



Testimony
Before the Committee on the Judiciary,
U.S. Senate

For Release on Delivery
Expected at 10:00 a.m. ET
Wednesday, March 4, 2015

WHISTLEBLOWER PROTECTION

Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints

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Chairman Grassley, Ranking Member Leahy, and Members of the Committee,

I am pleased to be here today to discuss our report on the Department of Justice's (DOJ) handling of Federal Bureau of Investigation (FBI) whistleblower retaliation complaints.¹ As you know, whistleblowers play an important role in safeguarding the federal government against waste, fraud, and abuse, and their willingness to come forward can contribute to improvements in government operations. However, whistleblowers also risk retaliation from their employers, sometimes being demoted, reassigned, or fired as a result of their actions. Some FBI whistleblowers who have alleged retaliation have waited several years for DOJ to resolve their complaints. For example, in 2002, former FBI agent Jane Turner filed a whistleblower complaint with DOJ alleging that her colleagues had stolen items from Ground Zero after the September 11, 2001, terrorist attacks. She was then given a "does not meet expectations" rating, placed on leave, and notified of proposed removal. Ms. Turner filed a whistleblower retaliation complaint that DOJ ultimately found in her favor in 2013—over 10 years later. Today I will discuss (1) how long DOJ has taken to resolve FBI whistleblower retaliation complaints, (2) the extent to which DOJ has taken steps to resolve complaints more quickly, and (3) the extent to which the two offices that investigate these complaints—DOJ's Office of the Inspector General (OIG) and Office of Professional Responsibility (DOJ-OPR)—have complied with regulatory reporting requirements. My remarks today are based on our report, entitled *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Whistleblower Retaliation Complaints*.²

In performing the work for our report, we reviewed all DOJ and OIG case files for the 62 FBI whistleblower retaliation complaints closed during the 5-year period from 2009 to 2013, and interviewed whistleblower attorneys, advocates, and government officials—including DOJ and OIG officials responsible for investigating and adjudicating these complaints—

¹GAO, *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints*, [GAO-15-112](#) (Washington, D.C.: Jan. 23, 2015).

²[GAO-15-112](#).

about the complaint process.³ More detailed information on the report's scope and methodology can be found in the published report. We conducted this work in accordance with generally accepted government auditing standards.

Background

As established by the Civil Service Reform Act of 1978, federal law generally prohibits retaliation against federal government employees for reporting wrongdoing, or whistleblowing, and provides for most federal employees to pursue retaliation complaints with the U.S. Office of Special Counsel and the Merit Systems Protection Board (MSPB).⁴ The FBI was excluded from this process and, instead, the Attorney General was required by law to establish regulations to ensure that FBI employees were similarly protected against retaliation.⁵ In response to this requirement, in 1998, DOJ issued regulations setting forth the process for FBI whistleblowers to report complaints of retaliation for their disclosures.⁶

³Because of the sensitivity of FBI whistleblowers' identities, to obtain whistleblower perspectives on these issues, we met with representatives of five whistleblower advocacy groups knowledgeable about DOJ's process and attorneys who have represented three FBI whistleblowers through this process. The information we gathered from these groups and attorneys—which we refer to collectively as eight whistleblower advocates and attorneys—is not generalizable, but provides perspectives on whistleblowers' experiences with DOJ's process.

⁴Pub. L. No. 95-454, §§ 101, 202, 92 Stat. 1111, 1113-8, 1121-31 (codified as amended at 5 U.S.C. §§ 2301-2306, 1201-1222, respectively).

⁵5 U.S.C. §§ 2302-2303. Under section 2303, the President is required to provide for the enforcement of whistleblower protections for FBI employees and applicants in a manner consistent with applicable provisions of sections 1214 and 1221 of title 5; the President delegated this enforcement authority to the Attorney General. Minimal legislative history exists explaining the separate statutory provision for the FBI. Comments made by Members of Congress at the time suggest a compromise was adopted given the sensitive nature of the agency but also in recognition of past improprieties and the need to ensure public confidence that there are channels within the FBI to raise whistleblower matters, among other things. See 124 CONG. REC. S14300 (daily ed. Aug. 24, 1978) (statement of Sen. Percy); 124 CONG. REC. H9359 (daily ed. Sept. 11, 1978) (statement of Rep. Derwinski); 124 CONG. REC. H9359-60 (daily ed. Sept. 11, 1978) (statement of Rep. Udall); 124 CONG. REC. H11822 (daily ed. Oct. 6, 1978) (statement of Rep. Schroeder).

