



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

October 17, 2014

The Honorable Charles E. Grassley  
United States Senate  
Washington, DC 20510

The Honorable Ron Wyden  
United States Senate  
Washington, DC 20510

Dear Senators Grassley and Wyden:

This responds to your letter of August 12, 2014, to the President, which requested a copy of the Attorney General's report titled "Department of Justice Report on Regulations Protecting FBI Whistleblowers." This report resulted from Presidential Policy Directive 19 (PPD-19), entitled "Protecting Whistleblowers with Access to Classified Information." Your letter was referred to the Department of Justice (the Department) for response.

The Department recognizes the important role played by whistleblowers in our law enforcement efforts. We take very seriously our responsibilities with regard to FBI employees who make protected disclosures under the regulations. We appreciate your interest in these matters and, in response to your request, have enclosed a copy of the Attorney General's report. This report addresses the Department's process for handling and adjudicating FBI whistleblower complaints and for protecting whistleblowers from reprisal. Specifically, the report assesses the efficacy of the provisions contained in part 27 of title 28, Code of Federal Regulations, in deterring the personnel practices prohibited in section 2303 of title 5, United States Code, and in ensuring appropriate enforcement of that section.

To assess and recommend potential changes to the current FBI whistleblower process, the Department brought together key stakeholders to form a working group of attorneys from the Office of the Deputy Attorney General, the FBI, the Justice Management Division, the Office of Attorney Recruitment and Management (OARM), the Office of the Inspector General (OIG), and the Office of Professional Responsibility (OPR). The working group analyzed and developed thoughtful suggestions for both streamlining and improving the process, to ensure that the FBI whistleblower procedures afford appropriate protections and that the process is a reasonably timely one. As part of its evaluation, the working group sought feedback from whistleblower advocates in the community, and the FBI consulted with its own employees – the ultimate beneficiaries of the Department's review. In addition, and pursuant to PPD-19, a draft of the report was circulated to the Office of Special Counsel for comment.

Based on this review, the report provides proposals and recommendations on a number of legal, policy, and regulatory matters, that the Department believes are warranted. As noted below, the Department has already started implementing some of these recommendations. Other recommendations will require further development, including, in some instances, the usual public notice and comment procedures involved in the rulemaking process. Specifically, the report proposes the following changes:

- **Providing access to alternative dispute resolution (ADR).** As a result of this review, the Department has created a voluntary mediation program for FBI whistleblower cases. This program utilizes the Department of Justice Mediator Corps Program, which was created in 2009 to expedite and make more efficient the resolution of workplace disputes. Mediation is available at all stages in the process at the request of the complainant. Through the notice and comment process, the Department will seek to formalize inclusion of the ADR program.
- **Awarding compensatory damages.** In accordance with PPD-19, the Department will propose amending its regulations to provide that OARM may award compensatory damages, in addition to other available relief.
- **Expanding the list of persons to whom a protected disclosure may be made.** Currently, a disclosure is protected if (1) its content qualifies for protection, and (2) it was made to specific persons within FBI management. The Department supports expanding the list of people to whom protected disclosures may be made to include – in addition to the highest-ranking FBI field office official – the second-highest ranking tier of field office officials. Such a change would mean that, in 53 field offices, a disclosure to the Special Agent in Charge (the highest-ranking official) or to any Assistant Special Agent in Charge (the second-highest ranking tier of officials, typically 2-3 per office) would be protected, assuming the disclosure's content qualified for protection. In the remaining and largest three field offices – Los Angeles, New York City, and Washington, D.C. – a disclosure to the Assistant Director in Charge (the highest-ranking official) or to any Special Agent in Charge (the second-highest ranking tier of officials, typically 5-6 in these three offices) would be protected. The Department will propose amending the regulations accordingly.
- **Improving training for FBI employees.** The Department believes that it is essential that all FBI employees, as well as non-FBI employees involved in the Department's FBI whistleblower program, receive proper training on the Department's regulations and the rights and responsibilities of all parties. The OIG Whistleblower Ombudsman, in connection with the FBI and other affected

offices, is currently reviewing the Department's training efforts regarding whistleblowing activities. As a result of this process, the Department will implement a new training program to ensure that (1) relevant employees receive appropriate training on a regular basis, and (2) that all employees are fully apprised of their rights and responsibilities.

- **Reporting findings of wrongdoing to the appropriate authority.** The Department, through OARM, has recently implemented a policy of referring any final decision that includes a finding of unlawful reprisal to the FBI Office of Professional Responsibility, and copying the FBI Director. The Department will propose amending the regulations to formalize this process.
- **Providing authority to sanction violators.** On several occasions, including in circumstances where the parties have requested the investigative file from OPR or OIG, the parties have agreed to enter a joint stipulated protective order to prevent the release of privacy-protected or sensitive law enforcement information. Currently, OARM does not have the authority to enforce such an order. To protect against the release of this sensitive information, the Department supports providing OARM with the authority to sanction those who violate protective orders similar to that provided to Merit System Protection Board (MSPB) administrative judges.
- **Expediting the OARM process through the use of acknowledgement and show cause orders.** At MSPB, within three business days of receipt of an appeal, an administrative judge issues an order which acknowledges receipt of the appeal, and informs the parties of the MSPB's case processing procedures (e.g., pertaining to designating a representative, discovery, filing pleadings, the agency's response, settlement, etc.). In cases where there is an initial question about the MSPB's jurisdiction, the MSPB issues, along with the acknowledgment order, an order directing that the appellant show cause as to why the appeal should not be dismissed for lack of jurisdiction. The show cause order puts the parties on notice of the jurisdictional requirements and their respective burdens of proof. Although MSPB procedures do not apply to FBI whistleblowers, issuing similar orders in FBI whistleblower cases could increase the efficiency of case adjudication at the jurisdictional phase. Through the public notice and comment process the Department intends to propose modifying its procedures to more closely mirror the MSPB process.
- **Equalizing access to witnesses.** During the Department's review, whistleblower advocates who met with the Department raised concerns about access to FBI

witnesses. They noted that, in some cases, the FBI has been able to call former FBI management officials or employees as witnesses against the complainant, either through affidavits or testimony at a hearing. However, they stated that the complainant has been unable to compel the deposition of those witnesses because OARM lacks authority to compel attendance at a hearing of, or the production of documentary evidence from, persons not currently employed by the Department. The Department will consider whether to amend its regulations to prohibit a party from admitting affidavits into evidence from persons who are unavailable for cross-examination at a hearing or deposition, unless an equitable access arrangement has otherwise been made.

