer] for a while, but she finally convinced me to just remove me from my position on June 19." Id.

Supervisor 1 testified that after she counseled Employee 1 and issued her the Letter of Reprimand, her conduct did not improve and she met with Lori Richards, the Director of OCIE, and James A. Clarkson, the Director of Regional Operations in Enforcement, and "we all agree[d] that we needed to move her out . . . of her role as a supervisor." Supervisor 1 Tr. at 33-34.

Supervisor 2 stated, "there was not an initial decision after the . . . Letter of Reprimand to remove her from her duties . . . That course of action was decided upon after that point in time," and noted that, "ultimately that was the decision." Supervisor 2 Tr. at 45-46.

H. OIG's Findings in Regards to Complaint

Employee 1 alleged that she suffered several acts of retaliation on the part of Supervisor 1 because of her opposition to the Privacy Information program in August 2007. Specifically, Employee 1 identified the retaliatory acts as her being: (a) purposefully excluded from involvement in the Privacy Information program, (b) asked to show a report she was working on for review, (c) mistreated during several meetings with (d) issued a Letter of Reprimand that contained numerous inaccuracies, and (e) involuntarily transferred to a non-supervisory position.

The OIG investigation found that Supervisor 1 had a history of conflict, which was exacerbated when he departed the Privacy Information program and expressed her opposition to the program. In light of his reaction to the Privacy Information program, the OIG did not find that Supervisor 1's decision to exclude her from the program to be inappropriate or an abuse of authority. The OIG also found that Employee 1 was within her rights to review a report that Employee 1 had drafted.

With respect to the meetings where Employee 1 alleged she was mistreated, the OIG found that her actions were unnecessary, and there should not have been such a public display of frustration with Employee 1.
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While the OIG did not find that was a whistleblower per se—as there was no evidence that made actionable disclosures beyond her supervisors in the investigation revealed that opposition to the program did contribute to the Letter of Reprimand, issued by and approved by as well as the involuntary transfer of to non-supervisory duties. The OIG particularly noted that there was no evidence of any performance concerns expressed to prior to her voicing opposition to the program.

Although the OIG found that the manner in which voiced her opposition to management of the program was an appropriate factor in the actions taken against her, the connection between complaints about program functions and the personnel actions against her was itself inappropriate and a basis for consideration of disciplinary action against.

II. Alleged Retaliation Against

made similar allegations to including that he and suffered retaliatory adverse personnel actions at the hands of and . Specifically, alleged retaliation for joining in her opposition to the program, as well as for his submission of a memorandum to SEC senior management, alleging mismanagement of the Examination program and possible violations of Federal Travel Regulations when traveled to . Memorandum dated June 23, 2008 from to Chairman Christopher Cox, Executive Director Diego Ruiz and OCIE Director (Memorandum), attached as Exhibit 3.

A. Introduction of New Examination Program

As discussed in the previous section, the investigation found that in late August 2007, at a year-end planning meeting, there was significant opposition from and to the program, to which at 7-8.

indicated that and all strenuously objected to the program.

indicated that voice was louder than other people at the meeting, but she did not think he acted in a disrespectful manner or was “out of line.” at 13. stated that at the August 2007 meeting, they were forceful in their opposition to the program and “didn’t beat around the bush.” at 21. indicated that got a little bit animated [at the meeting] as he tended to do when he
was pretty passionate about something” and was “not yelling or anything but raising his voice.” Tr. at 15.

Employee 2 characterized conduct at the meeting as “being close to insubordinate” and stated that she was “extremely combative over the issue.” Tr. at 11. However, she could not provide specific examples of inappropriate behavior by Employee 1 at the meeting or words that he had used. Id. at 12. Employee 1 stated that she would not characterize behavior at the meeting as forceful or assertive, although Employee 2 and Employee 3 were fairly direct about their resistance to the program in the meeting. Tr. at 10.

B. Memorandum to SEC Senior Leadership

Employee 1 testified that he was “very upset” about employee’s Letter of Reprimand and her involuntary transfer and “wanted to bring [it] to somebody’s attention” that he “just didn’t think it was right” and in a written memorandum addressed to the SEC Senior Management, dated June 23, 2008, he disclosed that he believed both he and the employee had mismanaged the Examination Program, and mistreated employees. Tr. at 87-89.

