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THOROUGHLY INVESTIGATING RETALIATION AGAINST WHISTLEBLOWERS ACT

APRIL 25, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 4639]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 4639) to reauthorize the Office of Special Counsel, to amend title 5, United States Code, to provide modifications to authorities relating to the Office of Special Counsel, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

At the end of the bill, add the following:

SEC. 9. REGULATIONS.

Not later than two years after the date of enactment of this Act, the Special Counsel shall prescribe such regulations as may be necessary to perform the functions of the Special Counsel under subchapter II of chapter 12 of title 5, United States Code, including regulations necessary to carry out sections 1213, 1214, and 1215 of such title, and any functions required due to the amendments made by this Act. Such regulations shall be published in the Federal Register.

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 4639, the Thoroughly Investigating Retaliation Against Whistleblowers Act, would reauthorize the U.S. Office of Special Counsel (OSC) and make changes to improve the efficiency and effectiveness of OSC operations.

BACKGROUND AND NEED FOR LEGISLATION

The Civil Service Reform Act of 1978 (CSRA) established the U.S. Office of Special Counsel (OSC) as a separate investigative and prosecutorial section of the Merit Systems Protection Board (MSPB).[1] With the enactment of the Whistleblower Protection Act of 1989, OSC became an independent agency in the executive branch.[2] OSC's authorities come from four federal statutes: CSRA, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[3]

OSC's mission is to: (1) safeguard the merit system by protecting federal employees from prohibited personnel practices, especially reprisal from whistleblowing; (2) provide employees a mechanism for disclosing wrongdoing in government agencies; (3) enforce and provide advice on the Hatch Act, which restricts political activity by government employees; and (4) enforce employment rights under USERRA for federal employees who serve or have served in the uniformed services.[4]

OSC's staff primarily consists of 140 personnel management specialists, investigators, and attorneys located in Washington, D.C. and three field offices.[5] OSC is headed by Carolyn Lerner, Special Counsel, who was appointed by the President and confirmed by the Senate for a five-year term (which began in June 2011).[6] In October 2015, Special Counsel Lerner was nominated for another five-year term.[7] In FY2016, OSC received appropriations of $24.1 million.[8] For FY2017, OSC requested a funding level of $26.5 million to sustain its current workforce and increase staff size from 140 to 155 full-time employees.[9]

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[1] U.S. Office of Special Counsel, *Fiscal Year 2014 Annual Report to Congress, at 10, available at* https://osc.gov/Resources/OSC%20Annual%20Report%20to%20Congress%20FY%202014.pdf [hereinafter *OSC FY 2014 Annual Report*].

[2] *Id.* at 10.

[3] *Id.*

[4] *Id.* at 11.

[5] U.S. Office of Special Counsel, *Fiscal Year 2016 Congressional Budget Justification and Performance Budget Goals*, at pp. 3 and 12, *available at* https://osc.gov/Resources/CBJ%20-%20FY16-Final%20Website%20Version.pdf [hereinafter *OSC FY 2016 Cong. Budget Justification*].

[6] Biography of Special Counsel Carolyn Lerner, available at *https://osc.gov/Pages/about-bio.aspx?ID=1.*

[7] https://www.congress.gov/nomination/114th-congress/896.

[8] *OSC FY 2017 Cong. Budget Justification* at 3.

[9] *Id.*

In FY2014 and FY2015, OSC achieved settlements in numerous cases on behalf of Department of Veterans Affairs (VA) employees that suffered retaliation after disclosing problems with the care of patients at various VA facilities.[10] OSC also achieved an increase in favorable results in prohibited personnel practice cases, mediated settlements, and whistleblower disclosures.[11] For cases involving violations of the Hatch Act, OSC obtained more disciplinary actions than any other similar period.[12] OSC also worked with whistleblowers and leadership at the VA to identify quality of care issues and improper scheduling practices at VA.[13] OSC has assisted service members and reservists returning to civilian life, achieving numerous favorable results under USERRA.[14]

Finally, in FY2014 and FY2015, whistleblowers made disclosures to OSC about the abuse of "administratively uncontrollable overtime" in the U.S. Department of Homeland Security (DHS).[15] As a result, the DHS prohibited employees from earning improper overtime payments, saving approximately $83.7 million.[16] In December 2014, Congress passed legislation implementing a new pay system, which CBO estimates will save $100 million every year.[17]

