



March 2017

CONTRACTOR WHISTLEBLOWER PROTECTIONS PILOT PROGRAM

Improvements Needed to Ensure Effective Implementation

Accessible Version

GAO Highlights

Highlights of [GAO-17-227](#), a report to congressional committees

Why GAO Did This Study

Whistleblowers play an important role in safeguarding the federal government against fraud, waste, abuse, and mismanagement. The National Defense Authorization Act for Fiscal Year 2013 introduced a pilot program to expand whistleblower rights against reprisal for executive agencies' contractors, subcontractors, and grantee employees. Also, in 2013, the FAR was amended to require agencies to insert a contract clause to ensure contractors communicate rights to their employees for certain contracts.

The act also contained a provision for GAO to report on the status of the pilot program. This report: (1) describes the results of the whistleblower pilot program across 14 selected executive departments from July 1, 2013, to December 31, 2015 and (2) assesses the extent to which four departments implemented the pilot program. GAO analyzed survey data from 14 executive departments, which are a subset of all entities covered by the legislation; selected four departments based on high and low contract funds awarded to conduct a more detailed review of the pilot program implementation; interviewed agency officials and contractors; and reviewed a non-generalizable sample of contracts included in the pilot program.

What GAO Recommends

GAO is making specific recommendations to the four selected departments to improve whistleblower protections policies and guidance and communication with contractors. The departments agreed with the recommendations and have taken or identified actions to address the recommendations.

View [GAO-17-227](#). For more information, contact Marie A. Mak at (202) 512-4841 or makm@gao.gov.

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CONTRACTOR WHISTLEBLOWER PROTECTIONS PILOT PROGRAM

Improvements Needed to Ensure Effective Implementation

What GAO Found

The Whistleblower Protections Pilot Program (pilot program) provides enhanced legal protections to contractor employees who believe that they have experienced reprisal as a result of disclosing certain wrongdoings. Among other enhancements, the act expanded the persons and entities to which a whistleblower could disclose wrongdoing and identified which office within an agency has responsibility for handling complaints. For example, under the pilot program, when the Office of Inspector General (OIG) receives a complaint, it must determine whether a complaint is covered by the pilot program and if covered, conduct an investigation and submit the findings to the agency head, complainant, and contractor. The 14 selected departments that GAO reviewed reported receiving an estimated 1,560 whistleblower reprisal complaints from July 1, 2013, through December 31, 2015. Of these complaints, 127 were submitted by contractor, subcontractor, and grantee employees under the pilot program. The 14 OIGs investigated 44 of the 127 complaints but did not find that reprisal had occurred in any of them. The complaints not investigated by the OIGs were excluded for a variety of reasons, such as the complaint was deemed to be frivolous or was being decided by another judicial authority.

GAO's in-depth review of four selected departments' implementation of the pilot program found various opportunities for improvement. Specific details follow:

- The pilot program requires findings of investigated reprisal complaints to be forwarded to several entities, including to the agency head for a determination of whether reprisal occurred and, as of December 2015, to the head of the contracting activity. However, at two of the four departments reviewed, the OIGs either did not forward their investigation findings to the appropriate entities or did not forward findings in the necessary format because, according to OIG officials, they were unclear about how to execute the requirement. As a result, at these two departments, the agency heads did not make the determination of whether reprisal occurred as required by the pilot program.
- Contracting officers must insert the required Federal Acquisition Regulation (FAR) whistleblower clause to be inserted into contracts exceeding the simplified acquisition threshold, which is generally \$150,000, as a method to communicate with contractors about pilot program requirements. However, while the four selected departments reported that they inserted the clause into the required contracts, GAO found new contracts awarded during the pilot program's timeframe that did not include the required clause. Without effective internal control policies, agencies may continue to omit the required clause.
- Some contractors GAO spoke with were unaware of their obligations under the pilot program. Officials from all four departments reported taking no additional action to communicate to contractors their responsibilities to inform employees of their rights under the pilot program. This is inconsistent with federal internal control standards for communication. Without actions to help contractors fully understand their responsibilities under the pilot program, the departments do not have assurance that contractor employees are also aware of the protections afforded by the pilot program legislation.

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Abbreviations

CIGIE	Council of the Inspectors General on Integrity and Efficiency
Commerce	Department of Commerce
DOD	Department of Defense
Energy	Department of Energy
FAR	Federal Acquisition Regulation
FPDS-NG	Federal Procurement Data System-Next Generation
Homeland Security	Department of Homeland Security
Interior	Department of the Interior
NASA	National Aeronautics and Space Administration
NDAA	National Defense Authorization Act
OIG	Office of Inspector General
pilot program	Pilot Program for Enhancement of Contractor Employee Whistleblower Protections
State	Department of State

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March 2, 2017

Congressional Committees:

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, including in the acquisition of services and goods provided by contractors. In fiscal year 2015, the federal government, excluding the Department of Defense, obligated over \$164 billion in contracts for a variety of services and goods, such as nuclear site cleanup, information technology services, and office supplies. Contractor, subcontractor, and grantee employees who carry out activities under federal contracts and grants may have insight into potential fraud, waste, abuse, and mismanagement. In order to encourage disclosure of wrongdoing, contractors should maintain an open environment without fear of reprisal.

Although some protections for contractor employee whistleblowers existed before 2013, the National Defense Authorization Act (NDAA) for Fiscal Year 2013 introduced a Pilot Program for Enhancement of Contractor Employee Whistleblower Protections (pilot program) to enhance contractor whistleblower protections for employees of contractors, subcontractors, and grantees at certain executive agencies against reprisal.¹ The legislation covers numerous executive agencies, including 14 executive departments.² The pilot program, among other things, provides enhanced legal protections to contractor employees who reasonably believe they have experienced reprisal as a result of disclosing certain wrongdoing as defined in the statute to specified bodies and individuals.

¹Pub. L. No.112-239, § 828, (codified as amended at 41 U.S.C. § 4712). The legislation provides protections for certain civilian executive agencies, but those protections are not extended to others such as elements of the intelligence community. Further, some agencies, National Aeronautics and Space Administration, the Department of Defense, and the Coast Guard are not covered by the pilot program and are covered under other statutory provisions.

²Since the legislation uses the terms “agency” and “agency head”, when we use those terms in this report, we are referring to the language used in the statute. When we use the term department, we are referring to our analysis of all applicable executive departments, which is a subset of the agencies covered by the statute. The 14 executive departments we reviewed in this report are also defined in statute.

The NDAA for Fiscal Year 2013 also contained a provision for us to evaluate and report on the implementation of the pilot program. This report (1) describes the results of the whistleblower protections pilot program between July 1, 2013, and December 31, 2015, across 14 executive departments subject to the act and (2) assesses the extent to which four selected executive departments implemented the pilot program.

To describe the results of the pilot program, we surveyed the Office of Inspector General (OIG) at the 14 executive departments covered by the legislation on whistleblower reprisal complaints received between July 1, 2013, and December 31, 2015.³ In this report, we use the terms “agency” and “agency head” when referring to provisions of the whistleblower protections pilot program legislation in general because the legislation uses these terms. When we refer to departments, we are referring to the 14 executive departments defined by statute and covered by the whistleblower protections pilot program that we focused on for our review. We surveyed the OIGs at the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs and received responses from the OIGs at all 14 of these departments. Among other things, the survey collected information about the number of disclosures of fraud, waste, abuse, and mismanagement as well as reprisal complaints and mechanisms used by executive departments to implement provisions of the pilot program. Each department’s OIG consulted with their cognizant department officials to obtain responses to our survey questions on an as-needed basis. The survey used for this study is reprinted in appendix I.

To assess the extent to which departments have implemented the pilot program, we selected four executive departments based primarily on the dollar value of their fiscal year 2015 contract funds awarded, the most recent year available at the time we began our review. To obtain a range of departments, we included two departments (Homeland Security, State) with higher contract funds awarded and two departments (Commerce, Interior) with lower contract funds awarded. At each department, we focused on the department’s handling of reprisal complaints filed by contractor and subcontractor employees. We interviewed or obtained

³Congress enacted legislation making the pilot program permanent on December 14, 2016. Pub. L. No. 114-261.

written answers from officials at each department's OIG, the office of the agency head, and the acquisitions office about their processes and practices for the agency duties outlined in the mandate. Where applicable, we reviewed documentation such as relevant policies, guidance, and internal reports. To identify whether contracts contained a required Federal Acquisition Regulation (FAR) clause, we requested a non-generalizable sample of contracts from each of the four selected departments. To identify an example of a contract without the clause, we reviewed documentation for a random selection of at least 50 contracts at each of the four departments. We asked for contract actions awarded in the fourth quarter of fiscal year 2015 to ensure we were sampling contracts that are required to have the clause and would be reasonably accessible by the departments (e.g., they would likely not be archived). We also reviewed orders awarded during this period. We used the Federal Procurement Data System–Next Generation (FPDS-NG) to generate a sample of contract actions over \$150,000, which is generally the simplified acquisition threshold, that were awarded by the four departments included in our review in the fourth quarter of fiscal year 2015. We conducted data reliability checks on the FPDS-NG dataset by comparing it to contract documentation obtained from contract files and determined it was sufficiently reliable for our purposes.

Further, to identify challenges experienced during the implementation of the pilot program, we conducted interviews with contractors and whistleblower advocacy groups. We contacted a total of 13 contractors, including both large and small business contractors based on their contract obligations from fiscal year 2013 through fiscal year 2015, as reported in FPDS-NG, and we spoke with or received written answers to our questions from 7. We also spoke with two whistleblower advocacy groups. For additional information on our scope and methodology, see appendix II.

We conducted this performance audit from February 2016 to March 2017 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.

Background

Federal Employee Whistleblower Protections

Federal employees have had protections against whistleblower reprisal—also known in some cases as adverse consequences or retaliation—for several decades. The Civil Service Reform Act of 1978 and the Whistleblower Protection Act of 1989 both provided federal employees with certain rights against reprisal for disclosing certain wrongdoing and created avenues of investigation of complaints. More recently, the Whistleblower Protection Enhancement Act of 2012 expanded and clarified protections for federal employee whistleblowers, including adding clarity that federal employees are protected even if the disclosures are identified as part of their existing job duties, such as for auditors and safety inspectors.

Contractor Employee Whistleblower Protections

In 1986, whistleblower reprisal protections were extended to employees of defense contractors. The National Defense Authorization Act for Fiscal Year 1987 provided protections for employees of defense contractors, who were prohibited from discharging, demoting, or otherwise discriminating against an employee for disclosing certain wrongdoing. Similar protections were expanded to other executive agencies in 1994, when legislation provided certain rights for contractor employees at civilian executive agencies. For example, one right is to have the OIG of the executive agency conduct an investigation into reprisal complaints when the contractor employee believes reprisal has occurred as a result of disclosing certain information to authorized persons or bodies, such as a member of Congress.⁴ In 2013, after the passage of the NDAA for Fiscal Year 2013, the pilot program went into effect and further expanded protections to also include employees of subcontractors and grantees and directs the agency head to make the determination on whether a contractor employee had been reprisal against.⁵

Disclosure:

An allegation to certain bodies and individuals made by an employee who believes he or she has witnessed certain wrongdoing, such as gross mismanagement or gross waste.

Source: GAO analysis based on 41 U.S.C. 4712(a) | GAO-17-227.

Reprisal Complaint:

Following a disclosure, a complaint that an employee has experienced reprisal as a result of the disclosure, such as demotion or discharge.

Source: GAO analysis based on 41 U.S.C. 4712(b) | GAO-17-227.

⁴Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355 § 6006.

⁵The term “protections”, here and throughout the report, refers to the rights and remedies provided under the pilot program.

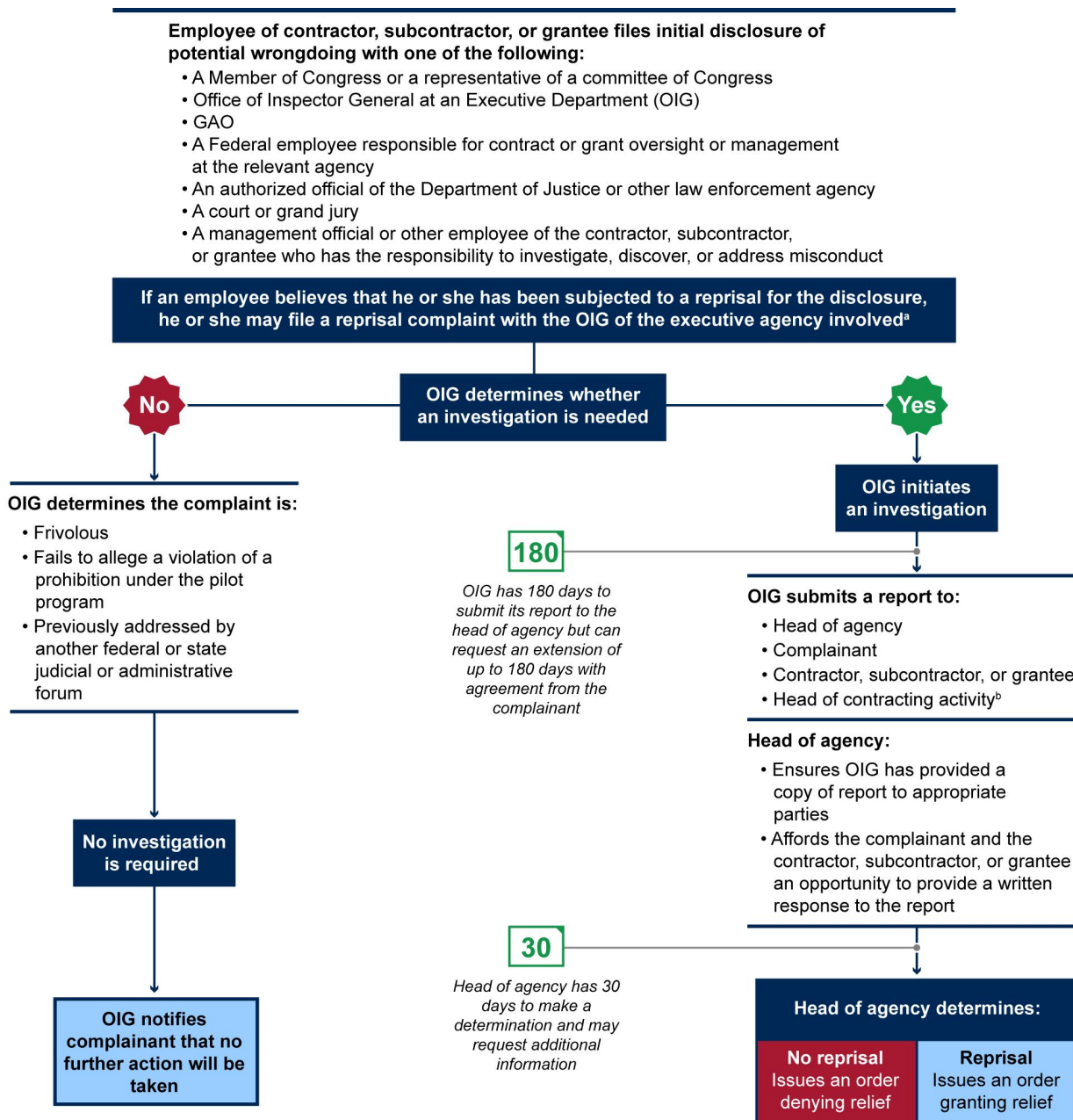
Requirements under the Pilot Program

In 2013, the pilot program went into effect and, among other enhancements, limited the OIG investigation of complaints to 180 days, whereas previously there was no time limitation on the investigation.⁶ Further, under the pilot program, contractor, subcontractor, and grantee employees are protected from reprisal if they disclose to certain persons or bodies information they reasonably believe is evidence of gross mismanagement of a federal contract or grant, a gross waste of federal funds, an abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract or grant. Moreover, in addition to protections under the previous statute for disclosing certain information to a Member of Congress or an authorized official of an executive agency or the Department of Justice, employees are now protected when disclosing information related to certain wrongdoing to a broader range of authorized persons or bodies, such as a management official at the contractor, or to a law enforcement agency.

