



Report to the Chairman,  
Committee on the Judiciary,  
U.S. Senate

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January 2015

# WHISTLEBLOWER PROTECTION

## Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints

# GAO Highlights

Highlights of [GAO-15-112](#), a report to the Chairman, Committee on the Judiciary, U.S. Senate.

## Why GAO Did This Study

Whistleblowers help safeguard the federal government against waste, fraud, and abuse—however, they also risk retaliation by their employers. For example, in 2002, a former FBI agent alleged she suffered retaliation after disclosing that colleagues had stolen items from Ground Zero following the September 11, 2001, terrorist attacks. DOJ found in her favor over 10 years after she reported the retaliation. GAO was asked to review DOJ's process for handling such complaints.

GAO examined (1) the time DOJ took to resolve FBI whistleblower retaliation complaints, (2) the extent to which DOJ took steps to resolve complaints more quickly, and (3) the extent to which DOJ complied with certain regulatory reporting requirements.

GAO reviewed all DOJ case files for FBI whistleblower retaliation complaints DOJ closed from 2009 to 2013, and interviewed whistleblower attorneys, advocates, and government officials about the complaint process. The interview results are not generalizable.

## What GAO Recommends

Congress may wish to consider whether FBI whistleblowers should have means to seek corrective action if retaliated against for disclosures to supervisors, among others. Further, GAO recommends that DOJ clarify guidance to clearly convey to whom employees can make protected disclosures, provide complainants with estimated complaint decision timeframes, and develop an oversight mechanism to monitor regulatory compliance. DOJ and the Office of the Inspector General concurred with GAO's recommendations.

View [GAO-15-112](#). For more information, contact David Maurer at (202) 512-8777 or [maurerd@gao.gov](mailto:maurerd@gao.gov).

January 2015

## WHISTLEBLOWER PROTECTION

### Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints

## What GAO Found

The Department of Justice (DOJ) closed 44 of the 62 (71 percent) Federal Bureau of Investigation (FBI) whistleblower retaliation complaints we reviewed within 1 year, took up to 4 years to close 15 complaints, and took up to 10.6 years to close the remaining 3. DOJ terminated 55 of the 62 complaints (89 percent) and awarded corrective action for 3. (Complainants withdrew 4.) We found that DOJ terminated many (48 of 62) complaints we reviewed because they did not meet certain regulatory requirements. For example, DOJ terminated at least 17 complaints in part because a disclosure was made to someone in the employee's chain of command or management, such as a supervisor, who was not one of the nine high-level FBI or DOJ entities designated under DOJ regulations to receive such disclosures. Unlike employees of other executive branch agencies, FBI employees do not have a process to seek corrective action if they experience retaliation based on a disclosure of wrongdoing to their supervisors or others in their chain of command who are not designated officials. This difference is due, in part, to DOJ's decisions about how to implement the statute governing FBI whistleblowers. In 2014, DOJ reviewed its regulations and, in an effort to balance competing priorities, recommended adding more senior officials in FBI field offices to the list of designated entities, but did not recommend adding all supervisors. DOJ cited a number of reasons for this, including concerns about the additional resources and time needed to handle a possible increase in complaints if DOJ added supervisors. However, DOJ is already taking other steps to improve the efficiency of the complaint process. More importantly, dismissing retaliation complaints made to an employee's supervisor or someone in that person's chain of command leaves some FBI whistleblowers—such as the 17 complainants we identified—without protection from retaliation. By dismissing potentially legitimate complaints in this way, DOJ could deny some whistleblowers access to recourse, permit retaliatory activity to go uninvestigated, and create a chilling effect for future whistleblowers.

We also found that DOJ and FBI guidance is not always clear that FBI employees reporting alleged wrongdoing to a supervisor or someone in their chain of command may not be a protected disclosure. Ensuring that guidance always clearly explains to whom an FBI employee can report wrongdoing will help FBI whistleblowers ensure that they are fully protected from retaliation.

DOJ took from 2 to 10.6 years to resolve the 4 complaints we reviewed that DOJ adjudicated, and DOJ did not provide complainants with estimates of when to expect DOJ decisions throughout the complaint process. Providing such estimates would enhance accountability to complainants and provide additional assurance about DOJ management's commitment to improve efficiency.

Further, DOJ offices responsible for investigating whistleblower retaliation complaints have not consistently complied with certain regulatory requirements, such as obtaining complainants' approvals for extensions of time. One investigating office does not track investigators' compliance with specific regulatory requirements and does not have a formal oversight mechanism to do so. Effectively monitoring investigators' compliance with such requirements could help assure complainants that their cases are making progress and that they have the information they need to determine next steps for their complaints.

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### Abbreviations:

DAG	Deputy Attorney General
DOD-OIG	Department of Defense Office of the Inspector General
DOJ	Department of Justice
DOJ-OPR	DOJ Office of Professional Responsibility
EEO	Equal Employment Opportunity
FBI	Federal Bureau of Investigation
FBI-INSD	FBI Inspection Division
MSPB	U.S. Merit Systems Protection Board
OARM	Office of Attorney Recruitment and Management
ODAG	Office of the Deputy Attorney General
OIG	Office of the Inspector General
OSC	U.S. Office of Special Counsel

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January 23, 2015

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate

Dear Mr. Chairman:

Whistleblowers play an important role in safeguarding the federal government against waste, fraud, and abuse, and their willingness to come forward can contribute to improvements in government operations. However, whistleblowers also risk retaliation from their employers, sometimes being demoted, reassigned, or fired as a result of their actions. In 1998, the Department of Justice (DOJ) issued regulations that set forth the process for Federal Bureau of Investigation (FBI) whistleblowers to report complaints of retaliation for their disclosures.<sup>1</sup> These regulations require that FBI whistleblower retaliation complaints be directed to DOJ's Office of the Inspector General (OIG) or Office of Professional Responsibility (DOJ-OPR) for investigation and provide specific timeliness and reporting requirements for these offices to meet as they manage these complaints. The regulations also establish roles for the Director of DOJ's Office of Attorney Recruitment and Management (OARM) and the Deputy Attorney General (DAG). In some instances, the total process for resolving a complaint—including investigation, adjudication, and appeals—has taken several years. For example, in 2002, former FBI agent Jane Turner filed a whistleblower complaint with DOJ alleging that her colleagues had stolen items from Ground Zero after the September 11, 2001, terrorist attacks. After making this whistleblower disclosure, she was given a "does not meet expectations" rating, placed on leave, and given a notice of proposed removal. According to Ms. Turner's attorneys, she retired from the FBI in order to avoid formal termination being placed on her record. Ms. Turner filed a whistleblower

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<sup>1</sup>Whistleblower Protection For Federal Bureau of Investigation Employees, 63 Fed. Reg. 62,937 (Nov. 10, 1998). DOJ initially issued these regulations as an interim rule effective upon publication in the *Federal Register*; however, DOJ invited postpromulgation comments that were addressed in a final rule issued in 1999. Whistleblower Protection For Federal Bureau of Investigation Employees, 64 Fed. Reg. 58,782 (Nov. 1, 1999) (codified as amended at 28 C.F.R. pts. 0, 27).

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retaliation complaint that DOJ ultimately found in her favor in 2013—over 10 years later. Members of Congress and whistleblower advocates have raised questions about the length of time it takes DOJ to investigate and adjudicate FBI whistleblower retaliation complaints.

To assist Congress in overseeing DOJ's efforts to protect FBI whistleblowers, you asked us to examine DOJ's process for handling FBI whistleblower retaliation complaints. Specifically, our report examines:

- how long DOJ has taken to resolve FBI whistleblower retaliation complaints and what factors have affected these time frames;
- the extent to which DOJ has taken steps to resolve complaints more quickly and determine the impact of any such efforts; and
- the extent to which DOJ's OIG and DOJ-OPR have complied with regulatory reporting requirements.

To determine how long DOJ has taken to resolve FBI whistleblower retaliation complaints and the factors that affected these time frames, we reviewed DOJ case files for all FBI whistleblower retaliation complaints closed within the last 5 calendar years (from 2009 through 2013), and calculated the duration of each complaint from initial filing to appeal, as applicable; the length of time between interim steps throughout this process; and factors affecting the time frames in each case, among other things. Specifically, we reviewed a total of 62 closed cases representing 62 complaints. In addition, we reviewed documentation, such as internal procedures and memos, and interviewed senior DOJ officials in each of the four offices responsible for investigating or adjudicating whistleblower retaliation complaints—OIG, DOJ-OPR, OARM, and the Office of the Deputy Attorney General (ODAG)—about the factors that affected these time frames and DOJ's process for handling these complaints and compared aspects of this process against standards in *Standards for Internal Control in the Federal Government*.<sup>2</sup> Because of the sensitivity of FBI whistleblowers' identities, to obtain whistleblower perspectives on these issues, we met with representatives of five whistleblower advocacy groups knowledgeable about DOJ's process and attorneys who have

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<sup>2</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: Nov. 1, 1999). These standards define the minimum level of quality acceptable for internal control in government and provide the basis against which internal control is to be evaluated. Internal control refers to the plans, methods, and procedures used to achieve missions, goals, and objectives.

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represented three FBI whistleblowers through this process.<sup>3</sup> We identified the representatives of five whistleblower advocacy groups using an iterative process often referred to as snowball sampling. At each interview, we solicited names of additional groups to interview and selected for interviews those that were most widely recognized as knowledgeable about DOJ's process. The information we gathered from these groups and attorneys—referred to throughout our report collectively as eight whistleblower advocates and attorneys—is not generalizable, but provides perspectives on whistleblowers' experiences with DOJ's process.<sup>4</sup>

To determine the extent to which DOJ has taken steps to resolve complaints more quickly, we interviewed DOJ officials responsible for handling these complaints about the factors that affect the timely processing of these complaints and steps DOJ has taken to address them. In addition, to identify any practices that have improved timeliness in comparable federal settings, we interviewed senior officials in the Department of Defense Office of the Inspector General (DOD-OIG) as well as the U.S. Office of Special Counsel (OSC) and the U.S. Merit Systems Protection Board (MSPB)—federal agencies that handle whistleblower retaliation complaints for other federal employees—about those agencies' processes for handling whistleblower retaliation complaints. To identify the extent to which DOJ officials have taken steps to determine the impact of their efforts to improve timeliness, we interviewed DOJ officials and reviewed DOJ's April 2014 report to the

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<sup>3</sup>The five whistleblower advocacy groups we interviewed were the American Civil Liberties Union, the Brennan Center for Justice at New York University School of Law, the Government Accountability Project, the National Whistleblowers Center, and the Project on Government Oversight. The attorneys we interviewed represented FBI whistleblowers in 3 of 5 cases where complainants have alleged retaliation and obtained corrective action since DOJ issued its regulations in 1998. (In 1 case the complainant represented his/her self and so did not have an attorney, and in another case, the attorney was unable to meet because of schedule conflicts.)

<sup>4</sup>Two representatives of a whistleblower advocacy group also represented an FBI whistleblower who obtained corrective action. Therefore, the eight whistleblower advocates and attorneys referred to throughout our report include four representatives of whistleblower advocacy groups, two attorneys who represented FBI whistleblowers, and two attorneys who represent a whistleblower advocacy group and have also represented an FBI whistleblower who obtained corrective action.

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President and compared DOJ's stated plans to standards in *Standards for Internal Control in the Federal Government*.<sup>5</sup>

To determine the extent to which OIG and DOJ-OPR have complied with regulatory reporting requirements, we compared evidence we saw in DOJ's case files with DOJ's regulations and analyzed the extent of any discrepancies. Specifically, for each case file, we reviewed the office's documented communication with the complainant including initial and ongoing outreach, and any interim and final notices that the agency closed or declined the case, as applicable. We also reviewed documentation and interviewed OIG and DOJ-OPR officials responsible for handling these complaints about any oversight mechanisms to ensure compliance with regulatory requirements. Further, we interviewed eight whistleblower advocates and attorneys, as noted above, to obtain whistleblower perspectives on the extent and effects of DOJ's compliance with regulatory requirements. In addition, because OSC serves a comparable function to that of OIG and DOJ-OPR in handling whistleblower complaints for most other federal employees and has similar regulatory reporting requirements, we interviewed OSC officials about their processes and mechanisms for ensuring compliance with OSC's requirements.

Additional details on our scope and methodology are discussed in appendix I.<sup>6</sup>

We conducted this performance audit from September 2013 through January 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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<sup>5</sup>[GAO/AIMD-00-21.3.1](#).

<sup>6</sup>In the course of our review, we identified additional issues concerning DOJ's whistleblower regulations for FBI employees beyond the scope of this report. We are continuing to address these issues with DOJ and may report on these results later.



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## Background

As established by the Civil Service Reform Act of 1978, federal law generally prohibits retaliation against federal government employees or applicants for employment for reporting wrongdoing, or whistleblowing.<sup>7</sup> Under these provisions, most federal employees pursue whistleblower retaliation complaints with OSC and MSPB. However, the FBI, as well as other intelligence agencies, is excluded from this process.<sup>8</sup> Instead, the Attorney General is required to establish regulations to ensure that FBI employees are protected against retaliation for reporting wrongdoing, consistent with certain statutory processes of OSC and MSPB.<sup>9</sup> Since the Civil Service Reform Act of 1978 was enacted, numerous amendments have been made to the provisions governing most executive branch whistleblowers, but corresponding amendments have generally not been made to the statutory provision governing FBI employees.<sup>10</sup> Provisions providing recourse for employees of intelligence community elements who are retaliated against for making disclosures of protected information

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<sup>7</sup>Pub. L. No. 95-454, §§ 101, 202, 92 Stat. 1111, 1113-8, 1121-31 (codified as amended at 5 U.S.C. §§ 2301-2306, 1201-1222, respectively).

<sup>8</sup>5 U.S.C. §§ 2302-2303.

<sup>9</sup>5 U.S.C. § 2303(b). In particular, the President is required to provide for the enforcement of whistleblower protections for FBI employees and applicants in a manner consistent with applicable provisions of sections 1214 and 1221 of title 5. Section 1214 relates to OSC's authority for investigating whistleblower retaliation complaints and seeking corrective action, and section 1221 relates to MSPB's authority to entertain whistleblower reprisal appeals and order corrective action. The President has delegated his enforcement authority to the Attorney General. Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, Memorandum for the Attorney General, 62 Fed. Reg. 23,123 (Apr. 14, 1997). For purposes of this report, "employees" includes applicants for employment unless otherwise specified.

<sup>10</sup>For example, under the statutory provision governing most executive branch employees—5 U.S.C. § 2302—the definition of "personnel action" under the CSRA consisted of 10 clauses; the section governing FBI employees—5 U.S.C. § 2303—refers back to these 10 clauses for the definition of "personnel action." Congress has twice added additional clauses to the section for most employees, but corresponding changes were not made to the section applicable to the FBI. In another example, in 1989, the Whistleblower Protection Act made an amendment to one type of information subject to protection under section 2302, including "gross mismanagement" as a protected disclosure, as opposed to "mismanagement." However, the Whistleblower Protection Act did not make a corresponding change to 2303, the section related to FBI employees.

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were established by Presidential Policy Directive 19 in 2012,<sup>11</sup> and in statute in 2014.<sup>12</sup>

In order to implement the statute governing FBI whistleblower protections, in 1998, DOJ issued regulations to protect FBI whistleblowers from retaliation for reporting alleged wrongdoing, and established the process for handling FBI whistleblower retaliation complaints.<sup>13</sup> Specifically, the regulations prohibit DOJ employees from taking or failing to take (or threatening to take or fail to take) a personnel action with respect to any FBI employee as a reprisal for a protected disclosure (i.e., retaliation).<sup>14</sup> The regulations also define what disclosures by FBI employees qualify as protected disclosures, entitling the employees to recourse should they experience retaliation. Specifically, the regulations state that disclosures are protected if the complainants

1. reasonably believe that they are reporting wrongdoing, defined as a violation of any law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety,<sup>15</sup> and
2. report the alleged wrongdoing to one of nine designated officials or offices (e.g., the Attorney General, the DAG, and OIG, among other entities).<sup>16</sup>

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<sup>11</sup>The White House, Presidential Policy Directive 19/PPD-19 (Washington, D.C.: Oct. 10, 2012).

<sup>12</sup>Intelligence Authorization Act for Fiscal Year 2014, 113-126, tit. VI, 128 Stat. 1390, 1414-1422.

<sup>13</sup>28 C.F.R. pt. 27.

<sup>14</sup>A personnel action includes a promotion, detail, transfer or reassignment, a removal or suspension action, or a decision concerning pay or benefits, among other actions. 5 U.S.C. §§ 2302(a)(2)(A), 2303(a); 28 C.F.R. § 27.2(b).

<sup>15</sup>28 C.F.R. § 27.2(a)(1)-(2). We refer to these generally as allegations of wrongdoing throughout this report.