OSC was last reauthorized in 2002 for the period of 2003 to 2007.[18] Since that time, OSC has experienced significant growth in its case load. In the past five years, OSC's caseload has risen by 58 percent.[19]

H.R. 4639 reauthorizes the agency for the years 2016 to 2020. The bill also makes several changes to assist OSC in meeting its vital mission, including protecting whistleblowers and guarding the merit system principles. H.R. 4639 strengthens OSC's ability to hold agencies and individuals accountable, and codifies best practices that have recently been developed and implemented by OSC. The bill codifies OSC's current practice of providing key metrics in its annual reports to Congress, and requires additional metrics to support Congressional oversight of OSC's effectiveness.

Once OSC receives a prohibited personnel practice complaint, OSC is required within fifteen days to provide a written acknowledgement of receipt and the name of the OSC staff member who will be the point of contact.[20] For whistleblower disclosures, however, OSC is currently required within fifteen days to make a more substantive determination of whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.[21] H.R. 4639 extends this timeframe for whistleblower disclosures from fifteen to forty-five days. Given the volume of cases OSC

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[10] *OSC FY 2016 Cong. Budget Justification* at 3.
[11] U.S. Office of Special Counsel, *Fiscal Year* 2015, *Performance and Accountability Report*, at 4, *available at* https://osc.gov/Resources/FY%202015%20PAR-16Nov2015%20Final.pdf [hereinafter, *OSC FY 2015 PAR*].
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] 5 U.S.C. 5509 note.
[19] *OSC FY 2017 Cong. Budget Justification* at 4.
[20] 5 U.S.C. § 1214(a)(1)(B).
[21] 5 U.S.C. § 1213(b).

receives, this is a more realistic timeframe for OSC to make an assessment of the substance of the complaint.

H.R. 4639 codifies several changes to improve OSC's effectiveness. Under current law, OSC closes, without investigation, three categories of prohibited personnel practice complaints: (1) cases which have previously been made by the same person with the same set of facts and circumstances and investigated by OSC; (2) cases with the same facts and circumstances which have previously been filed by the same person with the MSPB; and (3) cases which come from federal agencies over which OSC does not have investigative jurisdiction.[22] Closure of these complaints requires OSC to give written notice of the proposed findings of fact and legal conclusions, allow an opportunity for written comments from the complainant, and then provide a final written status report. H.R. 4639 would provide OSC discretionary authority to close these cases under simplified procedures, providing a written notification of the grounds for closure of the case within 30 days of OSC's decision.

Since 1994, OSC has been required to conduct an annual survey of federal employees who contact OSC for assistance.[23] The survey yields a low response rate, and provides little insight into what OSC might be able to do to improve its processes. For 2014, only 10 percent of recipients responded. H.R. 4639 eliminates the requirement for OSC to conduct an annual survey and instead provides OSC discretionary authority to pilot a new survey in FY2017 and FY2018. The resulting survey would be designed to gather information and improve customer service at various stages of the review or investigative process.

H.R. 4639 would also establish a three-year statute of limitations. Importantly, this statute of limitations is not a prohibition barring OSC from considering cases older than three years. Rather, it is a permissive authority allowing OSC to retain the ability to review any claim regardless of its age.

Additionally, H.R. 4639 makes several changes intended to strengthen OSC's ability to hold agencies and individuals accountable. With regard to whistleblower disclosures, OSC is required by statute to rely on agencies both to investigate allegations and take corrective action, reporting their findings back to OSC upon completion of their investigation. Such reports are required to include a list of any violation or apparent violation of any law, rule, or regulation, as well as a description of what corrective action the agency has taken or plans to take as a result of the investigation.[24] H.R. 4639 would require that if an agency substantiates a whistleblower disclosure from OSC in whole or in part, yet fails to take any corrective action, the agency's report must provide a detailed explanation of such failure. This change is intended to help ensure that agencies take action to both prevent problems in the future and correct substantiated claims of misconduct, such as by imposing discipline and holding employees accountable.

Additionally, if an agency report states that the agency plans to take certain action in the future, H.R. 4639 would require that the agency submit a supplemental report no later than 180 days after

[22] For example, private citizens, Postal Service employees, employees at agencies listed in 5 U.S.C. § 2302(a)(2)(C)(ii), etc.

