DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

MANAGEMENT ADVISORY MEMORANDUM

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Notification of Concerns Regarding Inconsistencies Between the Federal Bureau of Investigation's Non-Retaliation Policy and Retaliation Offense Code

OVERSIGHT & REVIEW DIVISION

August 31, 2026

Management Advisory Memorandum

To: Kash Patel
Director
Federal Bureau of Investigation

From: Don R. Berthiaume
Inspector General Don R. Berthiaume

Subject: Notification of Concerns Regarding Inconsistencies Between the Federal Bureau of Investigation's Non-Retaliation Policy and Retaliation Offense Code

The purpose of this memorandum is to advise the Federal Bureau of Investigation (FBI) of three issues the Department of Justice (DOJ) Office of the Inspector General (OIG) has identified regarding disparities in FBI policies protecting FBI personnel from retaliation and ensuring that FBI personnel are held accountable for retaliation, resulting from differences in the language used in FBI Policy Directive 0727D (Non-Retaliation for Reporting Compliance Risks) and FBI Offense Code 5.16 (Retaliation). The OIG identified these concerns during multiple investigations of allegations of retaliation by FBI personnel. In this memorandum, the OIG makes one recommendation to address the concerns we identified. The FBI has indicated that it does not object to modifying its Offense Codes and Penalty Guidelines in response to our recommendation and intends to do so in the near future.

Relevant Authorities

Policy Directive (PD) 0727D, entitled "Non-Retaliation for Reporting Compliance Risks," prohibits "[a]ll FBI personnel" from retaliating against "anyone for reporting a compliance concern that the reporting individual reasonably believes to be true," even if the FBI ultimately concludes that there was no compliance concern or violation.[1] The stated purpose of PD 0727D is to allow all FBI personnel "to express concerns or report potential violations regarding the FBI's legal and regulatory compliance, without retaliation, and to encourage the reporting of any such concerns."[2] PD 0727D defines the term "FBI personnel" to mean "all FBI employees, contractors, interns, task force personnel, and detailees assigned to the FBI,"[3] and accordingly

[1] PD 0727D § 8.1.2. To demonstrate a reasonable belief "an individual must believe that the compliance concern is true, and the belief must also be objectively reasonable; that is, a reasonable person, when confronted with the same or similar facts or circumstances, would conclude that the matter reported is likely to be true." PD 0727D § 16.4.

[2] PD 0727D § 7.

[3] PD 0727D § 16.1.

applies to the range of individuals who conduct work for the FBI, whether or not they are directly employed by the FBI.[4]

PD 0727D defines a "compliance concern" as "a concern that the FBI has violated or is not complying with the policies, regulations, and laws that govern it."[5] PD 0727D provides a list of offices and individuals to which FBI personnel may report compliance concerns and be protected from retaliation for reporting those concerns; this list includes persons designated to receive disclosures under the FBI Whistleblower Protection Regulation (28 C.F.R. § 27.1)[6] and "any supervisor in the chain of command of the person reporting the compliance risk."[7]

PD 0727D defines "retaliation" as "engaging or threatening to engage in conduct, direct or indirect, that adversely affects an individual who reports a compliance concern in accordance with this directive, as a consequence of such reporting."[8] PD 0727D further defines adverse conduct as *any* conduct that "is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from reporting a compliance concern."[9] Taken together, the language of PD 0727D broadly protects all FBI personnel (including contractors, interns, task force personnel, and detailees) from any threatened or actual adverse actions based on a retaliatory motive for reporting a compliance concern.

In the "References, Links, and Forms" section, PD 0727D references FBI Offense Code 5.16, which is entitled "Retaliation."[10] FBI Offense Code 5.16 provides penalties for:

> Taking, or threatening to take, an adverse employment action against an employee who engaged, or who was believed to have engaged, in a protected activity, including making a protected disclosure or exercising any other legitimate right authorized by the FBI. This Offense Code applies where the adverse action is motivated by both retaliatory and non-retaliatory reasons.

The penalties provided by FBI Offense Code 5.16 range from a 10-day suspension to dismissal depending on the severity of the offending conduct. The FBI Offense Code also has a catch-all provision, FBI Offense Code 5.23, entitled "Violation of Miscellaneous Rules/Regulations" that provides penalties for the failure to enforce or comply with an FBI, DOJ, Office of Personnel Management, or other federal administrative or operational

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[4] *See* PD 0727D § 16.1. The anti-retaliation language of PD 0727D is more protective than the FBI whistleblower protection statute, 5 U.S.C. § 2303, because, among other reasons, PD 0727D prohibits all FBI personnel from engaging in retaliation, while Section 2303 prohibits retaliation only by an FBI employee "who has authority to take, direct others to take, recommend, or approve any personnel action." 5 U.S.C. § 2303(a). In addition, while PD 0727 applies to "FBI personnel" and, as noted above, defines this term broadly, Section 2303 protects only employees and applicants for employment.

