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Opening Statement
Rep. Elijah E. Cummings, Ranking Member

Hearing on "Limitless Surveillance at the FDA: Protecting the Rights of Federal Whistleblowers"

February 26, 2014

Today, we will examine two distinct, but related issues. First, we will review allegations that FDA employees leaked trade secret and other confidential business information from companies seeking FDA approval of medical device applications. We will also review allegations by these employees that they were whistleblowers concerned about the safety of these medical devices and that the FDA retaliated against them by monitoring their computers.

Whistleblowers play a critical role in rooting out waste, fraud, and abuse at federal agencies and making our government more effective and efficient. They sometimes risk their careers and reputations to challenge the abuse of power, and our Committee must take very seriously any allegations of retaliation against them.

Unfortunately, the majority has taken a traditionally bipartisan issue—something that all Committee Members should be investigating together—and turned it into another partisan spectacle for which our Committee has become well-known.

One of the most basic steps our Committee should have taken was to interview the FDA employees who had concerns. As the foundation for a responsible investigation, we should have met with them, asked them questions, learned about their concerns, and given them an opportunity to address evidence that may contradict their accounts.

Instead, despite multiple requests from the Democratic side over the past year, the Chairman declined to hold interviews with these employees. Although he and Senator Grassley apparently have been communicating with them directly, these employees were never called in for standard Committee interviews. As a result, most Committee Members have had no opportunity to talk to these employees and will not have the benefit of their input as we proceed.

The Chairman also chose to issue a highly partisan Republican staff report this morning. Just to be clear, this is not an official Committee report. It did not follow Committee rules for an official Committee report. It was not vetted for accuracy by the Committee. And it was not provided to Committee Members before it was leaked to the press.

Also unfortunate was the timing of today's hearing. Over the past month, the Inspector General was finishing his own investigation and was poised to issue his final report on this issue. Rather than wait a week or two so the Committee could hear directly from the IG, the Committee rushed to hold today's hearing, apparently trying to beat the IG to the press. Fortunately, the IG was able to complete his report, and he provided it to the Committee last night.

This is what the IG found. First, the FDA "had reasonable concern that confidential information, including possibly trade secrets and/or CCI, had been disclosed by agency employees without authorization."

Companies that submitted applications had asked the FDA to investigate which employees leaked their trade secret and confidential commercial information in violation of federal law. The IG found that "FDA had provided notice to its scientists (and all other users of its network) through a network log-on banner that there was no right to privacy on the FDA computer network and that all data on the network were subject to interception by FDA."

The Committee's investigation has identified no evidence that the FDA monitored employees to retaliate against them. The agency had a reasonable basis for initiating the monitoring since the disclosure of proprietary information is prohibited by law.

The IG also found that, regardless of whether computer monitoring was allowable under the law, the FDA did not have sufficient safeguards to ensure that monitoring would avoid collecting communications with Congress, the Office of Special Counsel, or the IG.

Despite the reasonableness of FDA's concerns and its explicit warnings that employee computers could be monitored, the IG found that the FDA "should have assessed beforehand, and with the assistance of legal counsel, whether potentially intrusive EnCase and Spector monitoring would be the most appropriate investigative tools and how to ensure that the use of these tools would be consistent with constitutional and statutory limitations on Government searches."

The FDA has now implemented new policies that require written authorization from the Chief Operating Officer to initiate monitoring and a legal review of the proposed monitoring by the Chief Counsel, including a determination that proposed monitoring is consistent with the Whistleblower Protection Act.

Protecting the rights of whistleblowers is an issue we should all be working on together, and our Committee has done so in the past. In 2012, this Committee passed the Whistleblower Protection Enhancement Act, which was signed into law on November 27, 2012. This is strong evidence that when this Committee operates on a bipartisan basis, we can accomplish important, even groundbreaking things. I hope we can return to the type of bipartisanship in the future, and I look forward to hearing from the witnesses today.

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