

**Suspend the Rules and Pass the Bill, S. 743, With an Amendment**

**(The amendment strikes all after the enacting clause and inserts a new text)**

112<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 743

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IN THE HOUSE OF REPRESENTATIVES

MAY 9, 2012

Referred to the Committee on Oversight and Government Reform, and in addition to the Committees on Select Intelligence (Permanent Select), and Homeland Security, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## AN ACT

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections; to provide certain authority for the Special Counsel; and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Whistleblower Protec-  
5 tion Enhancement Act of 2012”.

6 **TITLE I—PROTECTION OF CER-**  
7 **TAIN DISCLOSURES OF IN-**  
8 **FORMATION BY FEDERAL EM-**  
9 **PLOYEES**

10 **SEC. 101. CLARIFICATION OF DISCLOSURES COVERED.**

11 (a) IN GENERAL.—Section 2302(b)(8) of title 5,  
12 United States Code, is amended—

13 (1) in subparagraph (A)(i), by striking “a viola-  
14 tion” and inserting “any violation”; and

15 (2) in subparagraph (B)(i), by striking “a viola-  
16 tion” and inserting “any violation (other than a vio-  
17 lation of this section)”.

18 (b) PROHIBITED PERSONNEL PRACTICES UNDER  
19 SECTION 2302(b)(9).—

20 (1) TECHNICAL AND CONFORMING AMEND-  
21 MENTS.—Title 5, United States Code, is amended—

22 (A) in subsections (a)(3), (b)(4)(A), and  
23 (b)(4)(B)(i) of section 1214 and in subsections  
24 (a), (e)(1), and (i) of section 1221, by inserting  
25 “or section 2302(b)(9) (A)(i), (B), (C), or (D)”

1 after “section 2302(b)(8)” each place it ap-  
2 pears; and

3 (B) in section 2302(a)(2)(C)(i), by insert-  
4 ing “or section 2302(b)(9) (A)(i), (B), (C), or  
5 (D)” after “(b)(8)”.

6 (2) OTHER REFERENCES.—(A) Title 5, United  
7 States Code, is amended in subsection (b)(4)(B)(i)  
8 of section 1214 and in subsection (e)(1) of section  
9 1221 by inserting “or protected activity” after “dis-  
10 closure” each place it appears.

11 (B) Section 2302(b)(9) of title 5, United States  
12 Code, is amended—

13 (i) by striking subparagraph (A) and in-  
14 serting the following:

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

18 “(i) with regard to remedying a viola-  
19 tion of paragraph (8); or

20 “(ii) other than with regard to rem-  
21 edying a violation of paragraph (8);”; and

22 (ii) in subparagraph (B), by inserting “(i)  
23 or (ii)” after “subparagraph (A)”.

24 (C) Section 2302 of title 5, United States Code,  
25 is amended by adding at the end the following:

1       “(f)(1) A disclosure shall not be excluded from sub-  
2 section (b)(8) because—

3           “(A) the disclosure was made to a supervisor or  
4 to a person who participated in an activity that the  
5 employee or applicant reasonably believed to be cov-  
6 ered by subsection (b)(8)(A)(i) and (ii);

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

9           “(C) of the employee’s or applicant’s motive for  
10 making the disclosure;

11          “(D) the disclosure was not made in writing;

12          “(E) the disclosure was made while the em-  
13 ployee was off duty; or

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

17       “(2) If a disclosure is made during the normal course  
18 of duties of an employee, the disclosure shall not be ex-  
19 cluded from subsection (b)(8) if any employee who has au-  
20 thority to take, direct others to take, recommend, or ap-  
21 prove any personnel action with respect to the employee  
22 making the disclosure, took, failed to take, or threatened  
23 to take or fail to take a personnel action with respect to  
24 that employee in reprisal for the disclosure.”.

