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COMMITTEE ON THE JUDICIARY

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September 15, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Director Comey:

On March 4, 2015, this Committee convened a hearing entitled, “Whistleblower Retaliation at the FBI: Improving Protections and Oversight.”¹ At the hearing, the Committee obtained testimony regarding reports from the Justice Department² and the Government Accountability Office (GAO),³ which found that the Justice Department had dismissed a large number of otherwise valid reprisal complaints from Federal Bureau of Investigation (FBI) employees on technical grounds: namely, because the underlying disclosures were made to the “wrong person” under regulations unique to the FBI.

Independent of these technicalities, however, retaliation against an employee for reporting suspected wrongdoing violates FBI policy.⁴ Those who violate this policy should be punished. As such, following the hearing, I asked the FBI to provide information on its policy defining whistleblower retaliation as misconduct.⁵ I also asked for the number of instances in

¹ U.S. Senate Committee on the Judiciary, *Whistleblower Retaliation at the FBI: Improving Protections and Oversight*, Mar. 4, 2015, <http://www.judiciary.senate.gov/meetings/whistleblower-retaliation-at-the-fbi-improving-protections-and-oversight>.

² Department of Justice, *Department of Justice Report on Regulations Protecting FBI Whistleblowers*, at 7-8 (2014) [hereinafter “DOJ Report”].

³ Government Accountability Office, *Whistleblower Protection: Additional Actions Needed to Improve DOJ’s Handling of FBI Retaliation Complaints*, GAO-15-112, at 14, 53 (2015) [hereinafter “GAO Report”].

⁴ See the FBI’s February 11, 2008, Policy Directive 0032D, “Non-Retaliation for Reporting Compliance Risks,” and the September 23, 2014, 0727D update; see also the FBI’s “Offense Codes and Penalty Guidelines Governing the FBI’s Internal Disciplinary Process,” Offense Code 5.16 (Retaliation).

⁵ Questions for the Record from Chairman Charles E. Grassley for Associate Deputy Director Kevin Perkins, Senate Committee on the Judiciary, “Hearing on Whistleblower Retaliation at the FBI: Improving Protections and Oversight” (submitted Mar. 10, 2015).

which the FBI had imposed discipline for whistleblower retaliation.⁶ The FBI confirmed as follows:

FBI personnel are subject to discipline if they retaliate against employees who report concerns about compliance with applicable laws, regulations, or policies *regardless* of whether the report is made to someone in a position identified in the whistleblower regulations (28 C.F.R. Part 27) or to a direct supervisor or other official in the reporting employee's chain of command as provided for in policy directive 0727D.⁷

However, as of March 27, 2015, the FBI had disciplined only five employees for such retaliatory conduct since 2004.⁸ No individual had been punished for such retaliatory conduct since 2012.⁹ In the past year alone, the Committee has received complaints from whistleblowers that suggest that the number of FBI supervisors who should have been punished for retaliatory conduct since 2004 is far greater than five.

This discrepancy merits continued oversight over the FBI's discipline of those who retaliate against whistleblowers, because punishing such retaliators is necessary to change the culture of the Bureau and to send a clear message that retaliation will not be tolerated. Accordingly, please provide responses to the following by October 2, 2015:

1. What policy governs the investigation of alleged retaliation against FBI employees for reporting suspected wrongdoing, and the determination of any corresponding discipline of FBI employees who are found to have engaged in such retaliation? Specifically:
 - a. What factors are considered, and under what circumstances will an investigation and punishment be warranted for retaliation?
 - b. Please describe the process—including all responsible offices and officials—for conducting investigations of and disciplining those who retaliate against employees who report suspected wrongdoing.
 - c. On what basis may the Director, the Assistant Director of the Human Resources Division or the Disciplinary Review Board vacate or reduce a punishment ordered by the FBI's Office of Professional Responsibility?
 - d. Why were disciplinary actions vacated or reduced by the relevant appellate authority for cases in 2004, 2006 and 2009?
 - e. How can FBI employees request an investigation of those who have allegedly engaged in prohibited retaliation?
 - f. How does the FBI ensure that employees who request these investigations are not retaliated against for making that request?

