112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 112–508
Part 1

WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2011

MAY 30, 2012.—Ordered to be printed

Mr. ISSA, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 3289]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 3289) to amend title 5, United States Code, to provide clarification relating to disclosures of information protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements are in conformance with certain protections; to provide certain additional authorities to the Office of Special Counsel; and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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19–006

The amendments are as follows:

Strike "Whistleblower Protection Enhancement Act of 2011" each place it appears in the bill and insert "Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011".

In section 2303a(b) of title 5, United States Code, in the matter preceding paragraph (1), as proposed to be added by section 201(a) of the bill—

(1) strike "or to the head" and insert "to the head"; and

(2) insert "or to a supervisor in the chain of authority of such employee who is authorized to access such information" before "which the employee".

At the end of title I of the bill, add the following:

SEC. 122. STUDY.

(a) IN GENERAL.—The Government Accountability Office shall study and, not later than 1 year after the date of enactment of this Act, submit to the appropriate committees of Congress a report on whistleblower hotlines of Federal agencies. Such study and report shall address the following:

(1) The days and hours the hotline is staffed by trained personnel.

(2) The level of training which operators who are designated to receive calls for the hotline possess, including academic credentials and additional training.

(3) Whether the hotline is staffed by sufficient personnel.

(4) Whether the hotline is operated in a manner consistent with the requirements established by the Sarbanes-Oxley Act of 2002 relating to whistleblower protections which apply with respect to publicly traded companies.

(5) Whether the hotline is operated independent of conflicts of interest.

(6) Whether the hotline is accessible through multiple methods of communication, such as electronic mail, personal interview, and confidential mail deposit.

(7) Whether sufficient protections from retaliation are provided for employees reporting illegal or unethical conduct or behavior.

(8) Whether the hotline is operated in a manner that ensures sufficient confidentiality of disclosures made using such hotline.

(9) Whether employees of the agency are encouraged and made aware of their ability to submit disclosures of perceived misconduct that they reasonably believe evidence a violation of law, rule, or regulation, gross waste, gross mismanagement, abuse of authority, or a substantial and specific violation of public health or safety.

(10) Any other issues which the Government Accountability Office may determine.

(b) DEFINITIONS.—For purposes of this section—

(1) the term "appropriate committees of Congress" means the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate; and

(2) the term "Federal agency" means an agency, as defined by section 2302(a)(2)(C) of title 5, United States Code.

Page 11, beginning on line 15, move the margin of clause (ii) 2 ems to the left.

Page 35, on lines 10 and 12, insert "at the end" after "the semicolon".

Page 67, line 1, strike "designating" and insert "redesignating".

Strike subsection (a) of section 202 and insert the following:

(a) IN GENERAL.—Section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 435b) is amended—

(1) by redesignating subsection (i) as subsection (k); and

(2) by inserting after subsection (h) the following new subsection:

"(i) REVIEW OF SECURITY CLEARANCE OR ACCESS DETERMINATIONS.—

"(1) IN GENERAL.—Not later than 180 days after the date of enactment of the Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011, the head of the entity selected pursuant to subsection (b) shall—

"(A) develop policies and procedures that permit, to the extent practicable, individuals who challenge in good faith a determination to suspend or revoke a security clearance or access to classified information to retain their government employment status while such challenge is pending; and

"(B) develop and implement uniform and consistent policies and procedures to ensure proper protections during the process for denying, suspending, or revoking a security clearance or access to classified information, including the provision of a right to appeal such a denial, suspension, or revocation, except that there shall be no appeal of an agency's suspension of a security clearance or access determination for purposes of conducting an investigation, if that suspension lasts no longer than 1 year or the head of the agency certifies that a longer suspension is needed before a final decision on denial or revocation to prevent imminent harm to the national security.

"(2) LIMITATION PERIOD.—Any limitation period applicable to an agency appeal under paragraph (1) shall be tolled until the head of the agency (or in the case of any component of the Department of Defense, the Secretary of Defense) determines, with the concurrence of the Director of National Intelligence, that the policies and procedures described in paragraph (1) have been established for the agency or the Director of National Intelligence promulgates the policies and procedures under paragraph (1). The policies and procedures for appeals developed under paragraph (1) shall be comparable to the policies and procedures pertaining to prohibited personnel practices defined under section 2302(b)(8) of title 5, United States Code, and provide—

"(A) for an independent and impartial fact-finder;

"(B) for notice and the opportunity to be heard, including the opportunity to present relevant evidence, including witness testimony;

"(C) that the employee or former employee may be represented by counsel;

"(D) that the employee or former employee has a right to a decision based on the record developed during the appeal;

"(E) that not more than 180 days shall pass from the filing of the appeal to the report of the impartial fact-finder to the agency head or the designee of the agency head, unless—

"(i) the employee and the agency concerned agree to an extension; or

"(ii) the impartial fact-finder determines in writing that a greater period of time is required in the interest of fairness or national security;

"(F) for the use of information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs in a manner consistent with the interests of national security, including ex parte submissions if the agency determines that the interests of national security so warrant; and

"(G) that the employee or former employee shall have no right to compel the production of information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, except evidence necessary to establish that the employee made the disclosure or communication such employee alleges was protected by subparagraphs (A), (B), and (C) of subsection (j)(1).".

In subsection (b) of section 202, strike "is amended by adding at the end" and insert ", as amended by subsection (a) of this section, is further amended by inserting after subsection (i)".

Page 2, after the item relating to section 121 (in the matter following line 7), insert the following:

Sec. 122. Study.

Page 3, line 15, strike "section)" and insert "section),".

Page 21, line 11, insert "or protected activity" after "disclosure".

Page 35, line 2, strike the matter after "under" and before "or" and insert "section 3105,".

Page 47, lines 7 and 8, strike "of title 5, United States Code,".

Page 52, line 20, insert a period at the end.

Page 66, line 24, strike "Whistleblower Protection Enhancement Review" and insert "Platts-Van Hollen Whistleblower Protection Enhancement".

Page 67, line 25, strike "submission; and" and insert "submission.".

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

Whistleblowers are crucial in helping to expose waste, fraud, abuse, mismanagement and criminal activity across the Federal government. Their disclosures can save billions of dollars, and even human lives. It is vital that Congress encourage—not discourage—these well-intentioned individuals from coming forward. To accomplish that, prospective whistleblowers must be protected from reprisal.

BACKGROUND AND NEED FOR LEGISLATION

The American people and the Members of Congress who represent them rely on well-intentioned whistleblowers to bring forth information exposing waste, fraud, abuse, mismanagement, or criminal behavior in the Federal bureaucracy. These employees are well-positioned to shed light on malfeasance in a manner that can save American lives as well as billions of taxpayer dollars.

Enacted in 1989, the Whistleblower Protection Act (WPA)[1] provides statutory protections for Federal employees who engage in "whistleblowing"—making a disclosure of illegal or improper government activity.

The protections of the WPA apply to most Federal Executive Branch employees and become applicable where an adverse personnel action (such as termination or demotion) is taken because of a protected disclosure made by a covered employee. Generally, whistleblower protections may be raised within three statutory forums: (1) employee appeals to the Merit Systems Protection Board (MSPB) of an agency's adverse action against an employee; (2) actions instituted by the Office of Special Counsel (OSC); and (3) individually maintained rights of action (IRAs) before the MSPB.

The MSPB is an independent, quasi-judicial agency in the Executive Branch tasked with protecting the Federal merit systems and the rights of those within those systems. The OSC is an inde-

[1] P.L. 101–12.

pendent agency separate from the MSPB. The OSC is tasked with protecting employees, former employees, and applicants, and has the authority to investigate instances of prohibited personnel practices.

Current law provides that an employee, former employee, or applicant has the independent right to seek review of whistleblower reprisal cases by the MSPB 60 days after the OSC closes an investigation, or 120 days after filing a complaint with the OSC.

Unfortunately, however, the U.S. Court of Appeals for the Federal District has eroded whistleblower protections over the years through a series of decisions. This has adversely impacted well-intentioned whistleblowers and led to an unwillingness by many to step forward. The Whistleblower Protection Enhancement Act, H.R. 3289, (WPEA) reestablishes appropriate whistleblower protections from retaliation. It also extends whistleblower protections to certain members of the Intelligence Community, and strengthens the Intelligence Community Whistleblower Protection Act (ICWPA).[2] These modifications are intended to reduce the often destructive disclosures that occur through anonymous leaks by providing an alternative in which institutional channels can be used by whistleblowers assured of certain safeguards.