1 **SEC. 102. DEFINITIONAL AMENDMENTS.**

2 Section 2302(a)(2) of title 5, United States Code, is  
3 amended—

4 (1) in subparagraph (B)(ii), by striking “and”  
5 at the end;

6 (2) in subparagraph (C)(iii), by striking the pe-  
7 riod at the end and inserting “; and”; and

8 (3) by adding at the end the following:

9 “(D) ‘disclosure’ means a formal or informal  
10 communication or transmission, but does not include  
11 a communication concerning policy decisions that  
12 lawfully exercise discretionary authority unless the  
13 employee or applicant providing the disclosure rea-  
14 sonably believes that the disclosure evidences—

15 “(i) any violation of any law, rule, or regu-  
16 lation; or

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

20 **SEC. 103. REBUTTABLE PRESUMPTION.**

21 Section 2302(b) of title 5, United States Code, is  
22 amended by amending the matter following paragraph  
23 (12) to read as follows:

24 “This subsection shall not be construed to authorize the  
25 withholding of information from Congress or the taking  
26 of any personnel action against an employee who discloses

1 information to Congress. For purposes of paragraph (8),  
2 (i) any presumption relating to the performance of a duty  
3 by an employee whose conduct is the subject of a dislo-  
4 sure as defined under subsection (a)(2)(D) may be rebut-  
5 ted by substantial evidence, and (ii) a determination as  
6 to whether an employee or applicant reasonably believes  
7 that such employee or applicant has disclosed information  
8 that evidences any violation of law, rule, regulation, gross  
9 mismanagement, a gross waste of funds, an abuse of au-  
10 thority, or a substantial and specific danger to public  
11 health or safety shall be made by determining whether a  
12 disinterested observer with knowledge of the essential  
13 facts known to and readily ascertainable by the employee  
14 or applicant could reasonably conclude that the actions of  
15 the Government evidence such violations, mismanagement,  
16 waste, abuse, or danger.”.

17 **SEC. 104. PERSONNEL ACTIONS AND PROHIBITED PER-**  
18 **SONNEL PRACTICES.**

19 (a) **PERSONNEL ACTION.**—Section 2302(a)(2)(A) of  
20 title 5, United States Code, is amended—

21 (1) in clause (x), by striking “and” after the  
22 semicolon; and

23 (2) by redesignating clause (xi) as clause (xii)  
24 and inserting after clause (x) the following:

1           “(xi) the implementation or enforcement of  
2           any nondisclosure policy, form, or agreement;  
3           and”.

4       (b) PROHIBITED PERSONNEL PRACTICE.—

5           (1) IN GENERAL.—Section 2302(b) of title 5,  
6       United States Code, is amended—

7           (A) in paragraph (11), by striking “or” at  
8           the end;

9           (B) in paragraph (12), by striking the pe-  
10          riod and inserting “; or”; and

11          (C) by inserting after paragraph (12) the  
12          following:

13          “(13) implement or enforce any nondisclosure  
14          policy, form, or agreement, if such policy, form, or  
15          agreement does not contain the following statement:  
16          “These provisions are consistent with and do not su-  
17          persede, conflict with, or otherwise alter the em-  
18          ployee obligations, rights, or liabilities created by ex-  
19          isting statute or Executive order relating to (1) clas-  
20          sified information, (2) communications to Congress,  
21          (3) the reporting to an Inspector General of a viola-  
22          tion of any law, rule, or regulation, or mismanage-  
23          ment, a gross waste of funds, an abuse of authority,  
24          or a substantial and specific danger to public health  
25          or safety, or (4) any other whistleblower protection.

1 The definitions, requirements, obligations, rights,  
2 sanctions, and liabilities created by controlling Exec-  
3 utive orders and statutory provisions are incor-  
4 porated into this agreement and are controlling.’.”.

5 (2) AGENCY WEBSITES.—Agencies making use  
6 of any nondisclosure policy, form, or agreement shall  
7 also post the statement required under section  
8 2302(b)(13) of title 5, United States Code (as added  
9 by this Act) on the agency website, accompanied by  
10 the specific list of controlling Executive orders and  
11 statutory provisions.