⁶Whistleblower Protection For Federal Bureau of Investigation Employees, 63 Fed. Reg. 62,937 (Nov. 10, 1998). DOJ initially issued these regulations as an interim rule effective upon publication in the *Federal Register*; however, DOJ invited postpromulgation comments that were addressed in a final rule issued in 1999. Whistleblower Protection For Federal Bureau of Investigation Employees, 64 Fed. Reg. 58,782 (Nov. 1, 1999) (codified as amended at 28 C.F.R. pts. 0, 27).

These regulations require that FBI whistleblower retaliation complaints be directed to OIG or DOJ-OPR for investigation, and provide specific timeliness and reporting requirements for these offices. The regulations also establish roles for the Director of DOJ's Office of Attorney Recruitment and Management (OARM) and the Deputy Attorney General (DAG) in adjudicating these complaints.

DOJ Closed Majority of Complaints within a Year, Some Because Employees Did Not Report Wrongdoing to a Designated Official; Adjudicated Complaints Took up to 10 Years

In our recent report, we found that DOJ closed the majority of the 62 complaints we reviewed within 1 year, generally because the complaints did not meet DOJ's threshold regulatory requirements.⁷ The most common reason these complaints did not meet DOJ's threshold regulatory requirements was that the complainants had made their disclosures to individuals or offices not designated in the regulations. Further, FBI whistleblowers may not be aware that they must report an allegation of wrongdoing to certain designated officials to qualify as a protected disclosure, in part because information DOJ has provided to its employees has not consistently explained to whom an employee must report protected disclosures. The 4 complaints we reviewed that met DOJ's threshold regulatory requirements and OARM ultimately adjudicated on the merits lasted from 2 to just over 10.6 years to resolve. In some cases, parties have waited a year or more for a DOJ decision without information on when they might receive the decision.

⁷A complaint that did not meet threshold regulatory requirements means a complaint where DOJ's decision to terminate the complaint was not based on whether there was a reprisal taken because of a disclosure, but on whether the allegations met threshold requirements. DOJ terminated 55 of the 62 FBI whistleblower retaliation complaints (89 percent) we reviewed and awarded corrective action for 3. (Complainants withdrew 4.) DOJ closed 44 of the 62 (71 percent) within 1 year, took up to 4 years to close 15 complaints, and took up to 10.6 years to close the remaining 3.

DOJ Closed the Majority of Complaints within a Year; Some Because the Employees Did Not Report Wrongdoing to a Designated Official

We found that DOJ closed 44 of the 62 complaints (71 percent) that we reviewed within 1 year, most often because the complaint did not meet DOJ's threshold regulatory requirements.⁸ For example, DOJ regulations require that, in order to qualify as an employee making a protected disclosure, FBI employees must report the alleged wrongdoing to one of nine high-ranking officials or offices including the Attorney General, the Director of the FBI, and the highest-ranking official in each FBI field office.⁹ In other words, if the employee does not make his or her initial disclosure of wrongdoing to one of these specific entities, the employee cannot later seek corrective action if the employee experiences retaliation. We found that in the 5-year period from 2009 to 2013, DOJ terminated at least 23 complaints in part because the complainant reported to someone not designated in the regulations. In at least 17 of these cases, we were able to determine that the disclosure was made to someone in the employee's chain of command or management, such as a supervisor.¹⁰

⁸Specifically, for 40 of these 44 cases (91 percent), DOJ found that the complaint did not meet threshold regulatory requirements.

⁹Under 5 U.S.C. § 2303(a), FBI employees may make protected disclosures to "the Attorney General (or an employee designated by the Attorney General for such purpose)." DOJ has designated nine entities as the appropriate officials to receive protected disclosures. These entities include DOJ-OPR, OIG, the FBI Office of Professional Responsibility, the FBI Inspection Division (FBI-INSD) Internal Investigations Section, the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, and the highest-ranking official in any FBI field office. 28 C.F.R. § 27.1(a)

¹⁰This constitutes 31 percent of all cases we reviewed where we could determine the basis for DOJ closing the complaint.

FBI Whistleblowers Do Not Have Recourse for Retaliation Based on Disclosures to Supervisors

Unlike employees of other executive branch agencies, FBI employees do not have a process to seek corrective action if they experience retaliation based on a disclosure of wrongdoing to their supervisors or others in their chain of command who are not designated officials.¹¹ This difference is due, in part, to DOJ's decisions about how to implement the statute governing FBI whistleblowers. When issuing its regulations in 1999, DOJ officials did not include supervisors in the list of entities designated to receive protected disclosures, stating that Congress intended DOJ to limit the universe of recipients of protected disclosures, in part because of the sensitive information to which FBI employees have access. In October 2012, the President issued Presidential Policy Directive 19, which established whistleblower protections for employees serving in the intelligence community, including those who experience retaliation for reporting wrongdoing to a supervisor.¹² The directive excluded the FBI from the scope of these protections, but required DOJ to report to the President on the efficacy of its FBI whistleblower retaliation regulations and describe any proposed revisions to these regulations to increase their effectiveness.