- **Expanding resources for OARM.** During the course of the Department's review, the Department determined that OARM's resources should be expanded to reduce the time necessary to adjudicate FBI whistleblower cases. In November 2013, OARM hired a part-time attorney to supplement the work of its full-time staff attorney. Since then, OARM has improved its case processing time.
- **Publishing decisions.** During the Department's review, whistleblower advocates recommended that decisions entered by OARM and the Deputy Attorney General be made available to the public, with appropriate redactions to protect the identities of employees and claimants. They suggested that publication of opinions would help potential whistleblowers better understand their rights and responsibilities and would assist whistleblowers in litigating their cases should they suffer reprisal. Generally, these decisions have not been published due to the presence of law enforcement-sensitive and Privacy Act-protected information. Often, OARM opinions are highly fact-dependent, with detailed personal information about the complainant inextricably interwoven into the legal analysis. To improve transparency in the process, the Department is exploring whether it is possible to publish suitably redacted opinions in a manner that would provide useful information to FBI employees and the public.
- **Publishing annual reports.** During the Department's review, whistleblower advocates recommended that the Department publish the annual reports that the Attorney General submits to the President pursuant to a 1997 Presidential memorandum delegating to the Attorney General responsibilities concerning FBI employees under the Civil Service Reform Act of 1978, as amended by the Whistleblower Protection Act of 1989. The Department has previously disclosed the underlying data contained in the annual FBI whistleblower reports in response

We hope that this information is helpful. Please do not hesitate to contact this Office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'P. J. Kadzik', with a stylized, cursive script.

Peter J. Kadzik  
Assistant Attorney General

Enclosure

cc: Hon. Patrick Leahy, Chairman, Senate Committee on the Judiciary  
Hon. Orrin Hatch, Ranking Member, Senate Committee on Finance

# Department of Justice Report on Regulations Protecting FBI Whistleblowers

April 2014



# DOJ Report on Regulations Protecting FBI Whistleblowers

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## **I. Introduction**

The Department of Justice has prepared this report pursuant to Presidential Policy Directive/PPD-19, "Protecting Whistleblowers with Access to Classified Information." The report:

assesses the efficacy of the provisions contained in part 27 of title 28, Code of Federal Regulations in deterring the personnel practices prohibited in section 2303 of title 5, United States Code, and ensuring appropriate enforcement of that section, and describes any proposed revisions to the provisions contained in Part 27 of title 28 that would increase their effectiveness in fulfilling the purposes of section 2303 of title 5, United States Code.

PPD-19 at 5. Part II of this report provides historical context regarding the Department's efforts to protect Federal Bureau of Investigation (FBI) whistleblowers from reprisal. Part III explains the Department's current policies and procedures for adjudicating claims of reprisal against FBI whistleblowers. Part IV summarizes and analyzes statistics regarding the use of these policies and procedures in recent years. Part V describes how the Department has conducted this review, including consultations. Part VI discusses changes that the Department intends to make to its policies and procedures. Part VII discusses changes that have been proposed to the Department but that the Department believes are not warranted at this time.

## **II. Historical Background**

The protection of civilian federal whistleblowers from reprisal began in 1978 with passage of the Civil Service Reform Act of 1978 (CSRA), and has been expanded legislatively via the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). Currently, federal employees fall into three categories. Most civilian federal employees are fully covered by the statutory regime and can challenge alleged reprisals via the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB). By contrast, some federal agencies that deal with intelligence are expressly excluded from the whistleblower protection scheme established by these statutes. The FBI is in an intermediate position; its employees are protected by regulations promulgated pursuant to the CSRA and WPA. *See* 28 C.F.R. Part 27. The regulations forbid reprisals against whistleblowers and provide an administrative remedy within the Department of Justice.

The CSRA set forth "prohibited personnel practices"—a range of personnel actions taken against federal employees for improper reasons. One such prohibited personnel practice is retaliating against an employee for revealing agency misconduct. Specifically, the CSRA made it illegal for an agency to

take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for  
(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences  
(i) a violation of any law, rule, or regulation, or



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(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Pub. L. 95-454 § 101(a) (codified at 5 U.S.C. § 2302(b)(8)). The CSRA created the MSPB and OSC to enforce the prohibitions on specified personnel practices.

The CSRA expressly excluded from this scheme the FBI, the Central Intelligence Agency, various intelligence elements of the Department of Defense, and, “as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities.” Pub L. 95-454 § 101(a) (codified at 5 U.S.C. § 2302(a)(2)(C)(ii)).

For the FBI alone, the CSRA enacted a separate statutory provision that specifically prohibits reprisals against whistleblowers in its employment. As enacted, 5 U.S.C. § 2303 provided:

(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences –

- (1) a violation of any law, rule, or regulation, or
- (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

For the purpose of this subsection, “personnel action” means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of section 1206 of this title.

Pub L. 95-454 § 101(a) (codified at 5 U.S.C. § 2303). In enacting section 2303, Congress provided protection to FBI employees only for disclosures made through limited internal channels—*i.e.*, to the Attorney General or a designee. By contrast, the broader scheme



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applicable to most civil service employees that Congress created in section 2302 did not contain such restrictions on reporting.

In January 1980, the Department published a final rule implementing section 2303. The rule authorized the Department's Office of Professional Responsibility (OPR) to "request the Attorney General to stay any personnel action" against an FBI employee if the OPR Counsel determined that "there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a reprisal for a disclosure of information by the employee to the Attorney General (or a Department official designated by the Attorney General for such purpose) which the employee reasonably believed evidenced" wrongdoing covered by section 2303. 45 FR 27754, 27755.

Congress revisited these issues in the Whistleblower Protection Act of 1989, which significantly expanded the avenues available to most civilian federal employees. Among other things, the WPA allowed aggrieved employees to file an individual right of action alleging retaliation for protected disclosures—a vehicle that had not been available under the CSRA. The WPA amended section 2303 by replacing the requirement that the President "provide for the enforcement of this section in a manner consistent with applicable provisions of section 1206" with a requirement that enforcement be consistent with applicable provisions of newly-added sections 1214 and 1221. Sections 1214 and 1221 set forth the procedures under which OSC would investigate prohibited personnel practices and recommend or seek corrective action and the circumstances in which an individual right of action would be available.

The WPA also amended the regime generally applicable to civil service employees by revising section 2302 to protect only disclosures of "gross mismanagement," rather than disclosures of simple "mismanagement" as provided by the CSRA. The Senate Report explained the change to section 2302 as follows:

While the Committee is concerned about improving the protection of whistleblowers, it is also concerned about the exhaustive administrative and judicial remedies provided under S. 508 that could be used by employees who have made disclosures of trivial matters. CSRA specifically established a de minimus [*sic*] standard for disclosures affecting the waste of funds by defining such disclosures as protected only if they involved "a gross waste of funds." Under S. 508, the Committee establishes a similar de minimus standard for disclosures of mismanagement by protecting them only if they involve "gross mismanagement."

S.Rep. No. 413, 100<sup>th</sup> Con. 2d Sess. at 13 (1988). However, for reasons not clear from the legislative record, the WPA did not make a corresponding change to section 2303. Thus, the law continued to cover FBI whistleblowers who disclosed "mismanagement," even if it did not rise to the level of "gross mismanagement."