[23] *See* Section 13, P.L. 103–424.

[24] 5 U.S.C. § 1213(c)(1)(B); 5 U.S.C. § 1213(d).

the initial report which states whether the proposed action has been taken and explains any failure to take the proposed action. Finally, H.R. 4639 would require OSC to make public its initial transmittal of the whistleblower disclosure to the agency,[25] in addition to the agency's report.[26] The bill would also codify OSC's current practice of posting comments on the agency reports from the Special Counsel and, in some circumstances, from the whistleblower who submitted the initial disclosure.

The legislation also would address a number of problems OSC faces regarding access to agency personnel and documents during investigations. The current Office of Personnel Management Civil Service Rule 5.4 states that when required by the Special Counsel or their authorized representative, agencies shall make employees available to testify, on official time, "in regard to matters inquired of under the civil service laws, rules, and regulations," as well as make available "all records pertinent to these matters."[27] It continues: "All such employees, and all applicants or eligibles for positions covered by these rules, shall give to . . . the Special Counsel, or to their authorized representatives, all information, testimony, documents, and material in regard to the above matters, the disclosure of which is not otherwise prohibited by law or regulation."[28]

Notwithstanding the unambiguous language of both provisions, OSC has historically faced a range of obstacles from agencies, including nonresponses, incomplete responses, untimely responses, and refusals to comply. In particular, refusals to comply have arisen from agencies stretching the interpretation of "not otherwise prohibited by law or regulation" to justify invoking common law privileges, such as attorney-client privilege, to prevent OSC from obtaining access to information. For example, the Committee on Oversight and Government Reform has heard concerns from the current Special Counsel regarding blanket assertions of attorney-client privilege by the Chemical Safety Board.

While the Committee does not believe that legislative clarification should be necessary to make clear that OSC's access to information overrides internal agency regulations and common law privileges, this bill is intended to settle once and for all that in carrying out its work, OSC is authorized to have access to *any* information from agencies under its jurisdiction. H.R. 4639 makes clear that OSC is authorized to have access to any record or other information of any agency under its jurisdiction in investigating allegations of prohibited personnel practices or Hatch Act violations.

Finally, H.R. 4639 would make a technical amendment to the penalties added by the Hatch Act Modernization Act of 2012.[29] That Act provided for a range of penalties for violations of the Hatch Act. The same year, a provision in the Whistleblower Protection Enhancement Act of 2012 provided that the MSPB could impose a "combination" of penalties for prohibited personnel practice

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[25] Given the current requirements of 5 U.S.C. § 1219(b), it is not believed that this will endanger whistleblowers by making any personally identifiable information public.

[26] 5 U.S.C. § 1219.

[27] 5 C.F.R. § 5.4.

[28] *Id.*

[29] P.L. 112–230.

violations.[30] H.R. 4639 would amend the Hatch Act penalties to clarify that a range of penalties could be imposed for violations.

LEGISLATIVE HISTORY

H.R. 4639, the Thoroughly Investigating Retaliation Against Whistleblowers Act, was introduced on February 26, 2016 by Congressman Rod Blum (R–IA) and referred to the Committee on Oversight and Government Reform. On March 1, 2016, the Committee on Oversight and Government Reform ordered H.R. 4639 reported, as amended, by voice vote.

SECTION-BY-SECTION

Section 1. Short title

Designates the short title of the bill as the "Thoroughly Investigating Retaliation Against Whistleblowers Act."

Section 2. Reauthorization of the Office of Special Counsel

This bill reauthorizes OSC for a five-year period, for fiscal years 2016 through 2020.

Section 3. Access to agency information

Amends 5 U.S.C. § 1212(b) by adding a subsection (5). The new section clarifies that OSC is authorized to have access to any record or other information (such as reports, audits, recommendations, etc.) that is available to an agency within its jurisdiction. Similarly, it allows OSC to require any agency employee to provide relevant information during its investigations.

Section 4. Whistleblower provisions

Amends 5 U.S.C. § 1213, which concerns substantive disclosures of waste, fraud, and abuse. It extends from 15 to 45 days the timeframe in which OSC must determine if there is any merit to substantive disclosures.

Once a disclosure is sent to an agency for response, if the agency substantiates the allegations in the disclosure and yet fails to take any action on the allegations (such as changing their rules or practices, restoring any aggrieved employee, disciplining any employee misconduct, etc.), the head of the agency's response to OSC, per § 1213(d), must include a detailed description of why the agency has failed to take any action.