LEGISLATIVE HISTORY

H.R. 3289 was introduced by Representatives Darrell Issa, Elijah Cummings, Todd Platts, and Chris Van Hollen on November 1, 2011, and was referred to the Committees on Oversight and Government Reform, Intelligence, and Homeland Security.

This legislation is substantially similar to a bill that was negotiated and passed by the Senate (S. 372) during the 111th Congress on December 10, 2010. The House approved its version of S. 372 with an amendment that struck the section of the bill that would have extended whistleblower protections to certain members of the Intelligence Community on December 22, 2010. No further action was taken in the 111th Congress.

On November 3, 2011, the Oversight and Government Reform Committee considered the bill and reported the legislation favorably, as amended, by a recorded vote of 35 Ayes to 0 Nays.

SECTION-BY-SECTION

Section 1. Short title; table of contents

The short title was amended during the Committee markup and changed to the: "Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011."

Section 101. Clarification of disclosures covered

Expands the scope of whistleblower protections to apply to any lawful disclosure of any violation of any law, rule, or regulation.

Section 102. Disclosure defined

A "disclosure" is defined as a "formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority, un-

[2] P.L. 105–272.

less the employee or applicant providing the disclosure reasonably believes that the disclosure evidences any violation of any law, rule, or regulation, and occurs during the conscientious carrying out of official duties; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." This definition covers communications beyond the initial disclosure, but does not apply to policy decisions.

Section 103. Rebuttable presumption

Reiterates that whistleblowers can disclose information to Congress without fear of reprisal. In addition, states that any presumption relating to the performance of a duty by an employee whose conduct is the subject of a "protected" disclosure as defined under "this section" may be rebutted by substantial evidence.

Section 104. Personnel actions and prohibited personnel practices

Includes as a prohibited personnel practice the implementation or enforcement of any agency nondisclosure policy, form, or agreement that does not contain a specific statement clarifying that its provisions are consistent with and cannot supersede requirements that preserve the right of Federal employees to make disclosures of illegality, waste, fraud, abuse, or public health or safety threats.

Also codifies the governing law for demonstrating that retaliatory investigations are prohibited personnel practices and permits corrective action awarded to whistleblowers to include damages, fees, and costs incurred due to an agency investigation of the employee.

Section 105. Exclusion of agencies by the President

Clarifies the President's flexibility to determine what agencies should be exempted from whistleblower protections. Explicit exceptions include the FBI, CIA, the National Geospatial-Intelligence Agency, NSA, the Office of Director of National Intelligence, and the National Reconnaissance Office. This section does not change the President's existing authority to exempt any Executive agency or unit thereof whose principal function is the conduct of foreign intelligence or counterintelligence activities, provided such determination is made prior to the personnel action involved.

Section 106. Disciplinary action

Increases the Special Counsel's ability to obtain disciplinary action from the MSPB against employees who commit a prohibited personnel practice or knowingly and willfully fail to comply with an order from the MSPB. Now the Board may combine disciplinary action to include employment and civil penalties.

Clarifies burdens of proof so the MSPB may impose disciplinary action if it is determined that the exposure of waste, fraud, mismanagement or abuse was a significant motivating factor underlying the prohibited personnel practice.

Section 107. Remedies

Grants the MSPB authority to require payment of reasonable attorney fees by the relevant agency. Current law states the "agency involved" should make that payment, which had been interpreted to mean the Office of Special Counsel if it did not prevail in a disciplinary action.

Expands the list of corrective actions available to the Board.

Section 108. Judicial review

Under current law, a whistleblower may appeal the MSPB decision to the United States Appeals Court for the Federal Circuit. Because of the Federal Circuit has often times misinterpreted Congressional intent when it comes to whistleblowers, so-called "pure" whistleblower appeals—that is, appeals only dealing with whistleblower claims—will now be heard in the United States Court of Appeals for the District of Columbia Circuit.

Grants the OPM authority to bring cases of substantial impact on appeal to the United States Court of Appeals for the District of Columbia Circuit.

Section 109. Prohibited personnel practices affecting the Transportation Security Administration

Extends whistleblower and other anti-discrimination protections to employees (and applicants for employment) of the Transportation Security Administration.

Section 110. Disclosure of censorship related to research, analysis, or technical information

Extends whistleblower protections to any current or prospective Federal employee for disclosures that such employee reasonably believes are evidence of censorship related to research, analysis, or technical information.

Section 111. Clarification of whistleblower rights for critical infrastructure information

Amends the Homeland Security Act of 2002 to bar Critical Infrastructure Information from overriding Whistleblower Protection Act free speech rights.

Section 112. Advising employees of rights

Requires Federal agency heads to advise their employees on how to make a lawful disclosure of information that is required to be kept secret in the interest of national defense or the conduct of foreign affairs.

Section 113. Special counsel amicus curiae appearance

Allows the Office of Special Counsel to file "friend of the court" briefs for whistleblower cases appealed from the administrative level.

Section 114. Scope of due process

Current law prohibits corrective action to be ordered in a whistleblower case if the agency can prove through clear and convincing evidence that it would have taken the same action against an employee on independently justified grounds despite that employee making a protected disclosure. This provision clarifies that before considering the independent justification issue the MSPB first must issue a finding whether the protected disclosure was a contributing factor to the conditions for either the Special Counsel or the individual to seek corrective action against an agency.

Section 115. Nondisclosure policies, forms, and agreements

Codifies and gives a remedy for the anti-gag statute from overriding whistleblower rights. Specifically, the bill would require every nondisclosure policy, form, or agreement of the Government to contain specific language informing employees of their rights.

Section 116. Reporting requirements

Requires the Comptroller General to submit a report to the oversight committees of Congress analyzing: the number of cases filed with the MSPB alleging prohibited personnel actions; the outcome of those cases; and any other details as determined by the Comptroller.

Requires the MSPB to include in its reports the outcome of cases alleging prohibited personnel practices, including the win-loss track record for decisions on each alleged prohibited personnel practice.

Section 117. Alternative review

Allows a whistleblower access to an appropriate United States district court to file for de novo review of their case. An employee may seek de novo review if they seek corrective action from the MSPB in a case alleging a prohibited personnel practice occurred, or file an appeal with the MSPB under certain circumstances.

Specifically, the employee may file in district court if no final order or decision is issued by the MSPB within 270 days after the request was submitted; or if the Board certifies it is not likely to dispose of the case within 270 days after the request was submitted, or that the case consists of multiple claims, requires complex or extensive discovery, arises out of the same set of facts as a civil action pending in a U.S. court, or involves a question of law for which there is no controlling precedent. Under this section, an employee may submit a motion for certification to the MSPB within 30 days of the original request for corrective action or appeal. The Board shall rule on the motion within 90 days after the submission, and the Board may not issue a decision on the merits of a request for corrective action within 15 days after granting or denying a motion requesting certification.

In district court, after an employee demonstrates a prima facie case that protected activity was a contributing factor to a challenged personnel action, the agency may prevail if it demonstrates by clear and convincing evidence that the agency would have taken the same personnel action in the absence of a protected disclosure. In district court, the employee may not be represented by the Special Counsel. The court may award damages, attorney's fees, and costs, but compensatory damages may not exceed $300,000 and punitive damages are not permitted. A pure whistleblower appeal will be filed in the United States Court of Appeals for the District of Columbia Circuit; while those appeals that also include allegations of violations of other prohibited personnel practices (e.g. discrimination) will be filed in United States Court of Appeals for the Federal Circuit.

Section 118. Merit Systems Protection Board summary judgment

Provides the MSPB summary judgment authority.

Section 119. Disclosures of classified information

Provides that employees protected under the WPA may make protected classified disclosures under the procedures set forth for disclosing classified information under the Intelligence Community Whistleblower Protection Act. These protections do not in any way limit the right to communicate with Congress under the Lloyd-La Follette Act, codified in 5 U.S.C. Sec. 7211, or other provisions of law.