Memorandum at 1. Specifically, Employee 1 stated in the memorandum that employee had been repeatedly abused and humiliated since the first week he took over as the Regional Director in the Western Region, culminating in the recent punitive action against her that effectively destroys her career in the Commission. Id. at 2. He also requested that SEC senior staff take action, stating, “in the interests of saving the career of an incredible asset to the Commission, preventing the implosion of the examination program, and ensuring the success of OCIE IA-BD integration efforts, I implore you to give this some thought.” Id. at 10. Employee 1 also alleged that Employee 1 had engaged in misconduct during official government travel. Id. at 3.

In this 12-page memorandum, Employee 1 stated that he and Employee 1 had engaged in “systematic abuse” of Employee 1, specifying that Employee 1 had been repeatedly berated and criticized for raising legitimate questions about how to manage the program. Id. at 3-4.

C. Response to Memorandum

Employee 2 returned from annual leave on July 14, 2008, he received a July 1, 2008 e-mail response to his June 23, 2008 memorandum from Lori Richards, acknowledging his memorandum and advising him that he would, “be addressing the issues you raise with you directly.” Tr. at 90; E-mail from Richards to Employee 2 dated July 1, 2008, attached as Exhibit 4.

The same day Employee 2 returned from leave, July 14, 2008, he met with Employee 1.

Employee 2 testified that he mistakenly believed that Employee 1 was going to address his concerns, but said she became “confrontational” and “generally dismissive,”
telling him he "had a lot of his facts wrong" and it was none of his business. Id. at 94-95. He asserted that he did not take the meeting seriously, and at one point, even talked on the phone with Direct TV concerning the television reception at her residence. Id. at 95.

On July 16, 2008, [Employee] sent an e-mail to [Supervisor] with copies to Richards and Jeff Risinger, Assistant Executive Director for Human Resources, stating that [Employee] did not appear to be taking his complaints seriously and noted that he felt it was inappropriate for [Supervisor] to be speaking with a Direct TV operator during a meeting "to discuss the destruction of one person's career, the future of mine and the condition of the exam program." E-mail from [Employee] to [Supervisor], with copies to Richards and Risinger, attached as Exhibit 5.

D. Performance Counseling Memorandum

On July 19, 2008, [Supervisor] with [Employee] and [Employee], in attendance, met with [Employee] to issue him a Performance Counseling Memorandum, Ex. 2, p. 53. The Performance Counseling Memorandum stated that "[a]lthough your performance in some key areas was good and your performance for the rating period was rated acceptable, you had significant performance deficiencies in the following critical element: 'Effective Leadership.'" Performance Counseling Memorandum from [Supervisor] to [Employee], dated July 18, 2008 (Performance Counseling Memorandum) at 1, attached as Exhibit 6.

The Performance Counseling Memorandum specifically identified the following examples of performance deficiencies:

- "[Y]ou have been openly adversarial toward key exam program goals..." Id. at 1.

- You have "attempted to undermine important exam program initiatives through critical and unconstructive comments to OCIE and others within the Regional Office." Id.

- "[Y]ou have demonstrated characteristics of a bully seeking to win short-term turf battles." Id.

- "[C]oncern has been expressed by multiple IA/IC managers and examiners regarding your resistance to work collaboratively." Id.

- "At various times in management meetings and other interactions with fellow exam program managers, you have been disruptive, rude and unprofessional." Id.
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- “Furthermore, you have reportedly been overly aggressive and combative and used poor judgment in your communications and interactions with numerous people in the office, including the Regional Director, the Associate Regional Director and exam program staff at various levels.” Id. at 2.

[Employee 3] testified that, “We had a meeting with [Employee 2] and with [Employee 3] and myself to collectively communicate to him the concerns we had with his leadership…” id. at 53.

[Employee 3] described the meeting and [Employee 2]'s intentions with regard to [Employee 1] as follows:

[In my mind the intent was to get Employee 2] to leave by having this meeting with this counseling memo. … but I wasn’t willing to go as far as they wanted to go. … I didn’t really even want to participate in it. … I think they wanted to ask him to leave, that you know it’s just not a good fit. We think you’d be better suited somewhere else. … I don’t remember the exact language [they used] but I didn’t agree… [W]hen he came into the meeting I [made] it.” Id. at 26-30.

[Employee 3] also said that during the meeting, [Employee 2] asked for specific examples of his misconduct because [Employee 3] thought the memorandum was too vague. Id. at 28. [Employee 3] also stated, “I don’t think it was appropriate that I was brought in at the last minute and to appear that we’re all on board with it… I think the way, like all these things, the way it was handled was wrong.” Id. at 29-30.