Under the pilot program, both the OIG at each executive agency as well as certain agency officials are responsible for executing provisions of the pilot program. The pilot program not only enhances agency responsibility to help ensure contractor employees are aware of their rights, but clearly identifies which office within the agency has responsibility for handling reprisal complaints. Figure 1 depicts the disclosure process and the complaint process.

⁶The December 14, 2016, legislation making the pilot program permanent expanded protections to subgrantees and now applies to personal services contracts, which were not covered under the pilot program. Pub. L. No. 114-261.

Figure 1: Disclosure Process and Reprisal Complaint Investigation and Review Process under the Whistleblower Protection Pilot Program



Source: GAO analysis of Section 828 of the National Defense Authorization Act of fiscal year 2013. | GAO-17-227

^aAn employee has three years from when the alleged reprisal took place to file a complaint.

^bNeither the National Defense Authorization Act (NDAA) for Fiscal Year 2013 nor the interim FAR rule issued in September 2013 implementing the pilot program required the OIG to submit a report to the head of the contracting activity. The final FAR rule implementing the pilot program was issued in December 2015 and requires the OIG to also submit a report to the head of the contracting activity.

Changes in Disclosure Process. Under the pilot program, the number of persons and bodies to whom a contractor employee may disclose protected information has expanded. Under the prior statute, a contractor employee was only covered if he or she disclosed certain wrongdoing to a Member of Congress, an authorized official of an executive agency, or the Department of Justice.⁷ Figure 1 above describes the disclosure process under the pilot program.

Agencies' OIG Responsibilities. Upon receiving a reprisal complaint, OIGs must evaluate whether a reprisal complaint is covered under the pilot program. OIGs might not investigate for a variety of reasons, such as in cases where the complaint is already under investigation by another authority such as another OIG, or otherwise does not allege a violation of the law, such as if the claim was made prior to July 1, 2013. If the OIG determines the case is not covered under the pilot program, it may then notify the complainant that no further action will be taken on the reprisal complaint.

If the reprisal complaint is covered, the OIG must investigate the complaint and submit a report of its findings to the agency head, the complainant, the head of the contracting activity, and the contractor. OIGs may make a preliminary determination of whether reprisal occurred based on the investigation; however, the final determination of reprisal must be made by the agency head. As described in figure 1 above, the report provided by the OIG to the agency head must be sent within 180 days from receipt of the reprisal complaint. If the OIG determines it needs more time to investigate, OIGs are able to seek an extension of this timeline by getting permission from the complainant to do so.

⁷FAR 3.901 defines "authorized official of an agency" to mean an officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract. In addition, it defines an "authorized official of the Department of Justice" to mean any person responsible for the investigation, enforcement, or prosecution of any law or regulation.

Federal Acquisition Regulation 52.203-17

Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights

(a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies in the pilot program on Contractor employee whistleblower protections established at 41 U.S.C. 4712 by section 828 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and FAR 3.908.

(b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. 4712, as described in section 3.908 of the Federal Acquisition Regulation.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts over the simplified acquisition threshold.

Source: Federal Acquisition Regulation | GAO-17-227

Agencies' Responsibilities. Once the investigation findings are forwarded from the OIG, the agency head must determine whether there is a sufficient basis to conclude that a contractor employee was reprimanded against, and must either issue an order that the contractor take some form of remedial action or issue an order denying relief. During the 30-day period after the agency head receives the OIG report, the agency head may ask the OIG for additional investigative work. In addition, the complainant and the contractor must be afforded an opportunity to submit a written response to the OIG report during the same 30-day period.⁸

Under the pilot program, contracting officers are also responsible for inserting Federal Acquisition Regulation clause 52.203-17 (FAR clause) into applicable contracts and agency heads are responsible for ensuring that contractors communicate to their employees their rights under the pilot program.⁹ This FAR clause lays out the responsibility of contractors to communicate to their employees their rights under the pilot program, which requires these protections to be communicated to contractor, subcontractor, and grantee employees in writing and in their predominant language. Applicable contracts that require the FAR clause include all contracts over the simplified acquisition threshold awarded on or after September 30, 2013, according to the FAR interim rule.¹⁰ The pilot program also requires agencies to make best efforts to include the clause in contracts awarded before July 1, 2013, that have undergone major contract modifications; the terms "best efforts" and "major modifications," are not defined in the statute.

Our Recent Work on Whistleblower Protections

In 2015 and 2016, we reported on whistleblower protection issues, including issues related to the general public and federal employees, as illustrated below:

- In October 2015, we reported on whistleblower protections for any individual, including the general public, reporting tax fraud to the

⁸Within 60 days of the agency head's issuance of the order, the complainant may file an appeal in the United States Court of Appeals.

⁹For commercial item acquisitions, contracting officers must insert FAR 52.212-4 in all solicitations and contracts. The clause requires that the contractor comply with, among other things, the whistleblower protections in 41 U.S.C. §4712.

¹⁰The simplified acquisition threshold is generally \$150,000. FAR 2.101.

Internal Revenue Service Whistleblower Office. We found that whistleblowers may not have adequate protections against employer retaliation when filing disclosures.¹¹ We made 10 recommendations to the Internal Revenue Service including tracking dates, strengthening and documenting procedures for award payments and whistleblower protections, and improving external communications. The Internal Revenue Service agreed with our recommendations.

- In July 2016, we reported on the whistleblower process at Homeland Security for a specific regulation on Chemical Facility Anti-Terrorism Standards and found that the Department did not have documented procedures for investigating disclosures made by whistleblowers and their website provided only limited guidance.¹² We recommended that Homeland Security develop a documented process and procedures to address whistleblower retaliation reports, and provide additional guidance on the Homeland Security whistleblower website and telephone tip line. Homeland Security agreed with our recommendations.
- In September 2016, we testified before a House subcommittee on the status of DOD's implementation of whistleblower protections and reported that of the 18 recommendations we had previously made, DOD had implemented 15, including that DOD ensure that investigations are conducted by someone outside of the complainant's chain of command.¹³ DOD also had implemented our recommendations to improve and track investigation timeliness and strengthen oversight of the military services' investigations, and was considering steps to implement the remaining three recommendations regarding standardized investigations and reporting to Congress.
- In November 2016, we reported on the status of implementing the Whistleblower Protection Enhancement Act, which strengthens protections for federal employees. We reported that the Merit Systems Protection Board has taken steps to collect and report whistleblower appeals data, but we found a number of weaknesses in Merit Systems

¹¹GAO, *IRS Whistleblower Program: Billions Collected, but Timeliness and Communication Concerns May Discourage Whistleblowers*, [GAO-16-20](#) (Washington, D.C.: Oct. 29, 2015).

¹²GAO, *Critical Infrastructure Protection: Improvements Needed for DHS's Chemical Facility Whistleblower Report Process*, [GAO-16-572](#) (Washington, D.C.: July 12, 2016).

¹³GAO, *Whistleblower Protection: DOD Has Improved Oversight for Reprisal Investigations, but Can Take Additional Actions to Standardize Process and Reporting*, [GAO-16-860T](#) (Washington, D.C.: Sept. 7, 2016).

Protection Board's data collection.¹⁴ We recommended that the Merit Systems Protection Board help ensure the accuracy of its reporting on whistleblower appeals received and closed by (1) updating its data entry user guide to include additional guidance and procedures and (2) adding a quality check in its data analysis and reporting process to better identify discrepancies. The Merit Systems Protection Board agreed with these recommendations.

In 2016, we also reported on aspects of the Department of Energy's (Energy) whistleblower program and its contractor-run facilities, including its implementation of the 2013 pilot program. In our July 2016 report, we reported that Energy had taken limited to no action to hold responsible contractors that had created a chilled work environment, or an environment that may not respond favorably to whistleblower disclosures.¹⁵ We recommended that Energy revise existing guidance to clarify what constitutes a chilled work environment and define appropriate steps the Department can take to hold contractors accountable. Energy agreed with this recommendation.

All 14 Executive Departments Surveyed Varied in the Number of Reprisal Complaints Received and How They Implemented the Pilot

As the pilot program was being implemented, the number of reprisal complaints received varied across the 14 executive departments, according to the OIGs' responses to our survey. According to the OIGs, of the estimated 1,560 reprisal complaints received from July 1, 2013, to December 31, 2015, the OIGs investigated about one-third of the total 127 complaints submitted by contractors, subcontractors, and grantee employees covered under the pilot program. All remaining reprisal complaints were disposed of for various reasons, but none of the pilot program investigations completed thus far resulted in findings that substantiated reprisal. In addition, the 14 OIGs reported using multiple mechanisms to implement the pilot program, including incorporating a new contract clause to notify contractors of their responsibilities.

¹⁴GAO, *Whistleblower Protections: Additional Actions Would Improve Recording and Reporting of Appeals Data*, [GAO-17-110](#) (Washington, D.C.: Nov. 28, 2016).

¹⁵GAO, *Department of Energy: Whistleblower Protections Need Strengthening*, [GAO-16-618](#) (Washington, D.C.: July 11, 2016).

Reprisal Complaints Received Varied across the 14 Executive Departments

The number of reprisal complaints received varied across the 14 executive departments we surveyed. OIGs at the 14 executive departments reported receiving an estimated 1,560 whistleblower reprisal complaints from July 1, 2013, through December 31, 2015. The 1,560 reprisal complaints consisted of each department receiving a range of complaints, from approximately 3 to 600 based on survey responses. The 1,560 reprisal complaints included complaints from employees of contractors, subcontractors, and grantees as well as groups not covered by the pilot program, such as federal employees and the general public.

Of the estimated 1,560 reprisal complaints received from July 1, 2013, through December 31, 2015, OIGs from the 14 departments reported that 127 were submitted by employees of contractors, subcontractors, and grantees under the pilot program. However, the OIGs reported varying levels of insight into whether federal, contractor, subcontractor, or grantee employees had submitted the reprisal complaints. For example, 2 departments reported actual counts for all categories while 4 departments provided a mix of actual counts and estimates. Two of the 14 departments could not separate the number of reprisal complaints by category, and did not track how many they had received from federal, contractor, subcontractor, or grantee employees. At these 2 departments, OIG officials said that their case management systems, the electronic systems they use to track complaints, could not provide this level of detail on the source of the complaint. As a result, the officials at these 2 departments said that they reviewed individual cases to determine if the reprisal complaints filed were relevant to the pilot program.

The 14 departments differed in the number of reprisal complaints received under the pilot program. For example, 2 departments reported receiving as few as 1 complaint apiece while 1 department received 35 complaints. Three departments accounted for almost 60 percent of the pilot program complaints received from employees of contractors, subcontractors, and grantees between July 1, 2013, and December 31, 2015. Almost all of the 127 reprisal complaints were reported directly to the department's OIG. For the remaining reprisal complaints, 4 were referrals from within the respective department, 1 was a referral from Congress, and 1 was filed by an advocacy group on the behalf of a complainant.

OIGs Investigated About One-Third of the 127 Reprisal Complaints Identified Under the Pilot Program

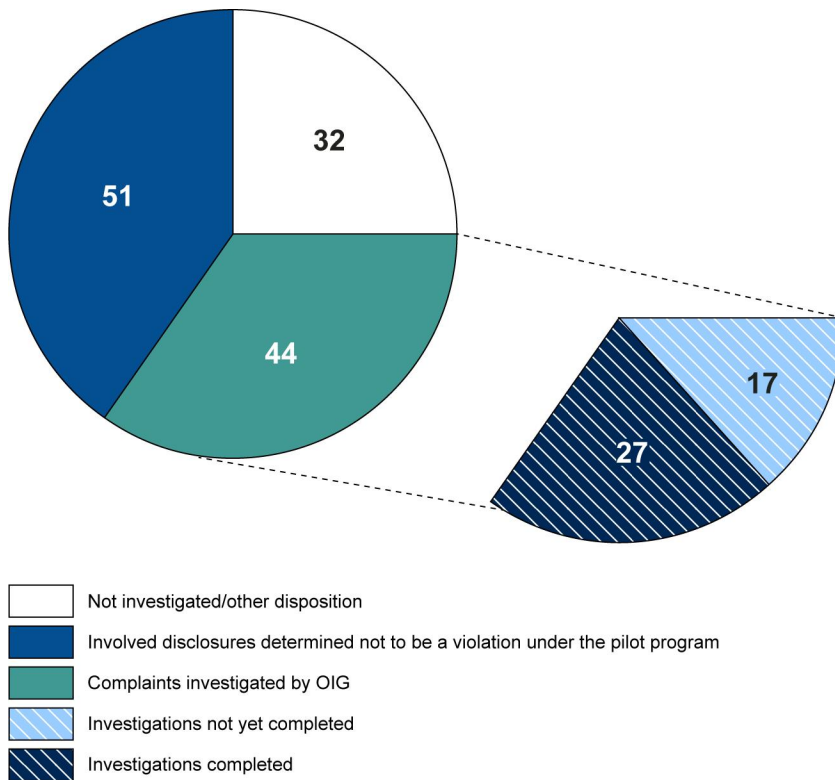
Of the 127 reprisal complaints submitted by employees of contractors, subcontractors, and grantees under the pilot program, 44 were investigated by the OIG and none of the investigations completed thus far resulted in findings that substantiated reprisal. See figure 2 for more information about the disposition of reprisal complaints covered in the pilot program.