In April 1997, President Clinton issued a memorandum to Attorney General Reno in which he delegated to the Attorney General the "functions concerning employees of the Federal Bureau of Investigation vested in the President by . . . section 2303(c)," and directed the

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Attorney General to establish "appropriate processes within the Department of Justice to carry out these functions." 62 FR 23123. The memorandum further instructed the Attorney General to provide to the President an annual report including the number of reprisal allegations received and their dispositions.<sup>1</sup>

In November 1999, the Department issued a final rule establishing procedures under which FBI employees or applicants for employment may make disclosures of wrongdoing. 64 FR 58782. The rule created a remedial scheme within the Department through which FBI employees could seek redress for having suffered reprisal for making a protected disclosure. Subject to minor amendments in 2001 and 2008, the rule remains in force.

### **III. Current Rule**

#### **A. Definition of Protected Disclosure**

With regard to its content, a disclosure is protected only if (as under the 1980 final rule)

the person making it reasonably believes that it evidences:

- (1) A violation of any law, rule or regulation; or
- (2) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

28 C.F.R. § 27.1(a).

Unlike the 1980 rule, which authorized disclosures to the Attorney General or designee, the current rule specifies the set of persons to whom a disclosure of wrongdoing must be made in order to qualify as a protected disclosure. A disclosure may qualify as protected only if it is made to

the Department of Justice's (Department's) Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI-INSID) Internal Investigations Section (collectively, Receiving Offices), the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office.

*Id.*

#### **B. Investigation**

An FBI employee or applicant who believes he or she has suffered a reprisal for making a

<sup>1</sup> According to press reports at the time, this memorandum was issued during the pendency of a lawsuit filed against the FBI by an employee of the FBI Laboratory who alleged that he had suffered retaliation for disclosing misconduct and sought to avail himself of the expanded remedies offered by the WPA. The memorandum was issued one day before the Department's Inspector General issued a report substantiating many of the employee's allegations about misconduct at the FBI Laboratory.

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protected disclosure may report the reprisal in writing to OPR or OIG (some are also referred by the FBI Inspection Division to the OIG). OPR and OIG will then confer to determine which office will conduct an investigation into the alleged reprisal. Occasionally, OIG or OPR may determine that one or the other component is more suited based on a variety of factors, including, for example, if one component has prior experience with the complainant, if the OIG has investigated the complainant for misconduct or is doing so at the time of the complaint, if the complainant alleges retaliation in connection with making a complaint to the OIG, or if the complainant's allegations are particularly relevant to the mission of the OIG. Otherwise, the offices typically will take turns. The office that eventually conducts the investigation is known as the "Conducting Office"; its role is roughly analogous to the role played by OSC for employees covered by section 2302. The Conducting Office investigates the allegation "to the extent necessary to determine whether there are reasonable grounds to believe that a reprisal has been or will be taken" for a protected disclosure. 28 C.F.R. § 27.3(d). The office has 240 days to make this determination unless granted an extension by the complainant. *Id.* § 27.3(f).

If the Conducting Office finds that there is no reasonable basis to believe that a reprisal occurred, it provides a draft report to the complainant with factual findings and conclusions justifying termination of the investigation, and allows the complainant to submit a written response. *Id.* § 27.3(g). Upon termination, the Office must so inform the complainant in writing, and must provide the reasons for termination, a summary of relevant facts ascertained by the Office, and a response to any written response submitted by the complainant. *Id.* § 27.3(h).

As part of its investigation, the Conducting Office obtains relevant documents from the FBI and from any other relevant source, including the complainant. These documents may include, for example, e-mails and personnel files. The Conducting Office interviews witnesses with relevant knowledge, typically including the complainant, the person(s) who allegedly retaliated against the complainant, and others (often other FBI employees working in the same unit) in a position to have knowledge of the relevant facts and circumstances.

If the Conducting Office determines that there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure, it reports its conclusion, along with any findings and recommendations for corrective action, to the Department's Office of Attorney Recruitment and Management (OARM). *Id.* § 27.4(a). Alternatively, a complainant may file a request for corrective action with OARM within 60 days of receipt of notification of termination of an investigation by the Conducting Office, or at any time beyond 120 days after filing a complaint with the Conducting Office if that Office has not notified the complainant that it will seek corrective action. *Id.* § 27.4(c)(1).

The regulations limit the extent to which proceedings before the Conducting Office are admissible before OARM. Without the complainant's consent, a determination by the Conducting Office that there are reasonable grounds to believe a reprisal has been or will be taken may not be cited or referred to. *Id.* § 27.4(a). (Where the Conducting Office finds in favor of the complainant on some, but not all claims, the complainant might not consent to the report being cited or referred to in proceedings before OARM, in order to prevent OARM from seeing any negative findings.) Nor may the Conducting Office's written statement explaining the termination of an investigation be admitted unless the complainant consents. *Id.* § 27.3(i).

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### C. Adjudication

OARM's adjudicatory role is roughly analogous to the role played by the MSPB in cases arising under section 2302. OARM's first step is to make a jurisdictional determination. To establish jurisdiction, a complainant must (1) demonstrate exhaustion of Conducting Office remedies and (2) allege in a non-frivolous manner that the complainant made a protected disclosure under 28 C.F.R. § 27.1(a) that was a contributing factor in the FBI's decision to take or not take (or threaten to take or not take) a personnel action covered by 28 C.F.R. § 27.2(b) against the complainant.

If OARM's jurisdiction is established, the parties then engage in discovery. In the past, OARM would sometimes stay proceedings in a case for an extended period of time at the parties' request to pursue related claims in another venue or to pursue settlement. In 2011, OARM implemented new case processing procedures under which it will dismiss a claim without prejudice where the parties need additional time to engage in discovery, to pursue settlement, or to litigate claims in an alternate forum.

OARM typically affords the parties 75 days to complete discovery, but extensions are often granted upon the parties' joint request. In some cases, at the parties' request, OARM has provided the parties with redacted portions of the investigative file received from the Conducting Office, subject to a stipulated protective order. OARM is often called upon by the parties to resolve discovery disputes, including various objections and motions to compel. Discovery is often extensive and may include thousands of pages of documentary evidence for OARM's review. Either party may request a hearing before OARM, which OARM may grant or deny at its discretion. At a hearing on the merits, the parties may call and cross-examine witnesses, and the proceedings are transcribed by a court reporter.

After discovery and any hearing, OARM sets a schedule for briefing on the merits, which typically takes two to four months to complete. To prevail on the merits, a complainant must first prove by a preponderance of the evidence that a protected disclosure was a contributing factor in a personnel action taken or to be taken. This can be proved indirectly:

OARM may conclude that the disclosure was a contributing factor in the personnel action based upon circumstantial evidence, such as evidence that the employee 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 factor in the personnel action.

*Id.* § 27.4(e)(1). If the complainant meets this burden, OARM will grant corrective relief unless the FBI proves by clear and convincing evidence that it would have taken the same personnel action against the complainant even if he or she had not made the protected disclosure. *Id.* § 27.4(e)(2).

