MEMORANDUM

For: Attorney General Eric Holder

U.S. Special Counsel Carolyn Lerner

From: Stephen M. Kohn and David K. Colapinto
National Whistleblower Legal Defense and Education Fund
3238 P Street, N.W.
Washington, D.C. 20007-2756

Michael German, Senior Policy Counsel
American Civil Liberties Union
Washington Legislative Office
915 15th Street, N.W.
Washington, D.C. 20005

Date: February 4, 2013

Re: **CHANGES NEEDED TO PROTECT FBI WHISTLEBLOWERS UNDER THE DOJ's FBI WHISTLEBLOWER PROGRAM 28 C.F.R. PART 27**

BACKGROUND

In 1989 Congress passed the historic Whistleblower Protection Act (the "WPA"). This law, building on the 1978 Civil Service Reform Act, created a detailed legal framework for protecting whistleblowers within the federal government. As part of this framework, Congress passed legislation requiring the Attorney General and President of the United States to establish equivalent protections for FBI agents. 5 U.S.C. § 2303(b) and (c). The following proposal is intended to improve the minimum requirements which must be contained in the DOJ regulations to make them consistent with applicable law.

The following recommended changes are necessary to minimally protect FBI employees under 28 C.F.R. Part 27, the DOJ regulations that implement the WPA for FBI Employees, 5 U.S.C. § 2303. On April 14, 1997, President William J. Clinton directed the Attorney General to formulate procedures to protect FBI employees and agents under the Whistleblower Protection

Act of 1989. *See* 62 F.R. 23123, Memorandum for the Attorney General from President Clinton (April 14, 1997). These whistleblower provisions applicable to FBI employees are supposed to be directly based on the legal standards Congress has imposed under the WPA, as amended. *See* 5 U.S.C. 2303(c) (requiring the President to ensure that FBI employees receive whistleblower protections "in a manner consistent with" the provisions of 5 U.S.C. §§ 1214 and 1221).

Following President Clinton's directive of April 14, 1997, the Attorney General promulgated regulations implementing the WPA for FBI employees for the first time. 28 C.F.R. Part 27. Under the DOJ whistleblower provisions to protect FBI employees, the DOJ established the right of employees to file complaints of whistleblower retaliation with the Office of Inspector General ("OIG").

Under 28 C.F.R. Part 27, the OIG performs the function of investigating complaints of whistleblower reprisal or retaliation in a manner consistent with the function of the U.S. Office of Special Counsel ("OSC") under 5 U.S.C. § 1214. While we do not agree with everything the OIG has done under the DOJ's FBI whistleblower program, and there is room for improvement, the OIG's role under 28 C.F.R. Part 27 has functioned relatively smoothly since the regulations were implemented. Because the OIG has functioned in a manner consistent with the important safeguards and rights required by 5 U.S.C. §1214 we do not have any suggested changes to this aspect of the program and caution against making any changes that would disrupt the current processing and investigation of complaints by the OIG. However, we would be open to a discussion of establishing a more independent, consistent and effective fact finder, provided that it is not delegated or re-delegated to the FBI.

Where the DOJ's current FBI whistleblower program suffers the most problems is at the adjudicatory stage, on appeals from the OIG's findings. Under 28 C.F.R. Part 27, adjudications

of appeals on an independent or private right action filed by either the FBI employee or the FBI are heard by the DOJ's Office of Attorney Recruitment and Management ("OARM"). Following a decision by the OARM, a final administrative review is conducted by the Deputy Attorney General ("DAG").

On October 10, 2012, President Barack H. Obama directed the Attorney General to consult with others in performing a review of the DOJ regulations that implement the WPA for FBI employees, by requiring:

> Within 180 days of the date of this directive, the Attorney General, in consultation with the Special Counsel and Federal Bureau of Investigation employees, shall deliver a report to the President that 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.

Presidential Policy Directive/PPD-19, p. 5 (Oct. 10, 2012).

While there are weaknesses in the current DOJ program, we strongly oppose combining the investigation or adjudication of FBI whistleblower claims with the administrative mechanisms that are to be created by agencies within the Intelligence Community pursuant to Presidential Policy Directive/PPD-19. In fact, 5 U.S.C. §2303(b) permits only the Attorney General to "prescribe regulations" to ensure that whistleblower retaliation is not taken against FBI employees. Even though the President has authority to provide for enforcement of rights udner §2303, that authority is limited by Congressional intent to vest the Attorney General with authority to prescribe the regulations to protect FBI employees from whistleblower retaliation. This Congressional intent on the role of the Attorney General was recognized by President

Clinton in 1997 when all functions vested in the President under §2303 were delegated to the Attorney General. *See* 62 F.R. 2313. Accordingly, we recommend strengthening the current FBI whistleblower program administered by DOJ under 28 C.F.R. Part 27 as opposed to attempting to transfer authority for investigating or adjudicating claims by FBI employees under the Intelligence Community procedures. Any such transfer would be contrary to law and Congressional intent, and would fail to build on the over 15 years of experience now enjoyed by the DOJ OIG and OARM in investigating and hearing whistleblower cases.

