May 29, 2023

The Honorable Merrick Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Via electronic submission: www.regulations.gov

Subject: Docket No. JMD 154; AG Order No. 5618-2023  

Dear Attorney General Garland:

The Project On Government Oversight (POGO) submits the following recommendations in response to the solicitation for public comments by the Department of Justice regarding updates to regulations on the protection of whistleblowers at the Federal Bureau of Investigation, published in the Federal Register on March 29, 2023.  

As the notice of proposed rulemaking states, FBI employees occupy “an intermediate position” within the federal whistleblower statutory scheme, excluded from the Civil Service Reform Act of 1978 and subsequent statutes affecting whistleblowers in other federal agencies, but protected by a separate statute and corresponding regulations. While Congress lags behind in strengthening whistleblower protections for all federal employees, it has recently enhanced protections for FBI employees, including language in the National Defense Authorization Act for Fiscal Year 2023 (FY 2023 NDAA) to provide FBI employees with appeal rights to the Merit Systems Protection Board (MSPB). This is only the latest change in response to which the department must update and align its regulations, following the FBI Whistleblower Protection and Enhancement Act (FBI WPEA) of 2016.


Currently, the department’s guidance to FBI employees is ambiguous and contradictory. The department needs clear and consistent policies and procedures to ensure that managers and employees understand and adhere to the rights to and processes for making protected disclosures, that whistleblowers are safe from retaliation, and that retaliation claims are resolved in a timely, objective, and equitable manner.

**Conforming to Technical and Substantive Requirements of the FBI WPEA of 2016**

The department’s regulations must comply with the definitions and substantive requirements of the FBI WPEA of 2016. To that end, POGO supports revising the description of a protected disclosure, expanding the definition of persons to whom a protected disclosure must be made, and revising the substantive requirements of a protected disclosure.

Amending provisions 28 CFR § 0.29d(a) and § 27.1(a)(1) to change a requirement for making a protected disclosure from “a violation” to “any violation” would align with statutory language and close an important loophole to protect FBI employees who disclose federally funded misconduct that occurs internationally. The broad scope of protected disclosures must clearly include wrongdoing, regardless of where it occurs. Simultaneously, amending § 0.29d(a) and § 27.1(a)(2) to substitute “gross mismanagement” for “mismanagement” clarifies that protections for disclosing mismanagement must be far greater than merely minor or trivial mismanagement. Should this amendment be instated, however, the department must be clear in communicating to its employees how to determine whether mismanagement meets this new requirement.

Additionally, the department must expand the list of recipients to whom a whistleblower may make a protected disclosure. This change, again, would conform to the FBI WPEA and underscore whistleblowers’ right to disclose wrongdoing to supervisors in their direct chain of command as well as Congress. This will help ensure that employees are protected when engaging in some of the most common forms of whistleblowing, have as many avenues as practicable to safely expose wrongdoing, and will not see their claims dismissed because of differing requirements for making protected disclosures. This change will also provide more parity for FBI whistleblowers vis-à-vis other federal employees, and enable Congress to fully exercise its oversight authority.⁴

**Updating the Definition of “Prohibited Personnel Practice”**

The department should amend the “personnel action” definition under 28 CFR § 27.2(b) to include all twelve actions currently listed in 5 U.S.C. § 2302(a)(2)(A). This will ensure that FBI whistleblowers are protected against the same adverse personnel actions as other federal employees, including not being forced to undergo psychiatric testing or examination or forced to sign any nondisclosure policy, form, or agreement.⁵

Additionally, the department should further expand the definition of “personnel action” to explicitly include launching a retaliatory investigation or extending a legitimate investigation for retaliatory purposes, or denying, suspending, or revoking a security clearance. Supervisors

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throughout the federal government have initiated fraudulent investigations in reprisal for making a lawful disclosure, attacking the whistleblower instead of the wrongdoing they have exposed. For whistleblowers in national security positions, these investigations may cost them their security clearances, forcing them into less desirable positions or ending their careers entirely.

The department must make explicit the prohibition against weaponizing the security clearance adjudication process in retaliation against FBI employees. While the FY 2023 NDAA affords FBI employees the right to appeal retaliation claims to the MSPB, the Supreme Court held in Navy v. Egan that the MSPB lacks jurisdiction to review security clearance decisions or other restrictions of access to necessary information. Egan and subsequent case law have had a chilling impact on whistleblower protections because courts have largely deferred security clearance decisions to the subject matter expertise of individual polygraphers and adjudicators rather than providing clear, specific guardrails. If the department does not list adverse security clearance decisions as an explicit prohibited personnel action, the FBI can easily abuse its broad discretion to deny access to classified information under the guise of protecting national security.