<sup>16</sup>Under 5 U.S.C. § 2303(a), FBI employees may make protected disclosures to “the Attorney General (or an employee designated by the Attorney General for such purpose).” DOJ has designated nine entities as the appropriate officials to receive protected disclosures. These entities include DOJ-OPR, OIG, the FBI Office of Professional Responsibility, the FBI Inspection Division (FBI-INSD) Internal Investigations Section, the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, and the highest ranking official in any FBI field office. 28 C.F.R. § 27.1(a)

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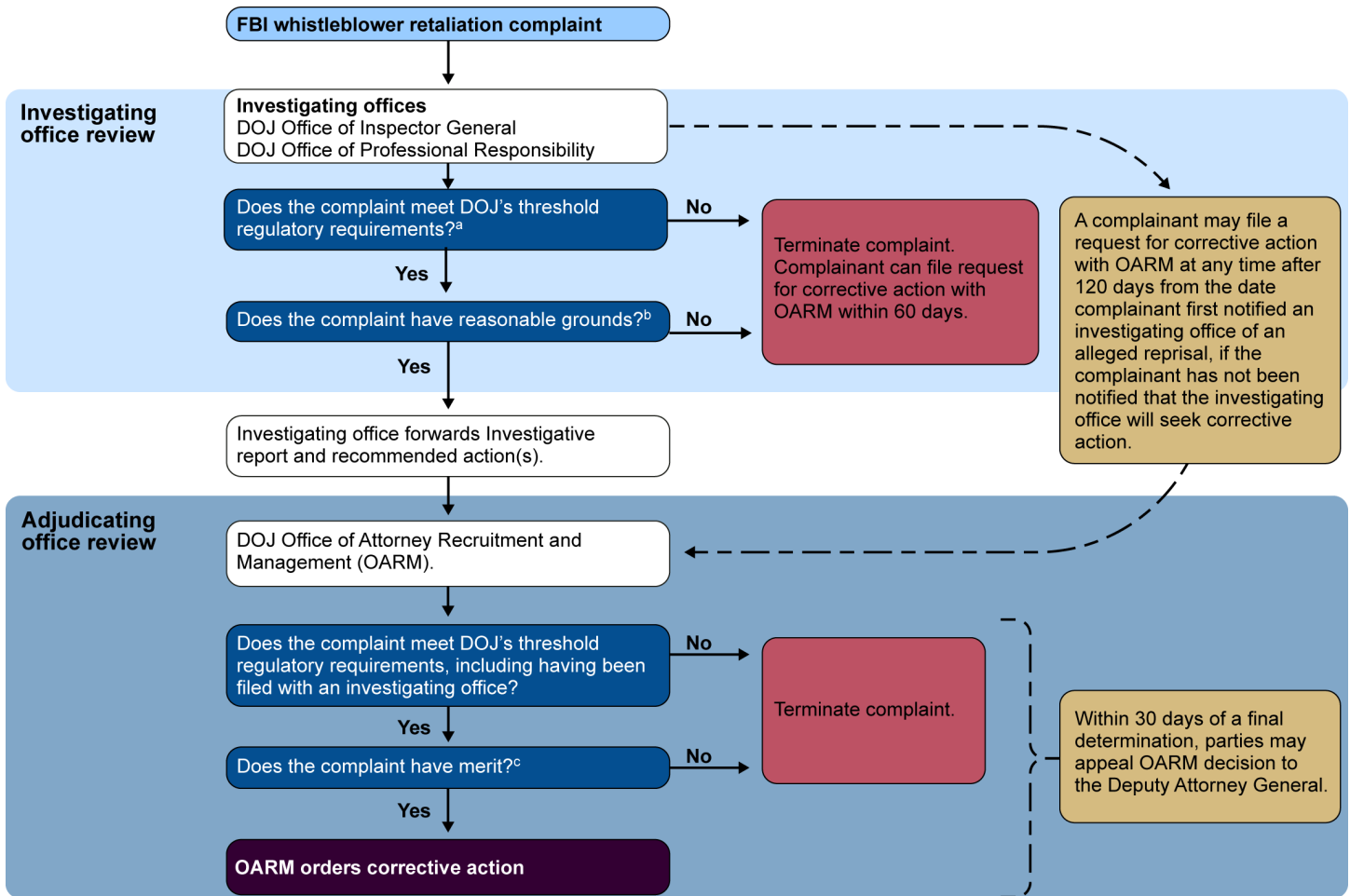
If the FBI employee does not meet either of these two criteria, then that person's disclosure is not protected and the person does not have a right to recourse if the individual should experience retaliation as a result. That is, for example, if the person reports wrongdoing to a nondesignated entity and then experiences retaliation, the person will not be eligible for corrective action for that retaliation. Further, once the employee reported to a nondesignated entity and experienced retaliation as a result, the employee cannot subsequently report the alleged wrongdoing to a designated entity and obtain corrective action for the retaliation that has already taken place.

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### Division of Responsibility for FBI Whistleblower Retaliation Complaints

The regulations lay out DOJ's process for handling FBI whistleblower retaliation complaints and describe various offices' responsibilities for investigating, adjudicating, and reviewing appeals related to these complaints. See figure 1.

**Figure 1: The Department of Justice’s (DOJ) Process for Investigating and Adjudicating Federal Bureau of Investigation (FBI) Whistleblower Retaliation Complaints**



Source: GAO analysis of DOJ regulations. | GAO-15-112

<sup>a</sup>A complaint that did not meet threshold regulatory requirements means a complaint where DOJ's decision to terminate the complaint was not based on whether there was a reprisal taken because of a disclosure, but on whether the allegations met threshold requirements. For example, threshold regulatory requirements include the requirement that the disclosure was made to one of nine designated entities, the alleged retaliatory act was a personnel action as defined by the regulations, and others.

<sup>b</sup>DOJ's Office of the Inspector General and Office of Professional Responsibility are required by DOJ regulation to determine whether there are reasonable grounds to believe that a reprisal has been or will be taken against the complainant.

<sup>c</sup>OARM determines whether, on the basis of a preponderance of the evidence, the employee made a protected disclosure, and if so, whether the disclosure was a contributing factor in the personnel action at issue. If the complainant meets that burden, then OARM considers whether the FBI has demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

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- **Investigation:** OIG and DOJ-OPR are responsible for receiving and investigating FBI whistleblower retaliation complaints to determine whether there are reasonable grounds to believe that a retaliatory act has been or will be taken (“reasonable grounds” determination).<sup>17</sup> The office that investigates the complaint (referred to as the investigating office) first reviews the complaint to determine whether it meets threshold regulatory requirements. A complaint that did not meet threshold regulatory requirements means a complaint where DOJ’s decision to terminate the complaint was not based on whether there was a reprisal taken because of a disclosure, but on whether the allegations met threshold requirements. For example, the investigating office may determine that the complaint does not meet threshold regulatory requirements because the complainant did not make his or her underlying disclosure to one of the nine entities designated in the regulations; or because the alleged retaliatory personnel action occurred before the complainant made a protected disclosure and therefore could not have been caused by the protected disclosure. If the complaint does not meet threshold regulatory requirements, then the investigating office closes the complaint.<sup>18</sup> However, if the investigating office determines that the complaint met threshold regulatory requirements, then the office investigates the merits of the complaint by, for example, conducting interviews and requesting and reviewing documentation, such as employee statements and records from the FBI.<sup>19</sup> At the conclusion of an investigation, if OIG or DOJ-OPR finds that there are reasonable grounds, it then forwards its investigative report with any recommended actions to OARM for adjudication. In cases in which OIG or DOJ-OPR has not found in the complainant’s favor or has not

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<sup>17</sup>28 C.F.R. § 27.3(d), (f). Although the regulations specify that complainants must submit allegations of FBI whistleblower retaliation in writing to OIG or DOJ-OPR, § 27.3(a)(1), these two offices also review such allegations from other sources, most notably FBI-INSD.

<sup>18</sup>The office may still investigate issues raised in the complaint as a nonwhistleblower matter if it falls within the office’s preexisting jurisdiction. 28 C.F.R. § 27.3(j). Alternatively, the investigating offices may forward the complaint to the FBI if, for example, the office determines that the complaint relates to a management matter or other issue under the FBI’s jurisdiction.

<sup>19</sup>DOJ-OPR attorneys are assigned to investigate FBI whistleblower retaliation complaints because DOJ-OPR does not have investigators. We refer to the DOJ-OPR attorneys assigned to investigate these complaints as investigators throughout this report.

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completed its investigation, the complainant may go directly to OARM to request corrective action.<sup>20</sup>

- **Adjudication:** OARM is responsible for adjudicating FBI whistleblower retaliation cases. OARM receives these cases from OIG or DOJ-OPR where either office has determined there are reasonable grounds to believe that there has been or will be reprisal for a protected disclosure, or else directly from the complainant.<sup>21</sup> As with the investigating offices, when OARM receives the complaint, OARM first determines whether the complaint meets threshold regulatory requirements, before proceeding to review the merits of the complaint. For OARM, considering the merits of the complaint entails reviewing the supporting evidence (e.g., documents and testimony), as well as the arguments each party—the complainant and the FBI—submits, and then determining, based on all of the evidence, if the individual substantiated the claim of retaliation. If the complaint is substantiated and the FBI is unable to prove by clear and convincing evidence that it would have taken the same personnel action even if the complainant had not made the protected disclosure, OARM will order that the FBI take corrective action, such as providing the complainant back pay or reimbursement for attorney’s fees.
- **Appeals:** DOJ’s DAG is responsible for reviewing and ruling on parties’ appeals of OARM decisions. Once OARM rules on a case, the parties have 30 days to file an appeal with the DAG. The DAG has the authority to set aside or modify OARM’s decisions when 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

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<sup>20</sup>This can occur within 60 days of being notified of the termination of the investigation, or at any time after 120 calendar days from the date the complainant first notified an investigating office of an alleged retaliation if the complainant has not been notified that the office will seek corrective action. 28 C.F.R. § 27.4(c)(1).

<sup>21</sup>If OIG or DOJ-OPR determines that there are reasonable grounds to believe that a reprisal has been or will be taken against the complainant it is required to report this conclusion, along with any findings and recommendations for corrective action, to OARM. 28 C.F.R. § 27.4(a). OARM determines whether, on the basis of a preponderance of the evidence, the employee made a protected disclosure, and if so, whether the disclosure was a contributing factor in the personnel action at issue. If the complainant meets that burden, then OARM considers whether the FBI has demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. § 27.4(e)(1)-(2).

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substantial evidence. The DAG has full discretion to review and modify the corrective action ordered.<sup>22</sup>

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## DOJ's Regulatory Timeliness and Reporting Requirements

DOJ's regulations also set forth timeliness and reporting requirements for the investigating offices.<sup>23</sup> Specifically, the investigating offices must

- provide written notice to the complainant acknowledging receipt of the complaint within 15 calendar days of either investigating office receiving it;<sup>24</sup>
- update the complainant on the status of the investigation within 90 days of the written acknowledgment, and continue providing such updates every 60 days thereafter;<sup>25</sup> and
- determine within 240 calendar days of receiving the complaint whether there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure, unless the complainant agrees to an extension.<sup>26</sup>

Additionally, if OIG or DOJ-OPR decides to terminate an investigation, the office must provide a written status report to the complainant at least 10 business days prior to the office's final termination report.<sup>27</sup> The final report must summarize the relevant facts of the case, provide reasons for terminating the investigation, and respond to any comments the complainant submits in response to the above-mentioned status report.<sup>28</sup>

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<sup>22</sup>28 C.F.R. § 27.5. The DAG must order appropriate corrective action if the DAG upholds a finding that there has been a reprisal.

<sup>23</sup>DOJ's regulations establish no such timeliness and reporting requirements for OARM or the DAG.

<sup>24</sup>The office that will investigate the complaint must provide this notice within 15 days of the date either of the investigating offices receives the complaint. In addition, the written notice must state the name of the person within the office who will serve as the point of contact for the complainant. 28 C.F.R. § 27.3(c).

<sup>25</sup>28 C.F.R. § 27.3(e).

<sup>26</sup>28 C.F.R. § 27.3(f).

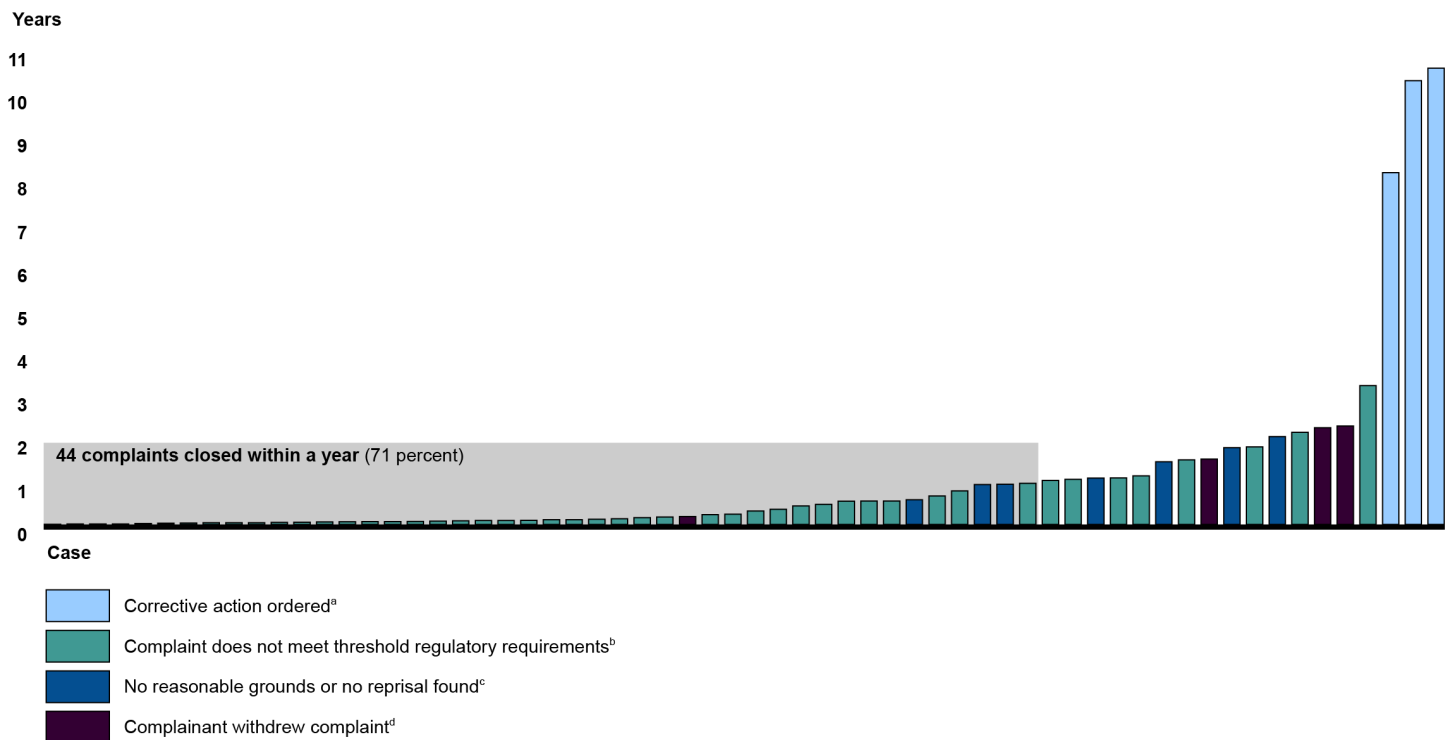
<sup>27</sup>This status report must include the factual findings and conclusions that justify the office's decision to terminate the investigation. 28 C.F.R. § 27.3(g).

<sup>28</sup>28 C.F.R. § 27.3(h).

## DOJ Closed Majority of Complaints within a Year, Some because Employee Did Not Report Wrongdoing to Designated Official; Complaints DOJ Adjudicated Took up to 10 Years

DOJ closed the majority of the 62 complaints we reviewed within 1 year, generally because the complaints did not meet DOJ's threshold regulatory requirements. The most common reason these complaints did not meet DOJ's threshold regulatory requirements was because the complainants made their disclosures to individuals or offices not designated in the regulations. Further, FBI whistleblowers may not be aware that they must report an allegation of wrongdoing to certain designated officials to qualify as a protected disclosure, in part because information DOJ has provided to its employees has not consistently explained to whom an employee must report protected disclosures. The 4 complaints we reviewed that met DOJ's threshold regulatory requirements and OARM ultimately adjudicated on the merits lasted from 2 to just over 10.6 years from the initial filing of the complaints with OIG or DOJ-OPR to the final OARM or DAG ruling. In some cases, parties have waited a year or more for a DOJ decision without information on when they might receive it. Figure 2 shows the duration and outcome of all 62 complaints we reviewed.

**Figure 2: Overall Length of Complaints the Department of Justice (DOJ) Closed from 2009 to 2013 and Reasons for Case Closure**



Source: GAO analysis of DOJ case files. | GAO-15-112



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<sup>a</sup>In the 3 complaints we reviewed where DOJ's Office of Attorney Recruitment and Management (OARM) ordered corrective action, it did not always order all of the corrective action the complainant sought where OARM determined that the complainant failed to establish entitlement to the corrective relief sought under 28 C.F.R. § 27.4(f).

<sup>b</sup>The "does not meet threshold regulatory requirements" category includes 48 complaints ultimately found by either an investigating office or OARM as not meeting DOJ's threshold regulatory requirements because, for example, the disclosure was not made to one of nine designated entities or the alleged retaliatory act was not a personnel action as defined by the regulations.

<sup>c</sup>The "no reasonable grounds or no reprisal found" category includes 6 complaints where the investigating office opened an investigation into at least one allegation made by the complainant but the investigating office did not find reasonable grounds to believe that a reprisal had been or will be taken against the complainant. It also includes 1 complaint where OARM found the disclosure was not a contributing factor in the personnel action based on a preponderance of the evidence or the FBI demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

<sup>d</sup>The "complainant withdrew complaint" category includes 4 complaints that were voluntarily withdrawn by the complainant.

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## DOJ Closed Majority of Complaints within a Year; Some Because the Employee Did Not Report Wrongdoing to a Designated Official

DOJ closed 44 of the 62 complaints (71 percent) that we reviewed within 1 year, most often because the complaint did not meet DOJ's threshold regulatory requirements. Specifically, for 40 of these 44 cases (91 percent), DOJ found that the complaint did not meet threshold regulatory requirements.<sup>29</sup> In 15 of the 32 (47 percent) complaints closed within a year where documentation in the case files was sufficient for us to determine why DOJ determined threshold requirements were not met, the fact that the complainant made a disclosure to the wrong person—someone not designated in the regulations to receive whistleblower complaints—was at least a partial basis for DOJ deciding the complaint

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<sup>29</sup>DOJ closed 4 additional complaints within 1 year for reasons other than a finding that the complaint did not meet threshold regulatory requirements under the regulations. Of these 4, DOJ closed 1 because the complainant withdrew before the DOJ office made a determination and 3 because, although the complaint met threshold regulatory requirements, the investigating office found that there were not reasonable grounds to believe the alleged retaliation had been taken in reprisal for a protected disclosure. For some complaints, we were not able to determine a specific reason for the investigating office's finding that one or more of the complainant's allegations did not meet threshold requirements based on information contained in the case file. For example, in some complaints, the investigating office's final letter to the complainant stated that the matters were more appropriate for review by another office of agency, but the case file did not indicate the office's basis for this determination. We discuss efforts to improve the documentation in investigating office case files later in this report.