12 (3) NONDISCLOSURE POLICY, FORM, OR AGREE-  
13 MENT IN EFFECT BEFORE THE EFFECTIVE DATE.—  
14 With respect to a nondisclosure policy, form, or  
15 agreement that was in effect before the effective  
16 date of this Act, but that does not contain the state-  
17 ment required under section 2302(b)(13) of title 5,  
18 United States Code (as added by this Act) for imple-  
19 mentation or enforcement—

20 (A) it shall not be a prohibited personnel  
21 practice to enforce that policy, form, or agree-  
22 ment with regard to a current employee if the  
23 agency gives such employee notice of the state-  
24 ment; and



1           (B) it shall not be a prohibited personnel  
2           practice to enforce that policy, form, or agree-  
3           ment after the effective date of this Act with re-  
4           gard to a former employee if the agency com-  
5           plies with paragraph (2) of this subsection.

6           (c) RETALIATORY INVESTIGATIONS.—

7           (1) AGENCY INVESTIGATION.—Section 1214 of  
8           title 5, United States Code, is amended by adding  
9           at the end the following:

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

17          (2) DAMAGES.—Section 1221(g) of title 5,  
18          United States Code, is amended by adding at the  
19          end the following:

20          “(4) Any corrective action ordered under this section  
21          to correct a prohibited personnel practice may include fees,  
22          costs, or damages reasonably incurred due to an agency  
23          investigation of the employee, if such investigation was  
24          commenced, expanded, or extended in retaliation for the

1 disclosure or protected activity that formed the basis of  
2 the corrective action.”.

3 **SEC. 105. EXCLUSION OF AGENCIES BY THE PRESIDENT.**

4 Section 2302(a)(2)(C) of title 5, United States Code,  
5 is amended by striking clause (ii) and inserting the fol-  
6 lowing:

7 “(ii)(I) the Federal Bureau of Inves-  
8 tigation, the Central Intelligence Agency,  
9 the Defense Intelligence Agency, the Na-  
10 tional Geospatial-Intelligence Agency, the  
11 National Security Agency, the Office of the  
12 Director of National Intelligence, and the  
13 National Reconnaissance Office; and

14 “(II) as determined by the President,  
15 any Executive agency or unit thereof the  
16 principal function of which is the conduct  
17 of foreign intelligence or counterintel-  
18 ligence activities, provided that the deter-  
19 mination be made prior to a personnel ac-  
20 tion; or”.

21 **SEC. 106. DISCIPLINARY ACTION.**

22 Section 1215(a)(3) of title 5, United States Code, is  
23 amended to read as follows:

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

1           “(i) disciplinary action consisting of removal,  
2           reduction in grade, debarment from Federal employ-  
3           ment for a period not to exceed 5 years, suspension,  
4           or reprimand;

5           “(ii) an assessment of a civil penalty not to ex-  
6           ceed \$1,000; or

7           “(iii) any combination of disciplinary actions  
8           described under clause (i) and an assessment de-  
9           scribed under clause (ii).

10          “(B) In any case brought under paragraph (1) in  
11          which the Board finds that an employee has committed  
12          a prohibited personnel practice under section 2302(b)(8),  
13          or 2302(b)(9) (A)(i), (B), (C), or (D), the Board may im-  
14          pose disciplinary action if the Board finds that the activity  
15          protected under section 2302(b)(8), or 2302(b)(9) (A)(i),  
16          (B), (C), or (D) was a significant motivating factor, even  
17          if other factors also motivated the decision, for the employ-  
18          ee’s decision to take, fail to take, or threaten to take or  
19          fail to take a personnel action, unless that employee dem-  
20          onstrates, by a preponderance of the evidence, that the  
21          employee would have taken, failed to take, or threatened  
22          to take or fail to take the same personnel action, in the  
23          absence of such protected activity.”.

1 **SEC. 107. REMEDIES.**

2 (a) **ATTORNEY FEES.**—Section 1204(m)(1) of title 5,  
3 United States Code, is amended by striking “agency in-  
4 volved” and inserting “agency where the prevailing party  
5 was employed or had applied for employment at the time  
6 of the events giving rise to the case”.

7 (b) **DAMAGES.**—Sections 1214(g)(2) and  
8 1221(g)(1)(A)(ii) of title 5, United States Code, are  
9 amended by striking all after “travel expenses,” and in-  
10 serting “any other reasonable and foreseeable consequen-  
11 tial damages, and compensatory damages (including inter-  
12 est, reasonable expert witness fees, and costs).” each place  
13 it appears.