Section 120. Whistleblower Protection Ombudsman

Instructs agency Inspectors General to designate a Whistleblower Protection Ombudsman who will educate employees about prohibitions on retaliations for protected disclosures, as well as those who have made or are contemplating making a protected disclosure.

Agency Inspectors General will appoint an Assistant Inspector General for Auditing who will have the responsibility for supervising the performance of auditing activities, and an Assistant Inspector General for Investigations who will be responsible for supervising the performance of the investigative activities.

Section 121. Pilot program for enhancement of contractor employee whistleblower protections

Establishes a two-year pilot program extending current protections afforded to DOD contract employees to non-DOD contract employees. To the extent practicable, the pilot program should operate consistently with the equivalent rights for civil service employees, including the burdens of proof governing actions in the pilot program. It requires a report on implementation of the pilot program by the Government Accountability Office to help determine whether the program should be made permanent.

Section 122. Study

Requires a GAO study and report to Congress on the use by Federal agencies of whistleblower hotlines. GAO will examine whether the hotline is operated consistent with best practices, including being operated independent of conflicts of interest; whether the hotline is accessible through multiple methods of communication; and whether there are sufficient protections for employees who use a hotline, among other criteria.

Section 201. Protection of intelligence community whistleblowers

Extends whistleblower protections to intelligence community employees who make disclosures through institutional checks and balances, such as the supervisory chain of command or the Office of Inspector General, including those who work at the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Geospatial Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office.

Requires intelligence agency heads to advise their employees on how to make a lawful disclosure of information that is required to be kept secret in the interest of national defense or the conduct of foreign affairs.

Section 202. Review of security clearance or access determinations

Requires the head of the entity chosen by the President that is responsible for oversight of investigations and adjudications for personnel security clearances to develop policies and procedures that permit individuals who challenge a determination to suspend or revoke a security clearance or access to classified information to retain their government employment status while the challenge is pending, and to develop and implement uniform procedures to ensure proper protections during the process for denying, suspending, or revoking a security clearance, or access to classified information. Codifies current Supreme Court and Merit Systems Protection Board case law that decisions ancillary to the clearance or access determination, such as eligibility, investigations, compliance with agency procedures, and actions subsequent to removal of clearance or access, are outside the scope of Executive Orders 10865 and 12968, and will continue to be under the Board's jurisdiction.

Requires intelligence agency heads to design an appeals process with minimum internal due process standards equivalent to that which exists under section 2308(b)(8) of title 5, USC. In addition, that appeals process will provide: (1) for an independent and impartial fact-finder; (2) for notice and the opportunity to be heard, including the opportunity to present evidence; (3) that the employee or former employee be represented by counsel; (4) that the employee or former employee has a right to a decision based on the record developed during the appeal, with ex parte or classified information sanitized or summarized for adequate notice so that a decision is not made on secret grounds; (5) that not more than 180 days shall pass from the filing of the appeal to the report from the independent fact-finder to the agency head; (6) for the use of information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs in a manner consistent with the interests of national security; and (7) that the individual shall have no right to compel the production of information specifically required by Executive Order to be kept classified in the interest of national defense or the conduct of foreign affairs.

Creates an appellate review board, which allows an individual to appeal a final decision of an agency determination. If the appellate review board finds there was an adverse action taken against an employee or former employee in violation of the Whistleblower Protection Act, it can find that the action was illegal, recommend reinstatement of a security clearance or access to classified information, and remand the case for further agency proceedings. In addition, the appellate review board can take corrective action to include reinstatement, reimbursement of attorney's fees, and can award compensatory damages not to exceed $300,000.

Section 203. Revisions relating to the Intelligence Community Whistleblower Protection Act

Provides for the direct transmission of a complaint or information under the Intelligence Community Whistleblower Protection Act to the Director of National Intelligence if the head of an establishment (i.e., cabinet level agency or department) determines that such complaint or information would create a conflict of interest for such head.

Section 204. Regulations; reporting requirements; nonapplicability to certain terminations

Requires the Director of National Intelligence to prescribe regulations to ensure personnel actions are not taken against employees of an intelligence community element for whistleblowing.

The DNI, in consultation with the Secretary of Defense, Attorney General, and appropriate agency heads, shall establish an appellate review board to hear whistleblower appeals related to security access determinations.

No later than 2 years after the date of enactment, the DNI shall submit a report on the status of the implementation of these regulations to the Committee on Oversight and Government Reform of the House, the Permanent Select Committee on Intelligence of the House, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Select Committee on Intelligence of the Senate.

Section 301. Effective date

This act shall take effect 30 days after the date of enactment of the Act.

Section 302. Savings provision

Nothing in this Act shall be construed to imply any limitation on any protections afforded by any other provision of law to employees and applicants. Rights in this Act shall govern legal actions filed after its effective date.

EXPLANATION OF AMENDMENTS

At the beginning of debate, Ranking Member Cummings made a unanimous consent request that the legislation be renamed as the, "Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011." This request was accepted without objection.

Representative John Tierney offered an amendment to grant whistleblower protections to Intelligence Community employees who also make a protected disclosure to their "supervisor in the chain of authority . . . who is authorized to access such information." The Tierney amendment was adopted by voice vote.

Representative Jackie Speier offered an amendment which added a GAO study and report to Congress on the use by Federal agencies of whistleblower hotlines. The Speier amendment was adopted by voice vote.

Representative Bruce Braley offered an amendment to give Federal employee whistleblowers access to trials by jury for the first time. Mr. Braley's amendment failed by a vote of 13–20.

COMMITTEE CONSIDERATION

On November 3, 2011, the Committee met in open session and ordered reported favorably the bill, H.R. 3289, as amended, by a recorded vote of 35 Ayes to 0 Nays, a quorum being present.

ROLLCALL VOTES

1. Mr. Braley offered an amendment (# 035) regarding jury trials. The amendment was defeated by a recorded vote of 13 Ayes to 20 Nays.

Voting Aye: Platts, Cummings, Maloney, Norton, Tierney, Clay, Lynch, Connolly, Quigley, Davis, Braley, Yarmuth and Speier.

Voting Nay: Issa, Burton, Mica, McHenry, Jordan, Chaffetz, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, Meehan, DesJarlais, Walsh, Gowdy, Ross, Guinta, Farenthold and Kelly.

2. The bill, H.R. 3289, as amended, was ordered favorably reported to the House, a quorum being present, by a recorded vote of 35 Ayes to 0 Nays.

Voting Aye: Issa, Burton, Mica, Platts, McHenry, Jordan, Chaffetz, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, Meehan, DesJarlais, Walsh, Gowdy, Ross, Guinta, Farenthold, Kelly, Cummings, Maloney, Norton, Kucinich, Tierney, Clay, Lynch, Cooper, Connolly, Quigley, Davis, Braley, Yarmuth and Speier.

Voting Nay: none.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill concerns the expansion of whistleblower protections to current and prospective Federal employees. Legislative branch employees and their families, to the extent that they are otherwise eligible for the benefits provided by this legislation, have equal access to its benefits.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In com-

pliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 3289 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of Rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 3289. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 3289 from the Director of Congressional Budget Office:

JANUARY 25, 2012.

Hon. DARRELL ISSA,
Chairman, Committee on Oversight and Government Reform, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3289, the Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 3289—Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011

Summary: H.R. 3289 would amend the Whistleblower Protection Act (WPA) to clarify current law and extend new legal protections to federal employees who report abuse, fraud, and waste related to government activities (such individuals are known as whistleblowers). The legislation also would affect activities of the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC). Finally, it would establish an oversight board within the intelligence community to review whistleblower claims.

CBO estimates that implementing H.R. 3289 would cost $26 million over the 2012–2017 period, assuming appropriation of the necessary amounts for awards to whistleblowers and additional admin-

istrative costs. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 3289 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 3289 is shown in the following table. The costs of this legislation primarily fall within budget functions 800 (general government) and 050 (national defense), as well as all other budget functions that include federal salaries and expenses.