Unsubstantiated Complaint:

A complaint where the Office of Inspector General performed an investigation and determined that no reprisal occurred.

Source: GAO analysis based on 41 U.S.C. 4712 (b) | GAO-17-227.

Figure 2: Disposition of 127 Pilot Program Reprisal Complaints Received by Offices of Inspector General at 14 Executive Departments from July 1, 2013, to December 31, 2015



Source: GAO analysis of survey responses from 14 executive departments. | GAO-17-227

Note: We fielded our survey in June 2016 and all 14 executive departments submitted their responses by July 2016. Two of the 14 agencies had case management systems that were not able to provide actual counts. Instead, they reported data based on their review of individual complaints to determine their relevancy to the Pilot Program for Enhancement of Contractor Employee Whistleblower Protections (pilot program).

According to OIG responses to our survey, they had completed investigations for 27 of the 44 investigated reprisal complaints. As required under the pilot program, OIGs reported forwarding their investigation findings to the agency head in 12 of the 27 completed investigations. The remaining 15 investigations were completed by 1 OIG that reported it did not forward its findings to the agency head. This is not consistent with a provision of the pilot program and is discussed later in this report.

Of the 32 reprisal complaints submitted but not investigated, OIGs determined that the cases were one of the following: frivolous, previously decided by another federal or state judicial proceeding, to be referred to another investigative body, or to receive an “other disposition.”¹⁶ In cases that received other dispositions, OIGs reported that these cases could not proceed because the complainants did not respond to requests for information or declined to waive confidentiality, which they stated were necessary to conduct an investigation.

Of the 51 reprisal complaints submitted for which it was determined that the complaints were not covered by the pilot program, the OIGs at the respective departments—10 in total—did not take any further actions to investigate. In these cases, the OIGs determined that the initial disclosure was related to conduct that did not, for example, allege gross mismanagement covered under the pilot, and therefore, these reprisal complaints were not covered by the pilot program.¹⁷

OIGs Reported Using Multiple Mechanisms to Implement the Pilot Program

All 14 OIGs reported using a combination of mechanisms to implement the pilot program, including existing efforts to manage whistleblower disclosures and new efforts to handle reprisal complaints filed under the pilot program. Some of these mechanisms were extensions of existing efforts, such as using existing whistleblower hotlines to accept reprisal complaints related to the pilot program. Several OIGs also noted that they developed education programs for contractors, subcontractors, and

¹⁶The term “frivolous” is not defined in the pilot program statute.

¹⁷Following our survey period, from January 1, 2016, through May 31, 2016, 8 OIGs reported receiving an additional 39 reprisal complaints under the pilot program, and 6 OIGs reported they were conducting investigations for 23 of these complaints.

grantees, such as adding information about the pilot program to their whistleblower websites. In addition to these efforts, a few OIGs reported developing efforts specifically for the pilot program. For example, one OIG reported using a monthly report to provide a snapshot for the status of complaints and when the 180-day investigative period would end for each complaint—a specific time frame that is part of the pilot program’s enhancements to whistleblower protections. See table 1 for various methods used by OIGs to implement the pilot program.

Table 1: Methods Used by 14 Departments to Facilitate the Contractor, Subcontractor, and Grantee Employee Whistleblower Disclosures and Reprisal Complaints Filed under the Whistleblower Protection Pilot Program

Method	Of 14 departments, used by
Hotline	All
Whistleblower ombudsman ^a	All
Electronic case management system	All
Required OIG training for pilot program investigations	5
Education programs for contractors, subcontractors, and grantees	8
Guidance for pilot program reprisal investigations	7
Establishment of separate office or division to handle pilot program complaints and reprisals	2

Source: GAO analysis of survey responses from 14 departments’ Offices of Inspector General (OIG). | GAO-17-227

^aThe Whistleblower Protection Enhancement Act of 2012 describes a whistleblower ombudsman as an official who shall educate agency employees: (1) about prohibitions on retaliation for protected disclosures; and (2) who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures. The whistleblower ombudsman is not discussed in the pilot program.

Under the pilot program as implemented, contracting officers are also required to include a FAR clause—which instructs contractors to communicate to their employees, in writing and in their predominant language, their protections under the pilot program—in new contracts (contracts awarded after September 30, 2013) that exceeded the simplified acquisition threshold, generally over \$150,000. All 14 departments reported in the survey that they had required insertion of the FAR clause 52.203-17 into new contracts as a means of ensuring that contractor employees are informed of their rights under the pilot

program.¹⁸ In addition to the clause, 2 departments reported taking additional steps to ensure contractors are informing their employees of their rights. One department reported developing new guidance that will require their contracting staff to obtain email confirmation from contractors that they have notified employees of their rights. Also, during a roundtable discussion we conducted with senior procurement officials, another department official said that they had conducted forums with contractors to inform them about the importance of the pilot program and to gather feedback about challenges.

Despite using various mechanisms to implement the pilot program, most of the 14 OIGs identified ambiguities and some challenges with the pilot program. For example, over half of the OIGs identified at least one of each of the following as a challenge that they experienced while implementing the pilot:

- *Ambiguities in the pilot program* (10 of 14 departments)—for example, the OIGs reported that there is a lack of guidance regarding the definition of a “frivolous” allegation.
- *Personnel or funding* (9 of 14 departments)—for example, the OIGs reported that these are complex cases where the investigation can be extensive and consume significant investigative manpower.
- *Timeliness requirements for investigating reprisal complaints* (8 of 14 departments)—for example, the OIGs reported that it is difficult to determine how much time it will take to complete an investigation because they have little formal control over non-government entities.

Two whistleblower advocacy groups we spoke with echoed these concerns, noting that contractor employees’ reprisal complaints can take a backseat to other issues because OIGs may have limited resources or other priorities, such as investigating federal employee complaints. Given these limited resources, one of the groups said that they had started to offer training on whistleblower protections during the implementation of the pilot program to help OIGs better understand issues such as what is considered a covered disclosure or personnel actions that may constitute reprisal to the detriment of the contractor.

¹⁸Although this information was reported by OIGs, OIGs also gathered information from department officials, where applicable. For example, OIGs are not responsible for inserting the whistleblower FAR clause 52.203-17 into contracts. Our survey did not include a question about contract modifications or FAR clause 52.212-4, the commercial items contract terms and conditions.

Four Selected Departments Did Not Fully Implement Provisions of the Mandate

Four selected departments—Commerce, Homeland Security, Interior, and State—used various processes for implementing the pilot program, and some had not yet fully implemented the program. In particular, OIGs of these departments reported they provided internal training on the protections provided by the pilot program. Further, the OIGs reported that they either had existing guidance or developed guidance during the implementation of the pilot program, however we found that the guidance was lacking in certain details. Moreover, the pilot program requires that the departments' OIGs forward a report of their investigation findings to several entities, but we found two OIGs with completed investigations that did not fully implement these reporting requirements. Additional details of contractor and subcontractor employees' reprisal complaints submitted to the selected departments and the handling of the complaints are included in appendix III. In addition, within the four departments' contracting offices, some of the new contracts we reviewed were missing one of the required FAR clauses as required by law, and none of the four departments have policies in place to make best efforts to include a required FAR clause in major contract modifications, as required by the pilot program. Finally, departments have not taken full advantage of opportunities to improve communications between department officials and contractors to help make contractors' employees aware of their protections from reprisal for disclosing potential wrongdoing.

Selected OIGs Provided Internal Training on the Pilot Program

At the four selected departments we reviewed, the OIGs reported that they provided internal training on the protections provided by the pilot program. For example, an official at State reported having training available not only for OIG staff, but also for contracting officers. Interior officials reported that they had developed detailed training slides that cover several whistleblower laws, including the pilot program protections. Homeland Security officials reported that they had a slide dedicated to the pilot program in whistleblower training slides, but also said additional training would be helpful. Commerce OIG officials reported that the Office of Special Counsel and Department of Justice officials provided training related to whistleblower protections to the OIG staff.

Selected OIGs Have Varying Pilot Program Guidance, but This Guidance Is Lacking in Certain Details

Commerce, Homeland Security, Interior, and State OIGs all reported having guidance in place to implement the pilot program, but that guidance varied and lacked certain details regarding the provisions in the pilot program. Specific details follow:

- Commerce OIG officials provided a flow chart and a legal memorandum as the pilot program guidance which detail the OIG and department responsibilities under the pilot program. Commerce OIG also has guidance related to conducting investigations, but not specifically those that fall under the pilot program. Commerce officials we spoke with said that these documents are sufficient as guidance to effectively implement the pilot program. However, we noted that while the flow chart provides a description of the pilot program, it does not include some program details that will facilitate implementing the program, such as identifying to which offices within Commerce a report should be sent following an investigation. For example, it does not identify which office is the “head of the contracting activity” or the designee to where a report should be sent. Further, the investigations guidance may benefit from incorporating some elements of the flow chart specific to the pilot program.
- Homeland Security OIG officials provided a directive as the pilot program guidance. The directive outlines OIG responsibilities under the pilot program, including intake and investigation procedures, as well as a process for tracking complaints. Homeland Security officials we spoke with said this directive is thorough. However, we noted the directive does not include the FAR 3.908-5 requirement to send the investigation findings to the head of the contracting activity and believe there may be opportunity to include more guidance. When we asked about the FAR requirement, OIG officials said they believed forwarding findings to the head of the contracting activity is a responsibility of the agency head which had not previously provided the proper contact to the OIG.
- Interior OIG officials provided their policy for investigations as the pilot program guidance. However, we noted that Interior’s OIG investigations policy document was not specific to the pilot program processes or protections. Interior OIG officials agreed and reported

that if the pilot is made permanent they plan to make changes to the policy for investigations to include the pilot program details.¹⁹

- State OIG officials provided their policy for pilot program investigations as the pilot program guidance. The policy includes instructions on obtaining evidence for pilot program investigations, on the reporting process when an investigation is complete, as well as identifies levels of review. The policy instructs State officials to share investigation findings with the agency head; however, we found it does not specify how that information should be communicated. A State OIG official said that the report of findings is communicated to the agency head through a system that allows memoranda to be submitted as either an action memorandum or information memorandum. State OIG officials reported that initially, they had submitted information memoranda because action memoranda traditionally have a one page limit, which is insufficient to communicate the findings of an investigation. However, according to State OIG officials, in 2016, the Office of the Executive Secretariat (which handles executive communication) requested that OIG put its whistleblower reports in the form of an action memorandum, but this change has not been put into guidance. An action memorandum signals that action by the agency head is required, while an information memorandum does not. Although a determination by the agency head is required by law, we noted that the OIG guidance does not specify that the action memoranda should be sent to the agency head, signaling action is to be taken.

According to federal internal control standards, management should internally communicate the necessary information to achieve the entity's objectives.²⁰ This can be achieved through clear guidance or policies. Further, FAR 3.908-5 establishes pilot program requirements, and department guidance should include the requirements laid out in the FAR, such as time frames for determinations by the agency head and who receives copies of the investigation results. Although the four selected OIGs all provided some level of guidance on executing the pilot program,

¹⁹In addition to the OIG's policy for investigations, the Department of the Interior issued specific guidance on implementing the pilot program in July 2014. However, we found that the department's guidance provides detailed explanation of the pilot program, but does not specify to which parties the OIG should report its investigation findings or that the agency head should make the determination of whether reprisal occurred, as required by the pilot program.

²⁰GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 2014).

it is possible that some steps in this process may be missed because they do not have detailed guidance that addresses all required elements of the pilot program. Without providing more details in their guidance, these departments may be at risk of not fully implementing all the provisions of the pilot program.

Two OIGs with Completed Investigations Did Not Fully Implement Pilot Program Reporting Requirements

The pilot program statute and implementing regulations require that the OIG forward a report of its investigation findings to several entities, including the agency head, the complainant, and the contractor. Additionally, the FAR requires that the agency's head of the contracting activity also receive a report of investigation findings. Of our four selected departments, Commerce and Interior reported that they did not have any investigations finalized during our review period. In contrast, Homeland Security and State had investigations with findings that were not forwarded to all appropriate entities to allow the agency head to make a final determination of whether reprisal occurred. Specific details follow:

- Homeland Security OIG officials reported that they found the complaints to be unsubstantiated in their two investigative reports and reported forwarding the findings from their two investigations during this period to the contractor and the complainant. However, although OIG officials reported attempting to send the report to the agency head, department officials reported that the reports did not actually go to the appropriate contacts. As a result, the reports were not received by the correct contact in the department, and the agency head did not make the determination in either case, as required by law. Agency officials reported that in one case a report was sent to the Office of General Counsel Labor and Employment division, not the agency head, and in the other case, the report was forwarded to the Secretary's office, but nothing was done with the report. OIG officials said their implementation of the pilot was an evolving process and that they were not notified that the reports had gone to the wrong person.
- State OIG officials reported that the five investigations completed by December 31, 2015, were forwarded to the agency head, and the results of the OIG investigations were communicated to both the complainant and the contractor. During the course of our review, a State OIG official said that he had previously sent the reports to the relevant contracting activity at each Bureau, as designated by the Department of State Acquisition Regulation, in an effort to meet the

requirement to provide the investigation results to the head of the contracting activity.²¹ However, starting in October 2016 and going forward, officials said the OIG plans to send reports to State's Procurement Executive, the head of the contracting activity at the State Department, who has since been designated by the agency head during the course of this review to make determination of potential reprisals, as well as provide remedies. For these five cases, a State OIG official reported that the complaints were unsubstantiated and the OIG forwarded all findings as information memoranda to the agency head. The information memoranda include a cover page indicating the investigation's findings, and that the Secretary should review the report for informational purposes, but there is no indication on the cover page of actions required—including that the agency head has 30 days to make a determination—because a determination had been made by the OIG. However, the pilot program requires that even if the OIG determines the reprisal complaint is unsubstantiated, the agency head must make the final determination. Officials from the agency head at State explained that for the five cases in which information memoranda were provided to report the investigations' findings, they understood that no action was required, and no action was taken, however the responsibility to make a final determination of whether reprisal occurred under the pilot program remained. As a result, no documentation exists indicating that the agency head agreed with the investigations' findings. According to the statute, however, the agency head, not the OIG, must make the determination of whether reprisal occurred within 30 days of receiving the report of investigation findings. During our review, and in part as a result of ongoing work, in June 2016, OIG officials said State instructed the OIG to provide the results of its investigations as action memoranda, rather than information memoranda, for both substantiated and unsubstantiated investigation findings of a reprisal complaint in order to indicate action from the agency head is necessary. In addition, the action memorandum now includes the 30-day requirement for the agency head to make a determination as to whether the employee was subjected to a reprisal on the complaint. As a result of these changes, two additional investigation findings from October 2016 were reported to the agency head in the action memorandum format.

