

111TH CONGRESS
2^D SESSION

S. 372

AN ACT

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, 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 2010”.

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)—

14 (A) by striking “a violation” and inserting
15 “any violation”; and

16 (B) by adding “except for an alleged viola-

17 tion that is a minor, inadvertent violation, and

18 occurs during the conscientious carrying out of

19 official duties,” after “regulation,”; and

20 (2) in subparagraph (B)(i)—

21 (A) by striking “a violation” and inserting
22 “any violation (other than a violation of this

23 section)”; and

24 (B) by adding “except for an alleged viola-

25 tion that is a minor, inadvertent violation, and

1 occurs during the conscientious carrying out of
2 official duties,” after regulation,”.

3 (b) PROHIBITED PERSONNEL PRACTICES UNDER
4 SECTION 2302(b)(9).—

5 (1) TECHNICAL AND CONFORMING AMEND-
6 MENTS.—Title 5, United States Code, is amended in
7 subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of
8 section 1214, in subsections (a), (e)(1), and (i) of
9 section 1221, and in subsection (a)(2)(C)(i) of sec-
10 tion 2302, by inserting “or section 2302(b)(9)
11 (A)(i), (B), (C), or (D)” after “section 2302(b)(8)”
12 or “(b)(8)” each place it appears.

13 (2) OTHER REFERENCES.—(A) Title 5, United
14 States Code, is amended in subsection (b)(4)(B)(i)
15 of section 1214 and in subsection (e)(1) of section
16 1221, by inserting “or protected activity” after “dis-
17 closure” each place it appears.

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

20 (i) by striking subparagraph (A) and insert-
21 ing the following:

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

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

3 “(ii) with regard to remedying a viola-
4 tion of any other law, rule, or regulation;”;

5 and

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

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

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

12 “(A) the disclosure was made to a person, in-
13 cluding a supervisor, who participated in an activity
14 that the employee or applicant reasonably believed to
15 be covered by subsection (b)(8)(A)(ii);

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

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

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

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

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

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

9 **SEC. 102. DEFINITIONAL AMENDMENTS.**

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

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

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

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

17 “(D) ‘disclosure’ means a formal or informal
18 communication or transmission, but does not include
19 a communication concerning policy decisions that
20 lawfully exercise discretionary authority unless the
21 employee or applicant providing the disclosure rea-
22 sonably believes that the disclosure evidences—

23 “(i) any violation of any law, rule, or regu-
24 lation, except for an alleged violation that is a
25 minor, inadvertent violation, and occurs during

1 the conscientious carrying out of official duties;

2 or

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

6 **SEC. 103. REBUTTABLE PRESUMPTION.**

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

10 “This subsection shall not be construed to authorize the
11 withholding of information from Congress or the taking
12 of any personnel action against an employee who discloses
13 information to Congress. For purposes of paragraph (8),
14 any presumption relating to the performance of a duty by
15 an employee whose conduct is the subject of a disclosure
16 as defined under subsection (a)(2)(D) may be rebutted by
17 substantial evidence. For purposes of paragraph (8), a de-
18 termination as to whether an employee or applicant rea-
19 sonably believes that such employee or applicant has dis-
20 closed information that evidences any violation of law,
21 rule, regulation, gross mismanagement, a gross waste of
22 funds, an abuse of authority, or a substantial and specific
23 danger to public health or safety shall be made by deter-
24 mining whether a disinterested observer with knowledge
25 of the essential facts known to and readily ascertainable

1 by the employee could reasonably conclude that the actions
2 of the Government evidence such violations, mismanage-
3 ment, waste, abuse, or danger.”.

4 **SEC. 104. PERSONNEL ACTIONS AND PROHIBITED PER-**
5 **SONNEL PRACTICES.**

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

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

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

12 “(xi) the implementation or enforce-
13 ment of any nondisclosure policy, form, or
14 agreement; and”.

15 (b) **PROHIBITED PERSONNEL PRACTICE.**—

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

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

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

22 (C) by inserting after paragraph (12) the
23 following:

24 “(13) implement or enforce any nondisclosure
25 policy, form, or agreement, if such policy, form, or

1 agreement does not contain the following statement:
2 ‘These provisions are consistent with and do not su-
3 persede, conflict with, or otherwise alter the em-
4 ployee obligations, rights, or liabilities created by
5 Executive Order 13526 (75 Fed. Reg. 707; relating
6 to classified national security information), or any
7 successor thereto; Executive Order 12968 (60 Fed.
8 Reg. 40245; relating to access to classified informa-
9 tion), or any successor thereto; section 7211 of title
10 5, United States Code (governing disclosures to Con-
11 gress); section 1034 of title 10, United States Code
12 (governing disclosure to Congress by members of the
13 military); section 2302(b)(8) of title 5, United
14 States Code (governing disclosures of illegality,
15 waste, fraud, abuse, or public health or safety
16 threats); the Intelligence Identities Protection Act of
17 1982 (50 U.S.C. 421 et seq.) (governing disclosures
18 that could expose confidential Government agents);
19 and the statutes which protect against disclosures
20 that could compromise national security, including
21 sections 641, 793, 794, 798, and 952 of title 18,
22 United States Code, and section 4(b) of the Subver-
23 sive Activities Control Act of 1950 (50 U.S.C.
24 783(b)). The definitions, requirements, obligations,
25 rights, sanctions, and liabilities created by such Ex-

1 ecutive order and such statutory provisions are in-
2 corporated into this agreement and are control-
3 ling.’”.

4 (2) NONDISCLOSURE POLICY, FORM, OR AGREE-
5 MENT IN EFFECT BEFORE THE DATE OF ENACT-
6 MENT.—A nondisclosure policy, form, or agreement
7 that was in effect before the date of enactment of
8 this Act, but that does not contain the statement re-
9 quired under section 2302(b)(13) of title 5, United
10 States Code, (as added by this Act) for implementa-
11 tion or enforcement—

12 (A) may be enforced with regard to a cur-
13 rent employee if the agency gives such employee
14 notice of the statement; and

15 (B) may continue to be enforced after the
16 effective date of this Act with regard to a
17 former employee if the agency posts notice of
18 the statement on the agency website for the 1-
19 year period following that effective date.

20 (c) RETALIATORY INVESTIGATIONS.—

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

24 “(h) Any corrective action ordered under this section
25 to correct a prohibited personnel practice may include fees,

1 costs, or damages reasonably incurred due to an agency
2 investigation of the employee, if such investigation was
3 commenced, expanded, or extended in retaliation for the
4 disclosure or protected activity that formed the basis of
5 the corrective action.”.

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

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

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

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

21 “(ii)(I) the Federal Bureau of Inves-
22 tigation, the Central Intelligence Agency,
23 the Defense Intelligence Agency, the Na-
24 tional Geospatial-Intelligence Agency, the
25 National Security Agency, the Office of the

1 Director of National Intelligence, and the
2 National Reconnaissance Office; and

3 “(II) as determined by the President,
4 any executive agency or unit thereof the
5 principal function of which is the conduct
6 of foreign intelligence or counterintel-
7 ligence activities, provided that the deter-
8 mination be made prior to a personnel ac-
9 tion; or”.