	By fiscal year, in millions of dollars—						
	2012	2013	2014	2015	2016	2017	2012–2017
CHANGES IN SPENDING SUBJECT TO APPROPRIATION							
Cost of Corrective Actions:							
Estimated Authorization Level	*	1	1	1	1	1	5
Estimated Outlays	*	1	1	1	1	1	5
Intelligence Community Whistleblower Protection Board:							
Estimated Authorization Level	*	1	1	1	1	1	5
Estimated Outlays	*	1	1	1	1	1	5
MSPB and OSC:							
Estimated Authorization Level	*	2	2	2	2	2	10
Estimated Outlays	*	2	2	2	2	2	10
Other Provisions:							
Estimated Authorization Level	*	4	2	*	*	*	6
Estimated Outlays	*	4	2	*	*	*	6
Total Changes:							
Estimated Authorization Level	*	8	6	4	4	4	26
Estimated Outlays	*	8	6	4	4	4	26

Notes: MSPB = Merit Systems Protection Board; OSC = Office of Special Counsel.
* = less than $500,000.

Basis of the estimate: For this estimate, CBO assumes that the bill will be enacted in fiscal year 2012, that the necessary amounts will be made available from appropriated funds, and that spending will follow historical patterns for similar programs.

Under current law, the OSC investigates complaints regarding reprisals against federal employees who inform authorities of fraud or other improprieties in the operation of federal programs. The OSC orders corrective action (such as job restoration, back pay, and reimbursement of attorneys' fees and medical costs) for valid complaints. If agencies fail to take corrective actions, the OSC or the employee can pursue a case through the MSPB for resolution. Whistleblower cases may also be reviewed by the U.S. Court of Appeals.

Cost of corrective actions

When settling an employment dispute between the federal government and an employee regarding prohibited personnel practices, federal agencies are required to pay for an employee's attorney, any retroactive salary payments, and any travel and medical costs associated with the claim.

H.R. 3289 would expand legal protections for whistleblowers and extend protections to passenger and baggage screeners working for the Transportation Security Administration, and all federal employees working primarily on scientific research. The bill would au-

thorize monetary awards to federal employees who suffered retaliation by their agency of up to $300,000 (including compensatory damages).

According to the MSPB and OSC, approximately 450 whistleblower cases and around 2,000 complaints about prohibited personnel practices (including engaging in reprisals against whistleblowers) are filed against the federal government each year. CBO is unaware of comprehensive information on the current costs of corrective actions related to those cases. Damage awards depend on the particular circumstances of each case. Settlement amounts for whistleblowers have been as high as $1 million, while the average settlement is around $18,000 (most corrective action is nonmonetary, for example, amending performance appraisals). In addition, the Government Accountability Office has reported that about $15 million is spent annually (from the Treasury's Judgment Fund) on equal employment opportunity and whistleblower cases. While it is uncertain how often damages would be awarded in such whistleblower situations, CBO expects that increasing the number of covered employees and legal protections under the bill would increase costs for such awards by about $1 million each year.

Intelligence Community Whistleblower Protection Board

Section 204 would require the Director of National Intelligence, in consultation with the Secretary of Defense and the Attorney General, to establish an appellate review board. That board would adjudicate appeals from employees who believe that they have been denied security clearances or other types of authorizations to access restricted information in retaliation for revealing certain types of misconduct. Based on information from the Office of the Director of National Intelligence about the staffing needs for similar activities, CBO estimates that implementing this provision would cost $1 million annually.

MSBP and OSC

CBO expects that enacting the bill would increase the workload of the MSPB and the OSC. For fiscal year 2012, the MSPB received an appropriation of $40 million, and the OSC received $19 million. Based on information from those agencies, we estimate that when fully implemented, those offices would spend about $2 million a year to hire additional professional and administrative staff to handle additional cases.

Other provisions

H.R. 3289 also would establish a two-year pilot program to protect employees of federal contractors who disclose improprieties related to federal spending and would require each Inspector General to designate a Whistleblower Protection Ombudsman to educate employees about the rights of whistleblowers. The bill would require the Government Accountability Office to prepare two reports on whistleblowers. In addition, agencies would be required to make changes to their personnel training and nondisclosure policies. Based on information from federal agencies and on the costs of similar requirements, CBO estimates that implementing those provisions would cost $6 million over the 2012–2017 period assuming appropriation of the necessary amounts.

Pay-As-You-Go Considerations: None.

Intergovernmental and private-sector impact: H.R. 3289 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no significant costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Matthew Pickford and Jason Wheelock; Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * * * *

PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

* * * * * * *

CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

* * * * * * *

SUBCHAPTER I—MERIT SYSTEMS PROTECTION BOARD

* * * * * * *

§ 1204. Powers and functions of the Merit Systems Protection Board

(a) * * *

(b)(1) * * *

* * * * * * *

(3) With respect to a request for corrective action based on an alleged prohibited personnel practice described in section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9) for which the associated personnel action is an action covered under section 7512 or 7542, the Board, any administrative law judge appointed by the Board under section 3105, or any employee of the Board designated by the Board may, with respect to any party, grant a motion for summary judgment.

[(3)**]** *(4)* Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

* * * * * * *

(m)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the [agency involved] *agency in which the prevailing party was employed or with which the prevailing party had applied for employment at the time of the events giving rise to the case* of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

* * * * * * *

SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

* * * * * * *

§ 1212. Powers and functions of the Office of Special Counsel

(a) * * *

* * * * * * *

(h)(1) The Special Counsel may appear as amicus curiae in any action brought in a court of the United States related to any civil action brought in connection with paragraph (8) or (9) of section 2302(b), or as otherwise authorized by law. In any such action, the Special Counsel may present the views of the Special Counsel with respect to compliance with the provisions of paragraph (8) or (9) of section 2302(b) and the impact court decisions would have on the enforcement of such provisions.

(2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described under subsection (a).

* * * * * * *

§ 1214. Investigation of prohibited personnel practices; corrective action

(a)(1) * * *

* * * * * * *

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) *or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9)* from the Special Counsel and—

(A) * * *

* * * * * * *

(b)(1) * * *

* * * * * * *

(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8) *or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9)*, has occurred, exists, or is to be taken.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) *or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9)*, the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure *or protected activity* described under section 2302(b)(8) *or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9)* was a contributing factor in the personnel action which was taken or is to be taken against the individual.

(ii) Corrective action under clause (i) may not be ordered if*, after a finding by the Board that a protected disclosure was a contributing factor,* the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

* * * * * * *

(g) If the Board orders corrective action under this section, such corrective action may include—

(1) * * *

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, **[**and any other reasonable and foreseeable consequential damages.**]** *any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).*

(h) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

§ 1215. Disciplinary action

(a)(1) * * *

* * * * * * *

[(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.**]**

(3)(A) A final order of the Board may impose—

(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

(ii) an assessment of a civil penalty not to exceed $1,000; or

(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

(B) In any case brought under paragraph (1) in which the Board finds that an employee has committed a prohibited personnel practice under section 2302(b)(8), or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9), the Board may impose disciplinary action if the Board finds that the activity protected under section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9) was a significant motivating factor, even if other factors also motivated the decision, for the employee's decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates, by a preponderance of the evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.

* * * * * * *

SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

§ 1221. Individual right of action in certain reprisal cases

(a) * * *

* * * * * * *

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure *or protected activity* described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure *or protected activity* was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure *or protected activity*; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure *or protected activity* was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if*, after a finding that a protected disclosure or protected activity was a contributing factor,* the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure *or protected activity*.

* * * * * * *

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include—

(i) * * *

(ii) back pay and related benefits, medical costs incurred, travel expenses, **[**and any other reasonable and foreseeable consequential changes.**]** *any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).*

* * * * * * *

(4) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

* * * * * * *

(k)(1) For purposes of this subsection, the term "appropriate United States district court", as used with respect to an alleged prohibited personnel practice, means the United States district court for the judicial district in which—

(A) such prohibited personnel practice is alleged to have been committed; or

(B) the employee, former employee, or applicant for employment allegedly affected by such prohibited personnel practice resides.

(2) An employee, former employee, or applicant for employment in any case to which paragraph (4) or (5) applies may file an action at law or equity for de novo review in the appropriate United States district court.

(3) Upon initiation of any action under paragraph (2), the Board shall stay any other claims of such employee, former employee, or applicant pending before the Board at that time which arise out of the same set of operative facts. Such claims shall be stayed pending completion of the action filed under paragraph (2) before the appropriate United States district court.