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did not meet threshold regulatory requirements.<sup>30</sup> In at least 12 of these 15 instances, the complainant reported the alleged wrongdoing to someone in management or within the complainant's chain of command, such as the complainant's supervisor, who was not one of the nine designated entities.<sup>31</sup>

For all 54 complaints we reviewed where documentation in the case files was sufficient for us to determine a specific reason DOJ closed the complaint, regardless of how long DOJ took to close the complaint, 23 (43 percent) had at least one claim dismissed because the complainant made his or her disclosure to an official or entity not designated in the regulations.<sup>32</sup> Of these, in at least 17 cases, we were able to determine that a disclosure was made to someone in the employee's chain of command or management.<sup>33</sup>

See appendix II for a summary of DOJ's final determinations in all cases we reviewed.

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<sup>30</sup>In some case files we reviewed, the final DOJ office to review the complaint cited multiple reasons for the decision to close the complaint. For example, the office may have found that the complainant's underlying allegation was not protected because it did not relate to a "violation of any law, rule, or regulation" or another issue covered by the regulations, or the alleged retaliation was not a personnel action as defined by the regulations. In some complaints we reviewed, the case file did not contain sufficient information to determine the basis for DOJ's decision that the complaint did not meet threshold regulatory requirements. See app. II for a summary of DOJ's reasons for closing all complaints we reviewed.

<sup>31</sup>This constitutes 38 percent of all cases closed within a year for failure to meet threshold regulatory requirements where we were able to determine the basis for dismissal. All 15 instances involved a disclosure, but in 1 case we were not able to identify from the case files the position of the individual or entity to whom the complainant made a disclosure, such as whether the individual was the complainant's supervisor. In the remaining 2 cases, a disclosure was made to the FBI Inspections Division, but not the Internal Investigations Section, and to a fellow agent.

<sup>32</sup>In some case files we reviewed, the final DOJ office to review the complaint cited multiple reasons for the decision to close the complaint.

<sup>33</sup>This constitutes 31 percent of all cases we reviewed where we could determine the basis for DOJ closing the complaint. For some cases we were not able to identify from the case files the position of the individual or entity to whom the complainant made a disclosure, such as whether the individual was the complainant's supervisor. Accordingly, this number is at least 17 cases, given available documentation in the case files we reviewed.

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FBI Employees Are Not Protected for Reporting Wrongdoing to Their Supervisors or Others in Their Chain of Command Not Designated in DOJ Regulations

Unlike employees of other executive branch agencies—including intelligence agencies—FBI employees do not have a process to seek corrective action if they experience retaliation based on a disclosure of wrongdoing to their supervisors or others in their chain of command who are not designated officials.<sup>34</sup> In 1978, federal law excluded the FBI, as well as other intelligence agencies, from the prohibited personnel practices system in place for employees of other executive branch agencies in part because of the sensitive nature of these agencies' operations and the information they handle. Instead the law required the Attorney General to develop regulations to ensure that FBI employees are not retaliated against for disclosures of wrongdoing.<sup>35</sup>

When issuing its interim and final regulations in 1998 and 1999, respectively, DOJ considered which individuals and offices the Attorney General would designate to receive protected disclosures from FBI employees. DOJ officials who developed these regulations included eight designated entities but did not include supervisors at that time because the officials maintained that Congress intended DOJ to limit the universe of recipients of protected disclosures, in part because of the sensitive

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<sup>34</sup>Under 5 U.S.C. § 2302, employees of executive branch agencies may generally make disclosures of information to supervisors, their agency inspector general, OSC, the media, Members of Congress, and others, if the disclosure is not specifically prohibited by law and not required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. Presidential Policy Directive 19 prohibits reprisals against employees serving in an intelligence community element for disclosures by the employee to a supervisor in the employee's direct chain of command, among others. The FBI's February 11, 2008, Policy Directive 0032D, "Non-Retaliation for Reporting Compliance Risks," and the September 23, 2014, 0727D update, prohibit retaliation against anyone who reports compliance risks to certain designated officials—including any supervisor in the chain of command of the person reporting the compliance risk—but does not offer any means of pursuing corrective action if an employee experiences retaliation for such a disclosure. According to FBI officials, the FBI has the authority to punish those who violate this policy and could, at its discretion, provide remedies to those who are retaliated against.

<sup>35</sup>Minimal legislative history exists explaining the separate statutory provision for the FBI. Comments made by Members of Congress at the time suggest a compromise was adopted given the sensitive nature of the agency but also in recognition of past improprieties and the need to ensure public confidence that there are channels within the FBI to raise whistleblower matters, among other things. See 124 CONG. REC. S14300 (daily ed. Aug. 24, 1978) (statement of Sen. Percy); 124 CONG. REC. H9359 (daily ed. Sept. 11, 1978) (statement of Rep. Derwinski); 124 Cong. Rec. H9359-60 (daily ed. Sept. 11, 1978) (statement of Rep. Udall); 124 Cong. Rec. H11822 (daily ed. Oct. 6, 1978) (statement of Rep. Schroeder).

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information to which FBI employees have access.<sup>36</sup> In issuing its final rule, DOJ responded to commenter suggestions to add additional entities to receive such disclosures—including FBI-INSD, supervisors, and coworkers. Among other things, DOJ stated its view that Congress contemplated that recipients for whistleblower disclosures would be a relatively restricted group and “to designate a large (and in the case of supervisors, arguably ill-defined) group of employees as recipients would be inconsistent with Congress’s decision, given the sensitivity of information to which FBI employees have access.” In addition, DOJ’s rule explained that “designating the highest ranking official in each field office, but not all supervisors, as recipients of protected disclosures . . . provides a way to channel such disclosures to those in the field who are in a position to respond and to correct management and other problems while also providing an on-site contact in the field for making protected disclosures.”

In October 2012, the President issued Presidential Policy Directive 19, which established whistleblower protections for employees serving in the intelligence community, including, among other things, explicitly providing protection to employees who are retaliated against for reporting wrongdoing “to a supervisor in the employee’s direct chain of command up to and including the head of the employing agency.” Presidential Policy Directive 19 excluded the FBI from the scope of these protections, and instead required DOJ to report to the President on the efficacy of its regulations pertaining to FBI whistleblower retaliation and describe any proposed revisions to these regulations to increase their effectiveness.<sup>37</sup>

In response to this requirement, ODAG officials led an effort to review FBI whistleblower retaliation complaints filed from January 1, 2005, through March 15, 2014, and, consistent with our review, found that DOJ had terminated a significant portion of complaints because they were not

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<sup>36</sup>DOJ added FBI-INSD’s Internal Investigations Section in 2008 in response to a restructuring of the FBI Office of Professional Responsibility in 2004.

<sup>37</sup>At the time the President issued Presidential Policy Directive 19, on October 10, 2012, DOJ had in place its current process whereby FBI whistleblowers could seek remedy for retaliation whereas the rest of the intelligence community had no such mandated process in place. Therefore, Presidential Policy Directive 19 required that within 180 days, DOJ report to the President on the efficacy of its regulations pertaining to FBI whistleblower retaliation and describe any proposed revisions to these regulations to increase their effectiveness. DOJ submitted the required report to the President in April 2014, a year after the due date.

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made to the proper individual or office. In addition, DOJ officials met with whistleblower advocates and OSC officials to solicit their views and found that these individuals and officials recommended that DOJ broaden its regulations to protect disclosures to any supervisor in the employee's chain of command. According to DOJ's April 2014 report in response to Presidential Policy Directive 19, the whistleblower advocates noted that the directive instructs intelligence community elements to protect disclosures to any supervisor in the employee's direct chain of command and that this is consistent with whistleblower protection laws that similarly protect other civil service employees. Further, DOJ's report notes that OSC officials believe that to deny employees protection unless their disclosure is made to the high-ranked supervisors in the office would undermine a central purpose of whistleblower protection laws.

In response to PPD-19, DOJ officials led by ODAG revisited their 1999 regulations and in April 2014 recommended expanding the persons to whom individuals can make protected disclosures to include—in addition to the highest-ranking official in FBI field offices, who is already included—the second highest ranking tier of officials in these field offices, which includes the two or three assistant special agents in charge in 53 field offices and the special agents in charge in the 3 largest field offices. Senior DOJ officials told us that DOJ leadership has approved this change and the agency is beginning the public notice and comment process; as of December 2014, DOJ has not issued any notice of proposed rulemaking or publicly moved forward on these stated plans. DOJ officials reported that they plan to evaluate the impact of this expansion, and they may choose subsequently to further expand the set of persons to whom an employee can make a protected disclosure, if DOJ determines that such expansion is warranted. However, as of December 2014, senior FBI and ODAG officials report that they do not have an estimated date or specific plans for this evaluation and could not provide specifics on how this evaluation would be conducted.

DOJ officials gave us several explanations about why DOJ did not recommend expanding the list to include supervisors and others in the employee's chain of command, a change that would bring the FBI into line with other executive branch agencies. First, in DOJ's April 2014 report, DOJ officials state that "the Department believes 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." However, when we asked officials how they arrived at this conclusion—particularly in light of our and DOJ's previous findings that numerous complainants had at least one claim dismissed for making

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a disclosure to someone in management or their chain of command—they could not provide supporting evidence or analysis for their conclusions. Rather, these officials cited concerns about striking the right balance between the benefits of an expanded list and the level of resources the department would have to expend assessing more complaints if the department added more designated officials, and the potential impact of these additional complaints on the timeliness of the process. While DOJ’s focus on the timeliness of complaint processing is important, dismissing retaliation complaints made to an employee’s supervisor or someone in his or her chain of command who is not a designated entity leaves some FBI whistleblowers with no recourse if they experience retaliation. We found at least 17 whistleblowers whose cases were dismissed—at least in part—for making a disclosure of wrongdoing to someone in their chain of command or management.<sup>38</sup> Our findings are similar to those of the ODAG-led review in which the department found that in a “significant portion” of OIG cases the claim was closed because it was not made to a proper individual or office under the regulations.<sup>39</sup> This means that these employees had no recourse for retaliation they may have experienced for making those disclosures. Moreover, with respect to DOJ’s concerns about resources and timeliness, DOJ has discretion in determining its regulatory process for enforcing protections for FBI whistleblowers and, as described in more detail later this report, is taking other steps to improve the timeliness of the process.

Senior FBI and ODAG officials also explained that the department plans to provide FBI employees with additional training on the list of entities designated to receive whistleblower complaints. While training could help provide information on how to make a protected disclosure, this planned

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<sup>38</sup>For the cases we reviewed, where we were able to determine the basis for closing the complaint from available documentation, we identified 17 cases out of 54 where a claim was dismissed on this basis (31 percent). The final office closing the complaint may cite more than one reason for closure.

<sup>39</sup>DOJ reported that it reviewed a total of 89 OIG cases (4 pending), of which 69 were closed based on threshold requirements; “a significant portion” of those were closed as not made to the proper individual or office. DOJ reported reviewing 24 resolved OPR complaints, 16 of which were closed by OPR for failure to meet threshold regulatory requirements for one or more reasons: (1) the complaint made a disclosure to a supervisor or other entity not covered by the regulations; (2) the disclosure did not evidence a violation of any law, rule, or regulation or other subject covered by the regulations; or (3) the protected disclosure occurred after the alleged reprisal. DOJ did not characterize what portion of these 16 had a claim dismissed for reporting to the wrong official or entity.

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training would have little effect for employees who initially raise a concern to their supervisors not expecting that this action would ever be a whistleblower disclosure. All seven of the whistleblower advocates and attorneys we interviewed who had relevant personal and professional experience stated that it is common practice for employees to report wrongdoing to their supervisors before reporting it to a more senior official, such as those designated in DOJ's regulations.<sup>40</sup> Further, two advocates we met with stressed that very few people intend to become whistleblowers. Rather, it is typical for employees who become aware of a problem to report it to their supervisors, expecting to resolve the issue at that level. In one FBI whistleblower case file we reviewed, the complainant wrote that "there is a practice in the FBI that a person is to go through his or her chain of command first." Further, senior FBI officials we spoke with emphasized that FBI policy encourages employees to report allegations of wrongdoing to a broader group of entities than those designated in regulation as recipients of protected disclosures—including any supervisor in the chain of command of the person reporting.<sup>41</sup>

Last, senior FBI and ODAG officials noted that the statute establishing whistleblower protections for FBI employees differs from the statute governing protections for other federal employees, so there is no legal requirement that DOJ designate supervisors or others in an employee's chain of command to receive protected disclosures. The separate statutory provision for the FBI has existed since enactment of the CSRA in 1978, but has generally not been revisited by Congress when passing amendments to legislation governing other executive branch whistleblowers. Over the years, Congress has passed amendments to the legislation covering employees in other executive branch agencies that

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<sup>40</sup>The eighth advocate or attorney we interviewed stated that he did not have personal knowledge sufficient to comment on this issue but clarified that he supports amending the FBI's definition of a protected disclosure to include any disclosure to any individual up the chain of command.

<sup>41</sup>These officials referred to FBI's February 11, 2008, Policy Directive 0032D, "Non-Retaliation for Reporting Compliance Risks," and the September 23, 2014, 0727D update. This FBI policy specifically prohibits retaliation against employees who report compliance risks to any supervisor in the employees' chain of command, as well as additional specified officials, but does not offer any means of pursuing corrective action if an employee experiences retaliation for such a disclosure. A senior FBI Office of Integrity and Compliance official reported that the FBI does not have authority to amend DOJ's regulations to provide for such relief. DOJ's proposed revisions to the list of designated officials will similarly not provide this relief.

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explicitly strengthen and expand protections for other federal whistleblowers. For example, Congress added language clarifying that disclosures to supervisors who participated in the misconduct are protected disclosures. The Whistleblower Act of 1989 provides, among other things, that employees should not suffer adverse consequences as a result of prohibited personnel practices.<sup>42</sup> The Senate report accompanying the Whistleblower Protection Enhancement Act of 2012 explained that, with regard to whistleblower retaliation matters, the focus should not be on whether or not disclosures of wrongdoing were protected, but rather whether the personnel action at issue in the case occurred because of the protected disclosure.<sup>43</sup> However, changes to laws affecting other executive branch whistleblowers did not automatically extend to the FBI since the law governing FBI employees was in a separate provision of the original legislation. DOJ's current regulations and its recommended changes deny FBI employees protection provided to employees of other executive branch agencies—including those in the intelligence community.<sup>44</sup> Thus, DOJ risks dismissing, and potentially not addressing, instances of actual retaliation against individuals who reported their disclosure to their supervisors, or another entity not designated in the regulations. Dismissing these whistleblower retaliation complaints could deny whistleblowers access to recourse, could permit retaliatory activity to go uninvestigated, and may have a chilling effect on other potential whistleblowers.

## DOJ Guidance Is Not Always Clear

In the course of our review, in addition to several DOJ and FBI guidance documents that accurately describe DOJ's FBI whistleblower regulations, we also found instances of DOJ guidance that could lead FBI employees to believe that reporting an allegation of wrongdoing to a supervisor in their chain of command would be a protected disclosure when that is not

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<sup>42</sup>Pub. L. No. 101-12, § 2, 103 Stat. 16.

<sup>43</sup>S. Rep. No. 112-155, at 5.

<sup>44</sup>Among other provisions, Presidential Policy Directive 19 requires the head of each intelligence community element to provide a process for employees serving in the intelligence community to seek review of personnel actions they allege were taken as a reprisal for a protected disclosure. The requirements contained in this directive differ in some respects from the processes provided for in DOJ's whistleblower regulations, in addition to including that protected disclosures may be made to a supervisor in the employee's direct chain of command.



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the case.<sup>45</sup> First, FBI’s guidance—the *FBI Domestic Investigations and Operations Guide*, specifically—states that, in general, the FBI requires employees to report known or suspected failures to adhere to the law, rules, or regulations to any supervisor in the employees’ chain of command, or others, but does not clarify that such disclosures are protected only if reported to certain designated individuals or offices.<sup>46</sup> Second, an April 2014 memo from the DAG to all DOJ employees—including FBI employees—encouraged employees to watch a video on whistleblower rights and protections and stated that employees may report waste, fraud, or abuse within the department to supervisors within their offices or the OIG, or outside the department to OSC.<sup>47</sup> The memo did not clarify that FBI employees who report such allegations to their supervisors or OSC may not have the right to pursue corrective action should they experience retaliation for their disclosure. Senior ODAG officials acknowledged that if taken in isolation, this memo could cause some confusion for FBI employees but stressed that FBI employees should already be familiar with the FBI-specific policy from FBI-offered training and resources. However, we reviewed the two trainings FBI officials cited as educating FBI employees on the procedures to follow when making a whistleblower complaint, and neither training mentions DOJ’s regulations related to FBI whistleblower retaliation or the specific steps FBI employees need to take to ensure their disclosures are protected.<sup>48</sup> OIG and FBI officials report that they are currently developing

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<sup>45</sup>We reviewed additional guidance documents on this topic that varied in terms of accuracy and clarity. We reviewed whistleblower guidance DOJ provided to FBI employees (1) that was complete and accurate; (2) that was outdated, such as by referencing regulations that are no longer in force; and (3) that accurately described some, but not all, of the nine entities designated in DOJ’s regulations as recipients of protected disclosures.

<sup>46</sup>The FBI’s October 15, 2011, *Domestic Investigations and Operations Guide* states: “In general, the FBI requires employees to report known or suspected failures to adhere to the law, rules or regulations by themselves or other employees, to any supervisor in the employees’ chain of command; any Division Compliance Officer; any Office of the General Counsel Attorney; any FBI-INSD personnel; any FBI Office of Integrity and Compliance staff; or any person designated to receive disclosures pursuant to the FBI Whistleblower Protection Regulation (28 Code of Federal Regulations 27.1), including the Department of Justice Inspector General.”

<sup>47</sup>The OIG-produced video discusses whistleblower rights and protections for DOJ employees and notes that the rules for FBI employees differ, but does not provide any additional clarifying information on this point.