10 **SEC. 106. DISCIPLINARY ACTION.**

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

13 “(3)(A) A final order of the Board may im-
14 pose—

15 “(i) disciplinary action consisting of re-
16 moval, reduction in grade, debarment from
17 Federal employment for a period not to exceed
18 5 years, suspension, or reprimand;

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

21 “(iii) any combination of disciplinary ac-
22 tions described under clause (i) and an assess-
23 ment described under clause (ii).

24 “(B) In any case brought under paragraph (1)
25 in which the Board finds that an employee has com-

1 mitted a prohibited personnel practice under section
2 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D),
3 the Board may impose disciplinary action if the
4 Board finds that the activity protected under section
5 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D)
6 was a significant motivating factor, even if other fac-
7 tors also motivated the decision, for the employee’s
8 decision to take, fail to take, or threaten to take or
9 fail to take a personnel action, unless that employee
10 demonstrates, by preponderance of evidence, that
11 the employee would have taken, failed to take, or
12 threatened to take or fail to take the same personnel
13 action, in the absence of such protected activity.”.

14 **SEC. 107. REMEDIES.**

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

20 (b) **DAMAGES.**—Sections 1214(g)(2) and
21 1221(g)(1)(A)(ii) of title 5, United States Code, are
22 amended by striking all after “travel expenses,” and in-
23 serting “any other reasonable and foreseeable consequen-
24 tial damages, and compensatory damages (including inter-

1 est, reasonable expert witness fees, and costs).” each place
2 it appears.

3 **SEC. 108. JUDICIAL REVIEW.**

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

7 “(b)(1)(A) Except as provided in subparagraph (B)
8 and paragraph (2) of this subsection, a petition to review
9 a final order or final decision of the Board shall be filed
10 in the United States Court of Appeals for the Federal Cir-
11 cuit. Notwithstanding any other provision of law, any peti-
12 tion for review shall be filed within 60 days after the
13 Board issues notice of the final order or decision of the
14 Board.

15 “(B) During the 5-year period beginning on the effec-
16 tive date of the Whistleblower Protection Enhancement
17 Act of 2010, a petition to review a final order or final
18 decision of the Board that raises no challenge to the
19 Board’s disposition of allegations of a prohibited personnel
20 practice described in section 2302(b) other than practices
21 described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B),
22 (C), or (D) shall be filed in the United States Court of
23 Appeals for the Federal Circuit or any court of appeals
24 of competent jurisdiction as provided under paragraph
25 (2).”.

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

4 “(d)(1) Except as provided under paragraph (2), this
5 paragraph shall apply to any review obtained by the Direc-
6 tor of the Office of Personnel Management. The Director
7 of the Office of Personnel Management may obtain review
8 of any final order or decision of the Board by filing, within
9 60 days after the Board issues notice of the final order
10 or decision of the Board, a petition for judicial review in
11 the United States Court of Appeals for the Federal Circuit
12 if the Director determines, in the discretion of the Direc-
13 tor, that the Board erred in interpreting a civil service
14 law, rule, or regulation affecting personnel management
15 and that the Board’s decision will have a substantial im-
16 pact on a civil service law, rule, regulation, or policy direc-
17 tive. If the Director did not intervene in a matter before
18 the Board, the Director may not petition for review of a
19 Board decision under this section unless the Director first
20 petitions the Board for a reconsideration of its decision,
21 and such petition is denied. In addition to the named re-
22 spondent, the Board and all other parties to the pro-
23 ceedings before the Board shall have the right to appear
24 in the proceeding before the Court of Appeals. The grant-

1 ing of the petition for judicial review shall be at the discre-
2 tion of the Court of Appeals.

3 “(2) During the 5-year period beginning on the effec-
4 tive date of the Whistleblower Protection Enhancement
5 Act of 2010, this paragraph shall apply to any review ob-
6 tained by the Director of the Office of Personnel Manage-
7 ment that raises no challenge to the Board’s disposition
8 of allegations of a prohibited personnel practice described
9 in section 2302(b) other than practices described in sec-
10 tion 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D).
11 The Director of the Office of Personnel Management may
12 obtain review of any final order or decision of the Board
13 by filing, within 60 days after the Board issues notice of
14 the final order or decision of the Board, a petition for judi-
15 cial review in the United States Court of Appeals for the
16 Federal Circuit or any court of appeals of competent juris-
17 diction as provided under subsection (b)(2) if the Director
18 determines, in the discretion of the Director, that the
19 Board erred in interpreting a civil service law, rule, or reg-
20 ulation affecting personnel management and that the
21 Board’s decision will have a substantial impact on a civil
22 service law, rule, regulation, or policy directive. If the Di-
23 rector did not intervene in a matter before the Board, the
24 Director may not petition for review of a Board decision
25 under this section unless the Director first petitions the

1 Board for a reconsideration of its decision, and such peti-
 2 tion is denied. In addition to the named respondent, the
 3 Board and all other parties to the proceedings before the
 4 Board shall have the right to appear in the proceeding
 5 before the court of appeals. The granting of the petition
 6 for judicial review shall be at the discretion of the court
 7 of appeals.”.

8 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**
 9 **THE TRANSPORTATION SECURITY ADMINIS-**
 10 **TRATION.**

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

13 (1) by redesignating sections 2304 and 2305 as
 14 sections 2305 and 2306, respectively; and

15 (2) by inserting after section 2303 the fol-
 16 lowing:

17 **“§ 2304. Prohibited personnel practices affecting the**
 18 **Transportation Security Administration**

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

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

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

5 “(3) any rule or regulation prescribed under
6 any provision of law referred to in paragraph (1) or
7 (2).

8 “(b) RULE OF CONSTRUCTION.—Nothing in this sec-
9 tion shall be construed to affect any rights, apart from
10 those described in subsection (a), to which an individual
11 described in subsection (a) might otherwise be entitled
12 under law.”.

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

 “2304. Prohibited personnel practices affecting the Transportation Security Ad-
 ministration.

 “2305. Responsibility of the Government Accountability Office.

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

18 (c) EFFECTIVE DATE.—The amendments made by
19 this section shall take effect on the date of enactment of
20 this section.

1 **SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RE-**
2 **SEARCH, ANALYSIS, OR TECHNICAL INFOR-**
3 **MATION.**

4 (a) DEFINITIONS.—In this subsection—

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

8 (2) the term “applicant” means an applicant
9 for a covered position;

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

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

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

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

22 (b) PROTECTED DISCLOSURE.—

23 (1) IN GENERAL.—Any disclosure of informa-
24 tion by an employee or applicant for employment
25 that the employee or applicant reasonably believes is

1 evidence of censorship related to research, analysis,
2 or technical information—

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

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

10 (I) any violation of law, rule, or
11 regulation, except for an alleged viola-
12 tion that is a minor, inadvertent viola-
13 tion, and occurs during the conscien-
14 tious carrying out of official duties; or

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

19 (ii) such disclosure is not specifically
20 prohibited by law or such information is
21 not specifically required by Executive order
22 to be kept classified in the interest of na-
23 tional defense or the conduct of foreign af-
24 fairs; and

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

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

8 (I) any violation of law, rule, or
9 regulation, except for an alleged viola-
10 tion that is a minor, inadvertent viola-
11 tion, and occurs during the conscien-
12 tious carrying out of official duties; 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 diselo-
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 disclo-
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(e) 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 any civil action brought in con-
10 nection with section 2302(b) (8) or (9), or as otherwise
11 authorized by law. In any such action, the Special Counsel
12 is authorized to present the views of the Special Counsel
13 with respect to compliance with section 2302(b) (8) or (9)
14 and the impact court decisions would have on the enforce-
15 ment of such provisions of law.