In response to this requirement, DOJ reviewed its regulations and in an April 2014 report recommended adding more senior officials in FBI field offices to the list of designated entities, but did not recommend adding all supervisors. DOJ cited a number of reasons for this, including concerns about striking the right balance between the benefits of an expanded list and the additional resources and time needed to handle a possible increase in complaints. By dismissing retaliation complaints based on a disclosure made to an employee's supervisor or someone in that person's chain of command, DOJ leaves some FBI whistleblowers—such as the 17 complainants we identified—without protection from retaliation. This DOJ policy could also permit retaliatory activity to go uninvestigated and create a chilling effect for future whistleblowers. As a result, in our 2015

¹¹Under 5 U.S.C. § 2302, employees of executive branch agencies may generally make disclosures of information to supervisors, their agency inspector general, the U.S. Office of Special Counsel, the media, Members of Congress, and others, if the disclosure is not specifically prohibited by law and not required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. Presidential Policy Directive 19 prohibits reprisals against employees serving in an intelligence community element for disclosures by the employee to a supervisor in the employee's direct chain of command, among others.

¹²The White House, Presidential Policy Directive 19/PPD-19 (Washington, D.C.: Oct. 10, 2012).

report, we concluded that Congress may wish to consider whether FBI whistleblowers should have a means to obtain corrective action if retaliated against for disclosing wrongdoing to supervisors, or others in their chain of command.

Guidance for FBI Employees Is Not Always Clear

We also found that FBI whistleblowers may not be aware that they must report an allegation of wrongdoing to certain designated officials to qualify as employees making a protected disclosure, in part because information DOJ has provided to its employees has not consistently explained this. For example, we reviewed FBI guidance stating that, in general, the FBI requires employees to report known or suspected failures to adhere to the law, rules, or regulations to any supervisor in the employees' chain of command, or others.¹³ But this guidance does not clarify that such disclosures are protected—allowing the employee to seek corrective action if retaliation occurs—only if reported to certain designated individuals or offices.

We concluded that, without clear information on how to make a protected disclosure, FBI whistleblowers may not be aware that, depending on how they report their allegation, they may not be able to seek corrective action if they experience retaliation. As a result, we recommended that the Attorney General clarify the department's guidance and communications on this point. DOJ concurred with this recommendation.

¹³The FBI's October 15, 2011, *Domestic Investigations and Operations Guide* states: "In general, the FBI requires employees to report known or suspected failures to adhere to the law, rules or regulations by themselves or other employees, to any supervisor in the employees' chain of command; any Division Compliance Officer; any Office of the General Counsel Attorney; any FBI-INSD personnel; any FBI Office of Integrity and Compliance staff; or any person designated to receive disclosures pursuant to the FBI Whistleblower Protection Regulation (28 Code of Federal Regulations 27.1), including the Department of Justice Inspector General."

Adjudicated Complaints Took up to 10 Years to Resolve, and DOJ Did Not Provide Parties with Expected Time Frames for Its Decisions

The 4 complaints we reviewed in our 2015 report that met threshold regulatory requirements and that DOJ ultimately adjudicated on the merits, took up to 10.6 years to resolve, and DOJ did not provide parties with expected time frames for its decisions throughout these cases.¹⁴ According to DOJ officials, case-specific factors, including competing staff priorities and case complexity, affected the length of these complaints. In 6 of 15 complaints we reviewed that progressed to the point of an OARM decision on whether the complaint met threshold regulatory requirements, parties at some point waited a year or more for a decision by either OARM or the DAG.¹⁵ Officials with these offices told us they do not routinely provide parties with an estimate for returning decisions because time frames can be difficult to judge. However, other federal agencies that handle whistleblower retaliation cases—such as MSPB and the U.S. Department of Defense Office of Inspector General—provide complainants with an estimate for when their cases will conclude.

