Office of the Inspector General
United States Department of Justice

Statement of

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before the

House Committee on Government Reform
Subcommittee on National Security, Emerging Threats, and International Relations

concerning

The Office of the Inspector General's Role in Investigating Whistleblower Complaints in the Federal Bureau of Investigation

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Mr. Chairman, Congressman Kucinich, and Members of the Subcommittee on National Security, Emerging Threats, and International Relations:

Thank you for inviting me to testify about the Department of Justice (Department or DOJ) Office of the Inspector General's (OIG) procedures for investigating whistleblower complaints in the Federal Bureau of Investigation (FBI). Whistleblowers serve as an important resource to the OIG in our oversight of the Department of Justice by helping to identify potential deficiencies in Department programs and operations or potential misconduct by Department employees and contractors.

With respect to FBI whistleblowers, the OIG plays a central role in investigating their allegations of retaliation. Although FBI employees are specifically excluded from the Whistleblower Protection Act of 1989 (which covers most other federal employees), Congress required, and the Department has implemented, a separate process for investigating allegations from FBI employees who complain of retaliation for making whistleblower disclosures. As discussed in my testimony, according to regulations established by the Department of Justice in 28 C.F.R. Part 27, the OIG and the Department's Office of Professional Responsibility (DOJ OPR) share responsibility for investigating allegations of reprisal raised by FBI whistleblowers.

In this statement, I will summarize the current whistleblower procedures applicable to FBI employees and describe how the OIG reviews and investigates claims of retaliation by FBI employees. Second, I also will explain the OIG's role in handling complaints under the Intelligence Community Whistleblower Protection Act. Third, I will address revocation of security clearances in retaliation for protected whistleblower disclosures and explain the procedures that would apply to an FBI employee making those claims within the Department of Justice.

I. OVERVIEW OF FBI WHISTLEBLOWER PROCEDURES

In amending the Civil Service Reform Act of 1978 (CSRA), the Whistleblower Protection Act of 1989 (WPA) established the United States Office of Special Counsel (OSC) as an independent Executive Branch agency. Separate from the Merit Systems Protection Board (MSPB), OSC has the authority to investigate and seek relief for prohibited personnel practices, including retaliation against whistleblowers. Most federal employees who believe they have been subjected to reprisal for making a protected disclosure under the WPA may request an investigation by OSC or, in appropriate circumstances, pursue an individual right of action before the MSPB. See 5 U.S.C. §§ 1214 and 1221. This is the process that most DOJ employees, except those from the FBI, would follow if they believe that they have been retaliated against for making a protected disclosure. In these cases, the OIG normally has no role in reviewing the alleged retaliation.

However, the WPA does not cover employees of agencies excluded from the CSRA, such as the FBI, the Central Intelligence Agency, and several other intelligence agencies. See 5 U.S.C. § 2302(a)(2)(C). Instead, the CSRA directed the Attorney General to promulgate regulations to ensure that FBI employees who make protected disclosures are not retaliated against "in a manner consistent with applicable provisions of sections 1214 and 1221 of [Title 5]," the provisions which govern OSC investigations of alleged retaliation for protected disclosures, the corrective actions that may be taken, and the individual rights of action that may be pursued.

In 1997, the President directed the Attorney General to develop the regulations specified in section 2303. See Presidential Memorandum, Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978. In response to the directive, the Attorney General issued policies that authorized the OIG or DOJ OPR to investigate retaliation complaints from FBI employees, and the DOJ began developing regulations to implement the President's directive. In 1999, the Department promulgated these regulations, entitled "Whistleblower Protection for Federal Bureau of Investigation Employees," which in large measure are based on the pertinent provisions of the WPA. See 28 C.F.R. Part 27.

These FBI whistleblower regulations were designed to protect an FBI employee from retaliation for making disclosures that the employee reasonably believes evidences a "violation of any law, rule or regulation; or [m]ismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to the public health or safety."

In order to be considered a "protected disclosure" under the regulations, an FBI employee's complaint must be made to specified individuals or offices listed in the regulations. These individuals and offices are the Attorney General, Deputy Attorney General, FBI Director, FBI Deputy Director, the highest ranking official in any FBI field office, the OIG, DOJ OPR, or FBI OPR.

If the FBI employee makes a protected disclosure to one of these specified individuals or entities, the regulations prohibit any FBI or DOJ employee from taking or failing to take, or threatening to take or fail to take, a "personnel action" against the FBI employee as a reprisal for the protected disclosure. A personnel action includes promotion, discipline, transfer, termination, or any other significant change in duties.