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

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

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

24 (b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title
25 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 restrictions are consistent with and do
11 not supersede, conflict with, or otherwise alter the
12 employee obligations, rights, or liabilities created by
13 Executive Order 13526 (75 Fed. Reg. 707; relating
14 to classified national security information), or any
15 successor thereto; Executive Order 12968 (60 Fed.
16 Reg. 40245; relating to access to classified informa-
17 tion), or any successor thereto; section 7211 of title
18 5, United States Code (governing disclosures to Con-
19 gress); section 1034 of title 10, United States Code
20 (governing disclosure to Congress by members of the
21 military); section 2302(b)(8) of title 5, United
22 States Code (governing disclosures of illegality,
23 waste, fraud, abuse, or public health or safety
24 threats); the Intelligence Identities Protection Act of
25 1982 (50 U.S.C. 421 et seq.) (governing disclosures

1 that could expose confidential Government agents);
2 and the statutes which protect against disclosure
3 that may compromise the national security, includ-
4 ing sections 641, 793, 794, 798, and 952 of title 18,
5 United States Code, and section 4(b) of the Subver-
6 sive Activities Act of 1950 (50 U.S.C. 783(b)). The
7 definitions, requirements, obligations, rights, sanc-
8 tions, and liabilities created by such Executive order
9 and such statutory provisions are incorporated into
10 this agreement and are controlling.”

11 (2) ENFORCEABILITY.—

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

19 (B) NONDISCLOSURE POLICY, FORM, OR
20 AGREEMENT IN EFFECT BEFORE THE DATE OF
21 ENACTMENT.—A nondisclosure policy, form, or
22 agreement that was in effect before the date of
23 enactment of this Act, but that does not con-
24 tain the statement required under paragraph
25 (1)—

1 (i) may be enforced with regard to a
2 current employee if the agency gives such
3 employee notice of the statement; and

4 (ii) may continue to be enforced after
5 the effective date of this Act with regard
6 to a former employee if the agency posts
7 notice of the statement on the agency
8 website for the 1-year period following that
9 effective date.

10 (b) PERSONS OTHER THAN GOVERNMENT EMPLOY-
11 EES.—Notwithstanding subsection (a), a nondisclosure
12 policy, form, or agreement that is to be executed by a per-
13 son connected with the conduct of an intelligence or intel-
14 ligence-related activity, other than an employee or officer
15 of the United States Government, may contain provisions
16 appropriate to the particular activity for which such docu-
17 ment is to be used. Such policy, form, or agreement shall,
18 at a minimum, require that the person will not disclose
19 any classified information received in the course of such
20 activity unless specifically authorized to do so by the
21 United States Government. Such nondisclosure policy,
22 form, or agreement shall also make it clear that such
23 forms do not bar disclosures to Congress or to an author-
24 ized official of an executive agency or the Department of
25 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 40 months after
6 the date of enactment of this Act, the Comptroller
7 General 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 para-
13 graph shall include—

14 (A) an analysis of any changes in the num-
15 ber of cases filed with the United States Merit
16 Systems Protection Board alleging violations of
17 section 2302(b) (8) or (9) of title 5, United
18 States 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 United States Merit Systems Protection
22 Board, the Federal Circuit Court of Appeals, or
23 any other court determined the allegations to be
24 frivolous or malicious;

1 (C) an analysis of the outcome of cases de-
2 scribed under subparagraph (A) that were de-
3 cided by a United States District Court and the
4 impact the process has on the Merit Systems
5 Protection Board and the Federal court system;
6 and

7 (D) any other matter as determined by the
8 Comptroller General.

9 (b) MERIT SYSTEMS PROTECTION BOARD.—

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

15 (A) Information relating to the outcome of
16 cases decided during the applicable year of the
17 report in which violations of section 2302(b) (8)
18 or (9) (A)(i), (B)(i), (C), or (D) of title 5,
19 United States Code, were alleged.

20 (B) The number of such cases filed in the
21 regional and field offices, the number of peti-
22 tions for review filed in such cases, and the out-
23 comes of such cases.

24 (2) FIRST REPORT.—The first report described
25 under paragraph (1) submitted after the date of en-

1 actment of this Act shall include an addendum re-
2 quired under that subparagraph that covers the pe-
3 riod beginning on January 1, 2009 through the end
4 of the fiscal year 2009.

5 **SEC. 117. ALTERNATIVE REVIEW.**

6 (a) IN GENERAL.—Section 1221 of title 5, United
7 States Code, is amended by adding at the end the fol-
8 lowing:

9 “(k)(1) In this subsection, the term ‘appropriate
10 United States district court’, as used with respect to an
11 alleged prohibited personnel practice, means the United
12 States district court for the judicial district in which—

13 “(A) the prohibited personnel practice is alleged
14 to have been committed; or

15 “(B) the employee, former employee, or appli-
16 cant for employment allegedly affected by such prac-
17 tice resides.

18 “(2)(A) An employee, former employee, or applicant
19 for employment in any case to which paragraph (3) or (4)
20 applies may file an action at law or equity for de novo
21 review in the appropriate United States district court in
22 accordance with this subsection.

23 “(B) Upon initiation of any action under subpara-
24 graph (A), the Board shall stay any other claims of such
25 employee, former employee, or applicant pending before

1 the Board at that time which arise out of the same set
2 of operative facts. Such claims shall be stayed pending
3 completion of the action filed under subparagraph (A) be-
4 fore the appropriate United States district court and any
5 associated appellate review.

6 “(3) This paragraph applies in any case in which—

7 “(A) an employee, former employee, or appli-
8 cant for employment—

9 “(i) seeks corrective action from the Merit
10 Systems Protection Board under section
11 1221(a) based on an alleged prohibited per-
12 sonnel practice described in section 2302(b) (8)
13 or (9) (A)(i), (B), (C), or (D) for which the as-
14 sociated personnel action is an action covered
15 under section 7512 or 7542; or

16 “(ii) files an appeal under section 7701(a)
17 alleging as an affirmative defense the commis-
18 sion of a prohibited personnel practice described
19 in section 2302(b) (8) or (9) (A)(i), (B), (C),
20 or (D) for which the associated personnel action
21 is an action covered under section 7512 or
22 7542;

23 “(B) no final order or decision is issued by the
24 Board within 270 days after the date on which a re-
25 quest for that corrective action or appeal has been

1 duly submitted, unless the Board determines that
2 the employee, former employee, or applicant for em-
3 ployment engaged in conduct intended to delay the
4 issuance of a final order or decision by the Board;
5 and

6 “(C) such employee, former employee, or appli-
7 cant provides written notice to the Board of filing an
8 action under this subsection before the filing of that
9 action.