[5] PD 0727D § 16.2.

[6] The OIG is a designated official under 28 C.F.R. § 27.1(a).

[7] PD 0727D §§ 8.1.2, 8.4.1. Pursuant to Section 2303, a disclosure of wrongdoing is protected if it is "made" to one of the designated officials or offices listed in the statute. 5 U.S.C. § 2303(a)(1)(A).

[8] PD 0727D § 16.3.

[9] PD 0727D § 16.3.

[10] PD 0727D § 15.1.1.

guideline or policy that is not specifically delineated in any other FBI Offense Code. The penalties provided by FBI Offense Code 5.23 range from an oral reprimand to a 30-day suspension.

The Issues

The DOJ OIG has investigated several matters involving FBI personnel that have drawn our attention to three significant differences in the language of FBI Policy Directive 0727D and FBI Offense Code 5.16. These differences have resulted in gaps that impair the ability of the DOJ OIG and the FBI to fully address retaliatory actions through the FBI Offense Code and hold violators fully accountable for retaliatory behavior.

First, PD 0727D purports to protect from retaliation all "FBI personnel" who make reports of compliance concerns, while FBI Offense Code 5.16 only provides penalties for retaliatory actions taken against FBI "employee[s]." As a result, where FBI personnel who are not FBI employees (but rather contractors, interns, task force personnel, or detailees assigned to the FBI) report a compliance concern, FBI Offense Code 5.16 does not provide a penalty for retaliatory actions against those individuals. While FBI Offense Code 5.23 (Violation of Miscellaneous Rules/Regulations) could be used to address adverse retaliatory actions taken against FBI personnel who are not FBI employees, the penalty range provided by FBI Offense Code 5.23 (oral reprimand to a 30-day suspension) is far less severe than the penalty range provided by FBI Offense Code 5.16 (10-day suspension to dismissal). By limiting the coverage of FBI Offense Code 5.16 to retaliatory actions against FBI employees, the FBI has created a significant disparity between the FBI's ability to address acts of retaliation taken against contractors, interns, task force personnel, and detailees assigned to the FBI compared to retaliation against FBI employees.[11]

Second, although FBI Offense Code 5.16 appears to protect FBI employees from retaliation when they make a protected disclosure or exercise "any other legitimate right authorized by the FBI," the scope of PD 0727D is more constrained because of its requirement for reporting a "compliance concern." This inconsistency has the potential to be confusing for FBI personnel who are seeking to determine whether they will be protected when reporting a concern that may not amount to a compliance concern within the meaning of PD 0727D. Moreover, this inconsistency is compounded by the first issue described above, because contractors, interns, task force personnel, or detailees who exercise "any other legitimate right authorized by the FBI" within the meaning of FBI Offense Code 5.16 but do not report a "compliance concern" within the meaning of PD 0727D would not be protected by either authority. The OIG was alerted to this issue when it was informed about a March 31, 2025 email sent by then Deputy Director Bongino to all FBI personnel inviting

[11] After reviewing a draft of this memorandum, the FBI told the OIG that the use of the word "employee" in FBI Offense Code 5.16 has not "prevented the FBI [Office of Professional Responsibility (OPR)] from addressing retaliatory actions taken against any personnel working for or with the FBI." The FBI stated that FBI interns are FBI employees and would be protected by the current version of FBI Offense Code 5.16; that FBI contractors have been brought within the definition of "employee" under the Whistleblower Protection Act through passage of Pub. L. 115-118, Title I, § 110(b), January 19, 2018, 132 Stat.16, which the FBI believes would also bring contractors within the meaning of "employee" under the current version of FBI Offense Code 5.16; and that the Memorandum of Understanding between the FBI and the home agency of each of the FBI's task force officers would qualify task force officers as "employees" under the current version of FBI Offense Code 5.16. Notwithstanding these comments, the FBI stated that it does not object to changing the wording of FBI Offense Code 5.16 to make clear that it prohibits retaliation against contractors and task force officers. The OIG notes that we asked an FBI OPR official about the concerns identified in this memorandum before sending a draft to the FBI, and the official told us that retaliation against FBI personnel who are not FBI employees, including task force officers, would need to be addressed using a different FBI offense code, FBI Offense Code 5.23 (Violation of Miscellaneous Rules/Regulations) because task force officers are not covered under FBI Offense Code 5.16. As noted above, FBI Offense Code 5.23 has a less severe penalty range than FBI Offense Code 5.16.