14 **SEC. 108. JUDICIAL REVIEW.**

15 (a) **IN GENERAL.**—Section 7703(b) of title 5, United  
16 States Code, is amended by striking the matter preceding  
17 paragraph (2) and inserting the following:

18 “(b)(1)(A) Except as provided in subparagraph (B)  
19 and paragraph (2) of this subsection, a petition to review  
20 a final order or final decision of the Board shall be filed  
21 in the United States Court of Appeals for the Federal Cir-  
22 cuit. Notwithstanding any other provision of law, any peti-  
23 tion for review shall be filed within 60 days after the  
24 Board issues notice of the final order or decision of the  
25 Board.

1           “(B) During the 2-year period beginning on the effec-  
2 tive date of the Whistleblower Protection Enhancement  
3 Act of 2012, a petition to review a final order or final  
4 decision of the Board that raises no challenge to the  
5 Board’s disposition of allegations of a prohibited personnel  
6 practice described in section 2302(b) other than practices  
7 described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B),  
8 (C), or (D) shall be filed in the United States Court of  
9 Appeals for the Federal Circuit or any court of appeals  
10 of competent jurisdiction. Notwithstanding any other pro-  
11 vision of law, any petition for review shall be filed within  
12 60 days after the Board issues notice of the final order  
13 or decision of the Board.”.

14           (b) REVIEW OBTAINED BY OFFICE OF PERSONNEL  
15 MANAGEMENT.—Section 7703(d) of title 5, United States  
16 Code, is amended to read as follows:

17           “(d)(1) Except as provided under paragraph (2), this  
18 paragraph shall apply to any review obtained by the Direc-  
19 tor of the Office of Personnel Management. The Director  
20 may obtain review of any final order or decision of the  
21 Board by filing, within 60 days after the Board issues no-  
22 tice of the final order or decision of the Board, a petition  
23 for judicial review in the United States Court of Appeals  
24 for the Federal Circuit if the Director determines, in the  
25 discretion of the Director, that the Board erred in inter-

1 preting a civil service law, rule, or regulation affecting per-  
2 sonnel management and that the Board's decision will  
3 have a substantial impact on a civil service law, rule, regu-  
4 lation, or policy directive. If the Director did not intervene  
5 in a matter before the Board, the Director may not peti-  
6 tion for review of a Board decision under this section un-  
7 less the Director first petitions the Board for a reconsider-  
8 ation of its decision, and such petition is denied. In addi-  
9 tion to the named respondent, the Board and all other  
10 parties to the proceedings before the Board shall have the  
11 right to appear in the proceeding before the Court of Ap-  
12 peals. The granting of the petition for judicial review shall  
13 be at the discretion of the Court of Appeals.

14       “(2) During the 2-year period beginning on the effec-  
15 tive date of the Whistleblower Protection Enhancement  
16 Act of 2012, this paragraph shall apply to any review ob-  
17 tained by the Director of the Office of Personnel Manage-  
18 ment that raises no challenge to the Board's disposition  
19 of allegations of a prohibited personnel practice described  
20 in section 2302(b) other than practices described in sec-  
21 tion 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D).  
22 The Director may obtain review of any final order or deci-  
23 sion of the Board by filing, within 60 days after the Board  
24 issues notice of the final order or decision of the Board,  
25 a petition for judicial review in the United States Court

1 of Appeals for the Federal Circuit or any court of appeals  
2 of competent jurisdiction if the Director determines, in the  
3 discretion of the Director, that the Board erred in inter-  
4 preting a civil service law, rule, or regulation affecting per-  
5 sonnel management and that the Board's decision will  
6 have a substantial impact on a civil service law, rule, regu-  
7 lation, or policy directive. If the Director did not intervene  
8 in a matter before the Board, the Director may not peti-  
9 tion for review of a Board decision under this section un-  
10 less the Director first petitions the Board for a reconsider-  
11 ation of its decision, and such petition is denied. In addi-  
12 tion to the named respondent, the Board and all other  
13 parties to the proceedings before the Board shall have the  
14 right to appear in the proceeding before the court of ap-  
15 peals. The granting of the petition for judicial review shall  
16 be at the discretion of the court of appeals.”.