(4) This paragraph applies in any case in which—

(A) an employee, former employee, or applicant for employment—

(i) seeks corrective action from the Merit Systems Protection Board under section 1221(a) based on an alleged prohibited personnel practice, described in section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9), for which the associated personnel action is an action covered under section 7512 or 7542; or

(ii) files an appeal under section 7701(a) alleging as an affirmative defense the commission of a prohibited personnel practice, described in section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9), for which the associated personnel action is an action covered under section 7512 or 7542;

(B) no final order or decision is issued by the Board within 270 days after the date on which a request for that corrective action or appeal has been duly submitted, unless the Board determines that the employee, former employee, or applicant for employment engaged in conduct intended to delay the issuance of a final order or decision by the Board; and

(C) such employee, former employee, or applicant provides written notice to the Board of filing an action under this subsection before the filing of that action.

(5) This paragraph applies in any case in which—

(A) an employee, former employee, or applicant for employment—

(i) seeks corrective action from the Merit Systems Protection Board under section 1221(a) based on an alleged pro-

hibited personnel practice, described in section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9), for which the associated personnel action is an action covered under section 7512 or 7542; or

(ii) files an appeal under section 7701(a)(1) alleging as an affirmative defense the commission of a prohibited personnel practice, described in section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9), for which the associated personnel action is an action covered under section 7512 or 7542;

(B)(i) within 30 days after the date on which the request for corrective action or appeal was duly submitted, such employee, former employee, or applicant for employment files a motion requesting a certification consistent with subparagraph (C) to the Board or an administrative law judge or other employee of the Board designated to hear the case; and

(ii) such employee has not previously filed a motion under clause (i) related to that request for corrective action; and

(C) the Board or an administrative law judge or other employee of the Board designated to hear the case certifies that—

(i) under standards applicable to the review of motions to dismiss under rule 12(b)(6) of the Federal Rules of Civil Procedure, including rule 12(d) thereof, the request for corrective action (including any allegations made with the motion under subparagraph (B)) would not be subject to dismissal; and

(ii)(I) the Board is not likely to dispose of the case within 270 days after the date on which a request for that corrective action has been duly submitted; or

(II) the case—

(aa) consists of multiple claims;

(bb) requires complex or extensive discovery;

(cc) arises out of the same set of operative facts as any civil action against the Government filed by the employee, former employee, or applicant pending in a court of the United States; or

(dd) involves a question of law for which there is no controlling precedent.

(6) The Board shall grant or deny any motion requesting a certification described under paragraph (5)(C)(ii) within 90 days after the submission of such motion and the Board may not issue a decision on the merits of a request for corrective action within 15 days after granting or denying a motion requesting certification.

(7)(A) Any decision of the Board or an administrative law judge or other employee of the Board designated to hear the case to grant or deny a certification described under paragraph (5)(C)(ii) shall be reviewed on appeal of a final order or decision of the Board under section 7703 only if—

(i) a motion requesting a certification was denied; and

(ii) the reviewing court vacates the decision of the Board on the merits of the claim under the standards set forth in section 7703(c).

(B) The decision to deny the certification shall be overturned by the reviewing court, and an order granting certification shall be

issued by the reviewing court, if such decision is found to be arbitrary, capricious, or an abuse of discretion.

(C) The reviewing court's decision shall not be considered evidence of any determination by the Board, any administrative law judge appointed by the Board under section 3105, or any employee of the Board designated by the Board on the merits of the underlying allegations during the course of any action at law or equity for de novo review in the appropriate United States district court in accordance with this subsection.

(8) In any action filed under this subsection—

(A) the appropriate United States district court shall have jurisdiction without regard to the amount in controversy;

(B) the court—

(i) subject to clause (iii), shall apply the standards set forth in subsection (e); and

(ii) may award any relief which the court considers appropriate under subsection (g), except that—

(I) relief for compensatory damages may not exceed $300,000; and

(II) relief may not include punitive damages; and

(iii) notwithstanding subsection (e)(2), may not order relief if the agency demonstrates by clear and convincing evidence that the agency would have taken the same personnel action in the absence of such disclosure; and

(C) the Special Counsel may not represent the employee, former employee, or applicant for employment.

(9) A petition to review a final order or final decision of a United States district court under this subsection that raises no challenge to the district court's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9) shall be filed in the United States Court of Appeals for the District of Columbia Circuit. All other petitions to review any final order or final decision of a United States district court in an action brought under this subsection shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review under this paragraph must be filed within 60 days after the date the petitioner received notice of the final order or final decision of the United States district court.

(10) This subsection applies with respect to any appeal, petition, or other request for corrective action duly submitted to the Board, whether under section 1214(b)(2), the preceding provisions of this section, section 7513(d), section 7701, or any otherwise applicable provision of law, rule, or regulation.

* * * * * * *

PART III—EMPLOYEES

* * * * * * *

SUBPART A—GENERAL PROVISIONS

* * * * * * *

CHAPTER 23—MERIT SYSTEM PRINCIPLES

§ 2302. Prohibited personnel practices

(a)(1) * * *

(2) For the purpose of this section—

(A) "personnel action" means—

(i) * * *

* * * * * * *

(x) a decision to order psychiatric testing or examination; [and]

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement that does not contain the statement required under subsection (b)(13); and

[(xi)] *(xii)* any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) * * *

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; [and]

(C) "agency" means an Executive agency and the Government Printing Office, but does not include—

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8) *or subsection (b)(9) (other than subparagraph (A)(ii) thereof)*;

[(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or]

(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II) as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to the personnel action involved; or

(iii) the Government Accountability Office**[**.**]***; and*

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority, unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

(i) any violation of any law, rule, or regulation, and occurs during the conscientious carrying out of official duties; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) * * *

* * * * * * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) **[**a violation**]** *any violation* of any law, rule, or regulation, or

* * * * * * *

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; **[**or**]**

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) **[**a violation**]** *any violation* of any law, rule, or **[**regulation,**]** *regulation (other than this section or any rule or regulation prescribed under this section),* or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; *or*

(C) any communication that complies with subsection (a)(1), (d), and (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.);

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

[(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;]

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8) or any rule or regulation prescribed under such paragraph; or

(ii) with regard to remedying a violation of any law, rule, or regulation not described in clause (i);

* * * * * * *

(11)(A) * * *

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; [or]

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title[.]*; or*

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order 13526 (75 Fed. Reg. 707, relating to classified national security information), or any successor thereto; Executive Order 12968 (60 Fed. Reg. 40245, relating to access to classified information), or any successor thereto; section 7211 (governing disclosures to Congress); section 1034 of title 10 (governing disclosure to Congress by members of the military); subsection (b)(8) (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq., governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18 and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive orders and such statutory provisions are incorporated into this agreement and are controlling.".

[This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.]

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), any presumption relating to the performance of a duty by an employee whose conduct is the subject of a protected disclosure under this section may be rebutted by substantial evidence. For purposes of paragraph (8), a determination as to whether an employee or applicant reasonably believes that such em-

ployee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to or readily ascertainable by the employee could reasonably conclude that the actions of the Government evidence such a violation, mismanagement, waste, abuse, or danger.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title*, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such a disclosure*. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

* * * * * * *

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a person, including a supervisor, who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty; or

(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

* * * * * * *

§ 2303a. Prohibited personnel practices in the intelligence community

(a) DEFINITIONS.—In this section—

(1) the term "agency" means an executive department or independent establishment, as defined under sections 101 and 104,

that contains an intelligence community element, except the Federal Bureau of Investigation;

(2) the term "intelligence community element"—

(A) means—

(i) the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(ii) any executive agency or unit thereof determined by the President under section 2302(a)(2)(C)(ii) to have as its principal function the conduct of foreign intelligence or counterintelligence activities; and

(B) does not include the Federal Bureau of Investigation; and

(3) the term "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) with respect to an employee in a position in an intelligence community element (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

(b) IN GENERAL.—Any employee of an agency who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of an intelligence community element as a reprisal for a disclosure of information by the employee to the Director of National Intelligence (or an employee designated by the Director of National Intelligence for such purpose), to the head of the employing agency (or an employee designated by the head of that agency for such purpose), or to a supervisor in the chain of authority of such employee who is authorized to access such information which the employee reasonably believes evidences—

(1) a violation of any law, rule, or regulation, except for an alleged violation that occurs during the conscientious carrying out of official duties; or

(2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) ENFORCEMENT.—The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221.