¹⁴When OARM receives the complaint, OARM first determines whether the complaint meets threshold regulatory requirements, before proceeding to review the merits of the complaint. For OARM, considering the merits of the complaint entails reviewing the supporting evidence (e.g., documents and testimony), as well as the arguments each party—the complainant and the FBI—submits, and then determining, based on all of the evidence, if the individual substantiated the claim of retaliation. If the complaint is substantiated and the FBI is unable to prove by clear and convincing evidence that it would have taken the same personnel action even if the complainant had not made the protected disclosure, OARM will order that the FBI take corrective action, such as providing the complainant back pay or reimbursement for attorney's fees. OARM adjudicated the merits of 4 of the 62 complaints we reviewed (6 percent), and these 4 cases lasted from 2 to just over 10.6 years, from the initial filing of the complaints with OIG or DOJ-OPR to the final OARM or DAG ruling. In 3 of these 4 cases, DOJ ultimately ruled in favor of the whistleblower. These 3 cases lasted from just over 8 to 10.6 years. In the fourth case, DOJ ruled in favor of the FBI, and this case lasted approximately 2 years.

¹⁵In 15 complaints we reviewed, OARM made decisions on whether the complaints met threshold regulatory requirements. If we exclude the 2 complaints where the complainant never filed a request for corrective action, parties waited from 4 to 475 days for OARM to issue these decisions. In the 4 cases where OARM made merit decisions, parties waited from 151 to 598 days for OARM to issue its decisions. The DAG took nearly a year or more to make half (3 of 6) of the appeals decisions in the cases we reviewed. The DAG's fastest appeal decision was rendered in 12 days and the longest in 499 days. We calculated these wait times from the day of the last complainant or FBI action on the complaint to the time DOJ provided the relevant decision.

In June 2012, DOJ stated a commitment to making every effort to improve the efficiency of the department's adjudication of these complaints.¹⁶ We concluded that providing parties with estimated time frames for returning DOJ's decisions and providing timely updates when DOJ officials cannot meet estimated time frames would enhance accountability to the complainants and help ensure DOJ management's commitment to improve efficiency. As a result, we recommended that DOJ offices responsible for adjudicating complaints provide estimated time frames for returning decisions in these cases. DOJ concurred with this recommendation.

DOJ Has Taken Steps to Resolve Complaints More Quickly but Has Limited Plans to Assess Impact

We found that in the last 3 years, DOJ has taken some steps to improve timeliness in resolving whistleblower retaliation complaints, but has limited plans to assess the impact of these actions. Specifically, DOJ offices responsible for investigating and adjudicating complaints have taken steps such as developing a mediation program, hiring an additional staff person, developing procedures with stricter time frames, and taking steps to streamline their intake procedures. We concluded that as DOJ implements these changes, assessing the impact would help DOJ officials ensure that the changes are in fact shortening total case length without sacrificing quality, and identify any additional opportunities to improve efficiency. As a result, we recommended that the DOJ offices responsible for handling complaints jointly assess the impact of their ongoing efforts to improve timeliness throughout the full complaint process, and ensure such efforts are having their desired impact. DOJ and OIG concurred with this recommendation.

¹⁶In June 2012, DOJ stated in questions for the record for the Senate Committee on the Judiciary that "the Department . . . is committed to making every effort to improve the efficiency of the Department's adjudication of FBI whistleblower cases." Internal control standards reinforce the position that agencies need to have ways of ensuring such management directives are carried out. GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21](#).3.1 (Washington, D.C.: Nov. 1, 1999).

Investigating Offices Have Not Consistently Complied with Regulatory Requirements, Such as Providing Status Updates and Obtaining Approvals for Extensions

We found that the two DOJ offices responsible for investigating whistleblower retaliation complaints—OIG and DOJ-OPR—have not consistently complied with certain regulatory requirements, such as providing complainants with status updates or obtaining complainants' approvals for extensions of time. For example, in 65 percent of the 57 complaints we reviewed where we could determine whether the investigating office met the requirement, the investigating office did not contact the complainant to acknowledge receipt of the complaint within 15 days of receiving it, as required. In addition, we found that neither investigating office was consistent in providing periodic status updates to complainants, as required, throughout the investigations. Additionally, for those cases that required extensions, over half did not contain documentation that the complainant had agreed to an extension, also as required.

In the last 2 years, OIG developed a database to better oversee investigators' compliance with regulatory requirements, but DOJ-OPR does not have a similar mechanism in place. Whistleblower advocates and attorneys we spoke with said that regular status updates are important to reassure complainants that the investigating office is continuing to make progress on their complaints. Further, these whistleblower advocates and attorneys reported that without such updates, complainants can become discouraged and develop a negative view of the process, and thus may be less likely to come forward to report wrongdoing. As a result, we recommended that DOJ-OPR develop an oversight mechanism to monitor compliance with regulatory requirements. DOJ concurred with this recommendation.

Chairman Grassley, Ranking Member Leahy, and Members of the Committee, this concludes my prepared statement. I look forward to responding to any questions that you or other members of the committee may have.

GAO Contacts and Staff Acknowledgments

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