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

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

13 “(i) seeks corrective action from the Merit Sys-
14 tems Protection Board under section 1221(a) based
15 on an alleged prohibited personnel practice described
16 in section 2302(b) (8) or (9) (A)(i), (B), (C), or (D)
17 for which the associated personnel action is an ac-
18 tion covered under section 7512 or 7542; or

19 “(ii) files an appeal under section 7701(a)(1)
20 alleging as an affirmative defense the commission of
21 a prohibited personnel practice described in section
22 2302(b) (8) or (9) (A)(i), (B), (C), or (D) for which
23 the associated personnel action is an action covered
24 under section 7512 or 7542;

1 “(B)(i) within 30 days after the date on which the
2 request for corrective action or appeal was duly submitted,
3 such employee, former employee, or applicant for employ-
4 ment files a motion requesting a certification consistent
5 with subparagraph (C) to the Board, any administrative
6 law judge appointed by the Board under section 3105 of
7 this title and assigned to the case, or any employee of the
8 Board designated by the Board and assigned to the case;
9 and

10 “(ii) such employee has not previously filed a motion
11 under clause (i) related to that request for corrective ac-
12 tion; and

13 “(C) the Board, any administrative law judge ap-
14 pointed by the Board under section 3105 of this title and
15 assigned to the case, or any employee of the Board des-
16 ignated by the Board and assigned to the case certifies
17 that—

18 “(i) under standard applicable to the review of
19 motions to dismiss under rule 12(b)(6) of the Fed-
20 eral Rules of Civil Procedure, including rule 12(d),
21 the request for corrective action (including any alle-
22 gations made with the motion under subparagraph
23 (B)) would not be subject to dismissal; and

24 “(ii)(I) the Board is not likely to dispose of the
25 case within 270 days after the date on which a re-

1 quest for that corrective action has been duly sub-
2 mitted; or

3 “(II) the case—

4 “(aa) consists of multiple claims;

5 “(bb) requires complex or extensive
6 discovery;

7 “(cc) arises out of the same set of op-
8 erative facts as any civil action against the
9 Government filed by the employee, former
10 employee, or applicant pending in a Fed-
11 eral court; or

12 “(dd) involves a novel question of law.

13 “(5) The Board shall grant or deny any motion re-
14 questing a certification described under paragraph (4)(ii)
15 within 90 days after the submission of such motion and
16 the Board may not issue a decision on the merits of a
17 request for corrective action within 15 days after granting
18 or denying a motion requesting certification.

19 “(6)(A) Any decision of the Board, any administra-
20 tive law judge appointed by the Board under section 3105
21 of this title and assigned to the case, or any employee of
22 the Board designated by the Board and assigned to the
23 case to grant or deny a certification described under para-
24 graph (4)(ii) shall be reviewed on appeal of a final order
25 or decision of the Board under section 7703 only if—

1 “(i) a motion requesting a certification was de-
2 nied; and

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

6 “(B) The decision to deny the certification shall be
7 overturned by the reviewing court, and an order granting
8 certification shall be issued by the reviewing court, if such
9 decision is found to be arbitrary, capricious, or an abuse
10 of discretion.

11 “(C) The reviewing court’s decision shall not be con-
12 sidered evidence of any determination by the Board, any
13 administrative law judge appointed by the Board under
14 section 3105 of this title, or any employee of the Board
15 designated by the Board on the merits of the underlying
16 allegations during the course of any action at law or equity
17 for de novo review in the appropriate United States dis-
18 trict court in accordance with this subsection.

19 “(7) In any action filed under this subsection—

20 “(A) the district court shall have jurisdiction
21 without regard to the amount in controversy;

22 “(B) at the request of either party, such action
23 shall be tried by the court with a jury;

24 “(C) the court—

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

3 “(ii) may award any relief which the court
4 considers appropriate under subsection (g), ex-
5 cept—

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

8 “(II) relief may not include punitive
9 damages; and

10 “(iii) notwithstanding subsection (e)(2),
11 may not order relief if the agency demonstrates
12 by a preponderance of the evidence that the
13 agency would have taken the same personnel
14 action in the absence of such disclosure; and

15 “(D) the Special Counsel may not represent the
16 employee, former employee, or applicant for employ-
17 ment.

18 “(8) An appeal from a final decision of a district
19 court in an action under this subsection shall be taken
20 to the Court of Appeals for the Federal Circuit or any
21 court of appeals of competent jurisdiction.

22 “(9) This subsection applies with respect to any ap-
23 peal, petition, or other request for corrective action duly
24 submitted to the Board, whether under section
25 1214(b)(2), the preceding provisions of this section, sec-

1 tion 7513(d), section 7701, or any otherwise applicable
2 provisions of law, rule, or regulation.”.

3 (b) SUNSET.—

4 (1) IN GENERAL.—Except as provided under
5 paragraph (2), the amendments made by this section
6 shall cease to have effect 5 years after the effective
7 date of this Act.

8 (2) PENDING CLAIMS.—The amendments made
9 by this section shall continue to apply with respect
10 to any claim pending before the Board on the last
11 day of the 5-year period described under paragraph
12 (1).

13 **SEC. 118. MERIT SYSTEMS PROTECTION BOARD SUMMARY**

14 **JUDGMENT.**

15 (a) IN GENERAL.—Section 1204(b) of title 5, United
16 States Code, is amended—

17 (1) by redesignating paragraph (3) as para-
18 graph (4);

19 (2) by inserting after paragraph (2) the fol-
20 lowing:

21 “(3) With respect to a request for corrective ac-
22 tion based on an alleged prohibited personnel prac-
23 tice described in section 2302(b) (8) or (9) (A)(i),
24 (B), (C), or (D) for which the associated personnel
25 action is an action covered under section 7512 or

1 7542, the Board, any administrative law judge ap-
2 pointed by the Board under section 3105 of this
3 title, or any employee of the Board designated by
4 the Board may, with respect to any party, grant a
5 motion for summary judgment when the Board or
6 the administrative law judge determines that there is
7 no genuine issue as to any material fact and that
8 the moving party is entitled to a judgment as a mat-
9 ter of law.”.

10 (b) SUNSET.—

11 (1) IN GENERAL.—Except as provided under
12 paragraph (2), the amendments made by this section
13 shall cease to have effect 5 years after the effective
14 date of this Act.

15 (2) PENDING CLAIMS.—The amendments made
16 by this section shall continue to apply with respect
17 to any claim pending before the Board on the last
18 day of the 5-year period described under paragraph
19 (1).

20 **SEC. 119. DISCLOSURES OF CLASSIFIED INFORMATION.**

21 (a) PROHIBITED PERSONNEL PRACTICES.—Section
22 2302(b)(8) of title 5, United States Code, is amended—

23 (1) in subparagraph (A), by striking “or” after
24 the semicolon;

1 (2) in subparagraph (B), by adding “or” after
2 the semicolon; and

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

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

8 (b) INSPECTOR GENERAL ACT OF 1978.—Section 8H
9 of the Inspector General Act of 1978 (5 U.S.C. App) is
10 amended—

11 (1) in subsection (a)(1), by adding at the end
12 the following:

13 “(D) An employee of any agency, as that
14 term is defined under section 2302(a)(2)(C) of
15 title 5, United States Code, who intends to re-
16 port to Congress a complaint or information
17 with respect to an urgent concern may report
18 the complaint or information to the Inspector
19 General (or designee) of the agency of which
20 that employee is employed.”;

21 (2) in subsection (c), by striking “intelligence
22 committees” and inserting “appropriate commit-
23 tees”;

24 (3) in subsection (d)—

1 (A) in paragraph (1), by striking “either
2 or both of the intelligence committees” and in-
3 serting “any of the appropriate committees”;
4 and

5 (B) in paragraphs (2) and (3), by striking
6 “intelligence committees” each place that term
7 appears and inserting “appropriate commit-
8 tees”;

9 (4) in subsection (h)—

10 (A) in paragraph (1)—

11 (i) in subparagraph (A), by striking
12 “intelligence”; and

13 (ii) in subparagraph (B), by inserting
14 “or an activity involving classified informa-
15 tion” after “an intelligence activity”; and

16 (B) by striking paragraph (2), and insert-
17 ing the following:

18 “(2) The term ‘appropriate committees’ means
19 the Permanent Select Committee on Intelligence of
20 the House of Representatives and the Select Com-
21 mittee on Intelligence of the Senate, except that with
22 respect to disclosures made by employees described
23 in subsection (a)(1)(D), the term ‘appropriate com-
24 mittees’ means the committees of appropriate juris-
25 diction.”.