Finally, this section requires that if an agency head states in their response that they propose to take certain action, within 180 days the head of the agency shall submit a supplemental report stating whether the action has been taken, and a reason if the action has not been taken.

Section 5. Termination of certain OSC investigations

Amends 5 U.S.C. § 1214, which concerns OSC's investigation of prohibited personnel practices. It would add a new subsection to § 1214(a) stating that, without its typical detailed description and opportunity to respond, OSC may within 30 days of receipt terminate any investigation which:

[30] P.L. 112–199.

(i) Constitutes the same allegations, from the same individual, which have previously been investigated by OSC if they concern the same set of facts and circumstances;

(ii) Constitutes the same allegations, from the same individual, which have previously been filed with MSPB if they concern the same set of facts and circumstances; or

(iii) Comes from a federal employee over which OSC does not have jurisdiction, such as FBI or intelligence community employees.

This section also includes a statute of limitations in a fourth category which may, at the discretion of the Special Counsel, be closed out with the simplified process. This category applies to investigations which:

(iv) Concern allegations of a prohibited personnel practice which the complainant knew or should have known about over three years prior to filing with OSC.

For any investigation from any of the four categories above, OSC must provide written notice within 30 days of termination that the case is being closed and providing the reason.

Section 6. Reporting requirements

Amends 5 U.S.C. § 1218 to require that OSC's annual report to Congress include a wider number of reporting metrics, including the number of stays or disciplinary actions negotiated by OSC with agencies; the number of stays and stay extensions obtained from the MSPB; the number of prohibited personnel practice complaints that result in favorable actions, and the number that result in favorable outcomes, both for whistleblowers and for all prohibited personnel practice cases; and the cost per case resolved.

With regard to substantive disclosures, this section also amends 5 U.S.C. § 1219(a)(1) to expand the list of items that OSC should make publicly available to include:

(i) The transmission of a matter to an agency head;

(ii) Any report from the agency head;

(iii) Comments from the complainant, if they give consent; and

(iv) OSC's comments or recommendations.

This section would also require that OSC include additional items in its annual report to Congress.

Section 7. Establishment of survey pilot program

Suspends, for FY2017 and FY2018, the current annual survey requirement, implemented by Congress in 1994 (P.L. 103–424) and instead gives OSC flexibility to implement a pilot program which would survey individuals at various stages of its process.

Section 8. Penalties under the Hatch Act

Amends 5 U.S.C. § 7326, to clarify that anyone who violates § 7323 (political activity generally) or § 7324 (political activity on duty or with official resources) of the Hatch Act may be subject to not just one of the penalties in § 7326, but to a combination of them. Those penalties, added in 2012 by the Hatch Act Modernization Act, include removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, or up to a $1000 civil penalty.

Section 9. Regulations

Requires that, not later than two years after the date of enactment of the Act, OSC adopt regulations concerning: 5 U.S.C. § 1213, which relates to whistleblower disclosures; § 1214, which relates to the investigation of prohibited personnel practices and the imposition of disciplinary action; and § 1215, which relates to disciplinary action. The OSC is required to publish the regulations in the Federal Register.

EXPLANATION OF AMENDMENTS

During Full Committee consideration of the bill, Congressman Mark Meadows (R–NC) offered an amendment to require OSC to adopt regulations within two years of the bill's passage, including regulations to carry out: 5 U.S.C. § 1213, which relates to whistleblower disclosures; § 1214, which relates to the investigation of prohibited personnel practices and the imposition of disciplinary action; and § 1215, which relates to disciplinary action. The Meadows amendment was adopted by voice vote.

COMMITTEE CONSIDERATION

On March 1, 2016 the Committee met in open session and ordered reported favorably the bill, H.R. 4639, as amended, by voice vote, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 4639.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill reauthorizes the Office of Special Counsel, amends title 5, United States Code, and provides modifications to authorities relating to the Office of Special Counsel. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

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

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective is to reauthorize the Office of Special Counsel, to amend title 5, United States Code, and to provide modifications to authorities relating to the Office of Special Counsel.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

This bill requires that within two years of the date of enactment, OSC prescribe regulations necessary to perform the functions of the Special Counsel under subchapter II of chapter 12 of title 5 of the United States Code, including regulations necessary to carry out sections 1213, 1214, and 1215 of such title, and any functions required due to the amendments made by this act.