<sup>48</sup>The two trainings FBI officials referred us to were a Skillsoft course called “Workplace Safety” and a mandatory 2012 Sexual Harassment Prevention and No Fear Act training.

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a training video that will address FBI-specific issues and will be required for all FBI employees. This planned training could improve employee awareness of the FBI-specific procedures, but such an effort could be undercut if unclear written policies and communications continue to be provided to FBI employees.

*Standards for Internal Control in the Federal Government* provides that agencies should distribute pertinent information so employees may efficiently carry out their duties.<sup>49</sup> Without clear information on the process for making a protected disclosure, including the individuals to whom a claimant can make a protected disclosure, FBI whistleblowers may not be aware that, depending on how they report their allegation, they may not be able to seek corrective action should they experience retaliation.

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### DOJ Took up to 10 Years to Resolve the 4 Complaints It Adjudicated on the Merits and Did Not Provide Parties with Expected Time Frames for Its Decisions

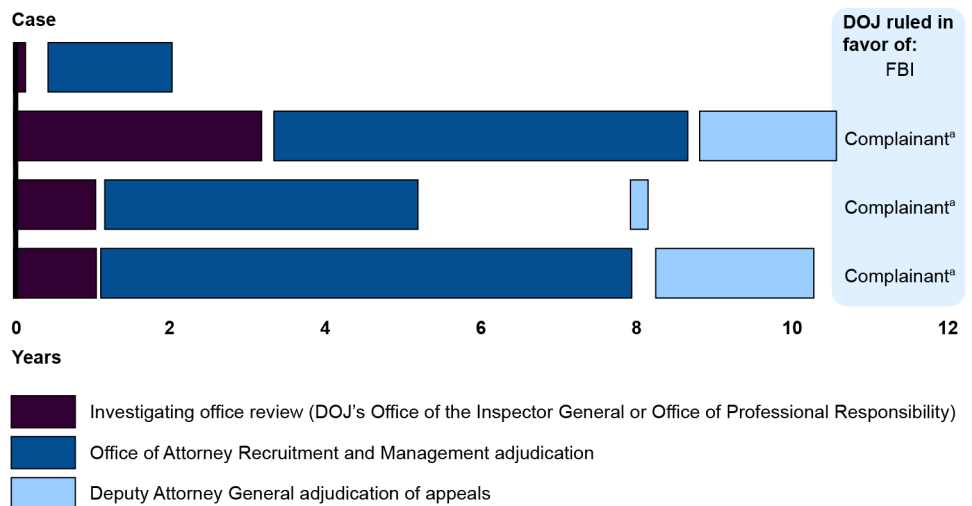
OARM adjudicated the merits of 4 of the 62 complaints we reviewed (6 percent), and these 4 cases lasted from 2 to just over 10.6 years, from the initial filing of the complaints with OIG or DOJ-OPR to the final OARM or ODAG ruling.<sup>50</sup> In 3 of these 4 cases, DOJ ultimately ruled in favor of the whistleblower. As shown in figure 3, these 3 cases lasted from just over 8 to 10.6 years. In the fourth case, DOJ ruled in favor of the FBI and this case lasted approximately 2 years.

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<sup>49</sup>[GAO/AIMD-00-21.3.1](#).

<sup>50</sup>Of the remaining 58 complaints, 46 were closed by OIG or DOJ-OPR or withdrawn by the complainant at the investigation stage and 12 were closed by OARM or withdrawn by the complainant while pending at OARM, but before reaching the adjudication stage.

**Figure 3: Length of Cases the Department of Justice (DOJ) Adjudicated, in Years**



Source: GAO analysis of DOJ case files. | GAO-15-112

Notes: For the investigating office's review, the graph reflects the time between the date the investigating office received the complaint and the date the office sent a termination report to the complainant (or in 1 case the date the complainant informed the investigating office that the complainant intended to go to OARM after receiving the proposed termination report). For OARM's adjudication, the graph reflects the time between the date the complainant filed a request for corrective action with OARM and OARM's final decision or corrective action order, whichever was later. For the Deputy Attorney General's adjudication of appeals, the graph reflects the time between the first party's appeal following OARM's final decision and the final adjudication on any appeals associated with that case. Each phase depicted in the graph includes all activity during that phase, such as extensions of time requested by the parties and time awaiting DOJ decisions. The gaps in the bars reflect time between the conclusion of one office's handling of the case and the complainant—or FBI in the case of some appeals—bringing the complaint to the attention of the next office.

<sup>a</sup>In these cases, DOJ ruled in favor of the complainant on at least one claim, but not necessarily on all of the complainant's claims.

According to DOJ officials responsible for handling these complaints, case-specific factors, including competing staff priorities at any given time, case complexity, and parties' requests for extensions, affected the length of investigating and adjudicating complaints.

- **Competing priorities:** These OIG, DOJ-OPR, OARM, and ODAG officials report that competing priorities for staff and senior management attention affect the length of FBI whistleblower retaliation cases. For example, a senior ODAG official explained that competing priorities is the biggest factor affecting the timeliness of ODAG's handling of appeals. This official explained that the DAG

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(who, under DOJ's regulations, personally decides on appeals) and ODAG staff (who prepare the DAG to discuss and decide the matter) handle issues of national importance and security so the office often has more time-sensitive and important issues that delay its decisions on FBI whistleblower retaliation cases.<sup>51</sup> The ODAG officials explained that to address this in part, in September 2014, they finalized an agreement to obtain assistance from Justice Management Division attorneys on future FBI whistleblower retaliation appeals, but ODAG officials acknowledged that this will not address the issue of competing priorities for the DAG. Further, we reviewed some OIG and DOJ-OPR investigative case files that included no evidence of agency activity for as long as 8 months for OIG and 12 months for DOJ-OPR. OIG and DOJ-OPR officials cited competing priorities—for the Inspector General and for the assigned investigator, respectively—as the biggest factor affecting the identified periods of apparent inactivity. Senior ODAG and OIG officials stress that the fact that the DAG and Inspector General personally review each complaint highlights the importance these offices place on these complaints, but note that competing priorities for these individuals' time do result in delays.

- **Case complexity:** OIG, DOJ-OPR, and OARM officials report that case complexity—such as numerous disclosures and allegations of retaliation, many witnesses, and voluminous documents—can cause a case to take longer. At the investigation stage, case complexity increases the need for cooperation and information from various people involved, including the complainant, witnesses, and the FBI—all of which can contribute to the length of the investigation, according to DOJ-OPR officials. OARM officials report that, at the adjudication stage, case complexity is a major factor affecting how quickly they can consider all of the relevant evidence and write decisions.
- **Parties' requests for extensions:** Once a case is at the adjudication stage, the FBI or the complainant may request extensions of time, such as an extension of an OARM deadline to collect evidence. In 9 of

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<sup>51</sup>DOJ's regulations specify that the DAG is the deciding official for review of OARM decisions, and there is no language allowing the DAG to delegate his or her decision-making authority to a designee. See Whistleblower Protection For Federal Bureau of Investigation Employees, 64 Fed. Reg. at 58782 (stating the language "(or a designee)" after "Deputy Attorney General" has been stricken because the department does not "believe that the authority of the Deputy Attorney General to conduct a review should be delegated").

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16 cases we reviewed that OARM or ODAG handled, parties filed a total of 69 requests for extensions—the FBI requested 43, complainants requested 19, and 7 were joint requests.<sup>52</sup> The median length of extensions that both the FBI and complainants requested was 15 days. In the 4 adjudicated cases shown in figure 3, parties' requests for extensions accounted for 45 days of the shortest case and over 19 months of the longest case.

In addition to affecting overall case length, competing priorities and case complexity specifically affect how long OARM and ODAG take to issue individual decisions on whether complaints met threshold regulatory requirements, merits, and appeals throughout the process. In the cases we reviewed, the longest wait for a decision was just over a year and a half for OARM to issue a decision on the merits of a case and the shortest was 4 days for OARM to rule on whether a complaint met threshold regulatory requirements.<sup>53</sup> Parties at some point waited a year or more for a decision by either OARM or ODAG in 6 of 15 complaints we reviewed that progressed to the point of an OARM decision on whether the complaint met threshold regulatory requirements.

OARM and ODAG do not routinely provide parties with an estimate for when they expect to return decisions in these cases, though OARM officials responsible for handling these complaints report that they have provided estimates in some cases where the parties specifically requested them. These OARM officials explained that they do not routinely provide such estimates because time frames can be difficult to judge, in part because of the complexity of the cases and the volume of

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<sup>52</sup>Nine of the 16 complaints we reviewed that were filed with OARM had at least 1 associated request for extension. These requests for extension of time were generally unopposed by the other party. We saw evidence that 6 of the 69 requests (9 percent) we reviewed were opposed. Officials in the FBI's Office of the General Counsel—the office that represents the FBI in FBI whistleblower retaliation cases—report treating these cases like any other employment cases, in terms of the level of FBI resources and number of requests for extension.

<sup>53</sup>In 15 complaints we reviewed, OARM made decisions on whether the complaints met threshold regulatory requirements. If we exclude the 2 complaints where the complainant never filed a request for corrective action, parties waited from 4 to 475 days for OARM to issue these decisions. In the 4 cases where OARM made merit decisions, parties waited from 151 to 598 days for OARM to issue its decisions. The DAG took nearly a year or more to make half (3 of 6) of the appeals decisions in the cases we reviewed. The DAG's fastest appeal decision was rendered in 12 days and the longest in 499 days. We calculated these wait times from the day of the last complainant or FBI action on the complaint to the time DOJ provided the relevant decision.

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evidence. Similarly, senior ODAG officials stated that such estimates would be guesses that could raise expectations the offices cannot meet because, for example, they cannot predict the Deputy Attorney General's schedule.

Other federal agencies and offices that handle whistleblower retaliation cases provide complainants with an estimate for when their cases will conclude. MSPB—which DOJ officials have looked to in the past for best practices in handling whistleblower retaliation cases—is statutorily required to provide parties with an estimate for when MSPB will make a decision. Accordingly, MSPB developed a goal to decide cases in 120 days, and where MSPB officials anticipate missing this goal by 30 days or more, it is MSPB's policy to publicly announce a new date for completion.<sup>54</sup> Legislative history suggests that this requirement was intended to reduce delays.<sup>55</sup> Similarly, DOD-OIG is statutorily required to complete reports of its investigations into whistleblower retaliation complaints within 180 days, and if officials need additional time, they must inform the complainant as to why and provide a new date by which the investigation report will be completed.<sup>56</sup> A senior DOD-OIG official told us that, at a minimum, a status update regarding progress toward case completion provides the complainant with an element of assurance that the case is being actively worked on and has not slipped through the cracks. An estimate also reinforces a sense of urgency and serves as an accountability measure for DOD-OIG investigative personnel, who

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<sup>54</sup>Under 5 U.S.C. § 7701(i)(1), for appeals submitted to MSPB, MSPB is required to “establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the [MSPB]. If [MSPB] fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, [MSPB] shall publicly announce the new date by which it intends to complete action on the appeal.”

<sup>55</sup>The Senate report accompanying the Civil Service Reform Act of 1978—which established this requirement for MSPB—explained that the Committee on Governmental Affairs had completed a study on delay in the regulatory process, which identified better agency management and planning as one of the prime ways regulatory delays could be reduced and, as a result, the committee “unanimously adopted a recommendation that agencies make greater use of deadlines as a way to help eliminate delay.” In addition, the committee noted that “administrative delay of cases before [MSPB] is especially troublesome because it directly affects in significant ways employees who may not even have a job while the appeal is pending.” S. Rep. No. 95-969, at 61 (1978).

<sup>56</sup>10 U.S.C. § 1034(e)(3). This information must also be reported to the Secretary of Defense and the Secretary of the military department concerned (or to the Secretary of Homeland Security where applicable).

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understand that individuals with great interest in the outcome of the investigation are expecting timely results, according to the DOD official.

Further, all eight whistleblower advocates and attorneys we met with agreed that it would be helpful for DOJ to provide such estimates. Six of the advocates and attorneys we met with explained that not having an estimate for when OARM or ODAG will return a decision in these cases may hurt complainants' morale and confidence in the process. Further, five advocates and attorneys noted that other FBI employees witness the uncertainty and professional limbo whistleblowers experience while DOJ considers a whistleblower retaliation complaint, and five further noted that this potentially has a chilling effect on prospective whistleblowers.

In February 2013 two of the advocacy groups we interviewed—the American Civil Liberties Union and the National Whistleblowers Center—sent a memo to the Attorney General asking DOJ to require that OARM issue merit decisions within 90 days and the DAG issue appeals decisions within 60 days, among other changes. In its April 2014 report to the President, DOJ officials responded to this recommendation, stating that the department does not support these revisions at this time because, given the volume of evidence and complexity of these cases, it would be very difficult, if not impossible, to meet a strict deadline for adjudication. We understand that given the great variability among these cases, a single fixed deadline may be impractical, but this limitation should not preclude these offices from providing complainants with case-specific estimates that take into account the specifics of each particular complaint.

In June 2012, DOJ stated a commitment to making every effort to improve the efficiency of the department's adjudication of these complaints.<sup>57</sup> Internal control standards reinforce the position that agencies need to have ways of ensuring such management directives are carried out.<sup>58</sup> Providing parties with estimated time frames for returning DOJ's decisions in FBI whistleblower retaliation cases (whether a complaint meets threshold regulatory requirements, merits, and appeals)

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<sup>57</sup>In June 2012, DOJ stated in questions for the record for the Senate Committee on the Judiciary that "the Department . . . is committed to making every effort to improve the efficiency of the Department's adjudication of FBI whistleblower cases."

<sup>58</sup>[GAO/AIMD-00-21.3.1](#).

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and timely updates when OARM and ODAG officials cannot meet estimated time frames would enhance accountability to the complainants and provide additional assurance about DOJ management's commitment to improve efficiency.

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## DOJ Officials Have Taken Some Steps to Resolve Complaints More Quickly but Have Limited Plans to Assess Impact

In the last 3 years, and in light of the Presidential Policy Directive 19 requirement that DOJ assess the efficacy of its current process, DOJ officials have identified some opportunities to improve their timeliness in resolving whistleblower retaliation complaints and have taken some steps to do so. However, DOJ officials have limited plans to assess the impacts of these actions. Specifically, OARM has developed a mediation program, hired an additional staff person, and developed procedures with stricter time frames, while DOJ-OPR and OIG have taken steps to streamline their intake procedures. DOJ leadership is also considering taking steps to revise DOJ's regulations to streamline OARM's process upon receiving a new complaint.

- **Developing a mediation program:** In the spring of 2014, OARM launched an alternative dispute resolution program that will provide complainants with the option to pursue mediation with the FBI at any point from initial filing of the complaint to appeal. OARM officials anticipate that this option will help to expedite processing of some complaints that can be more quickly resolved through mediation and permit DOJ to focus limited resources on the remaining cases. As of October 1, 2014, two complainants had pursued mediation, but, according to OARM officials, because these cases are pending, it is too soon to analyze the impact of the mediation program.<sup>59</sup>
- **Hiring additional staff:** To reduce the impact of competing priorities for limited staff, in November 2013, OARM senior officials stated that they hired a part-time attorney to help write OARM decisions in FBI

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<sup>59</sup>According to OARM officials, OARM initially provided written notice of the mediation program to all parties with whistleblower retaliation complaints pending before OARM, except for a select few in which OARM was in the process of finalizing a decision dismissing the complaint because it did not meet threshold regulatory requirements, or where the parties were already engaged in settlement discussions pertaining to an outstanding issue related to the amount of corrective relief due to the complainant. These officials stated that OARM currently notifies all parties with complaints pending before OARM about this option and the mediation program is also available and being used by OIG and DOJ-OPR during the investigation stage.



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whistleblower retaliation cases. OARM officials report that they have been able to reduce overall case-processing times, in good part because of the work of the part-time attorney.<sup>60</sup>

- **Developing procedures with stricter time frames:** Senior OARM officials report that in June 2011 they met with an MSPB administrative judge and an MSPB senior executive to gather ideas for shortening the time frames in OARM's cases. These officials further report that in response to the input from MSPB, in October of that same year OARM issued procedures that included stricter time frames for the complainant and FBI, such as shortening the period of time OARM initially provides for parties to gather evidence. In addition, OARM officials report that around this same time, they revised their practice of generally approving parties' requests for extensions. The OARM officials report that they began reviewing requests for an extension more critically and often do not approve the full length of the extension requested.
- **Streamlining intake procedures:** Senior OIG officials report that they could improve their timeliness in processing initial complaints and have since taken steps to ensure that complaints are transmitted for initial review within 1 to 2 days of receipt, if possible. DOJ-OPR officials report that in the last 2 years, they have established a new intake procedure so that an intake attorney handles the initial notice to the whistleblower instead of waiting until the complaint is assigned to an investigator.
- **Streamlining OARM's process:** DOJ's April 2014 report to the President included a recommendation intended to expedite OARM's process upon receiving new complaints. DOJ's report states: "Under OARM's current process, when a complainant files a request for corrective action 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 request are so deficient that neither OARM nor the FBI can reasonably construe the specific claims raised." Under the recommended revised procedures,

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<sup>60</sup>OARM officials report that since the part-time attorney joined the staff, the number of OARM issuances has increased from 39 in fiscal year 2013 to 90 issuances in fiscal year 2014. Issuances refer to decisions on whether complaints meet threshold regulatory requirements, final determinations, and more routine initial orders including orders to show cause, orders on motions for extensions of time, and others.

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where it appears that a complaint may not meet DOJ's threshold regulatory requirements, OARM would give the complainant a very short time period to clarify why the case should not be dismissed. DOJ officials state that this could allow for quick resolution of cases that plainly fail to meet the threshold regulatory requirements and increase efficiency of case adjudication.