²¹48 C.F.R. § 601.601-70.

Some New Contracts at the Four Departments Were Missing the FAR Clause, and the Departments Lack Processes to Ensure the FAR Clause Is Inserted

In addition to investigating reprisal complaints, the pilot program required a new FAR clause to be inserted into contract actions; this action is to be accomplished by the departments' contracting officials. As discussed earlier, the FAR clause instructs contractors to communicate to their employees, in writing and in the predominant language of their workforce, their rights under the pilot program. These rights include who an employee may report an initial disclosure or submit a reprisal complaint to, their right to an investigation for covered reprisal complaints, and other rights and remedies. The FAR clause is required to be inserted into new contracts over the simplified acquisition threshold, generally \$150,000, for any contracts awarded after September 30, 2013, until the close of the pilot program on July 1, 2017.²² For commercial item acquisitions, contracting officers must insert an already-required clause, 52.212-4, that now requires compliance with the pilot program statute 41 U.S.C. § 4712.

Commerce, Homeland Security, Interior, and State contracting officials reported that they use the FAR clause to inform contractors of their responsibilities. However, we found that at State, Commerce, and Homeland Security, contract writing systems may not automatically include the clause into contracts that are required, and some required a contracting officer to insert the FAR clause into each contract into which it is required to be included, rather than through an automated system. At Interior, officials said the clause would be automatically inserted into new awards as appropriate, however, we found the clause was not inserted in all contracts that we reviewed. Internal control standards require that an entity should establish monitoring activities and evaluate results.²³ However, we found all four selected departments reported having no department-wide, regular compliance review that would detect whether the required FAR clause is included in required contracts. For example, Commerce officials reported that while they do have a compliance review that checks for the insertion of mandatory clauses, and a review was conducted in 2014 and included contract actions from 2011 through 2013,

²²The December 14, 2016, legislation making the pilot program permanent expanded protections to subgrantees and now applies to personal services contracts, which were not covered under the pilot program. Pub. L. No. 114-261.

²³[GAO-14-704G](#).

a review has not been done since; therefore, no department-wide review has been done on the inclusion of the FAR clause required by the pilot program. A contracting official from Homeland Security said that all contracting officers, as part of the review process before a contract is signed, are required to review contract actions to ensure that all applicable clauses are included; however, no department-wide review is done. Contracting officials from Interior said that, while they conduct contracting compliance reviews, they do not include specific clauses in those reviews unless the agency has a specific reason to do so, such as if they determined through risk analysis that the clause may not be included. To date, according to these officials, Interior has not checked compliance of the inclusion of the FAR clause. Officials from State report they rely solely on supervisory review of contract documents and there is no higher-level compliance review to determine whether the FAR clause is inserted into new contracts.

Despite the acknowledgement from all four departments that the required clause was to be included in new contracts, we found that some contracts in our review lacked the required whistleblower protections FAR clause 52.203-17 or 52.212-4 for commercial item contracts.²⁴ The contracts for Homeland Security, Interior, and State were not commercial item contracts, but the contract for Commerce was. At Commerce, a contract awarded in September 2015 of more than \$450,000 for computer hardware and software licenses provided by contractors does not include the required whistleblower protections FAR clause or the commercial item contract clause. Further, at Homeland Security, a contract awarded in September 2015 for over \$550,000 for the design and implementation of security software does not include the required whistleblower protections FAR clause. In addition, at Interior, a contract awarded in August 2015 of about \$200,000 to perform research and development does not include the required whistleblower protections FAR clause. At State, a contract awarded in September 2015 for project development and design services for over \$230,000 also did not include the required whistleblower protections FAR clause. Without a process in place to ensure the required contract clause is inserted into new contracts, these clauses may continue to be excluded. If acquisition officials fail to include the required clauses and fail to take other action that would inform the contractor

²⁴To identify an example of a contract without the clause, we reviewed documentation for a random selection of at least 50 contracts at each of the four departments.

employees of their rights under the pilot program, contractor employees may not be aware of their rights.

The Four Departments Lack Policies on Making Best Efforts to Include the FAR Clause in Major Contract Modifications

The pilot program requires that executive agencies make a best effort to include the FAR clause in major contract modifications of existing contracts awarded before July 1, 2013. Officials from Commerce reported that they do not include the FAR clause in major modifications, but pointed out that the standard FAR convention for incorporating clauses into existing contracts allows the contracting officer to use discretion. Homeland Security officials also noted that contracting officers are encouraged to include the clause in major modifications to required contracts and task orders. Interior officials reported that it is up to the bureaus within Interior to decide if the clause is inserted into major modifications, and there is no department-wide policy.²⁵ State officials reported that the clause is added on a case-by-case basis, and contracting officials are responsible for determining whether it is necessary to add the clause. Contracting officials at all four departments said they do not have a policy in place that defines major modification, or any policy or guidance that instructs contracting officials on how to determine if a modification would be considered “major” or what the contracting officer should do to make a best effort to include the FAR clause. Some contracting officials reported that even though there are requirements in the statute regarding making best efforts, they rely on the FAR and generally do not seek out additional counsel on the implementation of the law. However, the requirement to make best efforts to include the FAR clause into existing contracts (those awarded before the effective date of the pilot program) during major modifications of those contracts is not implemented in the FAR. In the FAR interim rule, agencies are only “encouraged” to put the clause in major modifications, but there is no mention of “best efforts” to do so. As a result, some departments’ officials who rely on the FAR guidance and rules may not be aware of the statutory requirement to make a best effort to include the FAR clause in major modifications to contracts awarded before July 1, 2013.

²⁵Interior’s bureaus include the National Park Service, Bureau of Indian Affairs, Bureau of Land Management, and Bureau of Reclamation, among others.

Additionally, some of the contracting officials we spoke with said there may be costs associated with asking a contractor to include the clause during a major modification of an existing contract. However, contractors we spoke with said that adding the FAR clause would be largely administrative and they would be unlikely to ask for additional compensation to do so. Further, one contractor we spoke with pointed out that the company he represents would be hesitant to argue against including the FAR clause because the contractor understood and agreed with the importance of protecting whistleblowers from potential reprisal.

Without a department-wide policy in place to determine whether or not to include the FAR clause into an existing contract during a major modification and to define what is major, it may not be possible for these departments to ensure their contracting officers are making a best effort to include the clause into existing contracts awarded prior to July 1, 2013, as required by the pilot program.

Opportunities Exist to Improve Communications between Department Officials and Contractors

Some contractors we spoke with were unaware of their obligations under the pilot program. These contractors not only have received federal funds from one or more of the four selected departments in our review, but also other federal agencies. They pointed out that they generally have not been contacted by agencies to follow up on what steps or actions they have taken to communicate in writing to employees about their rights against reprisal. However, another contractor pointed out that agencies have followed up and sought confirmation or attestation on other contract clauses, such as clauses designed to address human trafficking. In addition, one whistleblower advocacy group we spoke with noted that contractors' employees may not be aware of their rights or where to find more information about the pilot program protections. This reinforces the need for agencies to ensure the mechanisms are in place for contractors to communicate these rights to the covered employees.

At the four selected departments, department officials reported taking no additional action beyond inserting the FAR clause to inform contractors about their responsibilities to communicate to their employees—in writing and in the employees' predominant language—their rights under the pilot program. Some officials noted that contractors are responsible for implementing FAR clauses, and if they do not do so, they are in breach of the contract. Federal internal control standards, under the information and

communication standard, note that management should externally communicate necessary information to achieve its objectives.²⁶ Given that contractors we spoke with stated they were not all aware of the need to communicate to their employees about their rights in this area, opportunities for improvements to communications between the two parties exist. For example, one department in our survey of 14 departments reported conducting external communication beyond including the FAR clause in new contracting actions by developing new guidance that will require its contracting staff to obtain email confirmation from contractors that they have notified their employees of their rights as reported above. Without additional communication about the requirements and protections provided by the whistleblower protections pilot program between the four departments and their contractors, contractors may not fully understand or appreciate the significance of their responsibility to communicate to their employees.

Conclusions

Executive departments have an opportunity to help reduce fraud, waste, abuse, and mismanagement of government funds by leveraging the willingness of contractor, subcontractor, and grantee employees to report such instances. Because whistleblowers risk reprisal, including potential job loss, agencies must ensure those contractor employees are aware of their protections against reprisal. To fully implement the enhancement of contractor employee whistleblower protections pilot program, especially now that it has been made permanent, and to ensure that the review process does not stop short of the agency head review, OIGs must report their investigation findings to the agency head.²⁷ When reports are not forwarded to the agency head for final determination, the requirement under the statute is not met. Further, the determination of the agency head may differ from that reached by the OIG, possibly affecting the complainant's recourse. At the four selected departments reviewed, confusion among department officials about the pilot program's processes and requirements remain, and further guidance may help clarify responsibilities under the pilot program. Further, opportunities exist for

²⁶GAO-14-704G.

²⁷Pub. L. No. 114-261. In December 2016, Congress enacted legislation making the pilot program permanent and expanded protections to subgrantees and now applies to personal services contracts, which were not covered under the pilot program.

these four departments to ensure that the necessary FAR clause is included in all required contracts, and that they make a best effort to include the FAR clause in major modifications to existing contracts. Finally, improving communication with contractors, subcontractors, and grantees to ensure employees are aware of their responsibilities and rights under the pilot program are important steps for the selected executive departments' contracting officials to take. By fully implementing the pilot program, these departments can encourage contractor personnel to disclose evidence of wrongdoing. Without these critical oversight elements of contracts, contractor employees may be unaware of the protections they have against reprisal, which may ultimately impact their willingness to come forward when witnessing fraud, waste, abuse, and mismanagement.

Recommendations for Executive Action

We recommend that the Inspectors General of Commerce, Homeland Security, Interior, and State develop or clarify existing guidance on the implementation of the pilot program. For example, the guidance should identify specific pilot program processes such as levels of review during an investigation, and where the findings of investigations are to be reported.

We also recommend that the Secretaries of Commerce, Homeland Security, Interior, and State develop policies and processes to help ensure that

- the FAR clause 52.203-17 is inserted in new contracts and major modifications as appropriate,
- contracting officials can determine whether a modification is major and the applicability of the FAR clause, and whether they are making their best efforts to include the clause into existing contracts during major modifications, and
- contracting officials communicate with contractors and subcontractors to help ensure employees are informed about the requirements and protections provided by the whistleblower protection pilot program.

Agency Comments and Our Evaluation

We provided a draft of this product to the Departments of Commerce, Homeland Security, Interior, and State for comment. All four departments concurred with the recommendations. The agencies' comments are summarized below and written comments from Commerce, Homeland Security, and State are reproduced in appendices IV, V, and VI respectively. Interior agreed with the recommendations in an email. We also received technical comments from Commerce, Homeland Security, and State which we incorporated, as appropriate.

In Commerce's written comments, the Department said the differences between the statute and the FAR regulations need to be addressed, and agreed to encourage contractors to communicate with their subcontractors about the requirements and protections of the pilot program. Commerce OIG agreed to incorporate some of the guidance in their policy manual into their flowchart guidance, and revise their investigative policy manual as necessary.

In Homeland Security's written comments, the Department agreed to review processes to ensure the FAR clause is inserted into new contracts, develop policies and procedures to ensure contracting officers have clear guidance on when to incorporate the FAR clause, and will communicate broadly with those who do business with the Department to remind them of their contractual obligation under the pilot. The Homeland Security OIG has updated their directive in accordance with our recommendation.

In an email, Interior noted that the Department plans to develop supplemental guidance in fiscal year 2017 to assist contracting officers in appropriately applying the FAR clause and remind them of their responsibility to communicate the requirements of the clause to their contractors and subcontractors where possible.

In State's written comments, the Department agreed to ensure that the FAR clause is inserted in new contracts and major modifications, assist contracting officers to determine whether a modification is major and whether they are making best efforts to include it, and assist contracting officials with communicating to contractors and subcontractors to help ensure contractor employees are informed about the requirements under the pilot program. The State OIG has updated policies to include the 30-day deadline for agency head determination in whistleblower reports,

accommodate the agency head's specifications for sending the report, and specify that the Procurement Executive is the Secretary of State's designee for whistleblower investigations.

We are sending copies of this report to the appropriate congressional committees, the Secretaries of Commerce, Interior, Homeland Security, and State, and to other interested parties. In addition, the report is 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) 512-4841 or makm@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 VII.



Marie A. Mak
Director, Acquisition and Sourcing Management

List of Committees

The Honorable John McCain
Chairman

The Honorable Jack Reed
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Ron Johnson
Chairman

The Honorable Claire McCaskill
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Mac Thornberry
Chairman

The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

The Honorable Jason Chaffetz
Chairman

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

Appendix I: Survey

Introduction:

The U.S. Government Accountability Office (GAO), an agency of the United States Congress, is reviewing the pilot program for the enhancement of contractor employee whistleblower protections, including its implementation at executive agencies and associated challenges.