FEDERAL ADVISORY COMMITTEE ACT

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

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

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

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the

Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 11, 2016.

Hon. JASON CHAFFETZ,
Chairman, Committee on Oversight and Government Reform, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4639, the Thoroughly Investigating Retaliation Against Whistleblowers Act.

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

Sincerely,

KEITH HALL.

Enclosure.

H.R. 4639—Thoroughly Investigating Retaliation Against Whistleblowers Act

Summary: H.R. 4639 would authorize appropriations for the Office of Special Counsel (OSC) for fiscal years 2016 through 2020. The bill also would amend several of the laws governing the OSC. Finally, the bill would change how penalties could be applied to federal workers who violate the Hatch Act. (The Hatch Act prohibits most employees of the Executive branch from engaging in certain forms of political activity.)

CBO estimates that implementing this legislation would cost $106 million over the 2017–2021 period, assuming appropriation of the estimated amounts. Because enacting H.R. 4639 could affect the amount of revenues collected from civil fines imposed on federal employees who violate the Hatch Act, pay-as-you-go procedures apply. However, CBO expects that any change in revenues collected would not be significant in any year. Enacting the bill would not affect direct spending.

CBO estimates that enacting H.R. 4639 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 4639 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary effects of H.R. 4639 are shown in the following table. The costs of this legislation fall within budget function 800 (general government).

	By fiscal year, in millions of dollars					
	2017	2018	2019	2020	2021	2017–2021
CHANGES IN SPENDING SUBJECT TO APPROPRIATION[a]						
Estimated Authorization Level	25	26	27	28	0	106
Estimated Outlays	23	26	27	28	2	106

[a] In fiscal year 2016, OSC received an appropriation of $24 million.

Basis of estimate: For this estimate, CBO assumes that H.R. 4639 will be enacted by the end of fiscal year 2016 and the amounts provided in 2016 for the OSC will be appropriated for each fiscal year through 2020 with adjustments for anticipated inflation. For fiscal year 2016, the OSC received an appropriation of $24 million. Estimated outlays are based on historical spending patterns for the agency.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting H.R. 4639 could affect the amount of revenue collected from civil fines imposed on federal employees who violate the Hatch Act. Under the bill employees who participate in unauthorized political activities could be penalized through workplace disciplinary actions (reprimand, suspension, removal, debarment) and civil penalties. Under current law only one of those sanctions may be used. CBO estimates that any change in revenue collections under the bill would not be significant. Enacting the bill would not affect direct spending.

Increase in long-term direct spending and deficits: CBO estimates that enacting H.R. 4639 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

Intergovernmental and private-sector impact: H.R. 4639 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Matthew Pickford; Impact on state, local, and tribal governments: Jon Sperl; Impact on the private-sector: Paige Piper/Bach.

Estimate approved by: H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

WHISTLEBLOWER PROTECTION ACT OF 1989

* * * * * * *

SEC. 8. AUTHORIZATION OF APPROPRIATIONS; RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978; TRANSFER OF FUNDS.

(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated—

(1) for each of fiscal years 2003, 2004, 2005, 2006, and 2007 such sums as necessary to carry out subchapter I of chapter 12 of title 5, United States Code (as amended by this Act); and

(2) for each of fiscal years [2003, 2004, 2005, 2006, and 2007] *2016, 2017, 2018, 2019, and 2020* such sums as nec-

essary to carry out subchapter I1 of chapter 12 of title 5, United States Code (as amended by this Act).

(b) RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978.—No funds may be appropriated to the Merit Systems Protection Board or the Office of Special Counsel pursuant to section 903 of the Civil Service Reform Act of 1978 (5 U.S.C. 5509 note).

(c) TRANSFER OF FUNDS.—The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available to the Special Counsel of the Merit Systems Protection Board are, subject to section 1531 of title 31, United States Code, transferred to the Special Counsel referred to in section 1211 of title 5, United States Code (as added by section 3(a) of this Act), for appropriate allocation.

