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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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September 20, 2017

**VIA ELECTRONIC TRANSMISSION**

The Honorable Jeff Sessions  
Attorney General  
U.S. Department of Justice  
Washington, D.C.

Dear Attorney General Sessions:

In response to Presidential Policy Directive 19 of October 2012 (“PPD-19”),<sup>1</sup> the Department of Justice examined the effectiveness of the FBI whistleblower regulations in an April 2014 report (DOJ Report) to President Obama.<sup>2</sup> The Department released its report on October 17, 2014, following a request from Senators Grassley and Wyden.<sup>3</sup> The DOJ Report outlined the Department’s review of the current regulations, policies, and procedures governing the receipt, investigation, and adjudication of FBI whistleblower complaints.<sup>4</sup> The report also analyzed the Department’s handling of those complaints, identified key systemic problems and challenges in protecting FBI whistleblowers under the agency’s current regulations and practices, and suggested eleven recommendations for improvement.<sup>5</sup>

The DOJ Report, along with a comprehensive review conducted by the Government Accountability Office (GAO), determined that regulatory limits should be expanded regarding who may receive “protected disclosures” from FBI employees.<sup>6</sup> The expansion was intended to retain the benefit of channeling on-site disclosures to persons with authority to redress wrongdoing once identified.<sup>7</sup> However, the Department did not expand the definition of persons

<sup>1</sup> The White House, Presidential Policy Directive/PPD-19 (Oct. 10, 2012), at 5 [Hereinafter “PPD-19”].

<sup>2</sup> Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014) [Hereinafter “DOJ Report”], available at: <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/Whistleblowers.%2010-21-14.%20DoJ%20Response.%20report%20to%20CEG.%20RW%20request%20for%20release%20of%20PPP19%20report.pdf>.

<sup>3</sup> Letter from P. Kadzik to C. Grassley and R. Wyden (Oct. 17, 2014) [Hereinafter “Letter re: DOJ Report”], available at: <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/Whistleblowers.%2010-21-14.%20DoJ%20Response.%20report%20to%20CEG.%20RW%20request%20for%20release%20of%20PPP19%20report.pdf>.

<sup>4</sup> DOJ Report at 4-7.

<sup>5</sup> *Id.* at 7-19; Letter re: DOJ Report at 2-4.

<sup>6</sup> DOJ Report at 13; U.S. Gov’t Accountability Office, GAO-15-112, Whistleblower Protection: Additional Actions Needed to Improve DOJ’s Handling of FBI Retaliation Complaints 18 (2015) [Hereinafter “GAO Report”].

<sup>7</sup> *Id.* at 13.

to whom a protected disclosure may be made to include an FBI employee's immediate supervisor, and therefore, many whistleblower complaints were dismissed when employees followed FBI policy and reported wrongdoing through their chain of command.<sup>8</sup> The Congress addressed this issue when it passed the FBI Whistleblower Protection Enhancement Act in December 2016, a bill that I co-authored with my colleague, then-Ranking Member Patrick Leahy.<sup>9</sup> The FBI WPEA clarified that Congress intended to protect FBI employees for disclosing wrongdoing to supervisors and officers within their chain of command, the Office of Special Counsel (OSC), and Members of Congress.<sup>10</sup>

While the Department has taken initial steps to improve the timeliness and effectiveness of its whistleblower program, it has failed to implement most of its own recommendations. Therefore, I write today to inquire about the status and effectiveness of the Department's programmatic efforts to improve the whistleblower program as well as the timeline of expected regulatory updates.

### **Program Improvements**

The DOJ Report noted several changes the Department could enact on its own to improve the whistleblower program for FBI employees, including jumpstarting a mediation program, updating its training, and hiring additional staff. According to the DOJ report, in the spring of 2014, the Department launched a "voluntary mediation program" for FBI whistleblowers.<sup>11</sup> The aim of the program is to assist in resolving cases in a timely manner, particularly where the positions of the two parties are not very far apart. The GAO review found that two complainants pursued mediation, though since their cases were still pending, it was too soon to analyze the overall impact of the program.<sup>12</sup>

The Department also stated its intention to improve training for FBI employees by providing the appropriate information on how to make protected disclosures and increasing employee awareness of the whistleblower program. According to DOJ, the agency has finally updated its training as of August 2017 to reflect the changes in the law that now explicitly protects disclosures to supervisors as well as to the OSC and Congress.<sup>13</sup>

Lastly, to help improve delays in case processing time, the Department reported that it hired an additional part-time attorney to work on adjudicating reprisal cases at the Department's Office of Attorney Recruitment and Management (OARM).<sup>14</sup> While OARM officials reported that they have reduced overall case processing times, "in good part because of the work of the

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<sup>8</sup> DOJ Report at 13; GAO Report at 14, 19 n. 41 (citing Policy Directive 0032D, Non-Retaliation for Reporting Compliance Risks (Feb. 11, 2008) and Policy Directive 0727D Update (Sept. 23, 2014)).

<sup>9</sup> S. 2390, 114th Cong. (as of April 2016).

<sup>10</sup> *Id.*

<sup>11</sup> DOJ Report at 11-12.