17 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**  
18 **THE TRANSPORTATION SECURITY ADMINIS-**  
19 **TRATION.**

20 (a) IN GENERAL.—Chapter 23 of title 5, United  
21 States Code, is amended—

22 (1) by redesignating sections 2304 and 2305 as  
23 sections 2305 and 2306, respectively; and

24 (2) by inserting after section 2303 the fol-  
25 lowing:

1 **“§ 2304. Prohibited personnel practices affecting the**  
2 **Transportation Security Administration**

3 “(a) IN GENERAL.—Notwithstanding any other pro-  
4 vision of law, any individual holding or applying for a posi-  
5 tion within the Transportation Security Administration  
6 shall be covered by—

7 “(1) the provisions of section 2302(b) (1), (8),  
8 and (9);

9 “(2) any provision of law implementing section  
10 2302(b) (1), (8), or (9) by providing any right or  
11 remedy available to an employee or applicant for em-  
12 ployment in the civil service; and

13 “(3) any rule or regulation prescribed under  
14 any provision of law referred to in paragraph (1) or  
15 (2).

16 “(b) RULE OF CONSTRUCTION.—Nothing in this sec-  
17 tion shall be construed to affect any rights, apart from  
18 those described in subsection (a), to which an individual  
19 described in subsection (a) might otherwise be entitled  
20 under law.”.

21 (b) TECHNICAL AND CONFORMING AMENDMENT.—  
22 The table of sections for chapter 23 of title 5, United  
23 States Code, is amended by striking the items relating to  
24 sections 2304 and 2305, respectively, and inserting the  
25 following:



“2304. Prohibited personnel practices affecting the Transportation Security Administration.

“2305. Responsibility of the Government Accountability Office.

“2306. Coordination with certain other provisions of law.”.

1           (c) **EFFECTIVE DATE.**—The amendments made by  
2 this section shall take effect on the date of enactment of  
3 this section.

4 **SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RE-**  
5 **SEARCH, ANALYSIS, OR TECHNICAL INFOR-**  
6 **MATION.**

7           (a) **DEFINITIONS.**—In this subsection—

8                   (1) the term “agency” has the meaning given  
9 under section 2302(a)(2)(C) of title 5, United States  
10 Code;

11                   (2) the term “applicant” means an applicant  
12 for a covered position;

13                   (3) the term “censorship related to research,  
14 analysis, or technical information” means any effort  
15 to distort, misrepresent, or suppress research, anal-  
16 ysis, or technical information;

17                   (4) the term “covered position” has the mean-  
18 ing given under section 2302(a)(2)(B) of title 5,  
19 United States Code;

20                   (5) the term “employee” means an employee in  
21 a covered position in an agency; and

1           (6) the term “disclosure” has the meaning  
2 given under section 2302(a)(2)(D) of title 5, United  
3 States Code.

4           (b) PROTECTED DISCLOSURE.—

5           (1) IN GENERAL.—Any disclosure of informa-  
6 tion by an employee or applicant for employment  
7 that the employee or applicant reasonably believes is  
8 evidence of censorship related to research, analysis,  
9 or technical information—

10           (A) shall come within the protections of  
11 section 2302(b)(8)(A) of title 5, United States  
12 Code, if—

13           (i) the employee or applicant reason-  
14 ably believes that the censorship related to  
15 research, analysis, or technical information  
16 is or will cause—

17           (I) any violation of law, rule, or  
18 regulation; or

19           (II) gross mismanagement, a  
20 gross waste of funds, an abuse of au-  
21 thority, or a substantial and specific  
22 danger to public health or safety; and

23           (ii) such disclosure is not specifically  
24 prohibited by law or such information is  
25 not specifically required by Executive order

1 to be kept classified in the interest of na-  
2 tional defense or the conduct of foreign af-  
3 fairs; and

4 (B) shall come within the protections of  
5 section 2302(b)(8)(B) of title 5, United States  
6 Code, if—