(d) EXISTING RIGHTS PRESERVED.—Nothing in this section shall be construed to—

(1) preempt or preclude any employee, or applicant for employment, at the Federal Bureau of Investigation from exercising rights currently provided under any other law, rule, or regulation, including section 2303;

(2) repeal section 2303; or

(3) provide the President or Director of National Intelligence the authority to revise regulations related to section 2303, codified in part 27 of the Code of Federal Regulations.

§ 2304. Prohibited personnel practices affecting the Transportation Security Administration

(a) IN GENERAL.—Notwithstanding any other provision of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—

(1) the provisions of paragraph (1), (8), or (9) of section 2302(b);

(2) any provision of law implementing paragraph (1), (8), or (9) of section 2302(b) by making any right or remedy available to an employee or applicant for employment in the civil service; and

(3) any rule or regulation prescribed under any provision of law referred to in paragraph (1) or (2).

(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect any rights, apart from those described in subsection (a), to which an individual described in subsection (a) might otherwise be entitled under law.

§ [2304.] *2305.* Responsibility of the Government Accountability Office

If requested by either House of the Congress (or any committee thereof), or if considered necessary by the Comptroller General, the Government Accountability Office shall conduct audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the executive branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management.

§ [2305.] *2306.* Coordination with certain other provisions of law

No provision of this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in section 102 of the National Security Act of 1947 (61 Stat. 495; 50 U.S.C. 403), the Central Intelligence Agency Act of 1949 (63 Stat. 208; 50 U.S.C. 403a and following), the Act entitled "An Act to provide certain administrative authorities for the National Security Agency, and for other purposes", approved May 29, 1959 (73 Stat. 63; 50 U.S.C. 402 note), and the Act entitled "An Act to amend the Internal Security Act of 1950", approved March 26, 1964 (78 Stat. 168; 50 U.S.C. 831-835).

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SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS

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CHAPTER 77—APPEALS

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§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a) * * *

[(b)(1) Except as provided in paragraph (2) of this subsection,] *(b)(1)(A) Except as provided in subparagraph (B) or paragraph (2),* a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9) shall be filed in the United States Court of Appeals for the District of Columbia Circuit. Notwithstanding any other provision of law, any petition for review under this subparagraph must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

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(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit *or the United States Court of Appeals for the District of Columbia Circuit* if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

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HOMELAND SECURITY ACT OF 2002

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TITLE II—INFORMATION ANALYSIS AND INFRASTRUCTURE PROTECTION

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Subtitle B—Critical Infrastructure Information

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SEC. 214. PROTECTION OF VOLUNTARILY SHARED CRITICAL INFRASTRUCTURE INFORMATION.

(a) * * *

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(c) INDEPENDENTLY OBTAINED INFORMATION.—Nothing in this section shall be construed to limit or otherwise affect the ability of a State, local, or Federal Government entity, agency, or authority, or any third party, under applicable law, to obtain critical infrastructure information in a manner not covered by subsection (a), including any information lawfully and properly disclosed generally or broadly to the public and to use such information in any manner permitted by law. *For purposes of this section, a permissible use of independently obtained information includes the disclosure of such information under section 2302(b)(8) of title 5, United States Code.*

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INSPECTOR GENERAL ACT OF 1978

* * * * * * *

APPOINTMENT AND REMOVAL OF OFFICERS

SEC. 3. (a) * * *

* * * * * * *

[(d) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service—

[(1) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment, and

[(2) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations.]

(d)(1) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service—

(A) appoint an Assistant Inspector General for Auditing, who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment;

(B) appoint an Assistant Inspector General for Investigations, who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations; and

(C) designate a Whistleblower Protection Ombudsman, who shall educate agency employees—

(i) about prohibitions on retaliation for protected disclosures; and

(ii) who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures.

(2) The Whistleblower Protection Ombudsman shall not act as a legal representative, agent, or advocate of the employee or former employee.

(3) For the purposes of this section, the requirement of the designation of a Whistleblower Protection Ombudsman under paragraph (1)(C) shall not apply to—

(A) any agency that is an element of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))); or

(B) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counter intelligence activities.

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SPECIAL PROVISIONS CONCERNING THE DEPARTMENT OF THE TREASURY

SEC. 8D. (a) * * *

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(j) An individual appointed to the position of Treasury Inspector General for Tax Administration, the Assistant Inspector General for Auditing of the Office of the Treasury Inspector General for Tax Administration under ⟦section 3(d)(1)⟧ *section 3(d)(1)(A)*, the Assistant Inspector General for Investigations of the Office of the Treasury Inspector General for Tax Administration under ⟦section 3(d)(2)⟧ *section 3(d)(1)(B)*, or any position of Deputy Inspector General of the Office of the Treasury Inspector General for Tax Administration may not be an employee of the Internal Revenue Service—

(1) * * *

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SEC. 8H. (a)(1)(A) * * *

* * * * * * *

(D) An employee of any agency, as that term is defined under section 2302(a)(2)(C) of title 5, United States Code, who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the Inspector General (or designee) of the agency of which that employee is employed.

* * * * * * *

(b)*(1)* Not later than the end of the 14-calendar day period beginning on the date of receipt of an employee complaint or information under subsection (a), the Inspector General shall determine whether the complaint or information appears credible. Upon making such a determination, the Inspector General shall transmit to the head of the establishment notice of that determination, together with the complaint or information.

(2) If the head of an establishment determines that a complaint or information transmitted under paragraph (1) would create a conflict of interest for the head of the establishment, the head of the establishment shall return the complaint or information to the Inspector General with that determination and the Inspector General shall make the transmission to the Director of National Intelligence. In such a case, the requirements of this section for the head of the establishment apply to the recipient of the Inspector General's transmission. The Director of National Intelligence shall consult with the

members of the appellate review board established under section 204 of the Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011 regarding all transmissions under this paragraph.

(c) Upon receipt of a transmittal from the Inspector General under subsection (b), the head of the establishment shall, within 7 calendar days of such receipt, forward such transmittal to the [intelligence committees] *appropriate committees*, together with any comments the head of the establishment considers appropriate.

(d)(1) If the Inspector General does not find credible under subsection (b) a complaint or information submitted to the Inspector General under subsection (a), or does not transmit the complaint or information to the head of the establishment in accurate form under subsection (b), the employee (subject to paragraph (2)) may submit the complaint or information to Congress by contacting [either or both of the intelligence committees] *any of the appropriate committees* directly.

(2) The employee may contact the [intelligence committees] *appropriate committees* directly as described in paragraph (1) only if the employee—

(A) before making such a contact, furnishes to the head of the establishment, through the Inspector General, a statement of the employee's complaint or information and notice of the employee's intent to contact the [intelligence committees] *appropriate committees* directly; and

(B) obtains and follows from the head of the establishment, through the Inspector General, direction on how to contact the [intelligence committees] *appropriate committees* in accordance with appropriate security practices.

(3) A member or employee of one of the [intelligence committees] *appropriate committees* who receives a complaint or information under paragraph (1) does so in that member or employee's official capacity as a member or employee of that committee.

* * * * * * *

(h) An individual who has submitted a complaint or information to an Inspector General under this section may notify any member of Congress or congressional staff member of the fact that such individual has made a submission to that particular Inspector General, and of the date on which such submission was made.

[(h)] *(i)* In this section:

(1) The term "urgent concern" means any of the following:

(A) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an [intelligence] activity involving classified information, but does not include differences of opinions concerning public policy matters.

(B) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity *or an activity involving classified information*.

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[(2) The term "intelligence committees" means the Permanent Select Committee on Intelligence of the House of Rep-

resentatives and the Select Committee on Intelligence of the Senate.]

(2) The term "appropriate committees" means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, except that, with respect to disclosures made by employees described in subsection (a)(1)(D), the term "appropriate committees" means the committees of appropriate jurisdiction.

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CHAPTER 47 OF TITLE 41, UNITED STATES CODE

CHAPTER 47—MISCELLANEOUS

Sec.
4701. Determinations and decisions.