<sup>12</sup> GAO Report at 28.

<sup>13</sup> Letter from Gregory A. Brower, Assistant Director, Office of Congressional Affairs, Federal Bureau of Investigation to Charles E. Grassley, Chairman, U.S. Sen. Comm. on the Judiciary (May 16, 2017); Act of Dec. 16, 2016, Pub. L. No. 114-302 (130 Stat. 1516).

<sup>14</sup> DOJ Report at 17-18.

part-time attorney,”<sup>15</sup> no further information was provided about how the Department came to assess the impact of this additional staff assistance.

### **Changes Under Consideration**

The Department indicated it would explore the possibility of additional changes that did not require formal rulemaking, including, for example, publishing OARM decisions, adjudicating FBI whistleblower reprisal complaints, and holding hearings in reprisal cases.

Since the Department does not publish OARM decisions, FBI whistleblowers do not have access to any body of case precedent should they suffer reprisal and choose to seek relief. The FBI, by contrast, can readily draw upon case precedent, which creates a significant imbalance in the fairness of these proceedings. The Department stated in its report that it would consider publicizing decisions, but noted that the process would be difficult due to the presence of law enforcement sensitive and other private information.<sup>16</sup> However, in October 2013, the Department provided a publicized decision in response to a motion for public disclosure, and thus, is plainly capable of preparing its decisions for public release. To date, the Department has not published any additional decisions or committed to doing so. Yet, statute, case law, and FOIA guidelines all indicate that the Department should be publishing these decisions consistent with the requirements of FOIA and the practice of the Merit Systems Protection Board (MSPB).<sup>17</sup>

Additionally, the Department has discretionary power over its decision to grant a whistleblower a hearing. In its report, the Department rejected whistleblower advocates’ recommendation to grant whistleblowers hearings in all cases upon request, but agreed to consider whether it should establish a set of criteria to use when deciding whether to grant a hearing or not, such as the need to evaluate the credibility of witnesses.<sup>18</sup>

### **Recommended Regulatory Amendments**

The statutory protections for FBI whistleblowers have always required that the President “provide for the[ir] enforcement . . . in a manner consistent with applicable provisions of sections 1214 and 1221 of . . . title [5].”<sup>19</sup> The Department’s regulations, however, unduly narrowed those provisions when it applied them to the FBI and failed to update those regulations consistent with the enactment of the Whistleblower Protection Enhancement Act (WPEA) of 2012.<sup>20</sup> Thus,

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<sup>15</sup> GAO Report at 29.

<sup>16</sup> DOJ Report at 18.

<sup>17</sup> 5 U.S.C. § 552(a)(2)(A) (2012) (requiring that final opinions in the adjudication of cases be made available for inspection and copying); *see also* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-54 (1975) (observing that the proactive disclosure provision “represents a strong congressional aversion to ‘secret [agency] law,’ . . . and represents an affirmative congressional purpose to require disclosure of documents which have ‘the force and effect of law’” (quoting H.R. Rep. No. 89-1497, at 7 (1966)); Memorandum from Attorney General Holder on FOIA Guidelines (Mar. 19, 2009), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> (“[A]gencies should readily and systematically post information online in advance of any public request.”).

<sup>18</sup> DOJ Report at 20; 28 C.F.R. 27.4(e)(3).

<sup>19</sup> 5 U.S.C. § 2303(c) (2012).

<sup>20</sup> Pub. L. No. 112-199, § 104, 126 Stat. 1465, 1468-69 (inserting “any other any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs)” and providing that corrective action “may include may include fees, costs, or damages reasonably incurred due to an agency investigation of the

the WPEA amendments providing for the award of compensatory damages and certain fees and costs for other Title 5 whistleblowers, were not incorporated into the Department's regulations for FBI employees.<sup>21</sup> According to its 2014 Report, the Department supported amending its regulations to provide for compensatory damages in addition to other available relief, but has not acted on that commitment.<sup>22</sup> Notably, the Department did not commit to amend its regulations consistent with section 1221(g) (4), also as amended in 2012, which provides for corrective action to "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."<sup>23</sup> It is worth noting again, however, that such corrective action has been available since the passage of the WPEA given the statute's incorporation of those sections.

In addition, the Department recommended "formalizing" its mediation program, and its process of referring reprisal findings to the FBI's Director and Office of Professional Responsibility (OPR), to allow for disciplinary action against retaliators,<sup>24</sup> and implementing "show cause" orders such as those used in MSPB proceedings for other Title 5 employees to resolve jurisdictional questions more efficiently.<sup>25</sup> The Department also stated it would "consider" amending its regulations to level the playing field for FBI whistleblowers who traditionally have been unable to cross examine or depose witnesses relied on by the FBI because they left the Bureau.<sup>26</sup>

The Committee requires additional, updated information about the status of all efforts to implement the Department's recommendations and address outstanding issues regarding the FBI whistleblower protection program. Accordingly, please provide written responses to the following questions by October 4, 2017 about the status of all ongoing efforts to address these issues within the FBI whistleblower program.