7 (i) the employee or applicant reason-  
8 ably believes that the censorship related to  
9 research, analysis, or technical information  
10 is or will cause—

11 (I) any violation of law, rule, or  
12 regulation; or

13 (II) gross mismanagement, a  
14 gross waste of funds, an abuse of au-  
15 thority, or a substantial and specific  
16 danger to public health or safety; and

17 (ii) the disclosure is made to the Spe-  
18 cial Counsel, or to the Inspector General of  
19 an agency or another person designated by  
20 the head of the agency to receive such dis-  
21 closures, consistent with the protection of  
22 sources and methods.

23 (2) DISCLOSURES NOT EXCLUDED.—A dislo-  
24 sure shall not be excluded from paragraph (1) for

1 any reason described under section 2302(f)(1) or (2)  
2 of title 5, United States Code.

3 (3) **RULE OF CONSTRUCTION.**—Nothing in this  
4 section shall be construed to imply any limitation on  
5 the protections of employees and applicants afforded  
6 by any other provision of law, including protections  
7 with respect to any disclosure of information be-  
8 lieved to be evidence of censorship related to re-  
9 search, analysis, or technical information.

10 **SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS**  
11 **FOR CRITICAL INFRASTRUCTURE INFORMA-**  
12 **TION.**

13 Section 214(c) of the Homeland Security Act of 2002  
14 (6 U.S.C. 133(c)) is amended by adding at the end the  
15 following: “For purposes of this section a permissible use  
16 of independently obtained information includes the dislo-  
17 sure of such information under section 2302(b)(8) of title  
18 5, United States Code.”.

19 **SEC. 112. ADVISING EMPLOYEES OF RIGHTS.**

20 Section 2302(c) of title 5, United States Code, is  
21 amended by inserting “, including how to make a lawful  
22 disclosure of information that is specifically required by  
23 law or Executive order to be kept classified in the interest  
24 of national defense or the conduct of foreign affairs to the  
25 Special Counsel, the Inspector General of an agency, Con-

1 gress, or other agency employee designated to receive such  
2 disclosures” after “chapter 12 of this title”.

3 **SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEAR-**  
4 **ANCE.**

5 Section 1212 of title 5, United States Code, is  
6 amended by adding at the end the following:

7 “(h)(1) The Special Counsel is authorized to appear  
8 as amicus curiae in any action brought in a court of the  
9 United States related to section 2302(b) (8) or (9), or as  
10 otherwise authorized by law. In any such action, the Spe-  
11 cial Counsel is authorized to present the views of the Spe-  
12 cial Counsel with respect to compliance with section  
13 2302(b) (8) or (9) and the impact court decisions would  
14 have on the enforcement of such provisions of law.

15 “(2) A court of the United States shall grant the ap-  
16 plication of the Special Counsel to appear in any such ac-  
17 tion for the purposes described under subsection (a).”.

18 **SEC. 114. SCOPE OF DUE PROCESS.**

19 (a) SPECIAL COUNSEL.—Section 1214(b)(4)(B)(ii) of  
20 title 5, United States Code, is amended by inserting “,  
21 after a finding that a protected disclosure was a contrib-  
22 uting factor,” after “ordered if”.

23 (b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title  
24 5, United States Code, is amended by inserting “, after

1 a finding that a protected disclosure was a contributing  
2 factor,” after “ordered if”.

3 **SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**  
4 **MENTS.**

5 (a) IN GENERAL.—

6 (1) REQUIREMENT.—Each agreement in Stand-  
7 ard Forms 312 and 4414 of the Government and  
8 any other nondisclosure policy, form, or agreement  
9 of the Government shall contain the following state-  
10 ment: “These provisions are consistent with and do  
11 not supersede, conflict with, or otherwise alter the  
12 employee obligations, rights, or liabilities created by  
13 existing statute or Executive order relating to (1)  
14 classified information, (2) communications to Con-  
15 gress, (3) the reporting to an Inspector General of  
16 a violation of any law, rule, or regulation, or mis-  
17 management, a gross waste of funds, an abuse of  
18 authority, or a substantial and specific danger to  
19 public health or safety, or (4) any other whistle-  
20 blower protection. The definitions, requirements, ob-  
21 ligations, rights, sanctions, and liabilities created by  
22 controlling Executive orders and statutory provisions  
23 are incorporated into this agreement and are con-  
24 trolling.”.