1 **SEC. 120. WHISTLEBLOWER PROTECTION OMBUDSMAN.**

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

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

8 “(A) appoint an Assistant Inspector General for
9 Auditing who shall have the responsibility for super-
10 vising the performance of auditing activities relating
11 to programs and operations of the establishment;

12 “(B) appoint an Assistant Inspector General for
13 Investigations who shall have the responsibility for
14 supervising the performance of investigative activi-
15 ties relating to such programs and operations; and

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

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

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

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

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

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

8 “(B) as determined by the President, any exec-
9 utive agency or unit thereof the principal function of
10 which is the conduct of foreign intelligence or
11 counter intelligence activities.”.

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

15 (1) by striking “section 3(d)(1)” and inserting
16 “section 3(d)(1)(A)”; and

17 (2) by striking “section 3(d)(2)” and inserting
18 “section 3(d)(1)(B)”.

19 (c) SUNSET.—

20 (1) IN GENERAL.—The amendments made by
21 this section shall cease to have effect on the date
22 that is 5 years after the date of enactment of this
23 Act.

24 (2) RETURN TO PRIOR AUTHORITY.—Upon the
25 date described in paragraph (1), section 3(d) and

1 section 8D(j) of the Inspector General Act of 1978
 2 (5 U.S.C. App.) shall read as such sections read on
 3 the day before the date of enactment of this Act.

4 **TITLE II—INTELLIGENCE COM-**
 5 **MUNITY WHISTLEBLOWER**
 6 **PROTECTIONS**

7 **SEC. 201. PROTECTION OF INTELLIGENCE COMMUNITY**
 8 **WHISTLEBLOWERS.**

9 (a) IN GENERAL.—Chapter 23 of title 5, United
 10 States Code, is amended by inserting after section 2303
 11 the following:

12 **“§ 2303A. Prohibited personnel practices in the intel-**
 13 **ligence community**

14 “(a) DEFINITIONS.—In this section—

15 “(1) the term ‘agency’ means an executive de-
 16 partment or independent establishment, as defined
 17 under sections 101 and 104, that contains an intel-
 18 ligence community element, except the Federal Bu-
 19 reau of Investigation;

20 “(2) the term ‘intelligence community ele-
 21 ment’—

22 “(A) means—

23 “(i) the Central Intelligence Agency,
 24 the Defense Intelligence Agency, the Na-
 25 tional Geospatial-Intelligence Agency, the

1 National Security Agency, the Office of the
2 Director of National Intelligence, and the
3 National Reconnaissance Office; and

4 “(ii) any executive agency or unit
5 thereof determined by the President under
6 section 2302(a)(2)(C)(ii) of title 5, United
7 States Code, to have as its principal func-
8 tion the conduct of foreign intelligence or
9 counterintelligence activities; and

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

12 “(3) the term ‘personnel action’ means any ac-
13 tion described in clauses (i) through (x) of section
14 2302(a)(2)(A) with respect to an employee in a posi-
15 tion in an intelligence community element (other
16 than a position of a confidential, policy-determining,
17 policymaking, or policy-advocating character).

18 “(b) IN GENERAL.—Any employee of an agency who
19 has authority to take, direct others to take, recommend,
20 or approve any personnel action, shall not, with respect
21 to such authority, take or fail to take a personnel action
22 with respect to any employee of an intelligence community
23 element as a reprisal for a disclosure of information by
24 the employee to the Director of National Intelligence (or
25 an employee designated by the Director of National Intel-

1 ligen­ce for such purpose), or to the head of the employ­ing
2 agency (or an employ­ee designat­ed by the head of that
3 agency for such purpose), which the employ­ee reason­ably
4 believes evidences—

5 “(1) a viola­tion of any law, rule, or regula­tion,
6 except for an alleged viola­tion that—

7 “(A) is a minor, inadvertent viola­tion; and

8 “(B) occurs dur­ing the conscien­tious car­
9 rying out of official duties; or

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

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

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

18 “(1) preempt or preclude any employ­ee, or ap­
19 plicant for employ­ment, at the Fed­eral Bureau of
20 Investigation from exer­cising rights cur­rently pro­
21 vided under any other law, rule, or regula­tion, in­
22 clud­ing sec­tion 2303;

23 “(2) repeal sec­tion 2303; or

24 “(3) provide the Pres­ident or Direc­tor of Na­
25 tional Intel­ligence the author­ity to revise regula­tions

1 related to section 2303, codified in part 27 of the
2 Code of Federal Regulations.”.

3 (b) TECHNICAL AND CONFORMING AMENDMENT.—
4 The table of sections for chapter 23 of title 5, United
5 States Code, is amended by inserting after the item relat-
6 ing to section 2303 the following:

“2303A. Prohibited personnel practices in the intelligence community.”.

7 **SEC. 202. REVIEW OF SECURITY CLEARANCE OR ACCESS**
8 **DETERMINATIONS.**

9 (a) IN GENERAL.—Section 3001(b) of the Intel-
10 ligence Reform and Terrorism Prevention Act of 2004 (50
11 U.S.C. 435b(b)) is amended—

12 (1) in the matter preceding paragraph (1), by
13 striking “Not” and inserting “Except as otherwise
14 provided, not”;

15 (2) in paragraph (5), by striking “and” after
16 the semicolon;

17 (3) in paragraph (6), by striking the period at
18 the end and inserting “; and”; and

19 (4) by inserting after paragraph (6) the fol-
20 lowing:

21 “(7) not later than 180 days after the date of
22 enactment of the Whistleblower Protection Enhance-
23 ment Act of 2010—

24 “(A) developing policies and procedures
25 that permit, to the extent practicable, individ-

1 uals who challenge in good faith a determina-
2 tion to suspend or revoke a security clearance
3 or access to classified information to retain
4 their government employment status while such
5 challenge is pending; and

6 “(B) developing and implementing uniform
7 and consistent policies and procedures to ensure
8 proper protections during the process for deny-
9 ing, suspending, or revoking a security clear-
10 ance or access to classified information, includ-
11 ing the provision of a right to appeal such a de-
12 nial, suspension, or revocation, except that
13 there shall be no appeal of an agency’s suspen-
14 sion of a security clearance or access determina-
15 tion for purposes of conducting an investiga-
16 tion, if that suspension lasts no longer than 1
17 year or the head of the agency certifies that a
18 longer suspension is needed before a final deci-
19 sion on denial or revocation to prevent immi-
20 nent harm to the national security.