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TITLE 5, UNITED STATES CODE

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PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

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

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SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

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

(a) The Office of Special Counsel shall—

(1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;

(2) receive and investigate allegations of prohibited personnel practices, and, where appropriate—

(A) bring petitions for stays, and petitions for corrective action, under section 1214; and

(B) file a complaint or make recommendations for disciplinary action under section 1215;

(3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213, disclosures of violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(4) review rules and regulations issued by the Director of the Office of Personnel Management in carrying out functions

under section 1103 and, where the Special Counsel finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice, file a written complaint with the Board; and

(5) investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in section 1216).

(b)(1) The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) The Special Counsel may—

(A) issue subpoenas; and

(B) order the taking of depositions and order responses to written interrogatories;

in the same manner as provided under section 1204.

(3)(A) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A), the Special Counsel may apply to the Merit Systems Protection Board to enforce the subpoena in court pursuant to section 1204(c).

(B) A subpoena under paragraph (2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in the manner referred to in subsection (d) of section 1204, and the United States District Court for the District of Columbia may, with respect to any such individual, compel compliance in accordance with such subsection.

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

(5)(A) In carrying out this subchapter, the Special Counsel is authorized to—

(i) have access to any record or other information (including a report, audit, review, document, recommendation, or other material) of any agency under the jurisdiction of the Office of Special Counsel; and

(ii) require any employee of such an agency to provide to the Office any record or other information during an investigation, review, or inquiry of any agency under the jurisdiction of the Office.

(B) With respect to any record or other information made available by an agency under this subchapter, the Office shall apply a level of confidentiality to such record or information at the level of confidentiality applied to the record by the agency.

(c)(1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.

(2) The Special Counsel may not intervene in an action brought by an individual under section 1221, or in an appeal brought by an individual under section 7701, without the consent of such individual.

(d)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

(2) Any appointment made under this subsection shall be made in accordance with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

(e) The Special Counsel may prescribe such regulations as may be necessary to perform the functions of the Special Counsel. Such regulations shall be published in the Federal Register.

(f) The Special Counsel may not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73).

(g)(1) The Special Counsel may not respond to any inquiry or disclose any information from or about any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any inquiry concerning an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any person described in paragraph (1)—

(A) unless the consent of the individual as to whom the information pertains is obtained in advance; or

(B) except upon request of an agency which requires such information in order to make a determination concerning an individual's having access to the information unauthorized disclosure of which could be expected to cause exceptionally grave damage to the national security.

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

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

§ 1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters

(a) This section applies with respect to—

(1) any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant reasonably believes evidences—

(A) a violation of any law, rule, or regulation; or

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

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

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

(A) a violation of any law, rule, or regulation; or

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

(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within [15 days] *45 days* after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

(c)(1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head—

(A) conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel to the agency head; and

(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.

(2) The Special Counsel may require an agency head to conduct an investigation and submit a written report under paragraph (1) only if the information was transmitted to the Special Counsel by—

(A) an employee, former employee, or applicant for employment in the agency which the information concerns; or

(B) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

(d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—

(1) a summary of the information with respect to which the investigation was initiated;

(2) a description of the conduct of the investigation;

(3) a summary of any evidence obtained from the investigation;

(4) a listing of any violation or apparent violation of any law, rule, or regulation; [and]

(5) a description of any action taken or planned as a result of the investigation, [such as] *including*—

(A) changes in agency rules, regulations, or practices;

(B) the restoration of any aggrieved employee;

(C) disciplinary action against any employee; and

(D) referral to the Attorney General of any evidence of a criminal violation[.]*; and*

(6) if any disclosure referred to an agency head under subsection (c) is substantiated in whole or in part by the agency head, a detailed explanation of the failure to take any action described under paragraph (5).

(e)(1) Any such report shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.

(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether—

(A) the findings of the head of the agency appear reasonable; and

(B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

(3) The Special Counsel shall transmit any agency report received pursuant to subsection (c) of this section, any comments provided by the complainant pursuant to subsection (e)(1), and any appropriate comments or recommendations by the Special Counsel to the President and the congressional committees with jurisdiction over the agency which the disclosure involves.

(4) Whenever the Special Counsel does not receive the report of the agency within the time prescribed in subsection (c)(2) of this section, the Special Counsel shall transmit a copy of the information which was transmitted to the agency head to the President and the congressional committees with jurisdiction over the agency which the disclosure involves together with a statement noting the failure of the head of the agency to file the required report.