As a part of this study, GAO is conducting a survey of the Offices of the Inspector General (OIG) at 14 executive departments. This survey should be answered by individuals with knowledge of the pilot program for the enhancement of contractor employee whistleblower protections and contractor, subcontractor, and grantee employee reprisal claims and investigations within your agency. Some questions may require coordination across multiple individuals and offices. If questions cannot be addressed by your OIG, please coordinate responses to these questions with the appropriate office or offices that are able to respond to them, or if coordination is not possible, please provide contact information for the individuals and offices that would be able to address these questions.

We will not release individually identifiable data outside of GAO, unless required by law or requested by a member of Congress. We will generally report the results of this survey in the aggregate, but if we incorporate individual responses into the report, we will do so in a manner designed to ensure that individual respondents cannot be identified.

Please complete the questionnaire by July 6, 2016. We understand that there are great demands on your time; however, your responses are very important. We appreciate your insights, as it is important for GAO to provide an overview of the implementation of the pilot program to the Congress.

If you have any questions or are unsure of how to respond to a question, please call or e-mail Meghan Perez at 937-258-7908 or perezmc@gao.gov, or Mary Diop at 303-572-7340 or diopm@gao.gov.

Thank you in advance for your cooperation.

Instructions for Completing and Submitting Questionnaire:

This questionnaire can be completed on your computer. To do this, first save this MS Word file containing the questionnaire to your computer. You may then enter your responses directly in that file.

Completing the questionnaire is very simple. There are only a few rules to follow.

- Please use your mouse to navigate by clicking on the field or check box you wish to answer.
- To select a check box, click on the center of the box and an "X" will appear.
- To change or deselect a check box response, click on the check box and the "X" will disappear.
- To answer a question that requires that you enter a number or write a comment, click on the answer box and begin typing. You may type as much as you wish. The box will expand to accommodate your answer.
- When the questionnaire has been completed, resave it and send it as an e-mail attachment to Meghan Perez at perezmc@gao.gov.

Section 1 – Background:

1. Please provide the following information for the primary person completing this questionnaire in the event we need to contact you to clarify a response.

Name: [Click here to enter text.](#)

Title: [Click here to enter text.](#)

Agency: [Click here to enter text.](#)

Office: [Click here to enter text.](#)

Phone: [Click here to enter text.](#)

Email: [Click here to enter text.](#)

Section 2 – Allegations of Fraud, Waste, Abuse, Misconduct, or Mismanagement:

2. How many allegations of fraud, waste, abuse, misconduct, or mismanagement received by or referred to the OIG from July 1, 2013 through December 31, 2015, were made by each of the following groups? If available, please include all allegations received from all components and divisions within your agency. (For each row, please indicate whether the numbers provided are actual or estimated, or if the number of allegations can't be determined. If none, enter zero. Provide the total number of allegations in the last row.)

	Number of whistleblower allegations	Is this number an actual number, an estimate, or could not be determined?
Federal employee	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Contractor/subcontractor employee ¹	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Grantee employee ¹	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
General public	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Other	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Unknown source	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Total number of allegations of fraud, waste, abuse, misconduct, or mismanagement	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine

If "other" please specify: Click here to enter text.

3. Does the total identified in question 2 include allegations of fraud, waste, abuse, misconduct, or mismanagement received from other components and divisions within your agency?

- Yes
- No

¹ For contractor, subcontractor, and grantee employees an allegation includes disclosures of gross waste of federal funds, an abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule or regulation related to a federal contract or grant for which reprisal actions were not taken.

4. How many contractor, subcontractor, and grantee employee allegations of fraud, waste, abuse, misconduct, or mismanagement were received by the OIG through each of the following sources from July 1, 2013 through December 31, 2015? (For each row, please indicate whether the numbers provided are actual or estimated, or if the number of allegations can't be determined. If none, enter zero.)

Sources	Number of contractor, subcontractor, and grantee employee allegations	Is this number an actual number, an estimate, or could not be determined?
Direct reporting to OIG	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Referral from other component or division within your agency	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Fraudnet	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Other government agency	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Employer (Contractor/Subcontractor/Grantee)	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Other source:	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine

If "other" please specify: [Click here to enter text.](#)

5. Please describe the source(s) of information used and steps taken to answer questions 2 through 4 regarding the number of contractor, subcontractor, or grantee employee allegations of fraud, waste, abuse, misconduct, or mismanagement.

[Click here to enter text.](#)

6. Do you know of any potential problems or limitations of the information used to answer questions 2 through 4? If so, please describe.

[Click here to enter text.](#)

Section 3 – Employee Whistleblower Reprisal Complaints and Investigations:

7. How many whistleblower reprisal complaints received by the OIG from July 1, 2013 through December 31, 2015, were made by each of the following groups? If available, please include all reprisal complaints received by the OIG from other components and divisions within your agency. (For each row, please indicate whether the numbers provided are actual or estimated, or if the number of complaints can't be determined. If none, enter zero. Provide the total number of complaints in the last row.)

	Number of whistleblower reprisal complaints	Is this number an actual number, an estimate, or could not be determined?
Federal employee	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Contractor/subcontractor employees ²	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Grantee employees ²	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Total number of whistleblower reprisal complaints	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine

7a. Does the number of whistleblower reprisal complaints identified in question 7 include whistleblower reprisal complaints received from other components and divisions within your agency?

- Yes
- No

² For contractor, subcontractor, and grantee employees a complaint is a submission to an agency OIG for reprisal actions taken for alleging or disclosing to certain individuals or bodies gross waste of federal funds, an abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule or regulation related to a federal contract or grant.

8. How many contractor, subcontractor, and grantee employee whistleblower reprisal complaints received by the OIG from July 1, 2013 through December 31, 2015, are covered by the National Defense Authorization Act (NDAA) Pilot Program for Enhancement of Contractor Whistleblower Protections (the NDAA Pilot Program), NDAA for FY 2013, Pub. L. No. 112-239, sec. 828 (codified at 41 U.S.C. sec. 4712); FAR3.908? *(This would exclude reprisal complaints that fall under, for example, American Recovery and Reinvestment Act of 2009 (ARRA), Public law 111-5, sec. 1553; FAR3.907).*

(For each row, please indicate whether the numbers provided are actual or estimated, or if the number of complaints can't be determined. If none, enter zero.)

	Number of whistleblower reprisal complaints covered by NDAA Pilot Program	Is this number an actual number, an estimate, or could not be determined?
Contractor/subcontractor employees protected by NDAA Pilot Program only	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Grantee employees protected by NDAA Pilot Program only	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine

8a. Does the number of whistleblower reprisal complaints covered by the NDAA Pilot Program identified in question 8 include whistleblower reprisal complaints received from other components and divisions within your agency?

- Yes
- No
- N/A – number of whistleblower reprisal complaints covered by the NDAA Pilot Program can't be determined

8b. Has your OIG received any additional reprisal complaints covered by the NDAA Pilot Program from January 1, 2016 through May 31, 2016?

- Yes
- No *(go to question 9)*

8b1. How many NDAA Pilot Program reprisal complaints has your OIG received from January 1, 2016 through May 31, 2016?

[Click here to enter text.](#) Number of complaints received

8b2. For how many of the NDAA Pilot Program reprisal complaints received from January 1, 2016 through May 31, 2016 has the OIG initiated an investigation?

[Click here to enter text.](#) Number of complaints with investigations initiated

For questions 9 through 16, please provide responses specific to NDAA Pilot Program reprisal complaints. If it is not possible for your OIG to distinguish between NDAA Pilot Program reprisal complaints and other complaints made by contractors, subcontractors, and grantees (e.g. ARRA reprisal complaints) please provide responses based on all contractor, subcontractor, and grantee reprisal complaints.

9. Does the data on contractor, subcontractor, and grantee employee whistleblower reprisal complaints that the OIG maintains contain information that allows you to identify the number of NDAA Pilot Program reprisal complaints made by contractors, subcontractors, and grantees?

- Yes (answer questions 10 through 16 based on NDAA Pilot Program reprisal complaints)
- No (answer questions 10 through 16 based on all contractor, subcontractor, and grantee reprisal complaints)

10. How many contractor, subcontractor, and grantee employee whistleblower reprisal complaints were received by the OIG from each of the following sources from July 1, 2013 through December 31, 2015? (For each row, please indicate whether the numbers provided are actual or estimated, or if the number of complaints can't be determined. If none, enter zero.)

Sources	Number of complaints received	Is this number an actual number, an estimate, or could not be determined?
Direct reporting to OIG	Click here to enter text	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Referral from other component or division within your agency	Click here to enter text	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Member or committee of Congress	Click here to enter text	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
U.S. Government Accountability Office (GAO)	Click here to enter text	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
U.S. Department of Justice or other law enforcement agency	Click here to enter text	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Office of Special Counsel (OSC)	Click here to enter text	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Government source other than GAO, Department of Justice or other law enforcement, or OSC	Click here to enter text	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine

Federal employee responsible for contract oversight	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Employer (Contractor/subcontractor/grantee)	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Other source:	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine

If "other source" please specify: [Click here to enter text.](#)

11. Of contractor, subcontractor, and grantee employee whistleblower reprisal complaint cases received by the OIG from July 1, 2013 through December 31, 2015, how many resulted in the following dispositions? (For each row, please indicate whether the numbers provided are actual or estimated, or if the number can't be determined. If none, enter zero.)

Disposition	Number of Complaints	Is this number an actual number, an estimate, or could not be determined?
Determined to be frivolous	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Failed to allege a violation in accordance with the requirements in section 828 ³	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Determined to have been previously addressed by another federal or state judicial proceeding	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Referred to another investigative body	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Investigated	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Other disposition:	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine

If "other reason" please specify: [Click here to enter text.](#)

³Section 828 of the National Defense Authorization Act for Fiscal Year 2013 prohibits contractors, subcontractors, and grantees from discharging, demoting, or discriminating against an employee as a reprisal for disclosing to certain entities information that the employee reasonably believes is evidence of gross mismanagement of a government contract, a gross waste of federal funds, an abuse of authority relating to a contract, a substantial and specific danger to public health or safety, or a violation of law, rule or regulation related to a contract or grant.

Section 4 – Outcomes of Employee Whistleblower Reprisal Complaints Investigated by the OIG:

12. For the contractor, subcontractor, and grantee employee whistleblower reprisal complaints received and investigated by the OIG from July 1, 2013 through December 31, 2015, how many had reports submitted to the agency head within 180 days of the OIG receiving the reprisal complaint?

[Click here to enter text.](#) Number of complaints with reports submitted

13. For the contractor, subcontractor, and grantee employee whistleblower reprisal complaints received and investigated by the OIG from July 1, 2013 through December 31, 2015 how many complainants did the OIG notify that additional time (i.e., more than 180 days after OIG received the reprisal complaint) was needed to submit reports to the agency head?

[Click here to enter text.](#) Number of complaints needing additional time

14. For the contractor, subcontractor, and grantee reprisal complaints received and investigated by the OIG from July 1, 2013 through December 31, 2015, how many resulted in the following OIG findings? *(For each row, please indicate whether the numbers provided are actual or estimated, or if the number of can't be determined. If none, enter zero.)*

Findings	Number of Investigations	Is this number an actual number, an estimate, or could not be determined?
Reprisal claim substantiated	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Reprisal claim unsubstantiated	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Other	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine

If "other" please specify: [Click here to enter text.](#)

15. For the contractor, subcontractor, and grantee employee whistleblower reprisal complaints received and investigated by the OIG from July 1, 2013 through December 31, 2015, how many had reports submitted to the agency head as of March 31, 2016?

Number of investigation reports submitted to the agency head: [Click here to enter text.](#)

No investigations submitted to agency head as of March 31, 2016 (go to question 17)

15a. Of those investigation reports submitted to the agency head that you identified in question 15, how many did the agency head decide within 30 days?

[Click here to enter text.](#) Investigations agency head decided within 30 days

16. What were the results for the investigations submitted to the agency head that you identified in your answer to question 15? Specifically, how many resulted in each of the following decisions by the executive agency head? (For each row, please indicate whether the numbers provided are actual or estimated, or if the number of can't be determined. Provide one answer in each row. If none, enter zero. If the number can't be determined, check "can't determine".)

Decisions	Number of Investigations	Is this number an actual number, an estimate, or could not be determined?
Denied relief to the complainant	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Ordered the contractor or grantee to take affirmative action to abate the reprisal	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Ordered the contractor or grantee to reinstate the complainant to the position they held prior to the reprisal and pay the complainant compensatory damages (including back pay, employment benefits, and other terms and conditions of employment that would apply to the person on that position if the reprisal had not been taken)	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Ordered the contractor or grantee to pay complainant the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) incurred by the complainant in bringing the reprisal complaint	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine
Agency head decision is currently pending	Click here to enter text.	<input type="checkbox"/> Actual <input type="checkbox"/> Estimate <input type="checkbox"/> Can't determine

17. Please describe the source(s) of information used and steps taken to answer question 7 through 16 regarding the number of whistleblower reprisal complaints by decisions of the executive agency head. If the number of complaints by decision cannot be determined, please explain why.

[Click here to enter text.](#)

18. Do you know of any potential problems or limitations of the information used to answer questions 7 through 16? If so, please describe

[Click here to enter text.](#)

Section 5 – Processes and Challenges Associated with Implementation of the NDAA Pilot Program:

19. As of June 1, 2016 does the OIG have in place any of the following mechanisms to facilitate managing contractor, subcontractor, and grantee employee whistleblower complaints and reprisals filed under the NDAA Pilot Program? *(Check one answer in each row)*

Mechanisms	Yes	No
Hotline	<input type="checkbox"/>	<input type="checkbox"/>
Whistleblower ombudsmen	<input type="checkbox"/>	<input type="checkbox"/>
Electronic case management systems	<input type="checkbox"/>	<input type="checkbox"/>
Required OIG training for NDAA Pilot Program complaints and investigations	<input type="checkbox"/>	<input type="checkbox"/>
Whistleblower education programs for contractors, subcontractors, and grantees regarding the NDAA Pilot Program	<input type="checkbox"/>	<input type="checkbox"/>
Specific guidance or policies for NDAA Pilot Program reprisal investigations	<input type="checkbox"/>	<input type="checkbox"/>
Establishment of a separate office or division to specifically handle NDAA Pilot Program complaints and reprisals	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>

If "other" please specify: [Click here to enter text.](#)

20. What, if any, processes or mechanisms has the OIG put in place specifically in order to help implement the NDAA Pilot Program?