The primary problems and weaknesses in the DOJ's FBI whistleblower program occur at the OARM level where there have been extensive administrative delays in processing cases due to lack of resources and priority. There also exists a need for enhanced transparency, additional procedural safeguards and improvements to be added to the regulations to make the WPA program functional and provide employees with due process. In addition, some changes in the DOJ regulations are needed to make the program for FBI employees consistent with applicable law and other government-wide changes in policy that have taken place since the regulations were adopted in 1998. The specific areas needing improvement can be addressed by making the recommended changes to the existing DOJ regulations that are set forth in more detail below.

SPECIFIC AREAS NEEDING IMPROVEMENT AND RECOMMENDED CHANGES

1. Independent/Private Right of Action

At the heart of the WPA is an independent or private right of action appeal. This private right of action enables the whistleblower to conduct extensive discovery and privately present his or her whistleblower case to a neutral judge now employed by the agency which engaged in the retaliation. 5 U.S.C. § 1221. The private right of action appeal is the single most important right granted to employees under the administrative scheme created by the WPA. By empowering

employees with the ability to question all of the alleged wrongdoers under oath (either at a trial or during discovery), to confront and cross-examine his or her accusers, to obtain documents through discovery which support his or her claim and call witnesses before an independent judge, the employee has the ability to prove his or her whistleblower case and seek remedies.

Under § 1221, if an employee whistleblower prevails in the private right of action appeal, he or she is entitled to significant relief, including a complete "make whole" remedy. 5 U.S.C. § 1221(g). In November of 2012, the WPEA amendments to the WPA added additional remedies (such as compensatory damages and remedies for findings of retaliatory investigations). The DOJ regulations for FBI whistleblowers must be changed to include these newly enacted enhancements from the WPEA. The applicable provisions of the WPEA and DOJ regulations are set forth below.

Administrative delay and lack of transparency have been the greatest weaknesses in the DOJ whistleblower program for FBI employees. Notably, it is not uncommon for the OARM to take years to process and decide cases.[1] The lengthy delays are extraordinary given the relatively light case load at the OARM. There are not a significant number of FBI whistleblower cases filed with OARM annually to excuse these administrative delays.

[1] *See, e.g., In the Matter of Robert Kobus,* OARM-WB No. 06-3, and *In the Matter of Jane Turner*. The *Kobus* matter is still pending before the OARM, more than five years after it was first filed with the OARM (in 2007), and more than seven years after it was filed with the OIG (in 2005). Notably, the OIG ruled in Mr. Kobus's favor in March of 2007 and the matter has been languishing on appeal before the OARM as a result of the FBI's challenge of the OIG's findings of whistleblower retaliation. Briefing on the claim was completed in 2009, and no hearing has yet been held in the *Kobus* matter. Since at least 2010, the OARM has been repeatedly promising that a ruling could be issued by the OARM in the next several months. Years have literally passed since those representations were made by OARM. In the *Turner* matter, it took almost an entire decade for that case to go through the administrative process. The length of time it takes to decide FBI whistleblower cases through the OIG-OARM-DAG process under Part 27 is in itself a deterrent and chilling effect on the right of other employees to report misconduct.

Additionally, there are no published opinions leaving claimants in the dark about OARM and DAG precedents, while giving the FBI (which has access to all of the opinions issued by the OARM and DAG) a distinct litigation advantage over employees and counsel for complainants. While the statute also requires the Attorney General to provide the President with annual reports about the program, these reports are not published or otherwise made available to the public. When the National Whistleblower Center attempted to obtain copies of the decisions entered by the OARM and copies of the annual reports on the DOJ's whistleblower program for FBI employees, the DOJ responded by invoking Exemption 5 of the Freedom of Information Act and DOJ also claimed the annual reports were exempt from disclosure under the Presidential communications privilege, or executive privilege.

2. Scope of Protected Activity

The Attorney General is required to properly define the scope of protected whistleblower conduct in a manner consistent with applicable law. This definition should incorporate the full array of activities which the President of the United States, Congress, the DOJ and the federal courts have already determined are protected whistleblower activities for FBI agents and law enforcement officials.