⁶ *Id.*

⁷ Responses of the Federal Bureau of Investigation to Questions for the Record from Chairman Charles E. Grassley, Senate Committee on the Judiciary, "Hearing on Whistleblower Retaliation at the FBI: Improving Protections and Oversight" (current as of Mar. 27, 2015), at 12 (emphasis added).

⁸ *Id.*

⁹ *Id.*

2. For the four cases in which the Office of Attorney Recruitment and Management (OARM) found that retaliation had in fact occurred and ordered corrective action, as of March 15, 2014,¹⁰ and with respect to any additional cases for which corrective action has been ordered since that time, please answer the following:
 - a. In how many of these cases did the FBI investigate the alleged retaliation?
 - b. For each case in which the FBI did not investigate the alleged retaliation, please provide an explanation for that decision.
 - c. For each case in which the FBI did conduct such an investigation, please provide (i) the date(s) of the investigation(s), (ii) the office(s) that conducted the investigation(s), (iii) the number of individuals who were investigated, and (iv) the final disposition of each investigation, including penalty imposed, where applicable.
3. To date, how many complaints of FBI whistleblower retaliation have been dismissed, in whole or in part, because the FBI employee made a disclosure to an individual or entity not listed in 28 C.F.R. § 27.1?¹¹
 - a. In how many of these cases did the FBI investigate the alleged retaliation?
 - b. For each case in which the FBI did not investigate the alleged retaliation, please provide an explanation for that decision.
 - c. For each case in which the FBI did conduct such an investigation, please provide (i) the date(s) of the investigation(s), (ii) the office(s) that conducted the investigation(s), (iii) the number of individuals who were investigated, and (iv) the final disposition of each investigation, including penalty imposed, where applicable.
4. According to the abovementioned GAO report, FBI officials stated that the FBI has the authority to not only punish those who violate its policy prohibiting retaliation, but also to provide remedies to those who are retaliated against in violation of FBI policy.¹²
 - a. To date, how many FBI employees have received such remedies, separate and apart from any discipline imposed on the retaliator? Please provide a detailed description of each case in which a remedy was provided.
 - b. What policy governs the exercise of the FBI's authority to provide remedies to employees who claim they have been retaliated against for reporting suspected wrongdoing, in violation of FBI policy? What factors are considered, and under what circumstances will a remedy be provided?
 - c. What office or individual at the FBI is responsible for exercising this authority?
 - d. What types of remedies can the FBI provide?
 - e. How can FBI employees request the FBI to exercise this authority?

¹⁰ DOJ Report, at 9.

¹¹ GAO reviewed all FBI whistleblower retaliation complaints closed from calendar years 2009 through 2013. GAO Report, at 2. Of the 54 complaints where there was sufficient documentation for GAO to determine why the complaint was closed, it found that at least 23 complaints were dismissed, at least in part, because the complainant made the disclosure to an individual or entity not listed in the regulations. GAO Report, at 14, 53. DOJ's report noted that a "significant portion" of OIG complaints that were found non-cognizable was because the disclosure was not made to the proper individual or office. DOJ Report, at 7. The report did not characterize which portion of OPR complaints were closed based on this technicality. DOJ Report, at 8.

¹² GAO Report, at 15 n.34.

- f. What processes are in place to ensure that reprisal allegations are independently reviewed so that victims receive an appropriate remedy?
- g. How does the FBI ensure that employees who request such remedies are not retaliated against for making that request?

Please number your responses according to their corresponding questions. If you have any questions, please contact Jay Lim or DeLisa Lay of my staff at (202) 224-5225. Thank you.

Sincerely,



Charles E. Grassley
Chairman

cc:

The Honorable Sally Quillian Yates
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
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