1           (2) AGENCY WEBSITES.—Agencies making use  
2 of any nondisclosure policy, form, or agreement shall  
3 also post the statement required under paragraph  
4 (1) on the agency website, accompanied by the spe-  
5 cific list of controlling Executive orders and statu-  
6 tory provisions.

7           (3) ENFORCEABILITY.—

8           (A) IN GENERAL.—Any nondisclosure pol-  
9 icy, form, or agreement described under para-  
10 graph (1) that does not contain the statement  
11 required under paragraph (1) may not be im-  
12 plemented or enforced to the extent such policy,  
13 form, or agreement is inconsistent with that  
14 statement.

15           (B) NONDISCLOSURE POLICY, FORM, OR  
16 AGREEMENT IN EFFECT BEFORE THE EFFEC-  
17 TIVE DATE.—With respect to a nondisclosure  
18 policy, form, or agreement that was in effect  
19 before the effective date of this Act, but that  
20 does not contain the statement required under  
21 paragraph (1) for implementation or enforce-  
22 ment—

23                   (i) it shall not be a prohibited per-  
24 sonnel practice to enforce that policy,  
25 form, or agreement with regard to a cur-

1           rent employee if the agency gives such em-  
2           ployee notice of the statement; and

3                   (ii) it shall not be a prohibited per-  
4           sonnel practice to enforce that policy,  
5           form, or agreement after the effective date  
6           of this Act with regard to a former em-  
7           ployee if the agency complies with para-  
8           graph (2).

9           (b) PERSONS OTHER THAN GOVERNMENT EMPLOY-  
10       EES.—Notwithstanding subsection (a), a nondisclosure  
11       policy, form, or agreement that is to be executed by a per-  
12       son connected with the conduct of an intelligence or intel-  
13       ligence-related activity, other than an employee or officer  
14       of the United States Government, may contain provisions  
15       appropriate to the particular activity for which such docu-  
16       ment is to be used. Such policy, form, or agreement shall,  
17       at a minimum, require that the person will not disclose  
18       any classified information received in the course of such  
19       activity unless specifically authorized to do so by the  
20       United States Government. Such nondisclosure policy,  
21       form, or agreement shall also make it clear that such  
22       forms do not bar disclosures to Congress or to an author-  
23       ized official of an executive agency or the Department of  
24       Justice that are essential to reporting a substantial viola-



1 tion of law, consistent with the protection of sources and  
2 methods.

3 **SEC. 116. REPORTING REQUIREMENTS.**

4 (a) GOVERNMENT ACCOUNTABILITY OFFICE.—

5 (1) REPORT.—Not later than 4 years after the  
6 date of enactment of this Act, the Comptroller Gen-  
7 eral shall submit a report to the Committee on  
8 Homeland Security and Governmental Affairs of the  
9 Senate and the Committee on Oversight and Govern-  
10 ment Reform of the House of Representatives on the  
11 implementation of this title.

12 (2) CONTENTS.—The report under this sub-  
13 section shall include—

14 (A) an analysis of any changes in the num-  
15 ber of cases filed with the Merit Systems Pro-  
16 tection Board alleging violations of section  
17 2302(b)(8) or (9) of title 5, United States  
18 Code, since the effective date of this Act;

19 (B) the outcome of the cases described  
20 under subparagraph (A), including whether or  
21 not the Merit Systems Protection Board, the  
22 United States Court of Appeals for the Federal  
23 Circuit, or any other court determined the alle-  
24 gations to be frivolous or malicious as well as  
25 a recommendation whether Congress should

1 grant the Merit Systems Protection Board sum-  
2 mary judgment authority for cases described  
3 under subparagraph (A);

4 (C) a recommendation regarding whether  
5 Congress should grant jurisdiction for some  
6 subset of cases described under subparagraph  
7 (A) to be decided by a district court of the  
8 United States and an evaluation of the impact  
9 that would have on the Merit Systems Protec-  
10 tion Board and the Federal court system; and

11 (D) any other matter as determined by the  
12 Comptroller General.