As DOJ implements these changes intended to improve the efficiency of DOJ's handling of FBI whistleblower retaliation complaints, as detailed above, assessing the impact would help DOJ officials ensure that these changes are in fact shortening total case length without sacrificing quality, and identify any additional opportunities to improve efficiency. OARM officials report that given the length of these cases, it is too early to assess whether the efforts implemented thus far are having the desired impact on the timeliness of OARM's adjudication process, but they explained that in the future, they could use their case docket to determine impact. For example, they could review the number of cases resolved through mediation and whether the revised procedures from 2011 have made a difference in the time needed to adjudicate large cases. OARM's stated plans to monitor the impact is a good first step by one of the relevant offices, but assessing the impact on timeliness and quality throughout the entire investigation, adjudication, and appeal process to determine the impact on total complaint-processing time will require a joint effort among OIG, DOJ-OPR, OARM, and ODAG.

In DOJ's April 2014 report to the President, DOJ stated plans to evaluate the impact of two policy changes to increase the effectiveness of DOJ's regulations, but stated no such plans for the policy changes intended to improve DOJ's timeliness in handling these complaints. *Standards for Internal Control in the Federal Government* calls for agencies to compare actual performance with planned or expected results and analyze significant differences.<sup>61</sup> Without assessing the impact of its policy changes on the complete process, DOJ will not be in a position to gauge progress in fulfilling DOJ's commitment to improving its efficiency in handling these complaints and correct course, if needed. Without assessment, it will be difficult for DOJ to know whether its various efforts to improve timeliness are working as intended.

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<sup>61</sup>[GAO/AIMD-00-21.3.1](#).

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## OIG and DOJ-OPR Have Not Consistently Met Regulatory Requirements to Provide Complainants with Information Needed to Determine Next Steps for Their Complaints

OIG and DOJ-OPR have not consistently provided complainants with status updates or obtained the complainant's approval for an extension when the investigator reviewing the complaint needed more time, as stipulated under agency regulations. In the last 2 years, OIG developed a database to increase management oversight of investigators' compliance with requirements to provide updates and obtain the complainants' approval for extensions, but DOJ-OPR does not have a similar mechanism in place. In addition, OIG did not inform complainants of its intent before closing complaints it declined to investigate and did not consistently explain the basis for its decisions to complainants, but plans to begin doing so.

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## OIG and DOJ-OPR Have Not Consistently Provided Complainants with Required Status Updates and Extension Requests; OIG Has Begun Tracking Compliance, but DOJ-OPR Has Not

OIG and DOJ-OPR have not consistently provided complainants with periodic status updates nor have they always obtained complainants' approvals for extensions when the investigator reviewing the complaint needed more time, as required under DOJ's FBI whistleblower regulations.<sup>62</sup> Specifically, in 65 percent of the complaints we reviewed (37 of 57), the investigating office did not meet the regulatory requirement to contact the complainant to acknowledge that the office had received the complaint within 15 days of the date either OIG or DOJ-OPR received the complaint. In particular, OIG did not meet the requirement in 20 of 36 complaints (56 percent) and DOJ-OPR did not meet the requirement in 17 of 21 complaints (81 percent). See appendix III for more detail on the number and percentage of complaints in which OIG and DOJ-OPR met each reporting requirement.

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<sup>62</sup>We reviewed 58 investigating office complaints—37 OIG complaints and 21 DOJ-OPR complaints. (In 4 of the 62 total complaints we reviewed, the complainant filed his or her complaint directly with OARM before filing with an investigating office; therefore we did not review investigating office case files associated with these complaints.) The number of complaints included in our analysis for each requirement may not total 58 because, in some instances, we were not able to determine whether a complaint met the requirement from the information contained in the case file or the investigating office closed the complaint before the deadline for the requirement. In these instances, we excluded the complaint from our analysis.

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After the deadline to acknowledge that the office received the complaint, we saw evidence in the case files for the majority of complaints we reviewed (27 of 37, or 73 percent) that OIG and DOJ-OPR provided the first status update within the 90-day time frame; however, both offices were less consistent about meeting the time frames for subsequent status updates, which are required at least every 60 days.<sup>63</sup> In 20 of 27 complaints we reviewed (74 percent)—including 8 of 12 OIG complaints and 12 of 15 DOJ-OPR complaints—we saw at least one period of more than 60 days during which the case file did not contain evidence that the investigating office had communicated with the complainant. In 8 of these 20 complaints, we identified only one 60-day period in which the case file did not contain evidence of communication with the complainant. However, in the other 12 complaints, we identified more than one 60-day period in which the case file did not demonstrate that the investigating office had communicated with the complainant.

In addition, OIG and DOJ-OPR did not always obtain the complainant's approval for an extension when the investigator needed more time. As discussed previously, the regulations require that the investigating office determine within 240 days of receiving the complaint if there are reasonable grounds to believe whistleblower retaliation occurred, unless the complainant agrees to an extension.<sup>64</sup> We found that the investigating offices met this requirement in most of the complaints we reviewed (47 of 57, or 82 percent), generally because the offices closed the majority of

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<sup>63</sup>In addition to letters informing the complainant of the status of the investigation, we counted as status updates all evidence of communication from the investigating office to the complainant, including evidence of phone calls, e-mails, and interviews with the complainant. Senior OIG officials and a DOJ-OPR official responsible for managing these complaints told us that they consider both letters and less formal communications, such as phone calls and e-mails, to be status updates under the regulations since they provide the complainant with information about the status of his or her complaint.

<sup>64</sup>We considered a complaint to have met the 240-day requirement if the investigating office provided the complainant a final termination report or otherwise closed the complaint within 240 days from the date the office received the complaint. In 1 DOJ-OPR complaint we reviewed, the complainant initially provided an incorrect address and DOJ-OPR sent both a proposed and final termination report to the incorrect address within 240 days, but closed the complaint after more than 240 days because of the time needed to obtain the correct address. We excluded that complaint from our analysis with regard to this requirement.

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complaints within 240 days (40 of 57, or 70 percent).<sup>65</sup> However, the case files for over half (10 of 17) of the complaints that exceeded 240 days—including 6 of 7 OIG complaints and 4 of 10 DOJ-OPR complaints—did not contain documentation that the complainant had agreed to an extension.

The regulatory requirements help ensure that both complainants and the investigating office receive information necessary to make decisions regarding the complaint. For example, the requirement to send notice to the complainant within 15 days acknowledging that the office has received the complaint ensures that the complainant is aware of whom to contact within OIG or DOJ-OPR if he or she has questions or additional information to provide regarding their complaint. Further, three of the eight whistleblower advocates and attorneys we spoke with stated that regular communication between investigators and complainants ensures that complainants provide the investigating office with follow-up information that the office needs to make a timely and appropriate decision. In addition, as previously discussed, the regulations provide complainants the right to bring their complaints directly to OARM after 120 days if they have not received notice that the investigating office will seek corrective action. Two of the whistleblower advocates we spoke with said that it is generally beneficial to the complainant to wait for OIG or DOJ-OPR to complete their investigations so that these offices can obtain a complete factual record, which is helpful if the complainant pursues his or her case with OARM. However, according to these whistleblower advocates, if the complainant is not satisfied with the investigating office's progress, the complainant may prefer to go directly to OARM. Regulatory requirements to provide periodic status updates and receive the complainant's approval for an extension when investigations are running long helps ensure complainants have the information they need to make this decision.

More broadly, regular status updates provide reassurance to complainants during the investigative process. Four of the eight whistleblower advocates and attorneys we spoke with said that regular status updates reassure complainants that the investigating office is

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<sup>65</sup>OIG closed 30 of 37 complaints (81 percent) within 240 days, and DOJ-OPR closed 10 of 20 complaints (50 percent) within 240 days. We found that the median length of the 37 OIG complaints we reviewed was 35 days and the median length of the 20 DOJ-OPR complaints we reviewed was 281 days.

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continuing to make progress on their complaints. Further, six of the attorneys and advocates said that, without regular status updates, complainants can become discouraged and develop a negative view of the process. Five of these attorneys and advocates said that, as a result of these negative experiences, potential whistleblowers may be less likely to come forward to report wrongdoing.

At the time the case files we reviewed were open, OIG and DOJ-OPR did not have oversight mechanisms in place to ensure compliance with the status update and extension requirements. According to senior OIG officials and a DOJ-OPR official responsible for managing these complaints, managers regularly discussed individual complaints with the investigator assigned to the complaint, but the investigator was responsible for setting due dates to ensure compliance with the regulations. The OIG and DOJ-OPR officials we spoke with said that their investigators were frequently in communication with complainants, but these communications were not always documented within their case files. Without documentation of these communications, managers could not verify that investigators had communicated with complainants, as required. In addition, senior OIG officials and the DOJ-OPR official said that they maintained information on the dates whistleblower retaliation complaints were opened and closed within their case management systems; however, these systems were not specific to whistleblower retaliation complaints and did not contain dates of interim communications. As a result, managers could not use these systems to oversee investigators' compliance with requirements to provide status updates within prescribed time frames or obtain the complainant's approval for an extension, if required.

OIG has taken steps to begin tracking compliance with these requirements; however, DOJ-OPR has not yet taken similar action. Specifically, in July 2014, during the course of our review, an OIG manager informed staff responsible for these complaints of the importance of documenting status updates within case files to ensure documentation of OIG's compliance with regulatory requirements to update complainants within prescribed time frames. Further, over the last 2 years, OIG has developed a database it now uses as a management tool to oversee investigators' compliance with requirements for communicating with complainants. According to senior OIG officials we spoke with, OIG decided to develop this database to help ensure that OIG meets its regulatory requirements. OIG managers use the database to track dates of interim communications, such as status updates, and the database calculates regulatory deadlines for subsequent updates and for

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closing the complaint. In addition, according to senior OIG officials, managers can use the database to run reports, such as to see upcoming deadlines for all open complaints. Although it is too soon to tell how effective this database will be, if used consistently, this database could help OIG managers ensure investigators communicate with complainants in accordance with regulatory requirements.

According to a DOJ-OPR official responsible for managing these complaints, DOJ-OPR could place an even greater emphasis on the deadlines for these complaints and take additional steps to oversee communications with complainants. This official stated that DOJ-OPR investigators may lose track of deadlines for status updates in FBI whistleblower retaliation cases because similar requirements are not in place for other cases DOJ-OPR typically handles. Further, as discussed previously, in many of the case files we reviewed we did not see evidence of communication between the DOJ-OPR investigator and the complainant within required time frames. For example, in one case file we reviewed, the complainant listed numerous attempts to contact DOJ-OPR over the prior year and expressed frustration at not receiving the required status updates.

According to senior DOJ-OPR officials, DOJ-OPR has taken some steps to improve its management of whistleblower retaliation cases, but does not track investigators' compliance with specific regulatory requirements and does not have a formal oversight mechanism to do so. In the last year and a half, DOJ-OPR managers have started to receive weekly reports with information on all open complaints, according to a DOJ-OPR official responsible for managing these complaints. However, the official said that the reports do not contain information on status updates. A senior DOJ-OPR official reported that DOJ-OPR is in the initial stages of upgrading its case management system, and DOJ-OPR officials expect that the new system could eventually be tailored to allow them to capture additional information on the office's handling of FBI whistleblower retaliation complaints, such as the dates of communications between investigators and complainants.

*Standards for Internal Control in the Federal Government* calls for agencies to conduct ongoing monitoring in the course of normal operations, such as when investigating whistleblower retaliation complaints, to help managers ensure compliance with applicable

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regulations and achieve desired results.<sup>66</sup> DOJ-OPR has begun taking steps to upgrade its case management system but is very early in this process. As DOJ-OPR upgrades its case management system, tailoring the system to capture data specific to FBI whistleblower retaliation complaints, or developing some other mechanism, could provide DOJ-OPR managers and investigators information necessary to track compliance with regulatory requirements. Further, using that information to conduct ongoing monitoring of DOJ-OPR attorneys' compliance with regulatory requirements could help DOJ-OPR ensure complainants receive the periodic updates that they are entitled to and that they need to determine next steps for their complaints.

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**OIG Has Not Informed Complainants before Closing Complaints It Declined to Investigate or Consistently Communicated Reasons for Its Decision, but Plans to Begin Doing So**

OIG has not informed complainants before closing complaints it declines to investigate and has not always communicated the reasons for its decision not to investigate because, according to senior OIG officials, OIG does not view the regulations as requiring them to do so. Specifically, these officials said that the regulations state that the office must provide the complainant with a written statement that indicates the office's intention to close the complaint when the investigating office decides to terminate an investigation. As a result, according to these officials, this provision does not apply if OIG declines the complaint before initiating an investigation. Similarly, these officials said that OIG does not view the requirement to send a final termination report including a summary of relevant facts and the reasons for terminating an investigation as applying to complaints OIG declines to investigate. Unlike in OIG's process, a DOJ-OPR official responsible for managing these complaints said that DOJ-OPR provides a draft report to the complainant when DOJ-OPR decides to close a complaint, including when DOJ-OPR makes this decision without initiating an investigation.

We found that OIG provided a proposed termination report including the factual findings and conclusions that justified terminating the investigation before OIG finalized its decision to close the complaint in 8 of the 9 complaints OIG investigated.<sup>67</sup> In addition, we found that OIG sent the

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<sup>66</sup>[GAO/AIMD-00-21.3.1](#).

<sup>67</sup>In addition to these 9 complaints, we reviewed 1 other complaint OIG investigated. Because the complainant withdrew the complaint before OIG determined whether to terminate the complaint, we excluded that complaint from our analysis.



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complainant a final termination report when OIG terminated most of these investigations (7 of 8).<sup>68</sup> Further, OIG generally included information required under the regulations, such as a summary of relevant facts, OIG's reasons for terminating in the investigation, and a response to the complainant's comments, in these final termination reports.<sup>69</sup>

We found that OIG did not send a proposed termination report in any of the 27 complaints OIG declined to investigate, in accordance with OIG's interpretation of the regulations. In addition, although OIG sent a final termination report in most of the complaints (25 of 27, or 93 percent) OIG declined to investigate, OIG did not always include the reasons for its decision in the report. Specifically, we found that in 15 of the 24 final termination reports (63 percent) we reviewed for complaints OIG declined to investigate, OIG did not clearly explain the reasons for this decision.<sup>70</sup> Seven of these 15 reports indicated that OIG found that the complaint did not meet threshold regulatory requirements under the FBI whistleblower regulations, but the report did not communicate why. For example, in one instance, OIG's report to the complainant explained the general finding that the allegations, even if accepted as true, did not demonstrate a personnel action in retaliation for a protected disclosure. Information we reviewed elsewhere in this case file specified that OIG found that the complainant had not made the underlying disclosure to a designated entity under the regulations. However, OIG did not include this information in its final report to the complainant. In the 8 other complaints, OIG's final report to the complainant stated that another office should

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<sup>68</sup>This excludes 1 complaint in which the complainant brought the complaint to OARM after receiving OIG's proposed termination report. In the 1 complaint in which OIG did not send a final termination report, OIG opened a separate investigation into additional allegations made by the complainant in comments on the proposed termination report.

<sup>69</sup>Specifically, we found that OIG included a summary of relevant facts and reasons for terminating the investigation in 6 of 7 final termination reports. OIG included a response to the complainant's comments in the final termination report for 5 of the 6 complaints in which the complainant provided comments on the proposed termination report. In the 1 complaint in which OIG did not address the complainant's comments in the final termination report, OIG wrote a separate letter responding to the comments. In 1 complaint, OIG did not provide the complainant a proposed termination report; therefore, the complainant could not have provided comments in response to the proposed termination report.

<sup>70</sup>This excludes 1 complaint in which we could not determine if the final termination report included the reasons for closing the complaint because the case file did not include a copy of the report.

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review the complaint, such as the FBI Inspections Division, but did not indicate the reason for this decision. In particular, the report did not indicate that OIG had considered the complaint as a whistleblower retaliation matter and determined the complaint did not meet threshold regulatory requirements for OIG to conduct an investigation.

In contrast, DOJ-OPR generally provided complainants proposed termination reports before closing their complaints and included required information in its final termination reports, including in complaints DOJ-OPR closed without conducting an investigation. Specifically, we found that DOJ-OPR sent a proposed termination report in 17 of 19 complaints (89 percent) that DOJ-OPR terminated, and included the office's findings and conclusions that justified terminating the investigation in all 17 of these reports.<sup>71</sup> In addition, we found that DOJ-OPR sent a final termination report in all 19 complaints and included relevant facts and the reasons for terminating the investigation in all 19 of these reports. Further, in all 9 complaints in which the complainant provided comments on the proposed termination report, DOJ-OPR responded to the complainant's comments in the final termination report.

Providing the complainant a proposed termination report describing the investigating office's findings and conclusions ensures that the complainant is aware of the office's rationale for the decision and has an opportunity to provide additional information or written comments before the office closes the complaint. According to two senior OSC officials we spoke with about their process for reviewing whistleblower retaliation complaints for most federal employees, OSC provides the complainant a letter when OSC intends to close a complaint that does not meet threshold requirements without conducting an investigation. In some instances, according to these officials, the complainant's response to OSC's proposed termination report has caused OSC to reconsider its initial decision to terminate the complaint. As with OIG and DOJ-OPR, if OSC intends to terminate a whistleblower retaliation investigation, OSC is required to provide the complainant a written statement including the facts and OSC's conclusions and provide the complainant an opportunity to provide comments. As previously discussed, OIG and DOJ-OPR are

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<sup>71</sup>In addition to these 19 complaints, we reviewed 2 other DOJ-OPR complaints. Because those 2 complainants went to OARM before DOJ-OPR determined whether to terminate the complaints, we excluded those 2 complaints from our analysis.

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required to provide for the enforcement of whistleblower protection in a manner consistent with certain OSC processes.<sup>72</sup>

In addition, the requirement to provide specific information in the office's final report to the complainant, including the basis for the office's decision to close the complaint, helps ensure that complainants have the information they need to make decisions about their complaints. As discussed previously, the regulations provide complainants the option of bringing their complaints to OARM after the investigating office has notified them that it has closed the complaint.<sup>73</sup> However, without information on the reasons for OIG's decision to decline to investigate, complainants may not have sufficient information to determine if they would like to continue to pursue their complaints through OARM. Further, the regulations require complainants to bring their complaints to OARM within 60 days of receiving notification from the investigating office. If complainants need to request additional information from OIG, such as the rationale for OIG's decision, they may not have sufficient time to bring their complaints to OARM.