After any merits hearing and filing of the parties' respective merits (or post-hearing)

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briefs, OARM renders a final determination on the merits. OARM has broad authority to order corrective relief, which may include

placing the Complainant, as nearly as possible, in the position he would have been in had the reprisal not taken place; reimbursement for attorneys fees, reasonable costs, medical costs incurred, and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages.

*Id.* § 27.4(f). Typically, the parties will submit briefs regarding the appropriateness of specific corrective remedies. A final corrective action order may require OARM to complete complex calculations regarding fees, back pay, and expenses, which in themselves may require additional rounds of briefing.

### D. Appeal

Within 30 days of a final determination or corrective action order by OARM, either party may request review by the Deputy Attorney General (DAG), *see* 28 C.F.R. § 27.5, which usually involves another round of briefing. The DAG may set aside or modify OARM's actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. The DAG has full discretion to review and modify corrective action ordered by OARM. However, if the DAG upholds a finding that there has been a reprisal, then the DAG must order appropriate corrective action.

## IV. Statistical Summary

Below is a summary of the disposition of FBI whistleblower reprisal cases filed with OIG, OPR, OARM, and the DAG from the beginning of 2005 through March 15, 2014.

### A. OIG

OIG reviewed a total of 89 cases, of which four remained pending as of March 15, 2014. Of the 85 cases that were closed, OIG found that 69 were "non-cognizable." In a significant portion of cases, the claim was found non-cognizable because it was not made to the proper individual or office under 28 C.F.R. § 27.1(a). In other cases, the disclosure did not qualify as protected because it did not allege the type of violation or other misconduct cognizable under the regulations. In another set of cases, the complainant did not allege or suffer a qualifying adverse personnel action as a result of the disclosure. One case was voluntarily dismissed before a decision was made on whether to investigate it.

Of the 69 non-cognizable cases, only three complainants filed a request for corrective action (RCA) with OARM. In two of those cases, OARM found that it lacked jurisdiction to consider the complainants' RCAs. The third case is currently pending before OARM.

OIG determined that the claims of whistleblower reprisal warranted investigation in 15 of the 85 closed matters. Two of these cases were dismissed voluntarily by the complainant after OIG had begun its investigation. In seven cases, OIG determined that there were reasonable grounds to believe that reprisal had been taken against the complainant. In another six cases,



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OIG did not find reasonable grounds to believe that a reprisal had been or would be taken. Of the four pending cases, OIG has initiated an investigation pursuant to 28 C.F.R. Part 27 in one case and is reviewing the others to determine whether such an investigation is appropriate.

Of the five cases in which OIG found reasonable grounds to believe that reprisal for a protected disclosure had occurred or would occur, three were reported to OARM under 28 C.F.R. § 27.4(a). In two of those cases, OARM found reprisal by the FBI and ordered corrective action. The third case is currently pending before OARM. In the two remaining cases not reported to OARM, one case ended because the FBI agreed to provide corrective relief, and the complainant in the other case did not pursue the matter following OIG's finding.

Of the five cases in which OIG found no reasonable grounds to believe that reprisal had been or would be taken, only one complainant proceeded to file an RCA with OARM. That matter is currently pending before OARM.

### B. OPR

OPR has received 30 reprisal complaints, of which it has resolved 24. Three complainants pursued RCAs with OARM after waiting the requisite 120 days after filing a complaint with OPR, and three complaints remained pending as of March 15, 2014.

Of the 24 complaints resolved, in only two cases did OPR find that there were reasonable grounds to believe that whistleblower reprisal had been or will be taken. In both cases, OPR forwarded its report to OARM. In one of the cases, OARM ultimately concluded that the complainant had failed to prove his allegations. The other case is pending with OARM.

In 16 of the resolved cases, OPR found that it lacked jurisdiction over the claims due to one or more jurisdictional flaws: (1) the complainant complained to a supervisor or other entity, such as the FBI Office of General Counsel, that is not one of the nine individuals or entities listed under 28 C.F.R. § 27.1(a) to receive protected disclosures; (2) the complainant failed to allege a violation of law, mismanagement, gross waste of funds, abuse of authority or a danger to public health or safety; or (3) the alleged protected disclosure occurred after, and thus could not have caused, the alleged reprisal. After OPR terminated its investigation and closed their complaints, three of these 16 complainants filed RCAs with OARM. One is currently pending, OARM dismissed another, and the third was dismissed voluntarily by the complainant.

In another five cases, OPR terminated the investigation after concluding that it lacked reasonable grounds to believe that reprisal occurred. In only one of these five cases did a complainant pursue an RCA with OARM. That matter is currently pending with OARM.

In addition to cases in which OPR either found it lacked jurisdiction or concluded it lacked reasonable grounds to believe reprisal occurred, OPR closed one matter because the complainant did not respond to OPR's requests for additional information.

In the three cases in which the complainants pursued RCAs with OARM after not hearing within 120 days whether OPR would seek corrective action in their case, two cases were dismissed voluntarily by the complainants. In the third matter, OARM found that the complainant failed to prove the merits of his RCA.

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### C. OARM

A total of 50 cases have been active before OARM. Of those, 37 have been resolved, and 13 remain pending.

Of the 37 closed matters, OARM dismissed 16 for a lack of jurisdiction. Of these 16 cases, seven complainants failed to exhaust their Conducting Office remedies by failing to file a reprisal complaint with either OIG or OPR prior to filing an RCA with OARM. Three of the dismissed claims were filed by individuals who were neither FBI employees nor applicants for employment. OARM dismissed the remaining six claims for failing to make non-frivolous allegations sufficient for OARM's jurisdiction or for failure to state a claim upon which relief could be granted.

In another 16 cases reviewed by OARM, the complaint established jurisdiction (including one case in which the DAG found on appeal that a complainant had established jurisdiction, reversing OARM's initial determination that it lacked jurisdiction). Eight of the 16 cases were adjudicated on the merits. In four of these cases, OARM found reprisal by the FBI and ordered corrective relief. In the other four cases, OARM did not find reprisal. Of the remaining eight cases, in four cases the parties reached a settlement after OARM's finding of jurisdiction, and in the other four cases the complainant voluntarily dismissed the case subsequent to OARM's finding of jurisdiction.<sup>2</sup>

In another three cases, the complainants requested voluntary dismissal of their RCAs prior to a jurisdictional determination by OARM. Finally, two additional cases were opened based on complainants' notice of intent to file RCAs, but were closed when no RCAs were ultimately filed.

### D. DAG

Seven cases decided by OARM have involved one or more requests for review by the DAG under 28 C.F.R. § 27.5. Three cases involved appeals of OARM's ruling on jurisdiction. In one case, the DAG affirmed OARM's determination that the complainant had failed to establish OARM's jurisdiction over his RCA. In a second case, the DAG reversed OARM's finding that the complainant failed to establish jurisdiction and remanded the matter to OARM. OARM subsequently made a determination that the complainant had proved some, but not all, of his allegations at the merits stage of the proceedings, and ordered corrective relief. The complainant filed an appeal of OARM's decision, which was affirmed by the DAG. In the third case, OARM determined that the complainant had failed to make a nonfrivolous allegation of a protected disclosure sufficient for OARM's jurisdiction. The complainant appealed OARM's decision in that regard, and the matter is currently pending before the DAG.