The department should ensure that training materials for security clearance adjudicators are clear and concise in their instructions for evaluating an employee’s or applicant’s eligibility to access classified information, and that internal guidelines have enforceable standards, up to and including potential sanctions for adjudicators and polygraphers who violate those standards during a security clearance authorization process.

**Reporting Findings of Unlawful Reprisal**

In addition to protecting its whistleblowers, the department must also hold managers accountable when they commit unlawful reprisal. A 2020 Government Accountability Office (GAO) report found that federal agencies terminated employees who filed whistleblower complaints at significantly higher rates than other employees. Therefore, the department should formalize its process of reporting findings of unlawful reprisal to the FBI Office of Professional Responsibility, Inspection Division, the FBI Director, and any other appropriate law enforcement authority. Those recipients must act promptly to sanction those found to have committed unlawful reprisal to deter such behavior, put managers on notice that these actions are not tolerated, and show employees that they are not held to different performance standards.

It is important for the department to use its full authority to sanction those who retaliate because the MSPB’s jurisdiction in most whistleblower retaliation cases is only to find whether an agency, and not an individual manager, is liable. This lack of jurisdiction to determine individual culpability in most cases makes it less likely that retaliating supervisors will be held accountable.

Without meaningful accountability, there is little incentive to prevent management from retaliating against whistleblowers. The department must create a culture of zero tolerance for retaliation, including factoring managers’ efforts to build and maintain a retaliation-free

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workplace into their performance evaluations. When the FBI declines to discipline corrupt officials, it should provide detailed explanations to the department’s Office of the Inspector General and congressional committees of jurisdiction about why discipline was not warranted.

**Leveling the Playing Field through Witness Access**

The department should amend 28 CFR § 27.4(e)(3) to authorize the director of the Office of Attorney Recruitment and Management (OARM) to prohibit a party from relying on evidence from a witness the opposing party is unable to examine. Because of the ease with which the FBI may obtain evidence from current or former managers or employees — while complainants lack that same access — and the FBI’s position that it is not authorized to compel testimony from former employees, the department should equalize access by adopting and adhering to a consistent rule. If the FBI relies on testimony or evidence provided by a current or former manager or employee, it should be required to provide equal access for the complainant to deposes that individual, or otherwise forgo its right to call that witness at any hearing.

Additionally, the department should require OARM to make its decisions and case law publicly available, redacted as necessary to protect individual identities. The secrecy of these decisions calls into question OARM’s independence from the department, let alone whether its decisions comply with administrative law rulings. It also creates a considerable advantage for the FBI over a whistleblower seeking relief, compromising the inherent fairness and integrity of proceedings. Without access to OARM decisions, a whistleblower is kept in the dark about legal standards in prior cases and is therefore less able to properly defend their case on the merits. The department should make these decisions publicly available.

**Improving Case Processing by Use of Acknowledgement and Show-Cause Orders**

According to a 2015 GAO report, OARM adjudicated only four out of 62 complaints over a one-year period that the GAO reviewed, finding for the whistleblower in three cases. These three cases lasted from eight to more than 10 years.\(^8\) That is an extraordinary amount of time, and a sizeable amount of an employee’s career, to wait for a resolution — time which may allow retaliation by management to continue.

The department should amend 28 CFR § 27.4(c)(1) and add § 27.4(f) to formalize OARM’s use of acknowledgement and show-cause orders to better manage the adjudication process and ensure the complainant is notified of the initial status of their claim. Furthermore, the department should ensure the FBI adheres to statutory and regulatory timelines for investigating and resolving these cases. In addition to meeting deadlines, the department should explore other ways for the FBI to further expedite investigations so that employees’ claims get timely review and resolution. Any extension of time limits should only happen with consent of the complainant.

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Awarding Compensatory Damages

The department should amend 28 CFR § 27.4(g) to authorize the OARM director to award compensatory damages in addition to other available relief. One concern for whistleblowers is being ostracized by colleagues after coming forward. The mental and psychological stress of choosing whether and how to make a protected disclosure can harm personal and professional relationships. Even where a whistleblower follows the law and prevails on the merits, they can still be shunned within their agency, and their reputation can follow them to other agencies throughout their career. Whistleblowers deserve compensatory damages for physical, emotional, and psychological pain, suffering, distress, and humiliation, in addition to every other remedy to which they are entitled.