Senior OIG officials said that although they have not provided proposed termination reports in complaints they declined to investigate, they considered any additional information complainants provided after receiving notice of OIG's decision not to investigate. However, when we met with these officials in October 2014, they said that they recognize the benefits of always providing complainants the opportunity to comment on OIG's decision to terminate a complaint without initiating an investigation because the complaint does not meet threshold regulatory requirements. In addition, these officials said that they need to be more specific about the reasons a complaint does not meet regulatory requirements. In light of our review, these OIG officials said that they have decided to implement these practices and have instructed their investigators to do so going

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<sup>72</sup>In particular, pursuant to presidential delegation, DOJ is required to provide for the enforcement of the prohibition against personnel practices taken in retaliation for protected disclosures consistent with 5 U.S.C. § 1214, which governs OSC's authority to investigate allegations of prohibited personnel practices and make recommendations for corrective action, among other things. As DOJ explained in issuing its regulations, the investigating offices (OIG and DOJ-OPR) have been granted powers and functions that are consistent with those granted to OSC under section 1214.

<sup>73</sup>Officials with both OIG and OARM told us that OIG's decision not to investigate a complaint is sufficient for the complainant to have met the requirement to bring the complaint to an investigating office—either OIG or DOJ-OPR—before filing it with OARM.

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forward. We believe that, if implemented effectively, these planned actions will help OIG ensure that all complainants have an opportunity to provide additional information or written comments before OIG closes their complaints and that complainants will receive the information they need to make decisions about their complaints.

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## Conclusions

Whistleblowers play an important role in safeguarding the federal government against waste, fraud, and abuse, but they often risk retaliation from their employers as a result of their actions. DOJ has established a process by which FBI whistleblowers can seek recourse should they experience such retaliation, and DOJ generally has the discretion to revise this process, as needed. We found that DOJ has terminated many FBI whistleblower complaints based on complainants' failure to meet threshold regulatory requirements rather than whether the retaliation occurred. In particular, FBI employees are protected if they report wrongdoing to certain high-level FBI or DOJ officials and other specified entities, and—unlike employees of other executive branch agencies—are not protected if they report wrongdoing to their supervisors. DOJ officials have stated plans to partially address this by adding several more senior officials in FBI field offices to the list of individuals to whom complainants may report protected disclosures, but the timing and outcome of this stated plan are uncertain. DOJ officials said they do not plan to expand the list to include supervisors or others in an employee's chain of command in part because of their concerns about the additional resources that would be needed to handle a possible increase in complaints and the potential effect on the timeliness of DOJ's process to handle these complaints. While DOJ officials' concern about timeliness is important, they are already taking other steps to improve the efficiency of this process. More importantly, dismissing retaliation complaints made to an employee's supervisor or someone in that person's chain of command leaves some FBI whistleblowers with no recourse if they allege retaliation, as our review of case files demonstrated. Training that DOJ officials plan to provide to FBI employees could help provide information on how to make a protected disclosure; however, this planned training will not address the fact that some employees report alleged wrongdoing first to their supervisors or others in their chain of command without ever expecting that this will lead to retaliation and a whistleblower claim.

As a result, congressional consideration of whether the purposes of 5 U.S.C. § 2303, which prohibits a personnel action taken against an FBI employee as a reprisal for a protected disclosure, are being met—in

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particular, whether FBI employees should, like employees of other executive branch agencies, have a means to obtain corrective action for retaliation for disclosures of wrongdoing made to supervisors and others in the employees' chain of command—could help ensure that DOJ's process for handling these complaints is consistent with congressional action to strengthen and expand protections for other federal whistleblowers. Further, it is important that, regardless of what changes DOJ may make to the list of entities designated to receive protected disclosures, information DOJ and the FBI provide to FBI employees on the process for making a protected disclosure is clear and consistent so FBI employees who consult such guidance make decisions based on accurate information.

In some instances—particularly where OARM ordered corrective action in favor of the complainant—the process for resolving these complaints has taken many years, and DOJ has stated a commitment to improving its efficiency in handling these cases. Committing to specific time frames for returning DOJ decisions on the outcomes of FBI whistleblower retaliation cases could help DOJ achieve its commitment to improving efficiency in handling these complaints. Additionally, assessing the impacts of DOJ actions to improve timeliness could help ensure that these actions are achieving the intended results. Finally, establishing an oversight mechanism to monitor DOJ-OPR investigators' compliance with regulatory reporting requirements—either by tailoring DOJ-OPR's case management system or another means—can assist DOJ in ensuring that complainants receive timely information they need to make informed decisions regarding their complaints, such as whether or not to seek corrective action from OARM.

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## Matter for Congressional Consideration

To ensure that the purposes of 5 U.S.C. § 2303—which prohibits a personnel action taken against an FBI employee as a reprisal for a protected disclosure—are met, Congress may wish to consider whether FBI employees should have a means to obtain corrective action for retaliation for disclosures of wrongdoing made to supervisors and others in the employee's chain of command who are not already designated officials.

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## Recommendations for Executive Action

We recommend the following four actions.

To better ensure that FBI whistleblowers have access to recourse under DOJ's regulations should the individuals experience retaliation, and to

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minimize the possibility of discouraging future potential whistleblowers, we recommend that the Attorney General clarify in all current relevant DOJ guidance and communications, including FBI guidance and communications, to whom FBI employees may make protected disclosures and, further, explicitly state that employees will not have access to recourse if they experience retaliation for reporting alleged wrongdoing to someone not designated in DOJ's regulations.

To better ensure that DOJ is fulfilling its commitment to improving efficiency in handling these complaints, we recommend the following to the heads of the relevant offices:

- OARM and ODAG should provide parties with an estimated time frame for returning each decision, including whether the complaint meets threshold regulatory requirements, merits, and appeals. If the time frame shifts, OARM and ODAG should timely communicate a revised estimate to the parties.
- DOJ-OPR, OIG, OARM, and ODAG should jointly assess the impact of ongoing and planned efforts to reduce the duration of FBI whistleblower retaliation complaints throughout the entire investigation, adjudication, and appeal process to ensure that these changes are in fact shortening total complaint length, without sacrificing quality.

To ensure that complainants receive the periodic updates that they are entitled to and need to determine next steps for their complaint, such as whether or not to seek corrective action from OARM, we recommend that Counsel, DOJ-OPR tailor its new case management system or otherwise develop an oversight mechanism to capture information on the office's compliance with regulatory requirements and, further, use that information to monitor and identify opportunities to improve DOJ-OPR's compliance with regulatory requirements.

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## Agency Comments and Our Evaluation

We provided a draft of this report to DOJ and OIG for review and comment. On January 16, 2015, an official with DOJ's Justice Management Division sent us an email stating that the department concurred with our recommendations. DOJ also provided technical comments which we incorporated, as appropriate. In its technical comments, DOJ stated a commitment to monitoring the implementation of its April 2014 recommendations to ensure that FBI employees are not unfairly excluded from whistleblower protection because they had disclosed information to their immediate supervisor. DOJ also reported

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that DOJ-OPR is taking steps, such as developing a report template and upgrading its case management system which, when completed, could help the agency begin systematically tracking investigators' compliance with regulatory reporting requirements. These initial steps position the agency to satisfy our recommendation that DOJ-OPR tailor its new case management system or otherwise develop an oversight mechanism to capture information on the office's compliance with regulatory reporting requirements.

In written comments provided by OIG, (reproduced in app. IV) the Inspector General concurred with our recommendation to OIG and provided technical comments which we incorporated, as appropriate. In its comment letter, OIG stated that OIG has consistently supported and continues to support broadening the list of persons to whom protected disclosures can be made. Further, with regard to guidance provided to FBI employees, the OIG fully supports providing clear and comprehensive guidance as to all aspects of whistleblower rights and protections. To this end, OIG's letter stated that the office is working with the FBI to create a specialized training program that highlights the specific requirements and procedures for FBI whistleblowers and on enhancements to OIG's website to include additional information specific to FBI employees.

The OIG letter also raised several additional issues. First, OIG's letter stated that, with regard to the total duration of Jane Turner's complaint, for example, the GAO draft does not distinguish between the responsibilities of OIG and the department. We appreciate the differing roles and responsibilities of each office and describe these in our report. In reporting our findings, we clearly distinguish between the separate offices' timeframes and records of compliance with certain regulatory requirements. However, it is important for us to also consider the total length of cases, which is particularly important to the whistleblowers. Second, the OIG letter mentioned that GAO's analysis excluded more recent complaints. Given the sensitive nature of open cases, we reviewed only complaints closed as of December 31, 2013. Third, the OIG letter commented that the GAO report failed to fully acknowledge the high priority and personal attention OIG senior staff give to FBI whistleblower retaliation matters. We disagree. Our report explains that the Inspector General personally reviews each complaint, but also recognizes that competing priorities for this high level of attention has resulted in delays. Fourth, OIG's letter noted that in many instances OIG has relied on telephone contact with complainants to meet regulatory notification requirements and because such contacts were not consistently documented, we would not always have identified them in our case file

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review. In our review of both DOJ and OIG case files, we noted all evidence of contact with the complainants, including evidence of written and oral communication, but it is correct that we would not have identified undocumented contact with complainants. As OIG acknowledged in its letter, it is important that evidence of contact be documented in case files to demonstrate compliance with the regulations. As discussed in our report, OIG has taken steps to address this.

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As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the Attorney General, the DOJ Inspector General, appropriate congressional committees, and other interested Member of Congress. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-8777 or [maurerd@gao.gov](mailto:maurerd@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix V.

Sincerely yours,

A handwritten signature in black ink that reads "David C. Maurer". The signature is written in a cursive style with a long, sweeping tail on the final letter.

David C. Maurer  
Director, Homeland Security and Justice



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# Appendix I: Scope and Methodology

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This appendix discusses in detail our methodology for addressing the following three objectives:

- determining how long the Department of Justice (DOJ) has taken to resolve Federal Bureau of Investigation (FBI) whistleblower retaliation complaints and what factors have affected these time frames,
- determining the extent to which DOJ has taken steps to resolve complaints more quickly and determine the impact of any such efforts; and
- determining the extent to which DOJ's Office of the Inspector General (OIG) and Office of Professional Responsibility (DOJ-OPR) have complied with regulatory reporting requirements.

To determine how long DOJ has taken to resolve FBI whistleblower retaliation complaints and the factors that affected these time frames, we reviewed DOJ case files for all FBI whistleblower retaliation complaints closed within the last 5 calendar years (from 2009 through 2013). Specifically, we reviewed the case files for a total of 62 closed whistleblower retaliation complaints to calculate the duration of each complaint from initial filing to DOJ's final decision, including, for example, the length of time from initial filing to the investigating office's final decision; the length of time from filing a request for corrective action with the Office of Attorney Recruitment and Management (OARM) to OARM's decision; and the length of the appeals process.<sup>1</sup> We did this by creating a data collection instrument to identify the key characteristics of whistleblower retaliation cases, determine the completeness of the files, and assess time frames for each case in accordance with DOJ's

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<sup>1</sup>The regulations require that whistleblower retaliation complaints be filed directly with OIG or DOJ-OPR. However, OIG officials report that OIG will investigate a retaliation complaint referred by the FBI if the complaint is sufficient to establish the elements of a retaliation claim under the regulations. Therefore, in addition to these 62 complaints, we also reviewed case files for 18 complaints that OIG received from the FBI. OIG officials told us that OIG reviews all complaints submitted to the FBI to determine if any complaints submitted to the FBI fall under OIG's jurisdiction, such as complaints that appear to allege FBI whistleblower retaliation. Because these 18 complaints were not submitted directly to OIG or DOJ-OPR, as required by § 27.3(a)(1), and OIG did not investigate these complaints as whistleblower retaliation complaints (or the complaint was withdrawn by the complainant before OIG made a determination), we excluded these 18 complaints from our analysis.

regulations.<sup>2</sup> We also gathered information on the outcome of each complaint and factors that could affect timeliness, such as the length and frequency of parties' requests for extensions of time. In addition, to better understand DOJ's process for handling these complaints, we reviewed relevant documentation, including DOJ's whistleblower regulations and internal guidance on the process for making a protected disclosure. To obtain DOJ officials' perspectives on DOJ's process, time frames for handling these complaints, and factors affecting these time frames, we also interviewed senior agency officials from offices responsible for investigating—OIG and DOJ-OPR—or adjudicating—OARM and the Office of the Deputy Attorney General (ODAG)—FBI whistleblower retaliation complaints. We compared aspects of DOJ's process against standards in *Standards for Internal Control in the Federal Government* to identify the extent to which DOJ's process was in alignment with these standards.<sup>3</sup>

Because of the sensitivity of FBI whistleblowers' identities, to obtain whistleblower perspectives about DOJ's process and time frames, we met with representatives of whistleblower advocacy groups knowledgeable about DOJ's process and attorneys who have represented FBI whistleblowers through this process. Specifically, we identified and interviewed representatives of five whistleblower advocacy groups using an iterative process often referred to as snowball sampling. At each interview, we solicited names of additional groups to interview and selected for interviews those that were most widely recognized as

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<sup>2</sup>In 1998, DOJ issued regulations that set forth the process for FBI whistleblowers to report complaints of retaliation for their disclosures. Whistleblower Protection For Federal Bureau of Investigation Employees, 63 Fed. Reg. 62,937 (Nov. 10, 1998). DOJ initially issued these regulations as an interim rule effective upon publication in *the Federal Register*; however, DOJ invited postpromulgation comments that were addressed in a final rule issued in 1999. Whistleblower Protection For Federal Bureau of Investigation Employees, 64 Fed. Reg. 58,782 (Nov. 1, 1999) (codified as amended at 28 C.F.R. pts. 0, 27).

<sup>3</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: Nov. 1, 1999). These standards define the minimum level of quality acceptable for internal control in government and provide the basis against which internal control is to be evaluated. Internal control refers to the plans, methods, and procedures used to achieve missions, goals, and objectives.

knowledgeable about DOJ's process.<sup>4</sup> We also interviewed attorneys who had represented FBI whistleblowers in three of five cases where complainants have alleged retaliation and obtained corrective action.<sup>5</sup> These attorneys discussed their experience with DOJ's process and factors affecting the length of their cases. We analyzed the results of all of these interviews to distill themes and patterns. The information we gathered from these groups and attorneys—referred to throughout our report collectively as eight whistleblower advocates and attorneys—is not generalizable, but provides perspectives on whistleblowers' experiences with DOJ's process.<sup>6</sup>

To determine the extent to which DOJ has taken steps to resolve complaints more quickly, we interviewed senior DOJ officials in each of the four offices responsible for investigating or adjudicating whistleblower retaliation complaints—OIG, DOJ-OPR, OARM, and ODAG. We asked about the factors that affect the timely processing of these complaints and any efforts to address them. In addition, to identify any practices that have improved timeliness in comparable federal settings, we interviewed senior officials in the Department of Defense's Office of the Inspector General as well as the U.S. Office of Special Counsel (OSC) and the U.S. Merit Systems Protection Board (MSPB)—federal agencies that handle whistleblower retaliation complaints for other federal employees—about those agencies' processes for handling whistleblower retaliation complaints. To identify the extent to which DOJ officials have taken steps to determine the impact of their efforts to improve timeliness, we

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<sup>4</sup>The five whistleblower advocacy groups we interviewed were the American Civil Liberties Union, the Brennan Center for Justice at New York University School of Law, the Government Accountability Project, the National Whistleblowers Center, and the Project on Government Oversight.

<sup>5</sup>This includes all five closed cases in which DOJ ordered corrective action in favor of an FBI whistleblower since DOJ issued its regulations in 1998. In all of these cases, DOJ substantiated the complaint and ordered that the FBI take corrective action, such as providing the complainant back pay or restoring that person to a prior position. In one case, the complainant represented his/her self and so did not have an attorney and in another case we attempted to meet with the attorney numerous times but the attorney was unable to meet because of schedule conflicts.

<sup>6</sup>Two representatives of a whistleblower advocacy group also represented an FBI whistleblower who obtained corrective action. Therefore, the eight whistleblower advocates and attorneys referred to throughout our report include four representatives of whistleblower advocacy groups, two attorneys who represented FBI whistleblowers, and two attorneys who represent a whistleblower advocacy group and have also represented an FBI whistleblower who obtained corrective action.

interviewed DOJ officials and reviewed DOJ's April 2014 report to the President<sup>7</sup> and compared DOJ's stated plans with standards in *Standards for Internal Control in the Federal Government*.<sup>8</sup>

To determine the extent to which OIG and DOJ-OPR have complied with regulatory reporting requirements, we compared evidence we saw in DOJ's case files with DOJ's regulations and analyzed the extent of any discrepancies. Specifically, for each case file, we reviewed OIG's and DOJ-OPR's documented communications with the complainants, including initial and ongoing outreach, and recorded the dates of all communications in our data collection instrument. We calculated the length of time between all documented communications to determine the number of complaints in which OIG and DOJ-OPR complied with the deadlines for reporting requirements in DOJ's regulations. In addition, we reviewed the content of the investigating office's final notice to the complainant that the office had closed its investigation or declined to open an investigation, as applicable, as well as the content of any interim notices stating the office's decision. We compared the content of these communications with DOJ's regulatory requirements. We also reviewed documentation and interviewed OIG and DOJ-OPR officials responsible for handling these complaints about any oversight mechanisms to ensure compliance with regulatory requirements. For example, we reviewed an electronic copy of an OIG spreadsheet for tracking regulatory deadlines for these complaints. We then compared these mechanisms against standards in *Standards for Internal Control in the Federal Government* to determine the extent to which OIG and DOJ-OPR met the relevant standards related to oversight.<sup>9</sup> Further, we interviewed eight whistleblower advocates and attorneys, as noted above, to obtain whistleblower perspectives on the extent of DOJ's compliance with regulatory requirements and the effects of this compliance. In addition, because OSC serves a function comparable to those of OIG and DOJ-OPR in handling whistleblower complaints for most other executive

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<sup>7</sup>Presidential Policy Directive 19, dated October 10, 2012, required that within 180 days, DOJ report to the President on the efficacy of its regulations pertaining to FBI whistleblower retaliation and describe any proposed revisions to these regulations to increase their effectiveness. DOJ submitted the required report to the President in April 2014, a year after the due date.