* * * * * * *

4705a. Pilot program for enhancement of protection of contractor employees from reprisal for disclosure of certain information.

* * * * * * *

§ 4705. Protection of contractor employees from reprisal for disclosure of certain information

(a) * * *

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(f) TWO-YEAR SUSPENSION OF EFFECTIVENESS WHILE PILOT PROGRAM IN EFFECT.—While section 4705a of this title is in effect, this section shall not be in effect.

§ 4705a. Pilot program for enhancement of protection of contractor employees from reprisal for disclosure of certain information

(a) DEFINITIONS.—In this section:

(1) CONTRACT.—The term "contract" means a contract awarded by the head of an executive agency.

(2) CONTRACTOR.—The term "contractor" means a person awarded a contract or a grant with an executive agency.

(3) INSPECTOR GENERAL.—The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978 (5 U.S.C. App.) and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, an executive agency.

(b) PROHIBITION OF REPRISALS.—An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress, a representative of a committee of Congress, an Inspector General, the Government Accountability Office, an agency employee responsible for contract oversight or management, an authorized official of an executive agency or the Department of Justice information that the employee reasonably believes is evidence of gross mismanagement of a contract or grant, a gross waste of agency funds, a substantial and specific danger to public health or safety, or a violation of a law related to a contract (including the competition for or negotiation of a contract) or grant.

(c) INVESTIGATION OF COMPLAINTS.—

(1) INVESTIGATION.—An individual who believes that the individual has been subjected to a reprisal prohibited by subsection (b) may submit a complaint to the Inspector General of the executive agency. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, on completion of the investigation, submit a report of the findings of the investigation to the individual, the contractor concerned, and the head of the agency. If the executive agency does not have an Inspector General, the duties of the Inspector General under this section shall be performed by an official designated by the head of the executive agency.

(2) DEADLINE.—(A) Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time as shall be agreed upon between the Inspector General and the person submitting the complaint.

(d) REMEDY AND ENFORCEMENT AUTHORITY.—

(1) ACTIONS CONTRACTOR MAY BE ORDERED TO TAKE.—Not later than 30 days after receiving an Inspector General report pursuant to subsection (c), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (b) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) ABATEMENT.—Order the contractor to take affirmative action to abate the reprisal.

(B) REINSTATEMENT.—Order the contractor to reinstate the individual to the position that the individual held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the individual in that position if the reprisal had not been taken.

(C) PAYMENT.—Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that the complainant reasonably incurred for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

(2) DE NOVO ACTION.—If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (c), or in the case of an extension of time under paragraph (c)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative

remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(3) EVIDENCE.—An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) ENFORCEMENT ORDER.—When a contractor fails to comply with an order issued under paragraph (1), the head of the executive agency shall file an action for enforcement of the order in the United States district court for a district in which the reprisal was found to have occurred. In an action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(5) REVIEW OF ENFORCEMENT ORDER.—A person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. A petition seeking review must be filed no more than 60 days after the head of the agency issues the order. Review shall conform to chapter 7 of title 5.

(e) SCOPE OF SECTION.—This section does not—

(1) authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (b); or

(2) modify or derogate from a right or remedy otherwise available to the employee.

(f) DURATION OF SECTION.—This section shall be in effect for the two-year period beginning on the date of the enactment of the Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011.

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INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

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TITLE III—SECURITY CLEARANCES

SEC. 3001. SECURITY CLEARANCES.

(a) DEFINITIONS.—In this section:

(1) * * *

* * * * * * *

(9) The term "access determination" means the process for determining whether an employee—

(A) is eligible for access to classified information in accordance with Executive Order 12968 (60 Fed. Reg. 40245;

relating to access to classified information), or any successor thereto, and Executive Order 10865 (25 Fed. Reg. 1583; relating to safeguarding classified information with industry); and

(B) possesses a need to know under that Order.

* * * * * * *

(i) REVIEW OF SECURITY CLEARANCE OR ACCESS DETERMINATIONS.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of the Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011, the head of the entity selected pursuant to subsection (b) shall—

(A) develop policies and procedures that permit, to the extent practicable, individuals who challenge in good faith a determination to suspend or revoke a security clearance or access to classified information to retain their government employment status while such challenge is pending; and

(B) develop and implement uniform and consistent policies and procedures to ensure proper protections during the process for denying, suspending, or revoking a security clearance or access to classified information, including the provision of a right to appeal such a denial, suspension, or revocation, except that there shall be no appeal of an agency's suspension of a security clearance or access determination for purposes of conducting an investigation, if that suspension lasts no longer than 1 year or the head of the agency certifies that a longer suspension is needed before a final decision on denial or revocation to prevent imminent harm to the national security.

(2) LIMITATION PERIOD.—Any limitation period applicable to an agency appeal under paragraph (1) shall be tolled until the head of the agency (or in the case of any component of the Department of Defense, the Secretary of Defense) determines, with the concurrence of the Director of National Intelligence, that the policies and procedures described in paragraph (1) have been established for the agency or the Director of National Intelligence promulgates the policies and procedures under paragraph (1). The policies and procedures for appeals developed under paragraph (1) shall be comparable to the policies and procedures pertaining to prohibited personnel practices defined under section 2302(b)(8) of title 5, United States Code, and provide—

(A) for an independent and impartial fact-finder;

(B) for notice and the opportunity to be heard, including the opportunity to present relevant evidence, including witness testimony;

(C) that the employee or former employee may be represented by counsel;

(D) that the employee or former employee has a right to a decision based on the record developed during the appeal;

(E) that not more than 180 days shall pass from the filing of the appeal to the report of the impartial fact-finder to the agency head or the designee of the agency head, unless—

(i) the employee and the agency concerned agree to an extension; or

(ii) the impartial fact-finder determines in writing that a greater period of time is required in the interest of fairness or national security;

(F) for the use of information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs in a manner consistent with the interests of national security, including ex parte submissions if the agency determines that the interests of national security so warrant; and

(G) that the employee or former employee shall have no right to compel the production of information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, except evidence necessary to establish that the employee made the disclosure or communication such employee alleges was protected by subparagraphs (A), (B), and (C) of subsection (j)(1).

(j) RETALIATORY REVOCATION OF SECURITY CLEARANCES AND ACCESS DETERMINATIONS.—

(1) IN GENERAL.—Agency personnel with authority over personnel security clearance or access determinations shall not take or fail to take, or threaten to take or fail to take, any action with respect to any employee's security clearance or access determination because of—

(A) any disclosure of information to the Director of National Intelligence (or an employee designated by the Director of National Intelligence for such purpose) or the head of the employing agency (or employee designated by the head of that agency for such purpose) by an employee that the employee reasonably believes evidences—

(i) a violation of any law, rule, or regulation, and occurs during the conscientious carrying out of official duties; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(B) any disclosure to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee reasonably believes evidences—

(i) a violation of any law, rule, or regulation, and occurs during the conscientious carrying out of official duties; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(C) any communication that complies with—

(i) subsection (a)(1), (d), or (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.);

(ii) subsection (d)(5) (A), (D), or (G) of section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q); or

(iii) subsection (k)(5) (A), (D), or (G), of section 103H of the National Security Act of 1947 (50 U.S.C. 403–3h);

(D) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(E) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (D); or

(F) cooperating with or disclosing information to the Inspector General of an agency, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the Inspector General,

if the actions described under subparagraphs (D) through (F) do not result in the employee or applicant unlawfully disclosing information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs.

(2) RULE OF CONSTRUCTION.—Consistent with the protection of sources and methods, nothing in paragraph (1) shall be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(3) DISCLOSURES.—

(A) IN GENERAL.—A disclosure shall not be excluded from paragraph (1) because—

(i) the disclosure was made to a person, including a supervisor, who participated in an activity that the employee reasonably believed to be covered by paragraph (1)(A)(ii);

(ii) the disclosure revealed information that had been previously disclosed;

(iii) of the employee's motive for making the disclosure;

(iv) the disclosure was not made in writing;

(v) the disclosure was made while the employee was off duty; or

(vi) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(B) REPRISALS.—If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from paragraph (1) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

(4) AGENCY ADJUDICATION.—

(A) REMEDIAL PROCEDURE.—An employee or former employee who believes that he or she has been subjected to a reprisal prohibited by paragraph (1) of this subsection may, within 90 days after the issuance of notice of such decision, appeal that decision within the agency of that employee or former employee through proceedings authorized by paragraph (7) of subsection (a), except that there shall be no appeal of an agency's suspension of a security clearance or ac-

cess determination for purposes of conducting an investigation, if that suspension lasts not longer than 1 year (or a longer period in accordance with a certification made under subsection (b)(7)).