Additionally, the department should consider amending § 27.4(f) to provide explicitly for compensatory damages incurred after an agency launches, expands, or extends an investigation in retaliation for protected activity.9

Opposing Authorizing OARM to Adjudicate Breach of Settlement Agreement Allegations

POGO opposes authorizing the OARM director to adjudicate breach of settlement agreement allegations. OARM’s lack of experience in conducting investigations makes it less suited for this responsibility. Furthermore, OARM’s secrecy calls into question relationships between OARM staff and agency management and its true independence from the department. Because of OARM’s questionable independence and lack of timeliness and accountability, it should not be entrusted with this additional authority at this time.

The department should increase OARM’s independence, transparency, and accountability, and ensure that OARM prioritizes the expedited processing of cases. Where a complainant allegedly commits misconduct during an OARM process, that allegation should go before the appropriate disciplinary body.

Providing Access to Alternative Dispute Resolution

The department should add 28 CFR § 27.7 to formalize in regulations its alternative dispute resolution program. Especially because of the low rate at which whistleblowers prevail on the merits, and the time and cost of bringing retaliation claims, whistleblowers should have as many avenues as practicable to get relief.10 An effective alternative dispute resolution process could provide a quicker and more equitable result. However, for such a process to work, FBI employees must be confident that whistleblowers will be protected at every stage throughout the process; that mediators are qualified, experienced, and independent from the department; and that the process will be timely and accountable.

The department should provide regulatory guardrails so that the alternative dispute resolution process is not abused, that whistleblowers are not forced to accept less relief than they would have received under a fairer adjudicatory system, and that the process does not expose employee witnesses to retaliation themselves.

**Additional Recommendations to Increase Protections for Whistleblowers**

POGO is increasingly concerned about the FBI’s previous weaponization of the security clearance adjudication process, and the continued potential to weaponize the process to retaliate against whistleblowers or to subject targeted communities or individuals to heightened scrutiny, harassment, and discrimination.

In the absence of articulated limits on Navy v. Egan, the department should amend its regulations to ensure that employees of foreign descent are protected against false allegations of being threats to national security. Without clear and better guidance, employees may be at the mercy of a rogue or corrupt adjudicator with their own agenda for retaliating against an individual.

In May 2022, the Office of the Director of National Intelligence (ODNI) published a report on protecting the privacy, civil liberties, and civil rights of Chinese Americans, including employees in national security positions. In addition to recommending that agencies reemphasize a prohibition on conducting intelligence based on race or ethnicity, and that they expand unconscious bias and cultural competency training, ODNI also considers highlighting the potential for disparate impacts on historically disadvantaged communities, particularly Americans of Chinese descent, and publishing demographic data regarding timelines and results of security clearance adjudications to determine the extent of any disparate impact in the adjudication process.

Especially given conflicting and non-specific criteria in ODNI guidelines for when any foreign influence or foreign preference may disqualify an individual from holding a security clearance, the department should commission an independent audit of the FBI’s Post Adjudication Risk Management program to identify and analyze racial disparities in security clearance decisions or reprisals against employees of East Asian, South Asian, Middle Eastern, and North African descent.

It should also consider amending 28 CFR § 17.41(b) to provide explicit criteria for which an employee or applicant may be found to have “conflicting allegiances and potential for coercion,” to help ensure that individuals are evaluated objectively without bias, conscious or unconscious, against race, ethnicity, religion, or national origin.

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12 Best Practices to Protect Privacy, Civil Liberties, and Civil Rights of Americans of Chinese Descent in the Conduct of U.S. Intelligence Activities, 5, [see note 12].
The department should also consider amending § 17.47(a)(1) and § 17.47(c) to establish deadlines by which an applicant or employee who is determined not to meet standards for access to classified information will receive a notice of that decision and a written explanation for the basis of the decision. Finally, the department should enforce sanctions against polygraphers and adjudicators found to have abused their discretion against an employee or applicant during the security clearance adjudication process.

There are currently few protections against denying, suspending, or revoking a security clearance because of retaliation or discrimination based on race or national origin, and there is no proper appeals process. An employee who is denied or loses their security clearance may effectively be blacklisted from any future national security position, ending their career in their chosen field.

By adopting clearer regulations and sanctioning this corrupt behavior, the department would help prevent fraud and discrimination during the security clearance adjudication process, protect FBI employees from undue harassment, and ensure the department hires and retains enough cleared experts to fulfill the agency’s mission and protect against true national security threats.

Thank you for your consideration of this comment regarding possible changes to FBI whistleblower regulations. For any questions, please reach out to joe.spielberger@pogo.org.

Sincerely,

Joe Spielberger
Policy Counsel