Unfortunately, 28 C.F.R. Part 27 does not meet the standards of the applicable laws and the WPA because it does not protect employees who report wrongdoing to their FBI supervisors. As a result of the hypertechnical definition of protected disclosure under Part 27 employees have had their claims dismissed due to this flaw in the DOJ regulations. To correct this deficiency, the DOJ should adopt language similar to the definition of protected disclosure in the Presidential Policy Directive/PPD-19, to state that protected disclosure under Part 27 includes the "disclosure of information by the employee to a supervisor in the employee's direct chain of

command up to and including the head of the employing agency"). The PPD definition of a protected disclosure is consistent with the definition of protected disclosures for which "prohibited personnel practices" are prohibited under 5 U.S.C. §§ 1214 and 1221.

Amending the DOJ regulations to define protected disclosures to include disclosures to supervisors in their chain of command up to and including the head of the agency would also be consistent with the controlling Executive Order concerning mandatory federal employee disclosures of wrongdoing, and other agency regulations, which state that all federal employees, generally, including FBI employees and FBI agents, should report "indications" of wrongdoing to any of the following persons: the Director of the FBI, the DOJ or FBI Offices of Professional Responsibility, and/or an employee's supervisors. *See* Executive Order 12731 § 101(k); 5 C.F.R. § 2635.101; and 57 *Federal Register* 35006 (August 7, 1992).

In addition to these self-evident contact points, the regulations must provide protections to employees who contact members of Congress pursuant to law. Congress has passed a specific statute allowing federal employees to disclose wrongdoing to Congress. This statue states as follows:

> The right of employees individually or collectively, to petition Congress of a Member of Congress, or to furnish information to either House of Congress, or to a committee of Member thereof, may not be interfered with or denied.

5 U.S.C. § 7211. *Also see* 5 U.S.C. § 2302.

Moreover, the courts of the United States have consistently held that the First Amendment protects federal employees, including FBI agents, from reprisals based on constitutionally protected speech. The DOJ regulations must incorporate these judicial decisions and insure that FBI employee's who "blow the whistle" consistent with judicially accepted First Amendment protected conduct governing law enforcement officers, are fully protected.

The DOJ regulations concerning FBI whistleblowers must incorporate the case law, statutory provisions and current regulatory procedures and that FBI agent whistleblowing activity is protected in a manner consistent with current law.

3. Specific Recommendations.

The following recommended changes to the DOJ regulations are necessary to improve the efficiency of processing cases, to avoid lengthy delay and provide due process rights that are currently lacking:

- **Due Process Hearings and APA Review:** Unless waived by the complainant, each whistleblower claim should be afforded a full, on-the-record hearing before a statutory Administrative Law Judge ("ALJ"). All proceedings, whether before an ALJ, the OARM or the DAG are subject to Administrative Procedure Act ("APA") standards.
- **Independent Statutory ALJs:** The functions of the Director of OARM in the DOJ regulations shall be carried out by one or more statutory ALJ's, as needed, depending on the volume of cases at the OARM.
- **Reasonable Deadlines for Decisions:** The processing of cases by an ALJ (or before the OARM) shall be subject to reasonable regulatory time limits of 240 days to complete the administrative processing of the complaint: conducting discovery and initiating a hearing. Furthermore, the recommend decision should be issued within 90 days of the close of the record. The entire process should be completed within one year. The time limits for processing DAG reviews should be 60 days from completion of briefing. These time limits should be for the benefit of the complainant and be extended only by consent of the complainant. Reasons for granting specific

extensions should include the necessity of completing discovery and delays that may be caused by a employee's attempt to locate an attorney.

- **Reporting Findings of Wrongdoing:** Any final decision by the DAG making a finding of whistleblower reprisal resulting from an adjudication of a private right of action appeal under 28 C.F.R. Part 27 shall be forwarded to the OIG, or other appropriate law enforcement authority, who shall take prompt action against the wrongdoers. 5 U.S.C. § 1221(f)(3).
- **Judicial Review:** The WPA provides for judicial review of private right of action cases. Such review must also be allowed in FBI whistleblower cases. Under the Administrative Procedure Act, 5 U.S.C. §§ 702 and 704, this review should occur in the federal district court in which the alleged reprisal occurred. In fact, this review is required as a matter of law. *Japan Whaling Ass'n v. American Cetacean Soc.,* 106 S.Ct. 2860, 2866, n. 4 (1986).
- Make Annual Reports Public: Each of the annual reports required by 5 U.S.C. 2303(c) regarding the FBI whistleblower program should be made available to the public.
- **Publish Decisions:** The decisions and orders entered by the OARM, the DAG, or any other administrative judge or administrative authority in cases filed under 28 C.F.R. Part 27, should be made available to the public, at least in redacted form to protect the identity of employees, agents and claimants. Employees must know what the legal standards are in FBI whistleblowers cases, both so they can ensure that they properly engage in protected activity and so they can defend their cases in the Part 27 proceedings.