[Employee 3] also recalled that a week before, [Employee 2] had issued the Performance Counseling Memorandum, he asked [Employee 3] to “get [Employee 2] out of the line of fire… get him out of this controversial situation.” Id. [Employee 2] said he suggested that [Employee 1] place [Employee 3] under his supervision as a [Employee 2] because [Employee 3] had “talents and he’s a good contributor… [but] that didn’t happen.” Id. at 27-28. [Employee 1] interceded on [Employee 3]'s behalf in an effort to head off trouble, stating, “you could almost see where it was headed. He’s a volatile personality and it’s not going to end well.” Id. at 28.

[Employee 3] however, conveyed a different impression of the meeting. [Employee 3] stated that she believed that [Employee 2] acted in an unprofessional manner after he was given the Performance Counseling Memorandum, by suggesting, that [Employee 2]'s motivations were impure, and indicated that at one point in the meeting [Employee 3] stated: “this is all bullshit.” id. at 26-27. [Employee 3] also said that [Employee 2] was very angry and left the meeting before they had finished. “I think he just took [the counseling statement] with him and very kind of angrily left the room. We clearly weren’t … finished with the discussion, so it was … for most employees, especially a manager, one would be very taken aback by that.” Id. at 27.
E. Allegations of Abusive Monitoring

The record shows that one day after [redacted], the Performance Counseling Memorandum, [redacted] received an e-mail from [redacted], with a copy to [redacted], stating, in pertinent part: "I want you to provide an update to me and [redacted] via email on Monday regarding recent progress on each of the following open items, current status of each and expected completion dates," and then listing eight items. E-mail from [redacted] to [redacted] dated July 20, 2008, attached as Exhibit 7. The e-mail further stated: "I want you to provide an update to [redacted] each day until I return." Id.

Stated that prior to this e-mail, he had never been subjected to daily monitoring and noted that the Performance Counseling Memorandum in no way suggested that he was not completing his assignments or fulfilling his responsibilities. Tr. at 102. Stated that over the next few days, [redacted] asked him "in very precise detail" about his progress on the assignments. He characterized the monitoring as "more like an investigation after the fact" of what had gone on with a particular exam. Id. at 104. He also stated that [redacted] accused him "of not working on stuff [and] providing inaccurate information." Id.

Stated that [redacted] asked her to supervise [redacted] in her absence, and requested that she "supervise him very closely." Tr. at 31. Testified that [redacted] was never formally his supervisor, she "while I was out of the office... she was acting on my behalf." Tr. at 54. It is noteworthy that there were two employees being supervised by [redacted] at that time, and , and was only asked to monitor , was not monitored. Tr. at 28-29; Tr. at 106.

According to both [redacted] and [redacted] complained about the daily monitoring to [redacted] at 37; [redacted] at 32. After complained, told him he would no longer be monitored and told both and that "we're not going to have this... if he's not getting the work done after he and I talk, then we will deal with it." Tr. at 38. indicated that [redacted] instructed her to stop the monitoring telling her, "Let's not do the daily reporting." Tr. at 32. Stated the monitoring stopped after he sent an e-mail to [redacted] on August 8, 2008, copying the Office of Human Resources, that questions the need for the monitoring and informs her that he felt it was "retaliatory." Tr. at 106; E-mail dated August 8, 2008 from [redacted] to [redacted] copying [redacted], Jeffrey Cunningham and Diego Ruiz, attached as Exhibit 8. Testified that the same afternoon he sent the e-mail, told [him] that he was no longer going to be subject to this daily monitoring. Tr. at 106.
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F. **Letter of Reprimand**

On August 7, 2008, and met with and gave him a Letter of Reprimand written by Tr. at 42. The Letter of Reprimand, dated August 4, 2008, provided several examples of meetings or communications where purportedly engaged in inappropriate conduct, including:

- A July 15, 2008 meeting discussing purported “unfounded and inaccurate allegations” in his June 23, 2008 memorandum to SEC Senior Management. Id. at 1.

- after the July 15, 2008 meeting, again making false accusations in a memorandum to Richards. Id.

- A reference to a July 16, 2008 meeting where was further counseled for insubordinate, disrespectful and inappropriate conduct and where he was asked not to contact anyone outside the during the performance counseling conference, regarding exam program policy issues without going through the proper chain of command. Id.