If the employee believes that he or she has been the subject of a personnel action as a reprisal for making a protected disclosure, the employee may report the alleged reprisal to either the OIG or DOJ OPR. However, while the OIG receives some whistleblower complaints directly from FBI employees, many FBI complainants provide their allegations of retaliation to officials in the FBI, who forward them to the OIG and to DOJ OPR.[1]

Under the FBI whistleblower regulations, the OIG and DOJ OPR share responsibility for investigating allegations of whistleblower retaliation against FBI employees. When the OIG or DOJ OPR receives a complaint of retaliation by an FBI whistleblower, the OIG and DOJ OPR discuss the complaint and jointly decide whether the allegation is covered by under the FBI whistleblower regulations. If the complainant has made a protected disclosure and alleges reprisal for that disclosure, the OIG and DOJ OPR then jointly decide which of the two offices will conduct the investigation.

The investigation attempts to "determine whether there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure." 28 C.F.R. § 27.3(f). To investigate the allegations of retaliation, the OIG normally interviews the complainant, relevant witnesses, and the subject, and reviews pertinent documents. In addition to investigating allegations of retaliation raised by FBI employees, the OIG also can investigate the allegations contained in the underlying protected disclosure. These allegations are complex and often

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[1] Prior to 2004, FBI OPR received most of the complaints and referred them to the OIG and DOJ OPR. In a February 2004 restructuring of FBI OPR, the FBI moved FBI OPR's investigatory functions to the Internal Investigations Section of the Inspection Division. Currently, the OIG receives many of its whistleblower complaints directly from the FBI's Inspection Division.

require difficult judgments regarding the evidence to determine whether the underlying allegations can be substantiated.

Under the regulations, the OIG provides the FBI employee who raised the allegation of reprisal periodic reports during the course of the investigation about the status of the investigation.

At the completion of the investigation, the OIG provides the FBI employee with a statement of the proposed findings and conclusions, and the employee is given an opportunity to comment. The OIG then considers comments submitted by the complainant and makes any appropriate changes based on the comments. The OIG must then provide the complainant a final statement of the relevant facts, the conclusions, and a response to comments by the employee. The OIG's statement may not be used as evidence in any subsequent proceeding without the consent of the employee.

If the OIG or DOJ OPR finds reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure, the OIG or DOJ OPR transmits the report relating to the findings of retaliation to the Department's Director of the Office of Attorney Recruitment and Management (OARM), along with any recommendations for corrective action. Even if the OIG or DOJ OPR investigation does not find reasonable grounds to believe that there has been retaliation, the FBI whistleblower may present his complaint of retaliation and request for corrective action directly to OARM. In such a case, the OIG's findings are not considered as part of the process unless the complainant introduces it.

The regulations impose time limits on when the FBI employee can submit to OARM a request for corrective action. The employee must file the request either (a) within 60 days of receiving notification from the OIG or DOJ OPR that the office terminated the investigation into the retaliation complaint, or (b) any time after 120 days from the date that the employee first notified the OIG or DOJ OPR of the alleged reprisal.

For OARM to have jurisdiction to hear the claim, the employee must make a non-frivolous allegation that the employee made a protected disclosure that was a contributing factor in the FBI's decision to take a personnel action against the employee. Former FBI employees also may bring claims to OARM, so long as the protected disclosure, the alleged reprisal, and the report of the alleged reprisal to the OIG or DOJ OPR occurred during their FBI employment.

The employee and the FBI may engage in discovery pursuant to the OARM proceeding that is relevant to the employee's claim of

retaliation. The employee also may request a hearing, but OARM can decide the case based solely on written evidence.

For the OARM to order corrective action, it must find that the employee has proven by a preponderance of the evidence that the employee made a protected disclosure that was a contributing factor in the personnel action at issue. If so, the FBI can negate that finding by establishing by clear and convincing evidence that it would have taken the same personnel action against the employee in the absence of the protected disclosure.

If the employee is not satisfied with the determination of the OARM Director, the employee may appeal the matter to the Deputy Attorney General.

II. OIG'S HANDLING OF RETALIATION COMPLAINTS

In the last 5 years, the OIG has initiated more than 25 investigations into allegations of reprisal from FBI employees. The types of allegations of reprisal vary, ranging from complaints about a poor performance review to termination of the employee. We have devoted significant resources to these investigations over the years. They often involve a large number of interviews, polygraph and forensic examinations, and detailed reports setting forth our findings. The complaints involve complex issues that require significant time and resources to address, such as determining the motive for the personnel action. The investigators in these matters have the complicated and difficult task of trying to determine if the stated reasons for the personnel action are credible or if the actual motive was to retaliate for a protected disclosure.

The OIG generally does not publicize its findings from whistleblower investigations, given the FBI whistleblower requirements and the privacy interests of subjects, witnesses, and complainants. Nonetheless, we have provided several such reports to congressional committees in response to formal requests. As noted above, pursuant to the regulations, we also provide the complainant with our findings on the retaliation allegations.