<sup>8</sup>[GAO/AIMD-00-21.3.1](#).

<sup>9</sup>[GAO-AIMD-00-21.3.1](#).

branch employees and has similar regulatory reporting requirements, we interviewed OSC officials about OSC's processes and mechanisms for ensuring compliance with its requirements.

We conducted this performance audit from September 2013 to January 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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# Appendix II: Department of Justice's Reasons for Closing Federal Bureau of Investigation Whistleblower Retaliation Complaints

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This appendix provides information on the Department of Justice's (DOJ) reasons for closing the 62 Federal Bureau of Investigation (FBI) whistleblower retaliation complaints we reviewed. These 62 complaints represent the universe of FBI whistleblower retaliation complaints that were closed within the last 5 calendar years (from 2009 through 2013) by the final DOJ office to review the complaint.<sup>1</sup> We reviewed case files at both of the offices responsible for investigating these complaints—the Office of the Inspector General (OIG) and the Office of Professional Responsibility (DOJ-OPR)—as well as at the office responsible for adjudicating these complaints—the Office of Attorney Recruitment and Management (OARM)—and identified the final outcome in each complaint.<sup>2</sup>

The DOJ office reviewing a whistleblower retaliation complaint may close the complaint before conducting an investigation (in the case of OIG and DOJ-OPR) or considering the merits of the complaint (in the case of OARM) if the office determines that the complaint does not meet threshold requirements under the FBI whistleblower regulations. If the investigating office finds that a complaint meets threshold regulatory requirements, the office will open an investigation to determine if there are reasonable grounds to believe that a personnel action had been taken or will be taken in retaliation for a protected disclosure. If OARM first determines that a complaint meets threshold requirements, OARM adjudicates the complaint to determine whether the disclosure was a contributing factor in the personnel action based on a preponderance of

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<sup>1</sup>The regulations require that whistleblower retaliation complaints be filed directly with OIG or DOJ-OPR. However, OIG officials report that OIG will investigate a retaliation complaint referred by the FBI if the complaint is sufficient to establish the elements of a retaliation claim under the regulations. Therefore, in addition to these 62 complaints, we also reviewed case files for 18 complaints that OIG received from the FBI. OIG officials told us that OIG reviews all complaints submitted to the FBI to determine if any complaints submitted to the FBI fall under OIG's jurisdiction, such as complaints that appear to allege FBI whistleblower retaliation. Because these 18 complaints were not submitted directly to OIG or DOJ-OPR, as required by § 27.3(a)(1), and OIG did not investigate these complaints as whistleblower retaliation complaints (or the complaint was withdrawn by the complainant before OIG made a determination), we excluded these 18 complaints from our review.

<sup>2</sup>We also reviewed Office of the Deputy Attorney General (ODAG) case files for the 4 complaints that were appealed to that office. Because the Deputy Attorney General either upheld OARM's decision or returned the complaint to OARM for review, we determined that OARM made the final determination in each complaint and, therefore, we included OARM's final determination for complaints that were appealed.

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the evidence and whether the FBI has demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. If the complaint is substantiated and the FBI is unable to meet its burden of proof, OARM will order that the FBI take appropriate corrective action. In addition complainants may voluntarily withdraw their complaints. Table 1 summarizes the final outcome of the 62 complaints we reviewed, sorted by the final DOJ office to review the complaint and the overall length of the complaint.<sup>3</sup>

**Table 1: Final Outcome in Federal Bureau of Investigation (FBI) Whistleblower Retaliation Complaints, by Final Department of Justice (DOJ) Office to Review Complaint and Length of Complaint**

Final office to review complaint	Final outcome	Number of complaints closed in less than 1 year	Number of complaints closed after 1 year	Total number of complaints
Investigating office—Office of the Inspector General (OIG) or Office of Professional Responsibility (DOJ-OPR)	<b>Complaint did not meet threshold regulatory requirements.</b> The office found that the complaint did not meet threshold requirements under the FBI whistleblower regulations.	33	6 <sup>a</sup>	39 <sup>b</sup>
	<b>No reasonable grounds.</b> The office investigated at least one allegation made by the complainant and found that there were not reasonable grounds to believe that a personnel action had been taken in retaliation for a protected disclosure.	3	3	6 <sup>c</sup>
	<b>Complainant withdrew complaint</b>	1	0	1
<b>Total number of complaints closed by the investigating office</b>		<b>37</b>	<b>9</b>	<b>46</b>

<sup>3</sup>As discussed previously in this report, if the investigating office finds that there are reasonable grounds to believe that there had been retaliation for a protected disclosure, the office forwards its investigative report with any recommended actions to OARM for adjudication. In certain circumstances in which OIG or OPR has not found in the complainant's favor or has not completed its investigation, the complainant may go directly to OARM to request corrective action. We did not identify any complaints in which the investigating office found reasonable grounds; however, in 12 of the complaints we reviewed, the complainant brought the complaint to OARM directly after submitting the complaint to an investigating office. In these 12 complaints, we considered the reasons cited in OARM's case file as the final reasons for closing the complaint, although, in some instances, OARM's determination differed from the investigating office's determination.

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<b>Final office to review complaint</b>	<b>Final outcome</b>	<b>Number of complaints closed in less than 1 year</b>	<b>Number of complaints closed after 1 year</b>	<b>Total number of complaints</b>
<b>Adjudicating office</b> —Office of Attorney Recruitment and Management (OARM)	<b>Complaint did not meet threshold regulatory requirements.</b> OARM found that the complaint did not meet threshold requirements for OARM to review the merits of the complaint under the FBI whistleblower regulations.	7	2	<b>9</b>
	<b>No reprisal found.</b> OARM reviewed the merits of at least one allegation made by the complainant and found either that the protected disclosure was not a contributing factor in the personnel action, or that the FBI had demonstrated by clear and convincing evidence that it would have taken the same action in the absence of the disclosure.	0	1	<b>1</b>
	<b>Complainant withdrew complaint</b>	0	3 <sup>d</sup>	<b>3</b>
	<b>OARM found reprisal and ordered corrective action</b>	0	3	<b>3<sup>e</sup></b>
<b>Total number of complaints closed by OARM</b>		<b>7</b>	<b>9<sup>f</sup></b>	<b>16</b>
<b>Total number of complaints closed by DOJ</b>		<b>44</b>	<b>16</b>	<b>62</b>

Source: GAO review of OIG, DOJ-OPR, and OARM case files. | GAO-15-112

<sup>a</sup>In 1 of these complaints, OIG found that the complaint did not meet threshold requirements under the FBI whistleblower regulations but investigated the complaint under its preexisting authority.

<sup>b</sup>In most instances, the investigating office determined that the complaint did not meet threshold regulatory requirements based on initial information submitted by the complainant; however, in some instances, the investigating office made this determination after taking some investigative steps, such as interviewing the complainant or requesting additional information. We included those complaints in this category.

<sup>c</sup>Some complaints we reviewed included multiple disclosures or alleged acts of retaliation. In some instances, OIG or DOJ-OPR investigated one allegation but determined other aspects of the complaint did not meet threshold requirements. We included those complaints in this category.

<sup>d</sup>In 2 of these complaints, the complainants withdrew after OARM determined that the complaints met threshold regulatory requirements. In the third complaint, the complainant withdrew before OARM determined whether the complaint met threshold regulatory requirements.

<sup>e</sup>In all 3 of these complaints, an investigating office had previously reviewed and terminated the complaint because, among other reasons, there was sufficient evidence to conclude that the personnel action would have been taken absent the disclosure. However, in all 3 complaints, OARM determined that at least one personnel action had been taken in reprisal for a protected disclosure. Figure 3 shows the overall length of these complaints, including the length of each office's review.

<sup>f</sup>These 9 complaints were reviewed by an investigating office before being reviewed by OARM. The investigating office completed its review of 6 of the complaints in less than a year and exceeded 1 year in 3 of the complaints.



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In addition to determining the final outcome in each complaint, we reviewed the case files to determine the reasons for the final DOJ office's decision to close the complaint.<sup>4</sup> For example, in some complaints, the final office determined that the complaint did not meet threshold regulatory requirements because the complainant's underlying disclosure had been made to an individual or entity not designated in the regulations and therefore the disclosure was not protected. In other complaints, the investigating office found that there were not reasonable grounds to believe the personnel action had been taken in reprisal for a protected disclosure because the evidence indicated that the personnel action would have been taken in the absence of the disclosure. Table 2 summarizes the reasons DOJ offices cited in their case files as reasons for closing whistleblower retaliation complaints and the number of complaints in which the final DOJ office to review the complaint cited each.<sup>5</sup>

**Table 2: Reasons for the Department of Justice's (DOJ) Final Decision to Close Federal Bureau of Investigation (FBI) Whistleblower Retaliation Complaints**

	<b>Total number of complaints</b>
One or more of the disclosures did not meet the definition of "protected disclosure" under 28 C.F.R. § 27.1(a).	<b>30</b>
The complainant made the disclosure to an individual or entity not listed in the regulations.	23
The disclosure did not evidence a violation of any law, rule, or regulation or other subject covered by the regulations.	7
The complainant did not have a reasonable belief of wrongdoing when making the disclosure.	2
The complainant did not claim to have made a protected disclosure.	<b>1</b>

<sup>4</sup>We did not assess whether the evidence in the case file supported the office's determination.

<sup>5</sup>In some instances, the office did not inform the complainant of the reasons it determined that the complaint did not meet threshold regulatory requirements, such as through a final report, but discussed its rationale elsewhere in the case file. We included in table 2 all reasons noted in the case file for the final office's determination, including reasons cited in internal documents as well as reasons communicated to the complainant.

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	<b>Total number of complaints</b>
One or more of the alleged acts of retaliation did not meet the definition of "personnel action" under 28 C.F.R. § 27.2(b) or the complainant did not claim to have experienced a personnel action related to the disclosure.	<b>14</b>
The facts of the complaint did not demonstrate that the alleged retaliation had been taken in reprisal for the disclosure.	<b>16</b>
The alleged retaliation occurred before the disclosure.	7
The timing of the personnel action was not reasonably close to the timing of the disclosure.	3
The personnel action would have occurred had the complainant not made the disclosure.	6
The evidence did not show that the alleged retaliator was aware of the disclosure.	4
The evidence did not demonstrate a causal connection between the alleged retaliation and the disclosure.	2
The complainant did not demonstrate that the disclosure was a contributing factor in the personnel action based on a preponderance of the evidence.	1
The complainant did not respond to requests for information necessary to show that the complaint met threshold regulatory requirements.	<b>3</b>
The complaint related to Equal Employment Opportunity (EEO) matters and should be addressed through that process. <sup>a</sup>	<b>7</b>
The allegations had previously been addressed by another office.	<b>1</b>
The complainant was not an FBI employee or applicant for employment with the FBI, as required by 28 C.F.R. § 27.1(a).	<b>2</b>
The complainant filed a request for corrective action with the Office of Attorney Recruitment and Management (OARM) before bringing the complaint to an investigating office, as required by 28 C.F.R. § 27.4(c)(1).	<b>3</b>
The complainant brought the complaint to OARM but did not file a request for corrective action.	<b>2<sup>b</sup></b>
The case file did not provide sufficient information to determine the reason DOJ determined that one or more of the complainant's allegations did not meet threshold regulatory requirements.	<b>10<sup>c</sup></b>

Source: GAO review of Office of the Inspector General (OIG), DOJ Office of Professional Responsibility (DOJ-OPR), and OARM case files. | GAO-15-112

**Notes:**

This includes all reasons cited in the case files for complaints DOJ closed because the complaint did not meet threshold regulatory requirements, complaints the investigating office closed after finding no

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reasonable grounds, and complaints OARM closed after finding no reprisal. The number of reasons exceeds the number of complaints we reviewed because, in some complaints, the final DOJ office cited multiple reasons in its decision to close the complaint. For example, in some instances, the final office found that the complaint did not meet threshold regulatory requirements but also noted that the facts did not demonstrate that the alleged retaliation had been taken in reprisal. Similarly, because some complainants alleged multiple disclosures, in some instances the final DOJ office determined that one or more of the disclosures did not meet the definition of a protected disclosure but opened an investigation with regard to one or more disclosures that it determined were protected. We counted complaints under each reason cited within the case files.

<sup>a</sup>Federal law protects federal employees and job applicants from discrimination because of race, color, religion, sex, national origin, age (40 or older), disability, or genetic information. These laws also make it illegal to fire, demote, harass, or otherwise "retaliate" against applicants or employees because they filed a charge of discrimination, because they complained to their employer or other covered entity about discrimination on the job, or because they participated in an employment discrimination proceeding (such as an investigation or lawsuit). Federal employees who believe that they have been retaliated against for a protected activity may file a complaint with the Equal Employment Opportunity Commission for corrective action. DOJ-OPR and OARM officials told us that they generally do not have jurisdiction over complaints of EEO-related reprisal, while OIG officials told us they generally do not exercise jurisdiction over complaints of EEO-related reprisal.

<sup>b</sup>In one of these complaints, the complainant had previously submitted the complaint to an investigating office and the investigating office found that the complaint did not meet threshold regulatory requirements. The complainant then submitted a letter to OARM stating an intention to file a request for corrective action but did not respond to OARM's request for additional information required to file the request for corrective action. In the second complaint, the complainant e-mailed OARM but did not file a request for corrective action after OARM informed the complainant that the complaint must first be filed with an investigating office before the complainant can file such a request with OARM.

<sup>c</sup>In these 10 complaints, we were not able to determine a specific reason for the investigating office's finding that one or more of the complainant's allegations did not meet threshold requirements based on information contained in the case file. For example, in some of these complaints, the investigating office's final letter to the complainant stated that the matters were more appropriate for review by another office or agency, but the case file did not indicate the office's basis for this determination.

# Appendix III: Department of Justice (DOJ) Investigating Offices' Compliance with Selected Reporting Requirements

Requirement	Percentage and number of complaints that met requirement, by investigating office	
	Office of the Inspector General (OIG)	Office of Professional Responsibility (DOJ-OPR)
<b>Acknowledgment of complaint:</b> The investigating office must notify the complainant that it has received the complaint and provide the name of a contact person within the office within 15 days of either OIG or DOJ-OPR receiving the complaint.	44 percent (16 of 36) <sup>a,b</sup>	19 percent (4 of 21) <sup>a,b</sup>
<b>First status update:</b> The investigating office must provide the complainant with the first status update within 90 calendar days of acknowledging receipt of the complaint.	82 percent (14 of 17) <sup>c</sup>	65 percent (13 of 20) <sup>c</sup>
<b>Subsequent status updates:</b> The investigating office must provide the complainant with a status update at least every 60 calendar days after the first status update.	33 percent (4 of 12) <sup>c,d</sup>	20 percent (3 of 15) <sup>c,d</sup>
<b>Overall timeliness:</b> The investigating office must determine within 240 days of receiving the complaint if there are reasonable grounds to believe whistleblower retaliation occurred, unless the complainant agrees to an extension.	84 percent (31 of 37) <sup>e</sup>	80 percent (16 of 20) <sup>e</sup>
<b>Closed complaint within 240-days</b>	81 percent (30 of 37) <sup>e</sup>	50 percent (10 of 20) <sup>e,f</sup>
<b>Obtained complainant's approval for an extension</b>	14 percent (1 of 7) <sup>g</sup>	60 percent (6 of 10) <sup>g</sup>

Source: GAO analysis of Department of Justice (DOJ) regulations and information contained in OIG and DOJ-OPR case files. | GAO-15-112

Notes: We determined whether the investigating office met each requirement based on information contained in the case file for each complaint. In some complaints, the office may have met the requirement but not retained documentation in the case file.

<sup>a</sup>This excludes 1 OIG complaint in which we could not determine the date of the first notice to the complainant from information contained in the case file. We counted all complaints in which the investigating office communicated with the complainant within 15 days of the date either OIG or DOJ-OPR received the complaint as meeting this requirement, including 1 OIG complaint in which the communication was not written, as required by 28 C.F.R. § 27.3(c). In 14 of the 16 instances in which OIG communicated with the complainant within 15 days, the communication included the name or contact information of a specific OIG staff person. We could not determine from the case files for 2 complaints if OIG included a contact in its first notice to the complainant because the content of the communication was not contained in the case files. DOJ-OPR included the name of a specific DOJ-OPR staff person in its first notice to the complainant in all 4 complaints in which DOJ-OPR communicated with the complainant within 15 days.

<sup>b</sup>In 2 DOJ-OPR complaints and 1 OIG complaint we reviewed, the investigating office received the complaint from the other office after more than 15 days had passed, but provided notice to the complainant within 15 days of the date the investigating office received the complaint. In an additional 2 DOJ-OPR complaints, DOJ-OPR received the complaint from OIG within 15 days of the date OIG received the complaint and DOJ-OPR provided notice to the complainant within 15 days of the date DOJ-OPR received the complaint, although more than 15 days had passed since the date OIG received the complaint. Because in these 5 complaints, more than 15 days had passed since either office received the complaint before the investigating office sent the complainant notice, these 5 complaints did not comply with the regulatory requirement.

<sup>c</sup>This excludes complaints closed before the deadline for the notice or update.

<sup>d</sup>In 3 of the 8 OIG complaints and 5 of the 12 DOJ-OPR complaints in which we did not see evidence that the office communicated with the complainant every 60 days, as required, we identified only one period of more than 60 days in which the case file did not contain evidence of communication between the investigator and the complainant.

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Selected Reporting Requirements**

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<sup>e</sup>We considered a complaint to have met the 240-day requirement if the investigating office provided the complainant a final termination report or otherwise closed the complaint within 240 days from the date the office received the complaint.