1. What steps has the Department taken to measure the effectiveness of its efforts to improve the resolution of cases and decrease significant delays?
  - a. Please describe whether, and how, the mediation program has affected case processing.
  - b. Please provide the number of cases resolved through mediation since the program began compared to the number of complaints received.
  - c. Has the Department taken steps to obtain and document feedback from parties regarding the mediation program?
  - d. How has the addition of a part-time attorney affected case processing time and quality?

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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").

<sup>21</sup> See 28 C.F.R. 27.4(f).

<sup>22</sup> DOJ Report at 12.

<sup>23</sup> 5 U.S.C. § 1221(g)(4) (2012); see also 5 U.S.C. § 1214(h) (2012).

<sup>24</sup> DOJ Report at 11, DOJ Letter at 3.

<sup>25</sup> DOJ Report at 16-17.

<sup>26</sup> DOJ Letter at 3-4.

- e. The Department stated that it is almost “impossible”<sup>27</sup> to meet strict deadlines for adjudication due to the voluminous evidentiary records and complexity of these legal disputes, but it would make some procedural changes to decrease case processing times while preserving a degree of flexibility. Please explain any and all procedural changes that have been implemented, as well as the Department’s ongoing efforts to construct more flexible judicial deadlines.
2. GAO found that the Department failed to meet basic regulatory requirements for reporting and handling complaints in a timely manner, including acknowledging receipt of complaints, providing regular updates on complaint status, and reasonable grounds for determinations within 240 days. In response, OPR took steps to upgrade its case management system, however, it did not provide a clear implementation plan for systematically tracking investigators’ compliance with regulatory reporting requirements.
    - a. What progress is being made to track and monitor compliance with regulatory requirements within the Department?
    - b. How has OPR tailored its new case management system or otherwise developed an oversight mechanism to capture information on the office’s compliance with regulatory requirements?
  3. The Department concurred with GAO’s recommendation to provide parties with estimated time frames for returning decisions, however, to date, neither OARM nor the Deputy Attorney General (DAG) regularly provides complainants with time estimates for final decisions. Meanwhile, other federal agencies, including the MSPB and the Department of Defense Office of Inspector General, are statutorily required to provide time estimates and complete investigations within specified periods. When asked by the Committee about the Department’s failure to implement this recommendation, DOJ officials claimed that producing reasonable estimates was contingent upon case support and legal review from the Justice Management Division Office of General Counsel (JMD OGC), though DAG previously stated that it was itself responsible for providing time frame estimates.<sup>28</sup> According to the GAO report, OIG and OPR were able to provide the first status update within the 90-day time frame, but both offices failed to meet time frames for subsequent status updates.
    - a. Why is the Department unable to provide at least *some* complainants with case-specific estimates that take into account the specifics of the particular complaint?
    - b. What plans does the Department have to increase and improve communication between investigators and complainants within required time frames?

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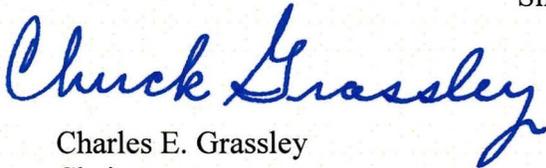
<sup>27</sup> DOJ Report at 20.

<sup>28</sup> Letter from Charles E. Grassley, Chairman, U.S. Senate Comm. on the Judiciary, to Sally Q. Yates, Deputy Attorney General, U.S. Dep’t. of Justice (Sept. 29, 2015), available at, [https://www.judiciary.senate.gov/imo/media/doc/2015-09-29%20CEG%20to%20DOJ%20\(Darin%20Jones%20Follow-Up\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2015-09-29%20CEG%20to%20DOJ%20(Darin%20Jones%20Follow-Up).pdf).

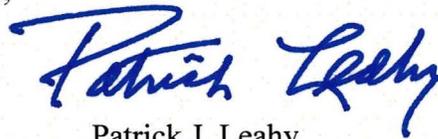
4. The Department rejected whistleblower advocates' recommendation that OARM grant all hearings upon request, citing witness credibility as the "most directly relevant factor"<sup>29</sup> for determining whether a hearing is held. Has the Department finalized a list of criteria to use when evaluating witness credibility? If yes, please provide a copy of those criteria. If not, why not?
5. Will the Department publish its decisions in FBI whistleblower cases? Why or why not? If so, when?
6. Please describe the steps that the Department has taken to implement each of its proposed regulatory changes.
7. While the Department disagreed with whistleblower advocates' recommendation that administrative law judges are necessary in order to ensure adjudications are impartial, it did agree to consider amending its regulations to "make explicit what has always been implicit regarding the independence and impartiality of OARM determinations."<sup>30</sup> What is the status of this recommendation? How does the Department intend to ensure employees have confidence in the "independence and impartiality of OARM determinations"?

Thank you in advance for your cooperation with this request. If you have questions, contact DeLisa Lay of my Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley  
Chairman  
Senate Judiciary Committee



Patrick J. Leahy  
Member  
Senate Judiciary Committee

cc: The Honorable Dianne Feinstein  
Ranking Member  
Senate Judiciary Committee

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 19.