- On July 18, 2008, together with and held a performance counseling conference with to address our collective concerns regarding his performance related to Effective Leadership and stating during the performance counseling conference, “became belligerent, overly aggressive and disrespectful, using expletives.” Id.

- On July 20, 2008, had instructed to provide a daily status report on outstanding projects and that had responded to with a rude, disrespectful and entirely inappropriate email criticizing her oversight of his activities. August 4, 2008 Letter of Reprimand, attached as Exhibit 9. Id. at 2.

The Letter of Reprimand concluded as follows: “Your disrespectful, insubordinate and inappropriate behavior as well as your complete lack of judgment present a significant risk to the examination program, the SEC and are immensely detrimental in your leadership role.” Id. at 2.

G. **Grievance**

On September 12, 2008 filed a Grievance against and which provided in pertinent part as follows:
Several actions taken against me by [redacted] and supported by [redacted], including the performance counseling memo dated July 18, 2008, that led to the Daily Monitoring [which led to the Letter of Reprimand] were taken in retaliation for me raising legitimate concerns about conduct by [redacted] that was inconsistent with SEC policies and ethical standards. Grievance Memorandum against [redacted] and [redacted] from Office of Human Resources Associate Executive Director Jeffrey Risinger, dated September 12, 2008 (grievance) at 1, attached as Exhibit 10.

After the grievance was filed, the Office of Human Resources worked with [redacted] and was able to broker an unofficial resolution of the grievance. Notes of Interview of [redacted] on October 16, 2008 at 1. [redacted] agreed to retract Letter of Reprimand in exchange for [redacted] not going forward with the grievance and accepting informal written counseling. Id. At the end of September 2008, [redacted] resigned from the SEC and accepted employment with [redacted] as a private company. [redacted] at p. 5. Because [redacted] left the SEC before the process was completed, a counseling statement was never prepared. [redacted] at p. 113; [redacted] at p. 43.

H. OIG’s Findings in Regards to [redacted] Complaint

Similar to [redacted] also alleged retaliatory actions against [redacted] and [redacted] for his opposition to the [redacted] program and his submission of a memorandum to SEC senior management alleging mismanagement and violations of law. [redacted] alleged that he was issued a performance counseling memorandum, was subjected to abusive monitoring, and issued a Letter of Reprimand as a result of his protected disclosures.

The OIG investigation found that the performance counseling memorandum was issued shortly after [redacted] complained about [redacted] to SEC senior management. The OIG also found that [redacted] was only subjected to daily monitoring after he complained about his supervisors, and the monitoring stopped after [redacted] claimed it was retaliatory. The investigation also found that the Letter of Reprimand actually cited [redacted] memorandum to senior SEC officials in its description of his inappropriate conduct.

In addition, unlike [redacted], the OIG found that [redacted], communication with SEC senior staff would constitute disclosures to authorities in a position to correct improper activity, which would be a prerequisite for a finding of retaliation of a whistleblower.

The record further showed that after [redacted] filed a grievance based upon his claim that the Letter of Reprimand was retaliatory in nature, the Letter of Reprimand was rescinded and he has since left the SEC.
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The demonstrated connection between [deleted] and [deleted] actions and complaints about program functions and personnel actions is inappropriate and a basis for consideration of disciplinary action against [deleted] and [deleted].

Conclusion

In light of the foregoing, the matter is being referred to the Director of OCIE, the Associate Executive Director for Human Resources, the Associate General Counsel for Litigation and Administrative Practice, and the Ethics Counsel for consideration of disciplinary action against [deleted] and [deleted].

Submitted: [redacted] Date: 9/15/2009

Concur: [redacted] Date: 9/15/2009

Approved: [redacted] Date: 9/15/2009

H. David Kotz
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List of Exhibits

2. E-mail, [Employee 1] to [Supervisor 2] [Employee 3] [Employees 3] dated March 12, 2008.
3. Memorandum dated June 23, 2008 from [Employee] to Chairman Christopher Cox, Executive Director Diego Ruiz and OCIE Director Lori Richards.
4. E-mail from Richards to [Employee] dated July 1, 2008.
8. E-mail dated August 8, 2008 from [Supervisor 3] to [Employee 3] copying [Supervisor 1] [Supervisor 2] Risinger, Jeffrey Cunningham and Ruiz.