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<sup>2</sup> Of the four cases in which the complainant voluntarily dismissed the case subsequent to OARM's finding of jurisdiction, one complainant sought dismissal due to counsel's maternity leave, one sought dismissal to focus on a related Title VII claim in federal court, and one sought dismissal to pursue extended discovery (pursuant to OARM's new case processing directive, *see supra* at 6, under which OARM will dismiss without prejudice to refiling when additional time is sought to engage in discovery). The record in the fourth case does not reflect the reason for the voluntary dismissal.



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Three other cases decided by OARM reached the DAG on appeal after OARM's adjudication of the merits of the complainants' RCAs. In one case, the DAG affirmed OARM's determination that the complainant failed to prove the merits of her case. In the second case, both parties appealed portions of OARM's final determination (which granted the complainant's RCA) and corrective action order; the DAG ultimately affirmed OARM's decision and ordered corrective relief consistent with that ordered by OARM. In the third case, OARM granted the complainant's RCA and ordered corrective action. Following the FBI's appeal, the DAG remanded the matter to OARM for further consideration of the legal standard it applied to one of complainant's claims. The DAG eventually affirmed OARM's remand decision, rejecting both sides' appeals, and ordered corrective action.

The seventh case was remanded to OARM for consideration of whether the complainant proved by a preponderance of the evidence that he made a protected disclosure. In that case, OARM had assumed without deciding that the complainant had made a protected disclosure, but ultimately denied the complainant's RCA on the basis that he failed to prove that his alleged protected disclosure was a contributing factor to the personnel action at issue. The matter is currently pending before OARM.

### **V. The Department's Review and Consultations**

This review was led by the Office of the Deputy Attorney General, with participation from the other key participants in administering the Department's FBI whistleblower regulation—the FBI, OARM, OIG, and OPR—as well as the Justice Management Division. In addition, the Department consulted with the Office of Special Counsel and FBI employees, as required by PPD-19, as well as with representatives of non-governmental organizations that support whistleblowers' rights and with private counsel for whistleblowers (collectively, “whistleblower advocates”).<sup>3</sup>

For the consultation with FBI employees, the FBI's representatives on the Department's working group consulted with various FBI entities: the Ombudsman; the Office of Equal Employment Opportunity Affairs; the Office of Integrity and Compliance; the Office of Professional Responsibility; the Human Resources Division; and the Inspection Division. The representatives also solicited the views of each of the FBI's three official advisory committees that represent FBI employees—the all-employees advisory committee, the agents committee, and the middle-management committee. In addition, the FBI working group representatives discussed the matter at length with the two co-chairs of the all-employees advisory committee.

The latter co-chairs conveyed two main points, based upon their own prior consultation with various constituents. First, they stated that OARM takes too long to process cases. The co-chairs repeatedly mentioned delays in the OARM process, which they depicted as a serious shortcoming. Second, the co-chairs stated that a better job could be done of making FBI employees conscious of the whistleblower process and its parameters. The co-chairs mentioned

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<sup>3</sup> The Department convened a meeting with the following whistleblower advocates: Angela Canterbury of the Project on Government Oversight; David Colapinto and Stephen Kohn of Kohn, Kohn & Colapinto; Tom Devine of the Government Accountability Project; Michael German of the American Civil Liberties Union; and Steven Katz, former chief counsel to the chairman of the MSPB.

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specifically that FBI employees may not be aware that, within field offices, a disclosure is protected only if made to the highest-ranking official in the office. The co-chairs recommended that additional trainings or other avenues be explored in order to increase employee knowledge of the rules. The co-chairs also gave the impression that they thought the adjudicators in these cases should be more independent; they implied that use of OARM and the DAG inherently suffered from an appearance-of-bias problem.

### **VI. Recommended Changes**

Below is a discussion of changes to policies and procedures, typically but not necessarily involving changes to the regulations, that the Department believes are warranted.

#### **A. Providing Access to Alternative Dispute Resolution (ADR)**

As a result of this review, the Department has created a voluntary mediation program for FBI whistleblower cases. ADR can focus the parties' attention at early stages of litigation, enabling each side to learn more about the other side's goals in a manner that may facilitate early resolution. The Department's Equal Employment Opportunity (EEO) community created the Department of Justice Mediator Corps (DOJMC) Program in 2009 as a means of informal resolution to address and, when possible, resolve workplace disputes. Although the program focuses on EEO issues, the mediators are available to help resolve any type of dispute. Coincidentally, the FBI Office of Equal Opportunity Affairs is responsible for the operational management of the DOJMC program, whose scope is Department-wide. The DOJMC currently has approximately 120 collateral-duty mediators. Roughly two-thirds are FBI employees; the remaining mediators are drawn from across other Department components. Current mediator resources are expected to be sufficient to make available a mediator from outside the FBI should the complainant so desire.

The Department developed and delivered training to a cadre of skilled mediators, and launched the mediation program for FBI whistleblower cases in April 2014. Mediation is available at all stages of the process—*i.e.*, at the Conducting Office level, before OARM, and on any appeal to the Deputy Attorney General. Once mediation is elected, the matter will be stayed. The mediation process should last approximately 90 calendar days, with most mediations taking place within 45 calendar days from the date of election. The mediator will meet with the parties and facilitate discussions in an effort to find common grounds on which to resolve the complaint. If mediation does not result in a settlement, proceedings will resume and the mediator will have no input into the investigation or adjudication of the matter. Nonetheless, the parties are likely to return to the proceedings with a better understanding of what is important to them and to the other party, which may help them reach a settlement later in the process.

OSC actively utilizes mediation in retaliation cases, and offered its strong support for the Department doing so in FBI whistleblower cases.

When revising its regulations, the Department will seek to formalize inclusion of the ADR program, by providing that ADR should be available with the agreement of both the complainant and the FBI from the time of the filing of the initial claim with the Conducting Office and at any subsequent point throughout the process, and that the time periods set forth in

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the regulations for review and disposition of the claim, as well as for related filings, would be formally stayed pending completion of the mediation process. (Under the current regulations, the Conducting Office's 240-day deadline for completing its investigation and rendering a determination can be extended only if the complainant consents.)

### B. Awarding Compensatory Damages

The Department supports amending its regulations to provide that OARM may award compensatory damages, in addition to other available relief. Currently, corrective action ordered by OARM may include:

placing the Complainant, as nearly as possible, in the position he would have been in had the reprisal not taken place;  
reimbursement for attorneys fees, reasonable costs, medical expenses incurred, and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages.

28 C.F.R. § 27.4(f). These categories roughly matched the remedies available to whistleblowers covered by section 2302 at the time when the rule was promulgated. However, the WPEA amended sections 1214 and 1221 to make compensatory damages available for such whistleblowers. *See* Pub. L. 112-199 § 107(b) (amending 5 U.S.C. §§ 1214(g)(2) and 1221(g)(1)(A)(ii)). Likewise, PPD-19 provides that corrective action may include compensatory damages, to the extent authorized by law. PPD-19 at 2.