[Click here to enter text.](#)

21. What, if any, specific guidance or practices have helped the OIG implement the NDAA Pilot Program? Please provide copies of any relevant documentation.

[Click here to enter text.](#)

22. Has your agency taken or initiated any of the following steps to ensure that contractors, subcontractors, or grantees inform their employees in writing of the rights and remedies under the NDAA Pilot Program? (Check one answer in each row)

	Yes	No
Included clause 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights in solicitations and contracts over \$150,000	<input type="checkbox"/>	<input type="checkbox"/>
Distributed fliers or other information	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Email notifications	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>

If "other" please specify: [Click here to enter text.](#)

23. Which of the following challenges, if any, has the OIG encountered during implementation of the NDAA Pilot Program? (Check one answer in each row)

	Encountered	Did not encounter	Don't know
OIG resources (personnel or funding)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Training	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lack of awareness about the provisions of the NDAA Pilot Program among OIG personnel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lack of awareness about the provisions of the NDAA Pilot Program among contractors, subcontractors, or grantees	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ambiguities in the NDAA Pilot Program provisions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Timeliness requirements for the investigation and adjudication of NDAA Pilot Program reprisal claims	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Access to testimonial evidence for reprisal claims from contractors and grantees	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Access to documentary evidence for reprisal claims from contractors and grantees	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If "other" please specify: [Click here to enter text.](#)

24. What, if any, new additional tools or resources could help the OIG improve its implementation of the NDAA Pilot Program?

[Click here to enter text.](#)

25. Does the OIG have any other comments about the NDAA Pilot Program?

[Click here to enter text.](#)

26. What is the name of the office within the OIG that is responsible for managing and investigating contractor, subcontractor, or grantee employee complaints of fraud, waste, and abuse?

[Click here to enter text.](#)

26a. Please provide the following information for the primary official in the office responsible for managing and investigating contractor, subcontractor, and grantee employee complaints of fraud, waste, and abuse.

Name: [Click here to enter text.](#)

Title: [Click here to enter text.](#)

Phone: [Click here to enter text.](#)

Email: [Click here to enter text.](#)

27. What is the name of the office within the OIG that is responsible for managing contractor, subcontractor, and grantee employee whistleblower reprisal claims?

27a. Please provide the following information for the primary official in the office responsible for contractor, subcontractor, and grantee employee whistleblower reprisal claims.

Name: [Click here to enter text.](#)

Title: [Click here to enter text.](#)

Phone: [Click here to enter text.](#)

Email: [Click here to enter text.](#)

Appendix II: Objectives, Scope, and Methodology

The National Defense Authorization Act for Fiscal Year 2013 contained a provision for us to evaluate and report on the implementation of the Pilot Program for the Enhancement of Contractor Employee Whistleblower Protections (pilot program). In December 2016, Congress enacted legislation making the pilot program permanent.¹ Our report: (1) describes the results of the whistleblower pilot program between July 1, 2013, and December 31, 2015, across 14 executive departments; and (2) assesses the extent to which four selected departments implemented the pilot program.

To describe the results of the whistleblower pilot program, we surveyed the Office of Inspector General (OIG) at the 14 executive departments covered by the legislation on the reprisal complaints received between July 1, 2013, and December 31, 2015. In this report, we use the terms “agency” and “agency head” when referring to provisions of the whistleblower protections pilot program legislation in general because the legislation uses these terms. We use the term “departments” when we refer to the 14 executive departments defined by statute and covered by the whistleblower protections pilot program that were the focus of this review. Specifically, we surveyed the OIGs at the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs. We sent the survey questionnaire—by e-mail in an attached Microsoft Word form that respondents could return electronically after completing it—to 14 executive departments on June 15, 2016, and received responses from the OIGs at all 14 departments. We coordinated survey responses through each department’s OIG, which consulted with their cognizant department officials to respond to questions on an as-needed basis.

Among other things, the survey collected information about the number of disclosures of waste, fraud, abuse, and mismanagement as well as reprisal complaints and mechanisms used by executive departments to implement provisions of the pilot program. For each department, we

¹Pub. L. No. 114-261.

asked officials to provide information about activities and data related to whistleblower complaints, including data on complaints that were not subject to the pilot program.² For pilot program-related information, we requested data on contractor, subcontractor, and grantee employees, such as the number of complaints received from each group and how many of the complaints were investigated by the OIG. When necessary, we performed limited follow-up with all 14 departments to clarify answers and request relevant documentation; this follow-up took place from July 26, 2016, to December 8, 2016. We did not independently verify information obtained through the survey, including data describing the case numbers the departments provided; however, to determine the information was reliable for our purposes we asked the departments to describe the source(s) of information used and steps taken to determine these numbers.³ We believe these data are reliable for our purposes. The survey used for this study is reprinted in appendix I.

Since this was not a sample survey, it has no sampling errors. However, the practical difficulties of conducting any survey may introduce errors, commonly referred to as nonsampling errors. For example, difficulties in interpreting a particular question, sources of information available to respondents, or entering data into a database or analyzing them can introduce unwanted variability into the survey results. We took steps in developing the survey, collecting the data, and analyzing them to minimize such nonsampling error. We conducted three telephone pretests of the survey instrument with officials at three departments to ensure that questions were clear, comprehensive, and unbiased, and to minimize the burden the questionnaire placed on respondents. An independent reviewer within GAO also reviewed a draft of the questionnaire prior to administration of the survey. We made changes to the content and format of the questions based on feedback from the pretests and independent review. In addition to pretesting the survey, we coordinated with the

²For example, we requested information about the department's overall number of reprisal complaints, including complaints filed by federal employees.

³We obtained documentation in instances where departments reported new efforts created under the pilot program.

Council of the Inspectors General on Integrity and Efficiency (CIGIE) to hold a question and answer session after releasing the survey.⁴

To assess the extent to which departments implemented the pilot program, we selected four departments based primarily on the dollar value of their fiscal year 2015 contract funds awarded, the most recent year available at the time we began our review. To obtain a range of experience level with contracting at departments, we included two departments with higher contract funds awarded (Homeland Security, State) and two departments with lower contract funds awarded (Commerce, Interior). To identify these departments, we ranked department contract funds awarded from highest to lowest, and selected two departments from the top half of the 14 departments, and two from the bottom half. Our secondary criteria included the proportion of contract funds awarded to overall obligations in fiscal year 2015 and whether the departments' OIG website included mention of the pilot program. At each department, we focused on the department's handling of reprisal complaints filed by contractor and subcontractor employees. We interviewed or obtained written answers from department OIG officials, the office of the agency head, and contracting officials about their processes and practices for the agency duties outlined in the mandate. Where applicable, we reviewed documentation such as relevant policies, guidance, and internal reports. Findings based on information collected from the four departments cannot be generalized to all departments.

To identify whether a Federal Acquisition Regulation (FAR) clause was included in contracts as required, we reviewed a non-generalizable sample from each of the four case study departments. To identify an example of a contract without the clause, we reviewed documentation for a random selection of at least 50 contracts at each of the four departments. We used the Federal Procurement Data System–Next Generation (FPDS-NG) to generate a sample of contract actions over \$150,000 that were awarded by the four departments included in our review in the fourth quarter of fiscal year 2015. The sample also included orders awarded in the fourth quarter of fiscal year 2015, regardless of the award date of the associated contract. To avoid selecting contracts where

⁴CIGIE was established by The Inspector General Reform Act of 2008, Pub. L. No. 110-409, §7 and is, “an independent entity established within the executive branch to address integrity, economy and effectiveness issues that transcend individual Government agencies and aid in the establishment of a professional, well-trained and highly skilled workforce in the Offices of Inspectors General.”

the underlying base contract was awarded by another department, we excluded interagency contracts. We asked for contract actions awarded in the fourth quarter of fiscal year 2015 to ensure we were sampling contracts that are required to have the clause and would be reasonably accessible by the departments (e.g., they would likely not be archived). To avoid selecting contracts where the underlying base contract was awarded by another department, we excluded interagency contracts. We also excluded task or delivery orders awarded using blanket purchase agreements because we could not consistently determine which department awarded the underlying base contract based on FPDS-NG data. For Homeland Security, we excluded contracts awarded by the Coast Guard because the Coast Guard is not covered under the pilot program and its contracts would not be required to contain this clause.⁵ We excluded personal services contracts because they are not specifically included in the pilot program statute.

We conducted data reliability checks on the FPDS-NG dataset by comparing it to contract documentation obtained from contract files and determined it was sufficiently reliable for our purposes.

Finally, in order to learn about challenges experienced during the implementation of the pilot program, we also conducted interviews with contractors and whistleblower advocacy groups. We contacted five large and eight small business contractors based on their contract obligations from fiscal year 2013 through fiscal year 2015, as reported in FPDS-NG. For large contractors, we contacted firms that were listed on FPDS-NG's "Top 100 Contractors" list for at least two of the four selected departments and in at least two of the fiscal years since 2013, when the pilot program went into effect. For small business contractors, we contacted firms that received among the largest amount of contract obligations at each of the four selected departments in at least two separate years since 2013.⁶ We ultimately interviewed or obtained written answers from seven contractors. While information collected from the contractors is not generalizable to all contractors, they provide important perspectives on

⁵National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §827, Jan. 2, 2013. Although the Act does not specifically discuss the Coast Guard, see Memorandum from Daniel L. Clever, deputy Chief Procurement Officer to Ashley J. Lewis, HCA, USCG, on DHS-USCG Class Deviation Number 14-01 Deviation from FAR §3.908, Pilot program for enhancement of contractor employee whistleblower protections, Dec. 31, 2013; see also FAR §3.908-1(b)(1).

⁶We conducted this contract analysis based on contract actions over \$150,000.

challenges experienced by both large and small contractors. Lastly, we spoke with two advocacy groups for whistleblowers.

We conducted this performance audit from February 2016 to March 2017 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.

Appendix III: A Summary of Selected Departments' Reprisal Complaints and the Handling of Those Complaints

This appendix provides additional information on reprisal complaints for the four selected departments—Commerce, Homeland Security, Interior, and State—under the Pilot Program for Enhancement of Contractor Employee Whistleblower Protections (pilot program).¹

Table 2 provides a summary of the data collected regarding reprisal complaints received at each department and the Office of Inspector General officials' disposition of each complaint.

¹Pub. L. No.112-239, § 828 (codified as amended at 41 U.S.C. §4712). The legislation provides protections for certain civilian executive agencies, but those protections are not extended to others such as elements of the intelligence community. Further, some agencies, National Aeronautics and Space Administration, the Department of Defense, and the Coast Guard are not covered by the pilot program and are covered under other statutory provisions.

**Appendix III: A Summary of Selected
Departments' Reprisal Complaints and the
Handling of Those Complaints**

Table 2: Summary of Contractor Employee Reprisal Complaints Reported by Offices of Inspector General (OIG) at Selected Departments under the Whistleblower Protections Pilot Program from July 1, 2013, to December 31, 2015

Department	Total reported reprisal complaints	No further investigation required			Referred to another investigative body ^b	Investigated by OIG	Investigations completed
		Failed to allege a violation in accordance with Pilot ^a	Determined frivolous	Previously decided by another federal or state judicial proceeding			
State	25 ^c	12	2	0	1	8	5 completed and 3 still under investigation
Commerce	9	1	2	1	3	2	2 still under investigation
Homeland Security	6	1	0	0	0	5	2 completed and 3 still under investigation
Interior	5	1	0	2	0	2	2 still under investigation
Total	45	15	4	3	4	17	NA

Source: GAO analysis of department data | GAO-17-227

^aFailed to allege a violation in accordance with the pilot program includes reprisal claims based on disclosures that did not meet the criteria established in the pilot program, including that the alleged violation did not constitute gross waste of federal funds, an abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract or grant.

^bReferred to another investigative body may include another OIG with jurisdiction over pilot program complaints.

^cTwo of State's reported reprisal claims were not investigated because the complainant did not waive confidentiality, so are not included in the dispositions to the right.

Appendix IV: Comments from the Department of Commerce



UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
Washington, D.C. 20230

January 31, 2017

Marie A. Mak
Director, Acquisition and Sourcing Management
Government Accountability Office
441 G St NW
Washington, DC 20548

Dear Ms. Mak:

This letter provides the Office of Inspector General's (OIG) response to the Government Accountability Office's (GAO) draft report GAO-17-227, Contractor Whistleblower Protections Pilot Program: Improvements Needed to Ensure Effective Implementation (the GAO Draft Report). We appreciate the GAO Draft Report's finding that the OIG's materials related to the Contractor Whistleblower Protections Pilot Program, specifically our flow chart, legal memo, and policy documents, successfully "detail the OIG and department responsibilities under the pilot program." We believe the OIG's policies, procedures, and practices for the disposition and investigation of all complaints, including complaints covered under the pilot program, are sufficient and meet all requirements under the pilot program; however, we will amend our flowchart to include a reference to Chapter 2 (Complaint Management) and Chapter 3 (Case Management) in OI's policy manual. We will also revise our investigative policy manual as necessary to expressly address the specific requirements under the provisions at issue.

Thank you for the opportunity to provide comments. If you have any questions or comments, please feel free to call me at (202) 482-4661 or Mark L. Greenblatt, Assistant Inspector General for Investigations, at (202) 482-0300.

Sincerely,

A handwritten signature in black ink, appearing to read "Peggy E. Gustafson".

Peggy E. Gustafson





UNITED STATES DEPARTMENT OF COMMERCE
Office of the Secretary
Washington, D.C. 20230

February 10, 2017

Ms. Marie A. Mak
Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Mak:

Thank you for the opportunity to review and comment on the Government Accountability Office's (GAO) draft report titled *Contractor Whistleblower Protections Pilot Program: Improvement Needed to Ensure Effective Implementation* (GAO-17-227). Enclosed are the Department of Commerce's comments responding to GAO's recommendations. We understand that our Office of Inspector General (OIG) is responding directly to GAO regarding recommendations for the OIG community.