21 “Any limitation period applicable to an agency
22 appeal under paragraph (7) shall be tolled until the
23 head of the agency (or in the case of any component
24 of the Department of Defense, the Secretary of De-
25 fense) determines, with the concurrence of the Di-

1 rector of National Intelligence, that the policies and
2 procedures described in paragraph (7) have been es-
3 tablished for the agency or the Director of National
4 Intelligence promulgates the policies and procedures
5 under paragraph (7). The policies and procedures
6 for appeals developed under paragraph (7) shall be
7 comparable to the policies and procedures pertaining
8 to prohibited personnel practices defined under sec-
9 tion 2302(b)(8) of title 5, United States Code, and
10 provide—

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

13 “(B) for notice and the opportunity to be
14 heard, including the opportunity to present rel-
15 evant evidence, including witness testimony;

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

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

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

1 “(i) the employee and the agency con-
2 cerned agree to an extension; or

3 “(ii) the impartial fact-finder deter-
4 mines in writing that a greater period of
5 time is required in the interest of fairness
6 or national security;

7 “(F) for the use of information specifically
8 required by Executive order to be kept classified
9 in the interest of national defense or the con-
10 duct of foreign affairs in a manner consistent
11 with the interests of national security, including
12 ex parte submissions if the agency determines
13 that the interests of national security so war-
14 rant; and

15 “(G) that the employee or former employee
16 shall have no right to compel the production of
17 information specifically required by Executive
18 order to be kept classified in the interest of na-
19 tional defense or the conduct of foreign affairs,
20 except evidence necessary to establish that the
21 employee made the disclosure or communication
22 such employee alleges was protected by sub-
23 paragraphs (A), (B), and (C) of subsection
24 (j)(1).”.

1 (b) RETALIATORY REVOCATION OF SECURITY
2 CLEARANCES AND ACCESS DETERMINATIONS.—Section
3 3001 of the Intelligence Reform and Terrorism Prevention
4 Act of 2004 (50 U.S.C. 435b) is amended by adding at
5 the end the following:

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

8 “(1) IN GENERAL.—Agency personnel with au-
9 thority over personnel security clearance or access
10 determinations shall not take or fail to take, or
11 threaten to take or fail to take, any action with re-
12 spect to any employee’s security clearance or access
13 determination because of—

14 “(A) any disclosure of information to the
15 Director of National Intelligence (or an em-
16 ployee designated by the Director of National
17 Intelligence for such purpose) or the head of
18 the employing agency (or employee designated
19 by the head of that agency for such purpose) by
20 an employee that the employee reasonably be-
21 lieves evidences—

22 “(i) a violation of any law, rule, or
23 regulation, except for an alleged violation
24 that is a minor, inadvertent violation, and

1 occurs during the conscientious carrying
2 out of official duties; or

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

7 “(B) any disclosure to the Inspector Gen-
8 eral of an agency or another employee des-
9 igned by the head of the agency to receive
10 such disclosures, of information which the em-
11 ployee reasonably believes evidences—

12 “(i) a violation of any law, rule, or
13 regulation, except for an alleged violation
14 that is a minor, inadvertent violation, and
15 occurs during the conscientious carrying
16 out of official duties; or

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

21 “(C) any communication that complies
22 with—

23 “(i) subsection (a)(1), (d), or (h) of
24 section 8H of the Inspector General Act of
25 1978 (5 U.S.C. App.);

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

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

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

10 “(E) testifying for or otherwise lawfully as-
11 sisting any individual in the exercise of any
12 right referred to in subparagraph (D); or

13 “(F) cooperating with or disclosing infor-
14 mation to the Inspector General of an agency,
15 in accordance with applicable provisions of law
16 in connection with an audit, inspection, or in-
17 vestigation conducted by the Inspector General,
18 if the actions described under subparagraphs (D)
19 through (F) do not result in the employee or appli-
20 cant unlawfully disclosing information specifically re-
21 quired by Executive order to be kept classified in the
22 interest of national defense or the conduct of foreign
23 affairs.

24 “(2) RULE OF CONSTRUCTION.—Consistent
25 with the protection of sources and methods, nothing

1 in paragraph (1) shall be construed to authorize the
2 withholding of information from the Congress or the
3 taking of any personnel action against an employee
4 who discloses information to the Congress.

5 “(3) DISCLOSURES.—

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

8 “(i) the disclosure was made to a per-
9 son, including a supervisor, who partici-
10 pated in an activity that the employee rea-
11 sonably believed to be covered by para-
12 graph (1)(A)(ii);

13 “(ii) the disclosure revealed informa-
14 tion that had been previously disclosed;

15 “(iii) of the employee’s motive for
16 making the disclosure;

17 “(iv) the disclosure was not made in
18 writing;

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

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

24 “(B) REPRISALS.—If a disclosure is made
25 during the normal course of duties of an em-

1 employee, the disclosure shall not be excluded from
2 paragraph (1) if any employee who has author-
3 ity to take, direct others to take, recommend, or
4 approve any personnel action with respect to
5 the employee making the disclosure, took, failed
6 to take, or threatened to take or fail to take a
7 personnel action with respect to that employee
8 in reprisal for the disclosure.

9 “(4) AGENCY ADJUDICATION.—

10 “(A) REMEDIAL PROCEDURE.—An em-
11 ployee or former employee who believes that he
12 or she has been subjected to a reprisal prohib-
13 ited by paragraph (1) of this subsection may,
14 within 90 days after the issuance of notice of
15 such decision, appeal that decision within the
16 agency of that employee or former employee
17 through proceedings authorized by paragraph
18 (7) of subsection (a), except that there shall be
19 no appeal of an agency’s suspension of a secu-
20 rity clearance or access determination for pur-
21 poses of conducting an investigation, if that
22 suspension lasts not longer than 1 year (or a
23 longer period in accordance with a certification
24 made under subsection (b)(7)).

1 “(B) CORRECTIVE ACTION.—If, in the
2 course of proceedings authorized under sub-
3 paragraph (A), it is determined that the ad-
4 verse security clearance or access determination
5 violated paragraph (1) of this subsection, the
6 agency shall take specific corrective action to
7 return the employee or former employee, as
8 nearly as practicable and reasonable, to the po-
9 sition such employee or former employee would
10 have held had the violation not occurred. Such
11 corrective action shall include reasonable attor-
12 ney’s fees and any other reasonable costs in-
13 curred, and may include back pay and related
14 benefits, travel expenses, and compensatory
15 damages not to exceed \$300,000.

16 “(C) CONTRIBUTING FACTOR.—In deter-
17 mining whether the adverse security clearance
18 or access determination violated paragraph (1)
19 of this subsection, the agency shall find that
20 paragraph (1) of this subsection was violated if
21 a disclosure described in paragraph (1) was a
22 contributing factor in the adverse security clear-
23 ance or access determination taken against the
24 individual, unless the agency demonstrates by a
25 preponderance of the evidence that it would

1 have taken the same action in the absence of
2 such disclosure, giving the utmost deference to
3 the agency’s assessment of the particular threat
4 to the national security interests of the United
5 States in the instant matter.

6 “(5) APPELLATE REVIEW OF SECURITY CLEAR-
7 ANCE ACCESS DETERMINATIONS BY DIRECTOR OF
8 NATIONAL INTELLIGENCE.—

9 “(A) DEFINITION.—In this paragraph, the
10 term ‘Board’ means the appellate review board
11 established under section 204 of the Whistle-
12 blower Protection Enhancement Act of 2010.