(B) CORRECTIVE ACTION.—If, in the course of proceedings authorized under subparagraph (A), it is determined that the adverse security clearance or access determination violated paragraph (1) of this subsection, the agency shall take specific corrective action to return the employee or former employee, as nearly as practicable and reasonable, to the position such employee or former employee would have held had the violation not occurred. Such corrective action shall include reasonable attorney's fees and any other reasonable costs incurred, and may include compensatory damages not to exceed $300,000, back pay and related benefits, and travel expenses.

(C) CONTRIBUTING FACTOR.—In determining whether the adverse security clearance or access determination violated paragraph (1) of this subsection, the agency shall find that paragraph (1) of this subsection was violated if a disclosure described in paragraph (1) was a contributing factor in the adverse security clearance or access determination taken against the individual, unless the agency demonstrates by clear and convincing evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter.

(5) APPELLATE REVIEW OF SECURITY CLEARANCE ACCESS DETERMINATIONS BY DIRECTOR OF NATIONAL INTELLIGENCE.—

(A) DEFINITION.—In this paragraph, the term "Board" means the appellate review board established under section 204 of the Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011.

(B) APPEAL.—Within 60 days after receiving notice of an adverse final agency determination under a proceeding under paragraph (4), an employee or former employee may appeal that determination to the Board.

(C) POLICIES AND PROCEDURES.—The Board, in consultation with the Attorney General, Director of National Intelligence, and the Secretary of Defense, shall develop and implement policies and procedures for adjudicating the appeals authorized by subparagraph (B). The Director of National Intelligence and Secretary of Defense shall jointly approve any rules, regulations, or guidance issued by the Board concerning the procedures for the use or handling of classified information.

(D) REVIEW.—The Board's review shall be on the complete agency record, which shall be made available to the Board. The Board may not hear witnesses or admit additional evidence. Any portions of the record that were submitted ex parte during the agency proceedings shall be submitted ex parte to the Board.

(E) FURTHER FACT-FINDING OR IMPROPER DENIAL.—If the Board concludes that further fact-finding is necessary or

finds that the agency improperly denied the employee or former employee the opportunity to present evidence that, if admitted, would have a substantial likelihood of altering the outcome, the Board shall remand the matter to the agency from which it originated for additional proceedings in accordance with the rules of procedure issued by the Board.

(F) DE NOVO DETERMINATION.—The Board shall make a de novo determination, based on the entire record and under the standards specified in paragraph (4), of whether the employee or former employee received an adverse security clearance or access determination in violation of paragraph (1). In considering the record, the Board may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. In doing so, the Board may consider the prior fact-finder's opportunity to see and hear the witnesses.

(G) ADVERSE SECURITY CLEARANCE OR ACCESS DETERMINATION.—If the Board finds that the adverse security clearance or access determination violated paragraph (1), it shall then separately determine whether reinstating the security clearance or access determination is clearly consistent with the interests of national security, with any doubt resolved in favor of national security, under Executive Order 12968 (60 Fed. Reg. 40245; relating to access to classified information) or any successor thereto (including any adjudicative guidelines promulgated under such orders) or any subsequent Executive order, regulation, or policy concerning access to classified information.

(H) REMEDIES.—

(i) CORRECTIVE ACTION.—If the Board finds that the adverse security clearance or access determination violated paragraph (1), it shall order the agency head to take specific corrective action to return the employee or former employee, as nearly as practicable and reasonable, to the position such employee or former employee would have held had the violation not occurred. Such corrective action shall include reasonable attorney's fees and any other reasonable costs incurred, and may include compensatory damages not to exceed $300,000 and back pay and related benefits. The Board may recommend, but may not order, reinstatement or hiring of a former employee. The Board may order that the former employee be treated as though the employee were transferring from the most recent position held when seeking other positions within the executive branch. Any corrective action shall not include the reinstating of any security clearance or access determination. The agency head shall take the actions so ordered within 90 days, unless the Director of National Intelligence, the Secretary of Energy, or the Secretary of Defense, in the case of any component of the Department of Defense, determines that doing so would endanger national security.

(ii) RECOMMENDED ACTION.—If the Board finds that reinstating the employee or former employee's security clearance or access determination is clearly consistent with the interests of national security, it shall recommend such action to the head of the entity selected under subsection (b) and the head of the affected agency.

(I) CONGRESSIONAL NOTIFICATION.—

(i) ORDERS.—Consistent with the protection of sources and methods, at the time the Board issues an order, the Chairperson of the Board shall notify—

(I) the Committee on Homeland Security and Government Affairs of the Senate;

(II) the Select Committee on Intelligence of the Senate;

(III) the Committee on Oversight and Government Reform of the House of Representatives;

(IV) the Permanent Select Committee on Intelligence of the House of Representatives; and

(V) the committees of the Senate and the House of Representatives that have jurisdiction over the employing agency, including in the case of a final order or decision of the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, or the National Reconnaissance Office, the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

(ii) RECOMMENDATIONS.—If the agency head and the head of the entity selected under subsection (b) do not follow the Board's recommendation to reinstate a clearance, the head of the entity selected under subsection (b) shall notify the committees described in subclauses (I) through (V) of clause (i).

(6) JUDICIAL REVIEW.—Nothing in this section shall be construed to permit or require judicial review of any—

(A) agency action under this section; or

(B) action of the appellate review board established under section 204 of the Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011.

(7) PRIVATE CAUSE OF ACTION.—Nothing in this section shall be construed to permit, authorize, or require a private cause of action to challenge the merits of a security clearance determination.

[(i)**]** *(k)* AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated such sums as may be necessary for fiscal year 2005 and each fiscal year thereafter for the implementation, maintenance, and operation of the database required by subsection (e).

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CENTRAL INTELLIGENCE AGENCY ACT OF 1949

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SEC. 17. INSPECTOR GENERAL FOR THE AGENCY.

(a) * * *

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(d) SEMIANNUAL REPORTS; IMMEDIATE REPORTS OF SERIOUS OR FLAGRANT PROBLEMS; REPORTS OF FUNCTIONAL PROBLEMS; REPORTS TO CONGRESS ON URGENT CONCERNS.—(1) * * *

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(5)(A) * * *

(B)*(i)* Not later than the end of the 14-calendar day period beginning on the date of receipt from an employee of a complaint or information under subparagraph (A), the Inspector General shall determine whether the complaint or information appears credible. Upon making such a determination, the Inspector General shall transmit to the Director notice of that determination, together with the complaint or information.

(ii) If the Director determines that a complaint or information transmitted under paragraph (1) would create a conflict of interest for the Director, the Director shall return the complaint or information to the Inspector General with that determination and the Inspector General shall make the transmission to the Director of National Intelligence. In such a case the requirements of this subsection for the Director apply to the recipient of the Inspector General's submission.

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(H) An individual who has submitted a complaint or information to the Inspector General under this section may notify any member of Congress or congressional staff member of the fact that such individual has made a submission to the Inspector General, and of the date on which such submission was made.

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ADDITIONAL VIEWS

The Whistleblower Protection Enhancement Act would help reduce waste, fraud, and abuse by significantly expanding the protections available to government whistleblowers. Whistleblowers play a critical role in exposing wrongdoing within the government. This bill responds to decisions by the U.S. Court of Appeals for the Federal Circuit that have limited when whistleblower disclosures are protected. The bill would establish a pilot program to afford whistleblower protections to civilian contractor employees, which would increase the accountability of federal contractors by protecting contract employees who expose fraud and other wrongdoing.

Unfortunately, the Committee failed to adopt the amendment offered by Representative Braley that would have provided whistleblowers with the right to request a jury trial. Providing whistleblowers with a jury trial would provide a check on the Merit System Protection Board and would bring the Whistleblower Protection Act in line with other whistleblower and discrimination laws.

ELIJAH E. CUMMINGS.