The Department agrees with the GAO that there are differences between the statute and its implementation in the Federal Acquisition Regulation, and the Department concurs with GAO's recommendations, as explained in the attached comments.

If you have any questions, please contact Virna Winters, Director, Acquisition Policy and Oversight Division, Office of Acquisition Management, at (202) 482-3483.

Sincerely,


Ellen Herbst

Enclosure

**Department of Commerce Comments on Contract-Related Recommendations of
GAO Draft Report titled *Contractor Whistleblower Protections Pilot Program: Improvement
Needed to Ensure Effective Implementation*
(GAO-17-227)**

The Department of Commerce (Department) has reviewed the recommendations to the Secretary in the draft report and offers the following comments for GAO's consideration.

GAO Recommendations (Reference Page 25 of the Draft Report)

The Government Accountability Office (GAO) recommends that the Secretaries of Commerce, Homeland Security, Interior, and State develop policies and processes to help ensure that:

- the FAR clause 52.203-17 is inserted in new contracts and major modifications,
- contracting officials can determine whether a modification is major and the applicability of the FAR clause, and whether they are making their best efforts to include the clause into existing contracts during major modifications, and
- contracting officials communicate with contractors and subcontractors to help ensure employees are informed about the requirements and protections provided by the whistleblower protection pilot program.

General Comments

The Department agrees with GAO that there are differences between the statute and the Federal Acquisition Regulation (FAR) as to what is required for major modifications. While the statute requires contracting officers to use their "best efforts" to insert the FAR clause into "major modifications," the preamble to the interim FAR rule only "encouraged" contracting officers to do so.¹ Neither the statute nor the FAR defines the terms "best efforts" or "major modifications." The statute also did not address the "simplified acquisition threshold." However, as required in the statute, implementation was accomplished government-wide through a FAR rule, which included a period of public notice and comment.

The Department is aware that the pilot was recently made permanent by Public Law 114-261 and that a new FAR case (2017-005) has been opened to implement Public Law 114-261. We believe the FAR Council should work with agencies to harmonize the FAR with the statutory mandate. FAR coverage is important because it establishes uniform requirements for contractors and agencies. A uniform FAR definition for "major modification" would reduce the burden and expense for contractors dealing with multiple agencies and for the agencies themselves. However, consideration should also be given to the potential cost impact for contractors and

¹ The final FAR rule as codified does not require or encourage contracting officers to use best efforts to insert the FAR clause into major modifications. Use of the FAR clause is governed by FAR 3.908-9, Contract Clause. FAR 3.908-9 requires use of FAR clause 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, in "all solicitations and contracts that exceed the simplified acquisition threshold".

government if FAR is revised to require use of the clause to existing contracts during “major modifications.”

GAO Bullet 1:

The Department concurs with this recommendation. We believe the FAR Council should work with agencies to ensure the new FAR rule defines “major modifications” and “best efforts” and the FAR conforms to the statutory requirements.

GAO Bullet 2:

The Department concurs with this recommendation. We believe the FAR Council should work with agencies to ensure the new FAR rule defines “major modifications” and “best efforts” and the FAR conforms to the statutory requirements.

GAO Bullet 3:

The Department concurs with this recommendation. While the Department has no relationship with subcontractors, it will encourage contractors to communicate with their subcontractors about the requirements and protections provided by the whistleblower protection pilot program.

Appendix V: Comments from the Department of Homeland Security

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

February 1, 2017

Marie A. Mak
Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Management's Response to Draft Report GAO-17-227, "CONTRACTOR
WHISTLEBLOWER PROTECTIONS PILOT PROGRAM: Improvement Needed to
Ensure Effective Implementation"

Dear Ms Mak:

Thank you for the opportunity to review and comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO) work in planning and conducting its review and issuing this report.

The Department is pleased to note GAO's recognition of existing DHS policy and training related to contractor whistleblower protections, as well as some of the challenges experienced by agencies across government in implementing these protections. DHS remains committed to implementing whistleblower protections provided to contractor and subcontractor employees, who have an important role in helping safeguard the Federal government against fraud, waste, abuse, and mismanagement.

The draft report contained four recommendations for DHS, three with which the Department concurs and one with which the DHS Inspector General (IG) will respond to separately. Attached find our detailed response to Recommendations 2, 3, and 4.

Again, thank you for the opportunity to review and comment on this draft report. Technical comments were previously provided under separate cover. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim H. Crumacker".

JIM H. CRUMACKER, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

Attachment

**Attachment: DHS Management Response to Recommendations
Contained in GAO-17-227**

GAO recommended that the Inspector General of Homeland Security:

Recommendation 1: Develop or clarify existing guidance on the implementation of the pilot program. For example, the guidance should identify specific pilot program processes such as levels of review during an investigation, and where the findings of investigations are to be reported.

Response: The DHS IG will respond independently via separate letter.

GAO recommended that the Secretary of Homeland Security:

Recommendation 2: Develop policies and processes to help ensure that [Federal Acquisitions Regulation] FAR clause 52.203-17 is inserted in new contracts and major modifications.

Response: Concur. The DHS Office of the Chief Procurement Officer (OCPO) will analyze why the clause was not included in some new contracts in order to determine whether improvements are needed in policy, process, or training. DHS OCPO will also develop additional policy and processes to ensure contracting officers have clear guidance on when to incorporate FAR clause 52.203-17 into existing contracts. Estimated Completion Date (ECD): June 30, 2017.

Recommendation 3: Develop policies and processes to ensure that contracting officials can determine whether a modification is major and the applicability of the FAR clause, and whether they are making their best efforts to include the clause into existing contracts during major modifications.

Response: Concur. The DHS OCPO will develop additional policy and processes to ensure contracting officers have clear guidance on when to incorporate FAR clause 52.203-17 into existing contracts. ECD: June 30, 2017.

Recommendation 4: Develop policies and processes to help ensure that contracting officials communicate with contractors and subcontractors to help ensure employees are informed about the requirements and protections provided by the whistleblower protection pilot program.

Response: Concur. The DHS OCPO will communicate broadly to those who do business with DHS and remind them of their contractual obligation to ensure employees are informed about the requirements and protections provided by the whistleblower protection program. ECD: May 31, 2017.



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

JAN 27 2017

MEMORANDUM FOR: Marie A. Mak
Director, Acquisition and Sourcing Management
United States Government Accountability Office

FROM: John Roth 
Inspector General

SUBJECT: *Contractor Whistleblower Protections Pilot Program
Improvement Needed to Ensure Effective
Implementation (GAO-17-227)*

Thank you for the opportunity to review and comment on this draft report. The Department of Homeland Security (DHS) Office of Inspector General (OIG) appreciates the work of the Government Accountability Office (GAO) in conducting its review and issuing this report.

We understand that DHS is preparing a response to your draft report. However, because the OIG operates independently from the rest of DHS, we are responding to your draft report separately from that response.

Our technical comments to the draft report are enclosed as a separate attachment. Additionally, the draft report contained two recommendations. We take no position on the second recommendation as it is directed to DHS contracting officials and not to OIG. We respond to the first recommendation as follows:

Recommendation 1: We recommend that the Inspector Generals of Commerce, Homeland Security, Interior, and State develop or clarify existing guidance on the implementation of the pilot program. For example, the guidance should identify specific pilot program processes such as levels of review during an investigation, and where the findings of investigations are to be reported.

Response: Concur. The draft report notes that our Directive does not include the requirement to send investigation findings to the head of contracting activity. We have since updated our Directive to include that information. Please see the attached revised directive. We believe the Directive is otherwise thorough and complete, and the draft report does not assert any other shortcomings with DHS OIG's directive. Therefore, we consider this recommendation complete.



OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

We appreciate the comments and issues identified by GAO. We remain committed to the pilot program and all other statutory whistleblower protections. To ensure that all DHS staff are aware of the pilot program, our whistleblower ombudsman plans to conduct additional training with the DHS components.

Please call me with any questions, or your staff may contact Matthew Neuburger, Assistant Counsel to the Inspector General, at (202) 254-4060.

Attachment

Appendix VI: Comments from the Department of State



United States Department of State
Comptroller
Washington, DC 20520

JAN 27 2017

Charles Michael Johnson, Jr.
Managing Director
International Affairs and Trade
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548-0001

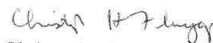
Dear Mr. Johnson:

We appreciate the opportunity to review your draft report, "CONTRACTOR WHISTLEBLOWER PROTECTIONS PILOT PROGRAM: Improvement Needed to Ensure Effective Implementation" GAO Job Code 100693.

The enclosed Department of State comments are provided for incorporation with this letter as an appendix to the final report.

If you have any questions concerning this response, please contact Renee Bemish, Senior Advisor, Front Office, Bureau of Administration Affairs at (202) 647-4461.

Sincerely,


Christopher H. Flaggs

Enclosure:
As stated

cc: GAO – Marie A. Mak
A – Joyce Barr
State/OIG - Norman Brown

Department of State Comments on GAO Draft Report

CONTRACTOR WHISTLEBLOWER PROTECTIONS PILOT PROGRAM: Improvement Needed to Ensure Effective Implementation
(GAO-17-227, GAO Code 100693)

The U.S. Department of State welcomes the opportunity to comment on the GAO's draft report "*Contractor Whistleblower Protections Pilot Program: Improvement Needed to Ensure Effective Implementation.*" The program was made permanent by Public Law 114-261 (December 29, 2016) and provides enhanced legal protections to contractor employees who believe they have experienced reprisal as a result of disclosing certain wrongdoings.

The Department concurs with the GAO's recommendations for implementation of this program and will:

- Ensure that the Federal Acquisition Regulations (FAR) clause 52.203-17 is inserted in new contracts and major modifications;
- Assist contracting officials in determining whether a modification is major and the applicability of the FAR clause and whether they are making the best efforts to include the clause into existing contracts during major modifications;
- Assist contracting officials communicate with contractors and subcontractors to help ensure employees are informed about the requirements and protections provided by the Program.

All domestic contracting officers are trained and certified to recognize what clauses must be included in contracts. Additionally, contracts exceeding \$250,000 issued by overseas contracting activities are reviewed by senior contract specialists to ensure compliance. Because there is an existing clause in the FAR, the Department of State does not plan to issue further guidance to its contracting activities.



OIG Office of Inspector General
U.S. Department of State • Broadcasting Board of Governors

UNCLASSIFIED

January 31, 2017

Ms. Marie Mak
Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
Washington, DC 20548

Dear Ms. Mak:

Thank you for the opportunity to comment on the draft report, *Contractor Whistleblower Protections Pilot Program: Improvement Needed to Ensure Effective Implementation*.

As we noted in our technical comments, the Office of Inspector General (OIG) has had policies and procedures for whistleblower reports in place since 2014 and has always issued whistleblower reports in accordance with these policies and procedures, as well as the statutory requirements. While OIG has modified how it transmits whistleblower reports to the Department of State at the Department's request, OIG has always issued its report to the parties specified by the statute, including the Secretary of State or the Chairman of the Broadcasting Board of Governors. In addition, OIG reports have always noted in the appendix that the agency is required to determine whether retaliation occurred and if a remedy is justified.

OIG concurs with and has already implemented the recommendation in this report. Specifically, OIG has updated its policies to (1) include in whistleblower reports the 30 day deadline for agency determination; (2) accommodate whenever possible the agency head's specifications for sending the report, including using web-based applications for transmittal and designating the report as an action memo; and (3) note that the Department of State Acquisition Regulation designates the Procurement Executive as the Secretary of State's designee for purposes of whistleblower investigations. A copy of our updated policies is enclosed.

Sincerely,

A handwritten signature in blue ink that reads "Jennifer Costello".

Jennifer Costello
Assistant Inspector General, Evaluations and Special Projects

U.S. Department of State, Office of Inspector General, Washington, D.C. 20522-0308

Appendix VII: GAO Contact and Staff Acknowledgments

GAO Contact

Marie A. Mak, (202) 512-4841 or MakM@gao.gov

Staff Acknowledgments

In addition to the contact names above, Penny Berrier (Assistant Director), Mary Diop, Meghan Perez, and Jocelyn Yin were principal contributors to this report. In addition, the following people made key contributions to this report: James Ashley, Lorraine Ettaro, Stephanie Gustafson, Kurt Gurka, Julia Kennon, John Krump, Kate Lenane, Sylvia Schatz, and Roxanna Sun.

Appendix VIII: Accessible Data

Data Tables

Text for Figure 1: Disclosure Process and Reprisal Complaint Investigation and Review Process under the Whistleblower Protection Pilot Program

Employee of contractor, subcontractor, or grantee files initial disclosure of potential wrongdoing with one of the following:

- A Member of Congress or a representative of a committee of Congress
- Office of Inspector General at an Executive Department (OIG) GAO
- A Federal employee responsible for contract or grant oversight or management at the relevant agency
- An authorized official of the Department of Justice or other law enforcement agency
- A court or grand jury
- A management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct

If an employee believes that he or she has been subjected to a reprisal for the disclosure, he or she may file a reprisal complaint with the OIG of the executive department involved

OIG determines whether an investigation is needed

1. No
 - a. OIG determines the complaint is:
 - i. Frivolous
 - ii. Fails to allege a violation of a prohibition under the pilot program

- iii. Previously addressed by another federal or state judicial or administrative forum
 - b. No investigation is required.
 - c. OIG notifies complainant that no further action will be taken
- 2. Yes
 - a. OIG initiates an investigation
 - b. OIG has 180 days to submit its report to the head of agency but can request an extension of up to 180 days with agreement from the complainant
 - i. OIG submits a report to:
 - 1. Head of agency
 - 2. Complainant
 - 3. Contractor, subcontractor, or grantee
 - 4. Head of contracting activity
 - ii. Head of agency:
 - 1. Ensures OIG has provided a copy of report to appropriate parties
 - 2. Affords the complainant and the contractor, subcontractor, or grantee an opportunity to provide a written response to the report.
 - c. Head of agency determines:
 - i. Head of agency has 30 days to make a determination and may request additional information.
 - 1. If head of agency finds no reprisal
 - a. Issues an order denying relief
 - 2. If head of agency finds Reprisal
 - a. Issues an order granting relief

Data Table for Figure 2: Disposition of 127 Pilot Program Reprisal Complaints Received by Offices of Inspector General at 14 Executive Departments from July 1, 2013, to December 31, 2015

Not investigated/other disposition	Involved disclosures determined not to be a violation under the pilot program	Complaints investigated by OIG
32	51	44

Of the 44 Complaints investigated by OIG

Investigations not yet completed	Investigations completed
17	27

Agency Comment Letters

Text of Appendix IV Comments from the Department of Commerce

Page 1, Dept of Commerce Inspector General

January 31, 2017

Marie A Mak

Director, Acquisition and Sourcing Management Government Accountability Office

441 G St NW

Washington, DC 20548

Dear Ms. Mak:

This letter provides the Office of Inspector General's (OIG) response to the Government Accountability Office's (GAO) draft report GA0-17-227, Contractor Whistleblower Protections Pilot Program: Improvements Needed to Ensure Effective Implementation (the GAO Draft Report). We appreciate the GAO Draft Report's finding that the OIG's materials related to the Contractor Whistleblower Protections Pilot Program,

specifically our flow chart, legal memo, and policy documents, successfully "detail the OIG and department responsibilities under the pilot program." We believe the OIG's policies, procedures, and practices for the disposition and investigation of all complaints, including complaints covered under the pilot program, are sufficient and meet all requirements under the pilot program ; however, we will amend our flowchart to include a reference to Chapter 2 (Complaint Management) and Chapter 3 (Case Management) in OIG's policy manual. We will also revise our investigative policy manual as necessary to expressly address the specific requirements under the provisions at issue.