The Department believes that it is appropriate to amend its regulations to provide for compensatory damages, and has determined that it is authorized to do so by section 2303, which (as amended by the WPA) authorized rulemaking "consistent with applicable provisions" of sections 1214 and 1221. In light of the provision of compensatory damages to whistleblowers covered by section 2302, and PPD-19's direction that covered agencies must make available compensatory damages where authorized by law, the Department intends to amend its regulations accordingly. To be sure, assessment of compensatory damages in a specific case would require examination of additional facts and would necessitate another round of briefing. The Department will therefore carefully monitor the impact of this expansion of remedies on OARM's case processing pace.

### C. Expanding the Definition of Persons to Whom a Protected Disclosure May Be Made

At this time, the Department recommends a limited expansion of the set of persons to whom a "protected disclosure" may be made. Currently, a disclosure is protected if (1) its content qualifies for protection and (2) it was made to one of numerous entities and individuals:

- the Department's Office of Professional Responsibility,
- the Department's Office of the Inspector General,

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- the FBI Office of Professional Responsibility,
- the FBI Inspection Division Internal Investigations Section,
- the Attorney General,
- the Deputy Attorney General,
- the Director of the FBI,
- the Deputy Director of the FBI, or
- the highest-ranking official in any FBI field office.

28 C.F.R. § 27.1(a).

The Department recommends expanding the persons to whom protected disclosures may be made to include—in addition to the highest-ranking FBI field office official—the second-highest ranking tier of field office officials. Such a change would mean that, in 53 field offices, a disclosure to the Special Agent in Charge (the highest-ranking official) or to any Assistant Special Agent in Charge (the second-highest ranking officials, typically 2-3 per office) would be protected, assuming its content qualified for protection. Further, in the remaining and largest three field offices—Los Angeles, New York City, and Washington, D.C.—a disclosure to the Assistant Director in Charge (the highest-ranking official) or to any Special Agent in Charge (the second-highest ranking official, typically 5-6 in these three offices) would be protected.

This expansion would enhance the ability of employees to make protected disclosures within their own office. At the same time, the limited nature of the expansion would retain the benefit of channeling on-site disclosures to persons with authority to redress wrongdoing once identified. The Department intends to evaluate the impact of this expansion and may choose subsequently to expand further the set of persons to whom a protected disclosure may be made, if it determines that such expansion is warranted.

During the process of reviewing the current FBI whistleblower standards and procedures, the whistleblower advocates recommended revising and broadening the regulations to protect disclosures to any supervisor, noting that PPD-19 instructs IC elements to protect disclosures to any supervisor in the employee's direct chain of command and that the WPEA similarly protects civil-service employees.

OSC, while supportive of the Department's proposed expansion, agrees with the whistleblower advocates that FBI personnel should be protected for making disclosures to other supervisors in the chain of command. OSC recommends that a disclosure should be protected if made to a supervisor at least one level above the employee who may be responsible for the wrongdoing or inefficiency that was disclosed. In OSC's view, whistleblower protection laws are most productive at encouraging the disclosure of wrongdoing, and therefore at making the government more efficient, if protections extend to the employee's specific work site, where

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most government inefficiencies occur and can be eliminated. OSC believes that to deny protection unless the disclosure is made to the high-ranked supervisors in the office would undermine a central purpose of whistleblower protection laws.

For now, however, the Department recommends a narrower approach to this issue. The Department believes that the set of persons to whom a protected disclosure can be made is extensive and diverse, and has seen no indication that the list has impeded disclosures of wrongdoing. Indeed, the list of persons and offices to whom a protected disclosure may be made appears on the FBI's Intranet site and is readily findable by any employee who searches that site for "whistleblowing."

### D. Improving Training

The Department believes that it is essential that all FBI employees, as well as non-FBI employees involved in the Department's FBI whistleblower program, receive proper training on the Department's regulations and the rights and responsibilities of all parties. The OIG Whistleblower Ombudsman, in connection with the FBI and other affected offices, is currently reviewing the Department's training efforts regarding whistleblowing activities, and expects to submit recommendations for increasing employee awareness regarding the FBI whistleblower program. The Department will aim to ensure that (1) relevant employees receive appropriate training on a regular basis and (2) employees have ready access at all times to information regarding their rights and responsibilities. Specifically, in light of the discussion in the previous section, the Department will aim to ensure that FBI employees are aware of the various entities and individuals to whom they may make a protected disclosure.

### E. Reporting Findings of Wrongdoing

The whistleblower advocates recommended that any final decision that includes a finding of unlawful reprisal be forwarded to OIG, or other appropriate law enforcement authority, for consideration of whether disciplinary action is warranted against the officials responsible for the reprisal. OARM has recently implemented a policy of sending referrals to the FBI Office of Professional Responsibility, with a copy to the FBI Director. The Department believes the regulation should be amended to formalize this practice.

### F. Providing Authority to Sanction Violators

The Department supports revising its regulations to allow OARM to sanction litigants who violate protective orders. On several occasions, including in circumstances where the parties have requested the investigative file from the Conducting Office, the parties have agreed to enter a joint stipulated protective order to prevent the release of sensitive law enforcement or privacy-protected information. And although it has yet to have occasion to do so, OARM would issue a protective order if necessary to protect from harassment a witness or other individual who testifies before it.

Because OARM lacks sanction authority, there is currently no recourse available against a party who does not comply with a protective (or other) order, except for possible referral to a



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bar association. The Department therefore intends to revise its regulations and/or OARM's procedures, as appropriate, to include a provision providing sanction authority similar to that provided to MSPB administrative judges under 5 C.F.R. § 1201.43. Under that provision, MSPB judges may impose sanctions upon the parties "as necessary to serve the ends of justice." As amended in October 2012, *see* 77 FR 62350, 62366, the rule provides that an MSPB judge must provide appropriate prior warning, allow a response to the actual or proposed sanction when feasible, and document in the record the reasons for any resulting sanction. Under the regulation, when a party fails to comply with an order, a judge may:

- (1) Draw an inference in favor of the requesting party with regard to the information sought;
- (2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;
- (3) Permit the requesting party to introduce secondary evidence concerning the information sought; and
- (4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.

5 C.F.R. § 1201.43(a).

### G. Implementing Acknowledgement and Show Cause Orders

The Department believes that the OARM process could be expedited through use of acknowledgement and show cause orders. The MSPB procedures can serve as a model for this process.