- **Level the Playing Field on Access to Former FBI employees as Witnesses:** In many cases, the FBI calls former FBI management officials or employees as witnesses against the complainant, either through affidavit or in testimony at a hearing. In other cases, where the complainant seeks to take the deposition of the former FBI employee the FBI takes the position that it cannot be forced to compel the deposition of former managers or employees even in cases where the FBI will call that former employee to testify against the employee at a hearing. There should be a uniform rule to level the playing field. If the FBI is to rely on the testimony of a former employee at a hearing it should either be required to produce that former employee for deposition or waive its right to call that witness at the hearing. In addition, the OARM procedures must be changed to require the production of government-wide employees (i.e., any government employee who does not work for FBI or DOJ).
- **Change the Appeal Process In Cases Where the OIG Rules in Favor of the Complainant:** In cases where the OIG rules in favor of the complainant the FBI takes the position that it cannot take corrective action until the OARM process is completed because OARM review in such cases is automatic. The DOJ regulations should be modified to require Alternative Dispute Resolution and to clarify that the FBI does not have to contest a decision of the OIG on the grounds that review is automatic. The FBI should be encouraged to adopt the findings of the OIG when the OIG rules in favor of the complainant.
- **Change the Definition of Protected Disclosures:** For the reasons set forth in more detail herein , the definition of protected disclosure in 28 C.F.R. Part 27 should be

amended to include the protection of reports made by employees to their supervisors to make the DOJ regulations consistent with the November 2012 WPEA amendments, and with the Presidential Policy Directive. *See* 5 U.S.C. § 2302; PPD-19, p. 7 (defining "protected disclosure" to include a "disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency"). There is case precedent which holds that reports to supervisors are the "first step" in a reporting process which could ultimately lead to a disclosure to the statutorily defined protected entity. *See Phillips v. Interior Board*, 500 F.2d 772, 778 (D.C. Cir. 1974). In other words, although the statute may require a report to the Director of the FBI or an SAC, a report to an ASAC or a Supervisory Special Agent clearly is the "first step" in filing a report with the higher levels of authority. The definition of protected disclosures should follow this common sense rule.

- **Change the Definition of Personnel Actions:** A change should be made to 28 C.F.R. 27.2 to include all of the adverse actions currently covered under the WPA, 5 U.S.C. §2302(a)(2)(i) through (xii). Currently, Part 27 only covers the adverse actions listed in sections (i) through (xi) of §2302(a)(2). *See* 28 C.F.R. § 27.2(b).
- **Make Remedies Consistent With WPEA:** Remedies in 28 C.F.R. §27.4(f) should be changed to include "compensatory damages (including interest, reasonable expert witness fees, and costs)." Also, remedies in 28 C.F.R. § 27.4 should also be changed to add the remedies for findings of retaliatory investigations that were added as part of the WPEA and that now appear at 5 U.S.C. § 1221(g)(4) ("Any corrective action … may include fees, costs, or damages reasonably incurred due to an agency

investigation of the employee if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action."). These changes are required by law to make Part 24 consistent with the corrective action and remedies available in 5 U.S.C. § 1221.

- **Establish An Effective ADR Program:** While the OARM operating procedures make reference to "mediation" it is rarely used and Alternative Dispute Resolution ("ADR") is not a priority or an effective part of the current program. There exist opportunities at all stages of the proceedings, before OIG, OARM and DAG to institute effective ADR. For example, if the OIG is about to find in favor of an employee it presents a good opportunity to refer the matter for ADR. In addition, the use of ADR should be encouraged as an alternative to litigation before the OARM and DAG levels of review. If the DOJ does not have ADR capabilities it should consult with the OSC as to how to effectively implement an ADR program.
- **Implement Mandatory Trainings:** Mandatory training on employee rights under the WPA should be provided on a regular basis as part of regular trainings given to FBI employees, managers and supervisors on government ethics and/or equal employment rights. The OSC should be consulted on such trainings. In addition, there should be annual mandatory training of OIG personnel who work in the FBI whistleblower protection program. Such training should be conducted by the OSC to promote consistency between the rights afforded employees under 5 U.S.C. § 1214.

Without a strong and independent "private right of action" remedy, the DOJ's regulations would violate the WPA and undermine Congress' intent to provide FBI employees with the equivalent rights afforded other federal employees under the WPA. 5 U.S.C. § 2303(c).