13 “(B) APPEAL.—Within 60 days after re-
14 ceiving notice of an adverse final agency deter-
15 mination under a proceeding under paragraph
16 (4), an employee or former employee may ap-
17 peal that determination to the Board.

18 “(C) POLICIES AND PROCEDURES.—The
19 Board, in consultation with the Attorney Gen-
20 eral, Director of National Intelligence, and the
21 Secretary of Defense, shall develop and imple-
22 ment policies and procedures for adjudicating
23 the appeals authorized by subparagraph (B).
24 The Director of National Intelligence and Sec-
25 retary of Defense shall jointly approve any

1 rules, regulations, or guidance issued by the
2 Board concerning the procedures for the use or
3 handling of classified information.

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

11 “(E) FURTHER FACT-FINDING OR IM-
12 PROPER DENIAL.—If the Board concludes that
13 further fact-finding is necessary or finds that
14 the agency improperly denied the employee or
15 former employee the opportunity to present evi-
16 dence that, if admitted, would have a substan-
17 tial likelihood of altering the outcome, the
18 Board shall remand the matter to the agency
19 from which it originated for additional pro-
20 ceedings in accordance with the rules of proce-
21 dure issued by the Board.

22 “(F) DE NOVO DETERMINATION.—The
23 Board shall make a de novo determination,
24 based on the entire record and under the stand-
25 ards specified in paragraph (4), of whether the

1 employee or former employee received an ad-
2 verse security clearance or access determination
3 in violation of paragraph (1). In considering the
4 record, the Board may weigh the evidence,
5 judge the credibility of witnesses, and determine
6 controverted questions of fact. In doing so, the
7 Board may consider the prior fact-finder's op-
8 portunity to see and hear the witnesses.

9 “(G) ADVERSE SECURITY CLEARANCE OR
10 ACCESS DETERMINATION.—If the Board finds
11 that the adverse security clearance or access de-
12 termination violated paragraph (1), it shall then
13 separately determine whether reinstating the se-
14 curity clearance or access determination is
15 clearly consistent with the interests of national
16 security, with any doubt resolved in favor of na-
17 tional security, under Executive Order 12968
18 (60 Fed. Reg. 40245; relating to access to clas-
19 sified information) or any successor thereto (in-
20 cluding any adjudicative guidelines promulgated
21 under such orders) or any subsequent Executive
22 order, regulation, or policy concerning access to
23 classified information.

24 “(H) REMEDIES.—

1 “(i) CORRECTIVE ACTION.—If the
2 Board finds that the adverse security
3 clearance or access determination violated
4 paragraph (1), it shall order the agency
5 head to take specific corrective action to
6 return the employee or former employee,
7 as nearly as practicable and reasonable, to
8 the position such employee or former em-
9 ployee would have held had the violation
10 not occurred. Such corrective action shall
11 include reasonable attorney’s fees and any
12 other reasonable costs incurred, and may
13 include back pay and related benefits, trav-
14 el expenses, and compensatory damages
15 not to exceed \$300,000. The Board may
16 recommend, but may not order, reinstatement
17 or hiring of a former employee. The
18 Board may order that the former employee
19 be treated as though the employee were
20 transferring from the most recent position
21 held when seeking other positions within
22 the executive branch. Any corrective action
23 shall not include the reinstating of any se-
24 curity clearance or access determination.
25 The agency head shall take the actions so

1 ordered within 90 days, unless the Director
2 of National Intelligence, the Secretary of
3 Energy, or the Secretary of Defense, in the
4 case of any component of the Department
5 of Defense, determines that doing so would
6 endanger national security.

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

15 “(I) CONGRESSIONAL NOTIFICATION.—

16 “(i) ORDERS.—Consistent with the
17 protection of sources and methods, at the
18 time the Board issues an order, the Chair-
19 person of the Board shall notify—

20 “(I) the Committee on Homeland
21 Security and Government Affairs of
22 the Senate;

23 “(II) the Select Committee on In-
24 telligence of the Senate;

1 “(III) the Committee on Over-
2 sight and Government Reform of the
3 House of Representatives;

4 “(IV) the Permanent Select Com-
5 mittee on Intelligence of the House of
6 Representatives; and

7 “(V) the committees of the Sen-
8 ate and the House of Representatives
9 that have jurisdiction over the employ-
10 ing agency, including in the case of a
11 final order or decision of the Defense
12 Intelligence Agency, the National
13 Geospatial-Intelligence Agency, the
14 National Security Agency, or the Na-
15 tional Reconnaissance Office, the
16 Committee on Armed Services of the
17 Senate and the Committee on Armed
18 Services of the House of Representa-
19 tives.

20 “(ii) RECOMMENDATIONS.—If the
21 agency head and the head of the entity se-
22 lected under subsection (b) do not follow
23 the Board’s recommendation to reinstate a
24 clearance, the head of the entity selected
25 under subsection (b) shall notify the com-

1 mittees described in subclauses (I) through
2 (V) of clause (i).

3 “(6) JUDICIAL REVIEW.—Nothing in this sec-
4 tion shall be construed to permit or require judicial
5 review of any—

6 “(A) agency action under this section; or

7 “(B) action of the appellate review board
8 established under section 204 of the Whistle-
9 blower Protection Enhancement Act of 2010.

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

14 (c) ACCESS DETERMINATION DEFINED.—Section
15 3001(a) of the Intelligence Reform and Terrorism Preven-
16 tion Act of 2004 (50 U.S.C. 435b(a)) is amended by add-
17 ing at the end the following:

18 “(9) The term ‘access determination’ means the
19 process for determining whether an employee—

20 “(A) is eligible for access to classified in-
21 formation in accordance with Executive Order
22 12968 (60 Fed. Reg. 40245; relating to access
23 to classified information), or any successor
24 thereto, and Executive Order 10865 (25 Fed.

1 Reg. 1583; relating to safeguarding classified
2 information with industry); and

3 “(B) possesses a need to know under that
4 Order.”.

5 (d) **RULE OF CONSTRUCTION.**—Nothing in section
6 3001 of the Intelligence Reform and Terrorism Prevention
7 Act of 2004 (50 U.S.C. 435b), as amended by this Act,
8 shall be construed to require the repeal or replacement of
9 agency appeal procedures implementing Executive Order
10 12968 (60 Fed. Reg. 40245; relating to classified national
11 security information), or any successor thereto, and Exec-
12 utive Order 10865 (25 Fed. Reg. 1583; relating to safe-
13 guarding classified information with industry), or any suc-
14 cessor thereto, that meet the requirements of section
15 3001(b)(7) of such Act, as so amended.

16 **SEC. 203. REVISIONS RELATING TO THE INTELLIGENCE**
17 **COMMUNITY WHISTLEBLOWER PROTECTION**
18 **ACT.**

19 (a) **IN GENERAL.**—Section 8H of the Inspector Gen-
20 eral Act of 1978 (5 U.S.C. App.) is amended—

21 (1) in subsection (b)—

22 (A) by inserting “(1)” after “(b)”; and

23 (B) by adding at the end the following:

24 “(2) If the head of an establishment determines that
25 a complaint or information transmitted under paragraph

1 (1) would create a conflict of interest for the head of the
2 establishment, the head of the establishment shall return
3 the complaint or information to the Inspector General with
4 that determination and the Inspector General shall make
5 the transmission to the Director of National Intelligence.
6 In such a case, the requirements of this section for the
7 head of the establishment apply to the recipient of the In-
8 spector General’s transmission. The Director of National
9 Intelligence shall consult with the members of the appel-
10 late review board established under section 204 of the
11 Whistleblower Protection Enhancement Review Act of
12 2010 regarding all transmissions under this paragraph.”;

13 (2) by designating subsection (h) as subsection
14 (i); and

15 (3) by inserting after subsection (g), the fol-
16 lowing:

17 “(h) An individual who has submitted a complaint or
18 information to an Inspector General under this section
19 may notify any member of Congress or congressional staff
20 member of the fact that such individual has made a sub-
21 mission to that particular Inspector General, and of the
22 date on which such submission was made.”.