Under OARM's current procedures, 28 C.F.R. § 27.4(c)(1), when a complainant files an RCA with OARM, OARM usually forwards it to the FBI and provides the FBI 25 calendar days to file its response. In some instances, however, the allegations in a complainant's RCA are so deficient that neither OARM nor the FBI can reasonably construe the specific claims raised. In such cases, OARM issues an order requiring the complainant to supplement the RCA to specifically address the elements of a whistleblower claim necessary for OARM's jurisdiction. OARM then forwards the RCA, as supplemented, to the FBI for a response. The complainant is afforded an opportunity to file a reply to the FBI's response, and the FBI is afforded time to file its surreply, if any, thereto. OARM then makes a jurisdictional determination over the complainant's RCA. If OARM finds that it has jurisdiction to consider all or some of complainant's claims, the parties are so notified and are directed to engage in discovery as relevant to the claims over which OARM has jurisdiction.

By contrast, at the MSPB, within three business days of receipt of an appeal, an

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administrative judge issues an acknowledgment order, which acknowledges receipt of the appeal and informs the parties of the Board's case processing procedures (*e.g.*, pertaining to designating a representative, discovery, filing pleadings, the agency's response, settlement, etc.). In cases where there is an initial question about the Board's jurisdiction, the Board issues, along with the acknowledgment order, an order directing that the appellant show cause as to why the appeal should not be dismissed for lack of jurisdiction. The show cause order puts the parties on full notice of the jurisdictional requirements and their respective burdens of proof. In individual right of action cases, the Board orders the appellant to file a statement accompanied by evidence, within 10 calendar days of the date of the order, listing the following:

- (1) the protected disclosure(s);
- (2) the date on which the appellant made the disclosure(s);
- (3) the individual(s) to whom the appellant made the disclosure(s);
- (4) why the appellant's belief in the truth of the disclosure(s) was reasonable;
- (5) the action(s) the agency took or failed to take, or threatened to take or fail to take, against the appellant because of the disclosure(s);
- (6) why the appellant believes that a disclosure was a contributing factor to the action(s); and
- (7) the date of the appellant's complaint to the Office of Special Counsel (OSC) and the date on which OSC notified the appellant that it was terminating its investigation into the complaint, or if the appellant has not received such notice, evidence that 120 days have passed since the appellant filed a complaint with OSC.

The agency then has 20 calendar days from the date of the order to file its response on the jurisdictional issue. Unless the judge informs the parties otherwise, the record on the issue of jurisdiction will close on the date the agency's response is due. No evidence or argument on jurisdiction filed after that date is accepted unless the submitting party shows that it was not readily available before the record closed.

Implementing similar acknowledgment/show cause orders in FBI whistleblower cases could increase the efficiency of case adjudication at the jurisdictional phase. The acknowledgment order, which would be issued in every case, would notify the parties of OARM's case processing procedures (including its deadlines for filing, the form of and restrictions on pleadings, etc.), the jurisdictional requirements, and the parties' respective burdens of proof at the very beginning of the litigation. Where it appears on the face of the RCA that OARM may lack jurisdiction over the matter (*e.g.*, in cases where the complainant failed to exhaust Conducting Office remedies), OARM would give the complainant a very short time period to show cause why the case should not be dismissed, allowing for quick resolution of cases that plainly fail to meet the jurisdictional standard. The FBI would have a specified number of calendar days from the date of the acknowledgement/show cause order to file its response to the complainant's RCA. The FBI's response would be required to include: a statement identifying the FBI's action taken against the complainant and stating the reasons for taking the action; all documents contained in the FBI record of the action; designation and signature by the FBI representative; and any other documents or responses requested by OARM. After receipt of the FBI's response, the record on the jurisdictional issue would close (absent



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exigent circumstances showing the need for the presentation of additional evidence and/or arguments), thereby eliminating the current practice of providing the parties with the opportunity and time to file reply/surreply briefs. Implementing these procedures would require that the current language pertaining to OARM's initial case processing procedures in 28 C.F.R. § 27.4(c)(1) be revised accordingly.

### H. Equalizing Access to Witnesses

The whistleblower advocates who met with the Department raised concerns about access to FBI witnesses. They noted that, in some cases, the FBI has been able to call former FBI management officials or employees as witnesses against the complainant, either through affidavits or testimony at a hearing. However, the complainant has been unable to compel the deposition of those witnesses because OARM lacks authority to compel attendance at a hearing of, or the production of documentary evidence from, persons not currently employed by the Department. *See* 28 C.F.R. § 27.4(e)(3). The Department is considering amending its regulations to prohibit a party from admitting affidavits into evidence from persons who are unavailable for cross-examination at a hearing or deposition, unless an access arrangement has otherwise been made.

### I. Expanding Resources

Over the years, concerns have been expressed about the length of time it takes to adjudicate FBI whistleblower cases. With a consistent average of approximately ten new cases a year, the number of active FBI whistleblower cases on OARM's docket at any one time is relatively small. However, the pendency of several large, complex cases among the more routine cases, along with associated administrative responsibilities, significantly slows overall case processing times. Prior to 2005, adjudications were rendered by the Director of OARM with the support of OARM attorneys who were also charged with numerous other duties performed by OARM. This arrangement was found to be impractical and inefficient. In 2005, a full-time attorney position was established to assist the Director in his adjudicatory functions and oversee all whistleblower and related matters.

The functions performed by the staff attorney include, but are not limited to: complaint intake and docketing; record review and organization; legal research; drafting and issuing jurisdictional findings; holding or participating in hearings/teleconferences on discovery issues; ruling on routine motions for extensions of time; setting briefing/hearing schedules; holding or participating in trial-type hearings on the merits of complainants' cases; and drafting final determinations and orders for appropriate corrective relief. The staff attorney also provides significant assistance to attorneys in the Office of the Deputy Attorney General who prepare memoranda to aid the DAG in reviewing cases on appeal. Aside from these adjudicatory functions, the staff attorney is also responsible for the management and oversight of all administrative functions associated with the program, such as records management (including transferring closed case files to the Washington National Records Center/NARA under the appropriate records retention system); maintaining OARM's FBI whistleblower website, docket, case precedent system, and case processing directive; handling Congressional inquiries regarding cases and potential legislation; preparing the annual FBI whistleblower report to the President for

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the AG's signature; and routinely advising senior level Department officials on OARM's FBI whistleblower procedures and relevant law.

Large, complex cases can slow the adjudicative process due to the multitude of procedural questions that may arise, requests to extend discovery, and extensive factual records that must be reviewed and analyzed after discovery has closed. Such cases complicate the assignment of Department resources in relation to the total case load. A number of cases have taken several years to resolve; the longest case took ten years from the filing of the complaint with OIG to the final decision by the DAG.

During the course of this review, the Department determined that OARM's resources should be expanded. In November 2013, OARM hired a part-time attorney to supplement the work of its full-time staff attorney. In a short period of time, this has enabled faster case processing by OARM.<sup>4</sup>

### J. Publishing Decisions

The whistleblower advocates recommended that decisions entered by OARM and the DAG be made available to the public, with appropriate redactions to protect the identities of employees and claimants. They suggested that publication of opinions would help potential whistleblowers provide information in a manner that would be protected and would assist them in litigating their cases should they suffer reprisal. Traditionally, these opinions have not been published due to the presence of law enforcement sensitive and Privacy Act-protected materials. Often, these opinions are highly fact-dependent, with detailed personal information about the claimant inextricably interwoven into the legal analysis. In August 2013, upon a complainant's motion for public disclosure of OARM's Final Determination, OARM for the first time released to the parties for public dissemination a copy of its opinion, which was redacted for Privacy Act protected and law enforcement sensitive information. The Department is exploring whether it is possible, on a broader basis, to publish suitably redacted opinions in a manner that would provide useful information.