Thank you for the opportunity to provide comments. If you have any questions or comments, please feel free to call me at (202) 482-4661 or Mark L. Greenblatt, Assistant Inspector General for Investigations, at (202) 482-0300.

Sincerely

Peggy Gustafson

Page 2, Dept of Commerce

February 10, 2017

Ms. Marie A. Mak

Director, Acquisition and Sourcing Management

U.S. Government Accountability Office 441 G Street, NW

Washington, DC 20548

Dear Ms. Mak:

Thank you for the opportunity to review and comment on the Government Accountability Office's (GAO) draft report titled Contractor Whistleblower Protections Pilot Program: Improvement Needed to Ensure Effective Implementation (GAO-17-227). Enclosed are the Department of Commerce's comments responding to GAO's recommendations. We understand that our Office of Inspector General (OIG) is responding directly to GAO regarding recommendations for the OIG community.

The Department agrees with the GAO that there are differences between the statute and its implementation in the Federal Acquisition Regulation, and the Department concurs with GAO's recommendations, as explained in the attached comments.

If you have any questions, please contact Virna Winters, Director, Acquisition Policy and Oversight Division, Office of Acquisition Management, at (202) 482-3483.

Sincerely,

Ellen Herbst

Enclosure

Page 3

Department of Commerce Comments on Contract-Related Recommendations of GAO Draft Report titled Contractor Whistleblower Protections Pilot Program: Improvement

Needed to Ensure Effective Implementation'

(GAO-17-227)

The Department of Commerce (Department) has reviewed the recommendations to the Secretary in the draft report and offers the following comments for GAO's consideration.

GAO Recommendations (Reference Page 25 of the Draft Report)

The Government Accountability Office (GAO) recommends that the Secretaries of Commerce, Homeland Security, Interior, and State develop policies and processes to help ensure that:

- the FAR clause 52.203-17 is inserted in new contracts and major modifications, contracting officials can determine whether a modification is major~and the applicability of the FAR clause, and whether they are making their best efforts to include the clause into existing contracts during major modifications, and
- contracting officials communicate with contractors and subcontractors to help ensure employees are informed about the requirements and protections provided by the whistleblower protection pilot program.

General Comments

The Department agrees with GAO that there are differences between the statute and the Federal Acquisition Regulation (FAR) as to what is required for major modifications. While the statute requires contracting officers to use their "best efforts" to insert the FAR clause into "major modifications," the preamble to the interim FAR rule only "encouraged" contracting officers to do so.¹ Neither the statute nor the FAR defines the terms "best efforts" or "major modifications." The statute also did not address the "simplified acquisition threshold."

However, as required in the statute, implementation was accomplished government-wide through a FAR rule, which included a period of public notice and comment.

The Department is aware that the pilot was recently made permanent by Public Law 114-261 and that a new FAR case (2017-005) has been opened to implement Public Law 114-261. We believe the FAR Council should work with agencies to harmonize the FAR with the statutory mandate. FAR coverage is important because it establishes uniform requirements for contractors and agencies; A uniform FAR definition for "major modification" would reduce the burden and expense for contractors dealing with multiple agencies and for the agencies themselves.

However, consideration should also be given to the potential cost impact for contractors and

Page 4

government if FAR is revised to require use of the clause to existing contracts during "major modifications."

¹ The final FAR rule as codified does not require or encourage contracting officers to use best efforts to insert the FAR clause into major modifications. Use of the FAR clause is governed by FAR 3.908-9, Contract Clause. FAR 3.908-9 requires use of FAR clause 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, in "all solicitations and contracts that exceed the simplified acquisition threshold".

GAO Bullet 1:

The Department concurs with this recommendation. We believe the FAR Council should work with agencies to ensure the new FAR rule defines "major modifications" and "best efforts" and the FAR conforms to the statutory requirements.

GAO Bullet 2:

The Department concurs with this recommendation. We believe the FAR Council should work with agencies to ensure the new FAR rule defines "major modifications" and "best efforts" and the FAR conforms to the statutory requirements.

GAO Bullet 3:

The Department concurs with this recommendation. While the Department has no relationship with subcontractors, it will encourage contractors to communicate with their subcontractors about the requirements and protections provided by the whistleblower protection pilot program.

Text of Appendix V Comments from the Department of Homeland Security

Page 1

February 1, 2017

Marie A. Mak

Director, Acquisition and Sourcing Management

U.S. Government Accountability Office 441 G Street, NW

Washington, DC 20548

Re: Management's Response to Draft Report GA0-17-227,
"CONTRACTOR WHISTLEBLOWER PROTECTIONS PILOT
PROGRAM: Improvement Needed to Ensure Effective Implementation"

Dear Ms Mak:

Thank you for the opportunity to review and comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO) work in planning and conducting its review and issuing this report.

The Department is pleased to note GAO's recognition of existing DHS policy and training related to contractor whistleblower protections, as well as some of the challenges experienced by agencies across government in implementing these protections. DHS remains committed to implementing whistleblower protections provided to contractor and subcontractor employees, who have an important role in helping safeguard the Federal government against fraud, waste, abuse, and mismanagement.

The draft report contained four recommendations for DHS, three with which the Department concurs and one with which the DHS Inspector General (IG) will respond to separately.

Attached find our detailed response to Recommendations 2, 3, and 4.

Again, thank you for the opportunity to review and comment on this draft report. Technical comments were previously provided under separate cover. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Sincerely,

Jim H. Crumpacker

Director

Departmental GAO-OIG Liaison Office

Attachment

Page 2

Attachment: DHS Management Response to Recommendations Contained in GA0-17-227

GAO recommended that the Inspector General of Homeland Security:

Recommendation 1:

Develop or clarify existing guidance on the implementation of the pilot program. For example, the guidance should identify specific pilot program processes such as levels of review during an investigation, and where the findings of investigations are to be reported.

Response: The DHS IG will respond independently via separate letter. GAO recommended that the Secretary of Homeland Security:

Recommendation 2:

Develop policies and processes to help ensure that [Federal Acquisitions Regulation] FAR clause 52.203-17 is inserted in new contracts and major modifications.

Response: Concur.

The DHS Office of the Chief Procurement Officer (OCPO) will analyze why the clause was not included in some new contracts in order to determine whether improvements are needed in policy, process, or training. DHS OCPO will also develop additional policy and processes to ensure contracting officers have clear guidance on when to incorporate FAR clause 52.203-17 into existing contracts. Estimated Completion Date (ECD): June 30, 2017.

Recommendation 3: Develop policies and processes to ensure that contracting officials can determine whether a modification is major and the applicability of the FAR clause, and whether they are making their best efforts to include the clause into existing contracts during major modifications.

Response: Concur.

The DHS OCPO will develop additional policy and processes to ensure contracting officers have clear guidance on when to incorporate FAR clause 52.203-17 into existing contracts. ECD: June 30, 2017.

Recommendation 4: Develop policies and processes to help ensure that contracting officials communicate with contractors and subcontractors to help ensure employees are informed about the requirements and protections provided by the whistleblower protection pilot program.

Response: Concur.

The DHS OCPO will communicate broadly to those who do business with DHS and remind them of their contractual obligation to ensure employees are informed about the requirements and protections provided by the whistleblower protection program.

Page 3, Department of Homeland Security, Office of Inspector General

MEMORANDUM FOR : Marie A. Mak

Director, Acquisition and Sourcing Management United States
Government Accountability Office

FROM: John Roth

Inspector General

SUBJECT: Contractor Whistleblower Protections Pilot Program
Improvement Needed to Ensure Effective Implementation (GAO-17-227)

Thank you for the opportunity to review and comment on this draft report. The Department of Homeland Security (DHS) Office of Inspector General (OIG) appreciates the work of the Government Accountability Office (GAO) in conducting its review and issuing this report.

We understand that DHS is preparing a response to your draft report. However, because the OIG operates independently from the rest of DHS, we are responding to your draft report separately from that response.

Our technical comments to the draft report are enclosed as a separate attachment. Additionally, the draft report contained two recommendations. We take no position on the second recommendation as it is directed to DHS contracting officials and not to OIG. We respond to the first recommendation as follows:

Recommendation 1: We recommend that the Inspector Generals of Commerce, Homeland Security, Interior, and State develop or clarify existing guidance on the implementation of the pilot program. For example, the guidance should identify specific pilot program processes such as levels of review during an investigation, and where the findings of investigations are to be reported.

Response: Concur.

The draft report notes that our Directive does not include the requirement to send investigation findings to the head of contracting activity. We have since updated our Directive to include that information.

Please see the attached revised directive. We believe the Directive is otherwise thorough and complete, and the draft report does not assert any other shortcomings with DHS OIG's directive. Therefore, we consider this recommendation complete.

Page4

We appreciate the comments and issues identified by GAO. We remain committed to the pilot program and all other statutory whistleblower protections. To ensure that all DHS staff are aware of the pilot program, our whistleblower ombudsman plans to conduct additional training with the DHS components.

Please call me with any questions, or your staff may contact Matthew Neuburger, Assistant Counsel to the Inspector General, at (202) 254-4060.

Attachment

Text of Appendix VI Comments from the Department of State

Page 1, Dept of State

Charles Michael Johnson, Jr. Managing Director

International Affairs and Trade Government Accountability

Office 441 G Street, N.W.

Washington, D.C. 20548-0001

Dear Mr. Johnson:

We appreciate the opportunity to review your draft report,
"CONTRACTOR WHISTLEBLOWER PROTECTIONS PILOT
PROGRAM: Improvement Needed to Ensure Effective Implementation"
GAO Job Code 100693.

The enclosed Department of State comments are provided for
incorporation with this letter as an appendix to the final report.

If you have any questions concerning this response, please contact
Renee Bemish, Senior Advisor, Front Office, Bureau of Administration
Affairs at (202) 647-4461.

Sincerely,

Christopher H. Flaggs

Enclosure:

As stated

cc: GAO - Marie A. Mak

A - Joyce Barr

State/OIG - Norman Brown

Page 2

Department of State Comments on GAO Draft Report

CONTRACTOR WHISTLEBLOWER PROTECTIONS PILOT

PROGRAM: Improvement Needed to Ensure Effective Implementation
(GAO-17-227, GAO Code 100693)

The U.S. Department of State welcomes the opportunity to comment on
the GAO's draft report "Contractor Whistleblower Protections Pilot

Program: Improvement Needed to Ensure Effective Implementation.” The program was made permanent by Public Law 114-261 (December 29, 2016) and provides enhanced legal protections to contractor employees who believe they have experienced reprisal as a result of disclosing certain wrongdoings.

The Department concurs with the GAO’s recommendations for implementation of this program and will:

- Ensure that the Federal Acquisition Regulations (FAR) clause 52.203-17 is inserted in new contracts and major modifications;
- Assist contracting officials in determining whether a modification is major and the applicability of the FAR clause and whether they are making the best efforts to include the clause into existing contracts during major modifications;
- Assist contracting officials communicate with contractors and subcontractors to help ensure employees are informed about the requirements and protections provided by the Program.

All domestic contracting officers are trained and certified to recognize what clauses must be included in contracts. Additionally, contracts exceeding \$250,000 issued by overseas contracting activities are reviewed by senior contract specialists to ensure compliance. Because there is an existing clause in the FAR, the Department of State does not plan to issue further guidance to its contracting activities.

Page 3, Department of State, Office of Inspector General

January 31, 2017

Ms. Marie Mak

Director, Acquisition and Sourcing Management

U.S. Government Accountability Office Washington, DC 20548

Dear Ms. Mak:

Thank you for the opportunity to comment on the draft report, Contractor Whistleblower Protections Pilot Program: Improvement Needed to Ensure Effective Implementation.

As we noted in our technical comments, the Office of Inspector General (OIG) has had policies and procedures for whistleblower reports in place since 2014 and has always issued whistleblower reports in accordance with these policies and procedures, as well as the statutory requirements. While OIG has modified how it transmits whistleblower reports to the Department of State at the Department's request, OIG has always issued its report to the parties specified by the statute, including the Secretary of State or the Chairman of the Broadcasting Board of Governors. In addition, OIG reports have always noted in the appendix that the agency is required to determine whether retaliation occurred and if a remedy is justified.

OIG concurs with and has already implemented the recommendation in this report. Specifically, OIG has updated its policies to (1) include in whistleblower reports the 30 day deadline for agency determination; (2) accommodate whenever possible the agency head's specifications for sending the report, including using web-based applications for transmittal and designating the report as an action memo; and (3) note that the Department of State Acquisition Regulation designates the Procurement Executive as the Secretary of State's designee for purposes of whistleblower investigations. A copy of our updated policies is enclosed.

Sincerely,

Jennifer Costello

Assistant Inspector General, Evaluations and Special Projects

GAO's Mission

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