The OIG views an allegation of retaliation as a serious matter. Even in cases where the complainant does not qualify for whistleblower protection under the regulations, the OIG can investigate the allegations. For example, in a matter involving Sibel Edmonds, an FBI contract linguist who did not qualify for whistleblower protection under the regulations because she was not a permanent FBI employee, the OIG investigated the matter and concluded that her allegations of misconduct

were at least a contributing factor in why the FBI terminated her services. The OIG also concluded that by terminating her under these circumstances, the FBI's actions could have the effect of discouraging others from raising similar concerns. We also have investigated other cases involving alleged retaliation that did not involve protected disclosures under the FBI whistleblower regulations, including allegations of retaliation raised by John Roberts, a former Unit Chief in FBI OPR.

III. INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTION ACT OF 1998

In addition to its responsibilities to review and investigate allegations raised by FBI whistleblowers, by statute the OIG is designated to receive and assess the credibility of complaints under the Intelligence Community Whistleblower Protection Act of 1998, which was codified as section 8H of the Inspector General Act.

Section 8H sets forth a procedure for employees and contractors of specified federal intelligence agencies, including the FBI, to report complaints or information to Congress about serious problems involving intelligence activities. Under the provisions of section 8H applicable to the FBI, an FBI employee or contractor who intends to report to Congress a complaint or information of "urgent concern" involving an intelligence activity may report the complaint or information to the DOJ OIG. Within a 14-day period, the OIG must determine "whether the complaint or information appears credible," and upon finding the information to be credible, thereafter transfer the information to the Attorney General who then submits the information to the House and Senate Intelligence Committees. If the OIG does not deem the complaint or information to be credible or does not transmit the information to the Attorney General, the employee may provide the information directly to the House and Senate Intelligence Committees. However, the employee must first inform the OIG of his or her intention to contact the intelligence committees directly and must follow the procedures specified in the Act.

The Act defines "urgent concern" as a "serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters"; a false statement to Congress; and taking or threatening to take certain personnel actions in retaliation for making the report to Congress.

Since this legislation was enacted in October 1998, the DOJ OIG has not received any complaints under this statute.

IV. REVOCATION OF EMPLOYEE SECURITY CLEARANCES AS A FORM OF REPRISAL

One of the topics of this hearing concerns retaliation against national security whistleblowers by arbitrarily suspending or revoking their security clearances. Since enactment of the FBI whistleblower regulations in 1999, the OIG has no record of receiving any complaints from FBI employees who have alleged that their security clearances were suspended or revoked in retaliation for making a protected disclosure.

The Supreme Court ruled in a 1988 decision that the MSPB did not have authority to review a personnel action that involved revoking or denying an employee's security clearance. Case law involving the MSPB is not binding on OARM, but according to OARM's website such case law is "instructive." Under this interpretation, revoking an employee's security clearance in retaliation for a protected disclosure would not qualify as a "prohibited personnel action" under the FBI whistleblower regulations. Nevertheless, the OIG would have the authority to investigate an allegation that an employee's security clearance had been revoked in reprisal for a protected disclosure under its general authority to investigate allegations of misconduct, fraud, waste, or abuse within the Department.

Within the FBI, the Personal Security Adjudication Section of the FBI's Security Division makes determinations about revocations or denials of employee security clearances. In the last two years, the FBI Security Division revoked the security clearances of six employees and three contractors. According to officials in the Security Division, the most common reason for revoking a security clearance is concern about the employee's financial responsibilities. The FBI officials also said that they were not familiar with any case in which an employee alleged that revocation or denial of a security clearance was in retaliation for a protected disclosure.

Pursuant to Executive Order 12968 (1995) and 28 C.F.R. Part 17, the Department of Justice has implemented a process for reviewing security clearance revocations and denials involving DOJ employees, including those at the FBI. In 1997, the DOJ created the Access Review Committee (ARC) to hear appeals from DOJ employees whose security clearances have been revoked or denied by any DOJ component, including the FBI. The ARC hears several appeals each year, and appeals from FBI employees represent the highest number among the DOJ components. In preparation for this hearing, we asked several officials affiliated with the ARC whether they were aware of any appeal in which the employee alleged that the revocation was retaliation for a

protected disclosure. These officials said they did not believe there have been any such complaints.

In conclusion, whistleblowers who raise good-faith allegations of misconduct about activities at their agencies play an important role in ensuring transparency and accountability throughout government. The OIG will continue to expend significant resources to investigate allegations of whistleblower retaliation raised by FBI employees.

This concludes my statement, and I would be pleased to answer any questions.