### K. Publishing Annual Reports

The whistleblower advocates recommended that the Department publish the annual

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<sup>4</sup> In addition, OARM has recently revised its policies to address concerns about slow case adjudication, particularly in the area of extended discovery requested by the parties. In a case processing directive issued in October 2011, OARM set specific limits on the type and amount of discovery the parties may conduct, adopting the MSPB's prior procedures and time limits pertaining to the parties' initial disclosures and requests for discovery. Previously, OARM had taken a liberal approach, routinely allowing the parties to engage in extended discovery and present thousands of pages of evidence in support of their respective claims. OARM also would liberally grant motions for extension of discovery deadlines (which had been 90 days from the date on which OARM issued a jurisdictional finding; now, parties are typically afforded 75 days). Now, when the parties request an extended continuation of the time for discovery, OARM has the discretion to dismiss the case without prejudice to filing again after the parties have completed discovery. This procedural option helps to keep cases from languishing on OARM's case docket, while providing the parties the time they need to obtain the discovery they seek. This option is also available in instances where the parties request time to pursue settlement, or where a complainant seeks a stay of OARM proceedings to pursue a Title VII claim in federal court.

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reports that the Attorney General submits to the President pursuant to President Clinton's 1997 memorandum. The Department has no objection to doing so, should the President authorize such publication. The Department has previously disclosed the underlying data contained in the reports (which is essentially what the reports consist of) in response to requests from Congressional staff.

### **VII. Changes Considered But Rejected**

The whistleblower advocates also recommended a number of additional changes that, upon consideration, the Department is not in favor of adopting at this time. These proposals, and the Department's rationale for not adopting them, are discussed below.

#### **A. Allowing Judicial Review**

The whistleblower advocates recommended that the regulations be amended to provide a right to judicial review. The Department declines to endorse this suggestion. In passing section 2303, Congress made a deliberate choice to create a closed system for FBI whistleblowers, in contrast to most civil service employees, who received the broader protections of section 2302(b), including access to judicial review. While most employees are protected for disclosures made to the general public, section 2303 provided that disclosures by FBI employees would be protected only if made to the Attorney General or a designee. Had Congress intended for FBI whistleblowers to be subject to judicial review like other agencies, it would have incorporated the FBI into the MSPB process. *See* 64 FR 58783 (quoting 124 Cong. Rec. 28770 (1978) ("We gave [the FBI] special authority . . . to let the President set up their own whistle-blower system so that appeals would not be to the outside but to the Attorney General.") (statement of Representative Udall)). Indeed, every court to have considered the question has concluded that section 2303 does not provide subject matter jurisdiction to hear a challenge to a determination made under the Department's FBI whistleblower regulations. *See McGrath v. Mukasey*, 2008 WL 1781243, \*4+ (S.D.N.Y. Apr 18, 2008) (No. 07 CIV. 11058(SAS)); *Runkle v. Gonzales*, 391 F.Supp.2d 210, 230-34 (D.D.C. 2005); *Roberts v. U.S. Dep't of Justice*, 366 F.Supp.2d 13, 17-23 (D.D.C. 2005). The Department lacks the authority to afford judicial review given the terms of the statute.

Moreover, the Department believes that Congress's choice was appropriate given the FBI's involvement in national security work—which has increased dramatically since section 2303 was enacted in 1978—and in law enforcement. The rationale for excluding other agencies from coverage under section 2302 applies to the FBI as well.

#### **B. Using Administrative Law Judges**

The whistleblower advocates recommended that adjudications be performed by administrative law judges (ALJs), who are selected pursuant to 5 U.S.C. § 3105, in order to ensure that the adjudications are independent and impartial. The Department agrees, of course, that adjudications must be impartial, but does not believe that ALJs are necessary in order to accomplish this. The Department is considering whether it is appropriate to amend its regulations to make explicit what has always been implicit regarding the independence and impartiality of OARM determinations.

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### C. Imposing Deadlines for Decisions

The whistleblower advocates recommended that OARM's adjudication be subject to a regulatory time limit of 240 days to conduct discovery and convene a hearing, that a decision be issued within 90 days of the close of the record, and that DAG review be limited to 60 days from the completion of briefing. The advocates would allow these time limits to be extended only by consent of the complainant. The Department does not support these revisions at this time.

Many cases involve voluminous evidentiary records and present complex factual and legal disputes. As a result, it would be difficult, if not impossible, to meet a strict deadline for adjudication. OARM has recently made procedural changes aimed at decreasing case processing times; if the parties comply with the new stricter discovery deadlines and briefing schedules, OARM believes that it would be possible to adjudicate most cases within one year of receipt (excluding the time needed at the Conducting Office or DAG levels). However, OARM believes that some flexibility is critical, especially when balancing the current resources, case load, and complexity of cases (some of which present thousands of pages of discovery for OARM's review and consideration). Until resource issues can be resolved, it is premature to determine whether and how such a flexible deadline should be constructed. If such a flexible deadline is to be devised, the Department would consider applying it at the DAG level as well.

### D. Granting Hearings Upon Request

The whistleblower advocates recommended that OARM grant hearings in all cases upon request. The Department does not believe such a change would be productive.

Currently, the decision whether to hold a hearing before OARM is discretionary. In making a determination of whether a protected disclosure was a contributing factor in a personnel action taken or to be taken, the Director of OARM "may hold a hearing at which the Complainant may present evidence in support of his or her claim, in accordance with such procedures as the Director may adopt." 28 C.F.R. § 27.4(e)(1). In practice, OARM has been receptive to requests for a hearing, particularly where the credibility of a witness is at issue. Where a fully developed written record presents a clear basis for a decision, holding a hearing could cause further delay in case resolution.

OSC agrees that hearings may not be necessary in all cases, but suggests adopting a short list of factors for OARM to consider when exercising its discretion on granting or denying a hearing. OSC suggests, for example, that a hearing could be held in cases that depend on witness credibility determinations, cases that require an assessment of employee performance, or where significant whistleblowing disclosures have been made that could reasonably result in retaliation by management.

Of these factors, the Department believes that whether or not witness credibility needed to be assessed is most directly relevant to determining whether a hearing should be held. The Department will consider whether to adopt a list of factors and, if so, whether other factors should be included.

### E. Requiring the Production of Any Federal Employee

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The whistleblower advocates recommended that OARM procedures be revised to require the production of any current employee of the federal government. (As noted in Part VI.H, OARM may compel attendance at a hearing of, or the production of documentary evidence from, only of persons currently employed by the Department.) The Department believes that it lacks the authority to make such a change by regulation, and therefore rejects this suggestion.