23 (b) CENTRAL INTELLIGENCE AGENCY.—Section
24 17(d)(5) of the Central Intelligence Agency Act of 1949
25 (50 U.S.C. 403q) is amended—

1 (1) in subparagraph (B)—

2 (A) by inserting “(i)” after “(B)”; and

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

4 “(ii) If the Director determines that a complaint or
5 information transmitted under paragraph (1) would create
6 a conflict of interest for the Director, the Director shall
7 return the complaint or information to the Inspector Gen-
8 eral with that determination and the Inspector General
9 shall make the transmission to the Director of National
10 Intelligence. In such a case the requirements of this sub-
11 section for the Director apply to the recipient of the In-
12 spector General’s submission; and”;

13 (2) by adding at the end the following:

14 “(H) An individual who has submitted a complaint
15 or information to the Inspector General under this section
16 may notify any member of Congress or congressional staff
17 member of the fact that such individual has made a sub-
18 mission to the Inspector General, and of the date on which
19 such submission was made.”.

20 **SEC. 204. REGULATIONS; REPORTING REQUIREMENTS;**

21 **NONAPPLICABILITY TO CERTAIN TERMI-**

22 **NATIONS.**

23 (a) **DEFINITIONS.**—In this section—

24 (1) the term “congressional oversight commit-
25 tees” means the—

1 (A) the Committee on Homeland Security
2 and Government Affairs of the Senate;

3 (B) the Select Committee on Intelligence
4 of the Senate;

5 (C) the Committee on Oversight and Gov-
6 ernment Reform of the House of Representa-
7 tives; and

8 (D) the Permanent Select Committee on
9 Intelligence of the House of Representatives;
10 and

11 (2) the term “intelligence community ele-
12 ment”—

13 (A) means—

14 (i) the Central Intelligence Agency,
15 the Defense Intelligence Agency, the Na-
16 tional Geospatial-Intelligence Agency, the
17 National Security Agency, the Office of the
18 Director of National Intelligence, and the
19 National Reconnaissance Office; and

20 (ii) any executive agency or unit
21 thereof determined by the President under
22 section 2302(a)(2)(C)(ii) of title 5, United
23 States Code, to have as its principal func-
24 tion the conduct of foreign intelligence or
25 counterintelligence activities; and

1 (B) does not include the Federal Bureau of
2 Investigation.

3 (b) REGULATIONS.—

4 (1) IN GENERAL.—The Director of National In-
5 telligence shall prescribe regulations to ensure that
6 a personnel action shall not be taken against an em-
7 ployee of an intelligence community element as a re-
8 prisal for any disclosure of information described in
9 section 2303A(b) of title 5, United States Code, as
10 added by this Act.

11 (2) APPELLATE REVIEW BOARD.—Not later
12 than 180 days after the date of enactment of this
13 Act, the Director of National Intelligence, in con-
14 sultation with the Secretary of Defense, the Attor-
15 ney General, and the heads of appropriate agencies,
16 shall establish an appellate review board that is
17 broadly representative of affected Departments and
18 agencies and is made up of individuals with expertise
19 in merit systems principles and national security
20 issues—

21 (A) to hear whistleblower appeals related
22 to security clearance access determinations de-
23 scribed in section 3001(j) of the Intelligence
24 Reform and Terrorism Prevention Act of 2004
25 (50 U.S.C. 435b), as added by this Act; and

1 (B) that shall include a subpanel that re-
2 flects the composition of the intelligence com-
3 mittee, which shall be composed of intelligence
4 community elements and inspectors general
5 from intelligence community elements, for the
6 purpose of hearing cases that arise in elements
7 of the intelligence community.

8 (c) REPORT ON THE STATUS OF IMPLEMENTATION
9 OF REGULATIONS.—Not later than 2 years after the date
10 of enactment of this Act, the Director of National Intel-
11 ligence shall submit a report on the status of the imple-
12 mentation of the regulations promulgated under sub-
13 section (b) to the congressional oversight committees.

14 (d) NONAPPLICABILITY TO CERTAIN TERMI-
15 NATIONS.—Section 2303A of title 5, United States Code,
16 as added by this Act, and section 3001 of the Intelligence
17 Reform and Terrorism Prevention Act of 2004 (50 U.S.C.
18 435b), as amended by this Act, shall not apply to adverse
19 security clearance or access determinations if the affected
20 employee is concurrently terminated under—

21 (1) section 1609 of title 10, United States
22 Code;

23 (2) the authority of the Director of National In-
24 telligence under section 102A(m) of the National Se-
25 curity Act of 1947 (50 U.S.C. 403–1(m)), if—

1 (A) the Director personally summarily ter-
2 minates the individual; and

3 (B) the Director—

4 (i) determines the termination to be in
5 the interest of the United States;

6 (ii) determines that the procedures
7 prescribed in other provisions of law that
8 authorize the termination of the employ-
9 ment of such employee cannot be invoked
10 in a manner consistent with the national
11 security; and

12 (iii) not later than 5 days after such
13 termination, notifies the congressional
14 oversight committees of the termination;

15 (3) the authority of the Director of the Central
16 Intelligence Agency under section 104A(e) of the
17 National Security Act of 1947 (50 U.S.C. 403–
18 4a(e)), if—

19 (A) the Director personally summarily ter-
20 minates the individual; and

21 (B) the Director—

22 (i) determines the termination to be in
23 the interest of the United States;

24 (ii) determines that the procedures
25 prescribed in other provisions of law that

1 authorize the termination of the employ-
2 ment of such employee cannot be invoked
3 in a manner consistent with the national
4 security; and

5 (iii) not later than 5 days after such
6 termination, notifies the congressional
7 oversight committees of the termination; or

8 (4) section 7532 of title 5, United States Code,
9 if—

10 (A) the agency head personally terminates
11 the individual; and

12 (B) the agency head—

13 (i) determines the termination to be in
14 the interest of the United States;

15 (ii) determines that the procedures
16 prescribed in other provisions of law that
17 authorize the termination of the employ-
18 ment of such employee cannot be invoked
19 in a manner consistent with the national
20 security; and

21 (iii) not later than 5 days after such
22 termination, notifies the congressional
23 oversight committees of the termination.

1 **TITLE III—SAVINGS CLAUSE;**
2 **EFFECTIVE DATE**

3 **SEC. 301. SAVINGS CLAUSE.**

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

7 **SEC. 302. EFFECTIVE DATE.**

8 This Act shall take effect 30 days after the date of
9 enactment of this Act.

Passed the Senate December 10, 2010.

Attest:

Secretary.

117TH CONGRESS
2D SESSION

S. 372

AN ACT

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