them to send emails to DeputyDirector@fbi.gov and share with his staff any "pressing concern or problem" so that his office can "do everything we can to remove obstacles that stand in your way." By inviting all FBI personnel to make such reports, the March 31, 2025 email appears to create a "legitimate right authorized by the FBI" for FBI personnel to report any pressing concerns or problems. However, to the extent that contractors, interns, task force personnel, or detailees seek to exercise that right, FBI Offense Code 5.16 would not be available to address acts of retaliation against those individuals, for the reasons articulated above. Nor is it clear that PD 0727D (and the penalties provided by FBI Offense Code 5.23) would provide a viable alternate remedy, unless the "pressing concern or problem" reported to DeputyDirector@fbi.gov also meets the definition of a "compliance concern" under PD0727D—which requires an allegation that the FBI has violated or is not complying with "the policies, regulations, and laws that govern it." To the extent that contractors, interns, task force personnel, or detailees report a pressing concern or problem via email to DeputyDirector@fbi.gov—but do not allege a potential violation of a policy, regulation, or law—the definition of compliance concern found in PD 0727D is likely not broad enough to protect such individuals against acts of retaliation. Incongruously, however, FBI Offense Code 5.16 would appear to protect an FBI employee who reported the identical concern or problem to the email address as the contractor, intern, task force officer, or detailee did. Indeed, at least one subject's counsel told the OIG that he believed his client could not be found to have violated PD 0727D for retaliating against a task force officer, unless the task force officer reported a policy or compliance violation.

Third, because FBI Offense Code 5.16 only provides a penalty for taking or threatening to take an "adverse employment action," its coverage appears to be more limited than the policy articulated in PD 0727D, which broadly prohibits "engaging or threatening to engage in conduct, direct or indirect, that adversely affects" FBI personnel who report compliance concerns. At least one subject in a recent OIG investigation took the position that FBI Offense Code 5.16 may only be used to penalize supervisors who retaliate by taking adverse personnel actions—an argument that is clearly in tension with the breadth of the policy articulated by PD 0727D. Unlike FBI Offense Code 5.16, PD 0727D strictly prohibits retaliatory conduct by all FBI personnel (not just supervisors capable of taking adverse employment actions). PD 0727D also broadly defines retaliation to include any conduct, direct or indirect, that is based on a retaliatory motive and reasonably likely to prevent others from reporting a compliance concern. While FBI Offense Code 5.23 could be used to address adverse retaliatory actions that do not amount to adverse employment actions, as noted above, the penalty range provided by FBI Offense Code 5.23 is far less severe than the penalty range provided by FBI Offense Code 5.16.[12]

Conclusion

As described above, through multiple investigations of alleged retaliation, the DOJ OIG has identified disparities arising from the differing language used in FBI Policy Directive 0727D and FBI Offense Code 5.16. These disparities have resulted in gaps in protecting FBI personnel from retaliation and ensuring that FBI personnel are held accountable for retaliation. The OIG makes one recommendation to address the concerns we identified.

[12] After reviewing a draft of this memorandum, the FBI stated that the OIG's description of the FBI Offense Codes was "incomplete" because there are circumstances under which retaliatory acts may be addressed under FBI Offense Code 2.11 (Obstruction of an Administrative Matter), FBI Offense Code 4.7 (Other Felonies), FBI Offense Code 4.8 (Other Misdemeanors), FBI Offense Code 2.12 (Violation of Ethical Guidelines), and FBI offense codes that address the provision of false or misleading information or lack of candor. These provisions do not ameliorate the OIG's concerns, because a finding of reprisal does not necessarily also constitute obstruction, a criminal offense, a violation of an ethical guideline, or lack of candor.

Recommendation

The OIG recommends that the FBI review PD 0727D and FBI Offense Code 5.16 to determine if the disparities identified in this memorandum were unintentional. If they were unintentional, make appropriate revisions to PD 0727D and FBI Offense Code 5.16 to ensure the following:

1. All FBI personnel, including employees, contractors, interns, task force officers, and detailees, are covered by both PD 0727D and FBI Offense Code 5.16.
2. All FBI personnel are afforded equivalent protections against retaliatory action under the language of each provision.
3. The same penalties apply to FBI personnel who engage in retaliatory conduct, regardless of whether the retaliation is directed at an employee, contractor, intern, task force officer, or detailee.

If the FBI concludes that the disparities identified in this memorandum were intentional, please provide the OIG with a detailed explanation of the rationale supporting these disparities.

The OIG requests that the FBI provide an updated response to the recommendations within 90 days of the issuance of this memorandum. If you have any questions or would like to discuss the information in this memorandum, please contact me at (202) 514-3435 or M. Sean O'Neill, Assistant Inspector General for Oversight & Review, at (202) 514-9539.

cc: Yamileth Davila
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