13 (b) MERIT SYSTEMS PROTECTION BOARD.—

14 (1) IN GENERAL.—Each report submitted an-  
15 nually by the Merit Systems Protection Board under  
16 section 1116 of title 31, United States Code, shall,  
17 with respect to the period covered by such report, in-  
18 clude as an addendum the following:

19 (A) Information relating to the outcome of  
20 cases decided by the Merit Systems Protection  
21 Board during the period covered by such report  
22 in which violations of section 2302(b)(8) or  
23 (9)(A)(i), (B)(i), (C), or (D) of title 5, United  
24 States Code, were alleged.

1           (B) The number of such cases filed in the  
2 regional and field offices, and the number of pe-  
3 titions for review filed in such cases, during the  
4 period covered by such report, and the out-  
5 comes of any such cases or petitions for review  
6 (irrespective of when filed) decided during such  
7 period.

8           (2) **FIRST REPORT.**—The first report described  
9 under paragraph (1) submitted after the date of en-  
10 actment of this Act shall include an addendum re-  
11 quired under that paragraph that covers the period  
12 beginning on the effective date of this Act and end-  
13 ing at the end of the fiscal year in which such effec-  
14 tive date occurs.

15 **SEC. 117. WHISTLEBLOWER PROTECTION OMBUDSMAN.**

16           (a) **IN GENERAL.**—Section 3 of the Inspector General  
17 Act of 1978 (5 U.S.C. App.) is amended by striking sub-  
18 section (d) and inserting the following:

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

22           “(A) appoint an Assistant Inspector General for  
23 Auditing who shall have the responsibility for super-  
24 vising the performance of auditing activities relating  
25 to programs and operations of the establishment;

1           “(B) appoint an Assistant Inspector General for  
2           Investigations who shall have the responsibility for  
3           supervising the performance of investigative activi-  
4           ties relating to such programs and operations; and

5           “(C) designate a Whistleblower Protection Om-  
6           budsman who shall educate agency employees—

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

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

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

16          “(3) For the purposes of this section, the requirement  
17          of the designation of a Whistleblower Protection Ombuds-  
18          man under paragraph (1)(C) shall not apply to—

19                   “(A) any agency that is an element of the intel-  
20                   ligence community (as defined in section 3(4) of the  
21                   National Security Act of 1947 (50 U.S.C. 401a(4)));  
22                   or

23                   “(B) as determined by the President, any exec-  
24                   utive agency or unit thereof the principal function of

1 which is the conduct of foreign intelligence or  
2 counter intelligence activities.”.

3 (b) TECHNICAL AND CONFORMING AMENDMENT.—  
4 Section 8D(j) of the Inspector General Act of 1978 (5  
5 U.S.C. App.) is amended—

6 (1) by striking “section 3(d)(1)” and inserting  
7 “section 3(d)(1)(A)”; and

8 (2) by striking “section 3(d)(2)” and inserting  
9 “section 3(d)(1)(B)”.

10 (c) SUNSET.—

11 (1) IN GENERAL.—The amendments made by  
12 this section shall cease to have effect on the date  
13 that is 5 years after the date of enactment of this  
14 Act.

15 (2) RETURN TO PRIOR AUTHORITY.—Upon the  
16 date described in paragraph (1), section 3(d) and  
17 section 8D(j) of the Inspector General Act of 1978  
18 (5 U.S.C. App.) shall read as such sections read on  
19 the day before the date of enactment of this Act.

20 **TITLE II—SAVINGS CLAUSE;**  
21 **EFFECTIVE DATE**

22 **SEC. 201. SAVINGS CLAUSE.**

23 Nothing in this Act shall be construed to imply any  
24 limitation on any protections afforded by any other provi-  
25 sion of law to employees and applicants.

1 **SEC. 202. EFFECTIVE DATE.**

2       Except as otherwise provided in section 109, this Act  
3 shall take effect 30 days after the date of enactment of  
4 this Act.