<sup>f</sup>In 1 DOJ-OPR complaint we reviewed, the complainant initially provided an incorrect address and DOJ-OPR sent both a proposed and final termination report to the incorrect address within 240 days, but closed the complaint after more than 240 days because of the time needed to obtain the correct address. We excluded that complaint from our analysis of the number of complaints that met this requirement.

<sup>g</sup>In 1 OIG complaint and 1 DOJ-OPR complaint, the case file did not contain documentation that the complainant agreed to an extension, but did contain evidence of ongoing communication between the complainant or complainant's attorney and the investigating office after the 240-day deadline. We counted these 2 complaints as meeting the requirement.

# Appendix IV: Comments from the Department of Justice Office of the Inspector General



U.S. Department of Justice

Office of the Inspector General

January 9, 2015

David C. Maurer  
Director, Homeland Security and Justice  
United States Government Accountability Office

Re: [GAO-15-112](#)

Dear Mr. Maurer:

Thank you for the opportunity to comment on the draft Government Accountability Office (GAO) report entitled “WHISTLEBLOWER PROTECTION – Additional Actions Needed to Improve DOJ’s Handling of FBI Retaliation Complaints.” (Draft). GAO has represented to the Office of the Inspector General (OIG) that this letter will be attached in full to the final GAO report released to Congress and the public.

We want to first acknowledge the hard work and professionalism of the GAO investigators involved in this project. As an independent oversight entity, we fully understand the difficulty and value of this important work. The OIG strongly believes that whistleblowers perform a service to their agency and the public when they come forward with information about potential wrongdoing, and that they should never be subject to reprisal for doing so. We have and will continue to implement reforms, before, during, and as a result of this review, in order to continue to make every effort to improve our efforts in this important area. Whistleblower rights and protections have been one of my highest priorities since becoming Inspector General in 2012.

Overview:

The OIG is a statutorily independent entity within the Department of Justice and its role in the process for addressing FBI whistleblower retaliation complaints is discrete and separate from the roles of other DOJ components. Accordingly, as an independent entity, once our investigative responsibilities are complete and we submit our report to the Department, the OIG has no further role in the adjudication process. As such, it is important to distinguish between the investigative role of the OIG and the adjudicative role played by

the Department in order not to leave any misimpression that the OIG has a continuing role in the process, or control over any delays that may occur after the conclusion of our investigation, which of course we do not.

For example, the GAO Draft begins by describing the Jane Turner case, which the Draft notes took over 10 years from investigation to final adjudication, as an example of the lengthy time it takes the DOJ to resolve some retaliation complaints. The Draft later repeatedly references the fact that the “DOJ” can take 10 or more years to resolve FBI retaliation cases. However, it is important to note that the OIG completed our draft report in the Turner case in a timely manner, within about 10 months from receiving the complaint. We are concerned that, in stressing the 10 years it took to ultimately resolve the Turner matter, the Draft does not adequately distinguish between the investigative role of the OIG, which was completed in a timely fashion, and that of other Department offices with roles in the process.

The OIG’s role in processing FBI whistleblower retaliation complaints is prescribed by regulation and consists of receiving, reviewing, and, in appropriate cases, investigating complaints to determine whether there is a “reasonable basis” to conclude that a reprisal for a protected disclosure has occurred. Under the regulations, the OIG has no role in the adjudication phase of the process, which occurs before the Department’s Office of Attorney Recruitment and Management (OARM), or in the appellate phase of the case involving the Office of the Deputy Attorney General (ODAG).

In the Turner case highlighted in the Draft, after the OIG as Conducting Office completed its investigation in a timely fashion of approximately 10 months, we provided a draft of our report to the complainant for her comments as required under the FBI whistleblower regulations. Turner responded by submitting 300 pages of comments, and then withdrew her complaint to the OIG before we could address the comments. As permitted under the FBI whistleblower regulations, she then filed her complaint with OARM. Those post-OIG proceedings consumed the great bulk of the 10 years GAO cites.<sup>1</sup> In sum, by not distinguishing between the OIG and the Department, we believe that the GAO Draft fails to acknowledge the OIG’s strong and consistent record of timely

<sup>1</sup> The GAO noted one additional case out of the 62 complaints it examined where the matter took the Department more than 10 years to complete. (See Figure 2.) The OIG was not the investigating office in this other retaliation matter. The Draft identifies a third complaint that took over 8 years to resolve. (See Figures 2 and 3.) The OIG was the investigating office for this matter, and as shown in Figure 3 of the Draft, we completed our phase of the matter in approximately one year.

completion of its discrete responsibilities under the FBI whistleblower regulations, 28 C.F.R. Part 27.

The OIG is fully committed to furthering the rights and protections of whistleblowers throughout the Department of Justice. To advance this work, we have established a Whistleblower Ombudsperson Program, created at my direction shortly after my arrival as Inspector General and before such positions were required by the Whistleblower Protection Enhancement Act and going well beyond the requirements of that statute. To lead this program, I assigned a member of my Front Office staff, with whom I consult regularly regarding whistleblower issues. We helped to create and we continue to chair the government-wide working group of federal whistleblower ombudsmen established through the Council of the Inspectors General on Integrity and Efficiency. Within the past year, we found that there were reasonable grounds to believe that two individual FBI employees had suffered reprisal for making protected disclosures in connection with an ongoing OIG review, and we referred the results of our investigation to DOJ's Office of Attorney Recruitment and Management for adjudication, as we publicly reported in our "Review of the Organized Crime Drug Enforcement Task Forces Fusion Center" in March 2014.

While the OIG has always pursued FBI whistleblower matters with the utmost dedication and commitment, we have been making important improvements to our process for handling such matters since the initiation of our Whistleblower Ombudsperson Program in mid-2012, and we will continue to make every effort to improve our processes, including based upon recommendations from external sources such as this GAO review, as well as independent outreach we have done with leading whistleblower organizations. For example, we have determined that there are areas for potential improvement in our processing of these complaints, and we have taken concrete steps to effect such improvements. Specifically, although we have been providing notice to complainants when we receive and are reviewing their complaints, we believe that the OIG can improve its compliance with the regulatory requirement to provide a written notice to the complainant within 15 days of receiving the complaint indicating that the allegation has been received and identifying a point of contact. See 28 CFR § 27.3(c). Similarly, while our investigators regularly and routinely have communicated with complainants about the status of our investigations, such communications have most often been through telephone contacts. Accordingly, we have found room for improvement in documenting the periodic status notifications that we provide to



complainants pursuant to 28 CFR § 27.3(e), and in documenting the agreement of complainants to extend the time for making our “reasonable grounds” determinations should investigations continue beyond 240 days from the receipt of the original complaint under 28 CFR § 27.3(f). And, even before the GAO review was complete, the OIG adopted oversight mechanisms to improve our performance on these important matters. We appreciate GAO’s careful review of this important topic, and will continue to make every effort to perform and document our role in the process for reviewing reprisal claims in the best possible manner.

The OIG has a strong and consistent record of timely completion of its responsibilities with respect to FBI whistleblower retaliation complaints.

Our review of available data relating specifically to the OIG’s performance of its discrete role in addressing FBI whistleblower retaliation complaints confirms that the OIG has a consistent record of timely completion of its responsibilities. The OIG has processed a total of 73 Whistleblower retaliation complaints that were received in the six years since January 1, 2009. Of these, the OIG closed 52 complaints without conducting an investigation, most commonly because an investigation would not be fruitful because the facts alleged in the complaint, if accepted as true, would not meet one of the requirements for establishing a prohibited reprisal for making a protected disclosure under the regulation.<sup>2</sup> The OIG completed investigations of 10 other complaints. In 2 cases, the complainant withdrew the complaint before the OIG completed its investigation. In 9 cases, the OIG’s investigation was still underway as of December 31, 2014. The median time it took for the OIG to determine that a complaint should be closed without an investigation was 23 days.<sup>3</sup> The longest was 142 days. The median time for the OIG to complete an investigation (including writing a report of investigation or final termination report) was 363 days. The longest was 478 days. We are committed to continued improvement, but these numbers reflect the strong commitment of the OIG to complete its role as Conducting Office efficiently and expeditiously.

The methodology in the Draft report excluded many of the more recent complaints that were included in calculating the foregoing numbers. However, the Draft provided relevant data in a footnote confirming the success of the OIG

<sup>2</sup> GAO’s Draft refers to this determination as a “failure to meet threshold regulatory requirements.”

<sup>3</sup> The calculations in this paragraph exclude four complaints for which available records did not permit us to make a determination of their duration.

in completing its determinations in the investigation phase. The Draft states that the OIG closed 81 percent of its complaints within 240 days, with a median length of just 35 days.<sup>4</sup> (Draft at 28, fn. 65.) We believe that this record further confirms our ongoing efforts to expeditiously carry out our responsibilities.

Although we have worked to achieve significant success in completing the investigative phase in a timely fashion, the OIG has, as discussed above, identified opportunities for improving our processes before, during, and as a result of the GAO review. For example, we recognized that we could do better in processing initial complaints faster, including by ensuring that they are transmitted to the OIG's Oversight and Review Division more quickly for initial review, and by conducting those initial reviews within 1 or 2 days of receipt when possible. We took further action to improve the timeliness of investigations and reports by creating a specialized Access database and SharePoint Site to facilitate case tracking, and by adopting model report language to make report writing more efficient. These steps are referenced in the report, but we believe that they are highly significant in demonstrating our continuing proactive efforts to handling these matters appropriately.

The Draft report references, but fails to fully acknowledge the high priority and personal attention that my senior staff and I have given to FBI whistleblower retaliation matters. My senior staff and I are regularly and directly involved in the discussion of these matters, and I personally review and approve every declination decision, termination report, and report to OARM.<sup>5</sup> I firmly believe that any additional time required by such involvement is well spent to ensure that these important matters receive the attention and priority that they deserve. Moreover, my Whistleblower Ombudsperson and I have met personally with representatives of the leading nongovernmental organizations active on whistleblower issues to discuss in detail their views as to how we can best perform our role in the process and further the protection of whistleblowers within the Department.

<sup>4</sup> The GAO sample also included one OIG matter, initiated in 2005, that was not resolved in the OIG phase until January 2009. This matter was not taken to OARM. Although this particular case was clearly not resolved in a timely fashion, it is not remotely representative of the OIG's performance over the past 6 years.

<sup>5</sup> The Draft acknowledges that I personally review "each complaint." (Draft at 21.) This understates, however, the personal and substantial involvement of my senior staff and I in every aspect of the OIG's involvement in these matters.

The OIG has taken steps to improve its documentation of required status updates and extension requests.

The FBI whistleblower regulations require that the Conducting Office provide periodic status notifications and obtain the consent of the complainant to any extensions of the 240-day period for completion of the investigation. The regulations do not require that the updates or agreements be in writing. See 22 C.F.R. §§ 27.3(e) and (f). In practice, the OIG is typically in frequent telephone contact with complainants during the investigation. In many instances, the OIG has relied on these conversations to satisfy the notification requirement of the regulation and in obtaining complainants' consent to extensions. However, we have not consistently documented these communications in our case files. The finding in the Draft report that the OIG has not consistently met the statutory requirement to provide such status notifications (Draft at 27) is based entirely on a file review, and does not account for previously undocumented oral communications that our investigators regularly have with complainants.

As noted above, we have acknowledged that improvement in our documentation of contacts with complainants is necessary to demonstrate our compliance with the regulations, and as a means of ensuring such compliance. We have already taken steps to effectuate this. As the GAO acknowledged,

[I]n July 2014, during the course of our review, an OIG manager informed staff responsible for the complaints of the importance of documenting status updates within case files to ensure documentation of OIG's compliance with regulatory requirements to update complainants within prescribed time frames. Further, over the last 2 years, OIG has developed a database it now uses as a management tool to oversee investigators' compliance with requirements for communicating with complainants. According to senior OIG officials we spoke with, OIG decided to develop this database to help ensure that OIG meets its regulatory requirements. OIG managers use the database to track dates of interim communication, such as status updates, and the database calculates regulatory deadlines for subsequent updates and for closing the complaint. In addition, according to senior OIG officials, managers can use the database to run reports, such as to see upcoming deadlines for all open complaints. Although it is too soon to tell how effective this database will be, if used consistently, this database could help OIG

managers ensure investigators communicate with complainants in accordance with regulatory requirements. (Draft at 30.)

The OIG can represent that these measures have substantially improved its documentation of status notifications and agreements for extensions.

The OIG has modified its procedures with respect to decisions not to initiate an investigation.

As noted above, many complaints submitted to the OIG do not require or call for the opening of an investigation because the facts alleged in the complaint, even if accepted as true, would not be sufficient to satisfy an essential element of a retaliation claim under the regulation.<sup>6</sup> The OIG has closed such complaints by means of brief declination letters, not more detailed termination reports, which are only required for matters we investigate.<sup>7</sup>

Nevertheless, in the interest of enhancing the transparency of our review process and giving whistleblowers the fullest possible opportunity to provide additional information that may be relevant to our determinations, the OIG has begun providing more detailed information in our declination letters identifying the deficiencies in their complaints, including identifying the specific element or elements of a claim of reprisal under the regulation that are absent based on our review of the initial complaint.

We also now inform the employee filing the complaint that we are providing them with 10 business days to submit any additional relevant information or comment on the OIG's initial determination prior to the OIG's declination of the complaint becoming final. We agree with GAO these changes in practice, which we believe go beyond the regulatory requirement, "will help OIG ensure that all complainants have an opportunity to provide additional information or written comments before OIG closes their complaints and that complainants will

<sup>6</sup> For example, the complaint may fail to allege a "protected disclosure" because the subject matter is not within the scope of protected disclosures under the regulation or the disclosure was not made to one of the persons or offices designated in the regulation to receive such disclosures.

<sup>7</sup> Under the FBI whistleblower regulation, a proposed termination report and final termination report is required "[i]f the Conducting Office terminates an investigation." See 28 C.F.R. §§ 27.3(g) and (h). Where no investigation has been initiated, the regulation does not require the issuance of a termination report, and the OIG instead issues a declination letter. The Draft states that the OIG failed to provide "proposed termination reports" to complainants in this situation (Draft at 33), however, no proposed termination reports were required because no investigations were opened.

receive the information they need to make decisions about their complaints.”  
(Draft at 35.)

#### GAO Recommendations

Only one of the recommendations made by GAO in the Draft Report pertains specifically to the OIG. It recommends that OIG work with the other relevant DOJ component to jointly assess the impact of ongoing and planned efforts to reduce the time for resolving retaliation complaints. (Draft at 37.) The OIG concurs with this recommendation.<sup>8</sup>

The Draft addresses at length the list of designated recipients of protected disclosures, and recommends that the Department provide recourse to FBI employees “who experience for reporting alleged wrongdoing to someone not designated in DOJ’s regulations.” (Draft at 13-17 and 37.) The OIG has consistently supported and continues to support broadening the list of persons to whom protected disclosures can be made.<sup>9</sup> With regard to guidance to FBI employees on the question of whom a disclosure must be made in order to be protected, the OIG fully supports providing clear and comprehensive guidance as to all aspects of whistleblower rights and protections. The Draft mentions the video prepared through the OIG’s Whistleblower Ombudsperson Program, which points out where the rules for FBI employees differ from those applicable to other DOJ employees, as well as the OIG’s related ongoing work with the FBI to create a specialized training program that highlights the specific requirements and procedures for FBI whistleblowers. (Draft at 18, 19.) The OIG also has a dedicated “Whistleblower Protection” page on its website, available to FBI employees and others at <http://www.justice.gov/oig/hotline/whistleblower-protection.htm>, with a section on FBI Whistleblowers that we have enhanced to include additional links to the applicable regulation and other information specific to FBI employees.

<sup>8</sup> Although it is not listed as a formal recommendation, the Draft report states at page 26 that “assessing the impact on timeliness and quality throughout the entire investigation, adjudication, and appeal process to determine the impact on total complaint processing time will require a joint effort among OIG, DOJ-OPR, OARM, and ODAG.” We fully support the goal, but with the understanding that, as noted at the outset of this letter, the OIG is a statutorily independent entity within the Department of Justice and its role in the process for addressing FBI whistleblower retaliation complaints is discrete and separate from the roles of other Department components.

<sup>9</sup> To the extent the summary findings at the outset of the Draft report suggest that there is discretion as to whether to pursue an allegation on this basis, that is not the case – as the body of the Draft explains, the regulation sets forth to whom protected disclosures may be made, and there is therefore no basis to pursue an investigation under the regulation for disclosures made to other persons.

Appendices

Footnote 82 of the Draft may create a misimpression that the OIG will not investigate a complaint under the FBI whistleblower regulations if the complainant submitted the complaint to the FBI Inspection Division rather than to the OIG. That is not the case. The OIG reviews all complaints received by the FBI Inspection Division. The OIG identifies any such complaint that may be cognizable under the FBI whistleblower regulations, and then forwards them for consideration to the appropriate OIG personnel to examine more closely. Although the regulations require that retaliation complaints be filed directly with the OIG or DOJ-OPR, the OIG nevertheless will conduct a retaliation investigation of a complaint referred to us from the FBI if the complaint alleges facts that, if accepted as true, would otherwise be sufficient to establish the elements of a retaliation claim under the regulations. The OIG was unable to investigate the 18 complaints mentioned in footnote 82 because they were legally deficient under the regulation (in that they did not meet “threshold requirements,” in the terminology used in the Draft report), not because they were originally submitted to the FBI rather than to the OIG.

Thank you again for the opportunity to comment on the Draft report on this very important topic.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael E. Horowitz".

Michael E. Horowitz  
Inspector General

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# Appendix V: GAO Contact and Staff Acknowledgments

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## GAO Contact

David C. Maurer, (202) 512-8777 or [maurerd@gao.gov](mailto:maurerd@gao.gov)

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## Staff Acknowledgments

In addition to the contact named above, Eileen Larence (Director), Dawn Locke (Assistant Director), Claudia Becker (Analyst-in-Charge), Vanessa Dillard, Michele Fejfar, Eric Hauswirth, Susan Hsu, Tom Lombardi, Signora May, Erin McLaughlin, Linda Miller, Jan Montgomery, and Janet Temko-Blinder made key contributions to this report.

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