(5) If an agency head submits a report to the Special Counsel under subsection (d) that includes a description of any agency action proposed to be taken as a result of the investigation, the agency head shall, not later than 180 days after the date of such submission, submit a supplemental report to the Special Counsel stating whether any proposed action has been taken, and if the action has not been taken, the reason why it has not been taken.

(f) In any case in which evidence of a criminal violation obtained by an agency in an investigation under subsection (c) of this section is referred to the Attorney General—

(1) the report shall not be transmitted to the complainant; and

(2) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.

(g)(1) If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head.

(2) If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency which the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.

(3) If the Special Counsel does not transmit the information to the head of the agency under paragraph (2), the Special Counsel shall inform the individual of—

(A) the reasons why the disclosure may not be further acted on under this chapter; and

(B) other offices available for receiving disclosures, should the individual wish to pursue the matter further.

(h) The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

(i) Except as specifically authorized under this section, the provisions of this section shall not be considered to authorize disclosure of any information by any agency or any person which is—

(1) specifically prohibited from disclosure by any other provision of law; or

(2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(j) With respect to any disclosure of information described in subsection (a) which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate.

§ 1214. Investigation of prohibited personnel practices; corrective action

(a)(1)(A) ⟦The Special Counsel⟧ *Except as provided in paragraph (6), the Special Counsel* shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that—

(i) the allegation has been received by the Special Counsel; and

(ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.

(C) Unless an investigation is terminated under paragraph (2) *or paragraph (6)* , the Special Counsel shall—

(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.

(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of—

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;

(iii) the reasons for terminating the investigation; and

(iv) a response to any comments submitted under paragraph (1)(D).

(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

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

(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and

(ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

(6)(A) Within 30 days of receiving an allegation from a person under paragraph (1), the Special Counsel may terminate an investigation under such paragraph with respect to the allegation, without further inquiry or an opportunity for the person to respond, if the Special Counsel determines that—

(i) the same allegation, based on the same set of facts and circumstances—

(I) had previously been made by the person and previously investigated by the Special Counsel; or

(II) had previously been filed by the person with the Merit Systems Protection Board;

(ii) the Office of Special Counsel does not have jurisdiction to investigate the allegation; or

(iii) the person knew or should have known of the alleged prohibited personnel practice earlier than the date that is 3 years before the date Special Counsel received the allegation.

(B) If the Special Counsel terminates an investigation under subparagraph (A), not later than 30 days after the date of such termination the Special Counsel shall provide a written notification stating the basis for the termination to the person who made the allegation. Paragraph (1)(D) shall not apply to any termination under such subparagraph.

(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board—

(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or

(ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

(2)(A)(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.

(B) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

(D) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.

(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for—

(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

(B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

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

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

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

(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, former employee, or applicant for employment adversely affected by such order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless—

(A) the alleged violation has been reported to the Attorney General; and

(B) the Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

(1) that the head of the agency has personally reviewed the report; and

(2) what action has been or is to be taken, and when the action will be completed.

(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

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

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

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

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

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[§ 1218. Annual report

[The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i), and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.**]**

§ 1218. Annual report

(a) The Special Counsel shall submit an annual report to Congress on the activities of the Special Counsel. Any such report shall include—

(1) the number, types, and disposition of allegations of prohibited personnel practices filed with the Special Counsel, and the cost of allegations so disposed of;

(2) the number of investigations conducted by the Special Counsel;

(3) the number of stays or disciplinary actions negotiated by the Special Counsel with agencies;

(4) the number of cases in which the Special Counsel did not make a determination whether there are reasonable grounds to

believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i);

(5) a description of the recommendations and reports made by the Special Counsel to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations;

(6) the number of—

(A) actions initiated before the Merit Systems Protection Board, including the number of corrective action petitions and disciplinary action complaints so initiated; and

(B) stays and stay extensions obtained from the Board; and

(7) the number of prohibited personnel practice complaints that result in—

(A) a favorable action for the complainant, categorized by actions with respect to whistleblower reprisal cases and all other cases; and

(B) a favorable outcome for the complainant, categorized by outcomes with respect to whistleblower reprisal cases and all other cases.

(b) The report required by subsection (a) shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.

§ 1219. Public information

(a) The Special Counsel shall maintain and make available to the public—

[(1) a list of noncriminal matters referred to heads of agencies under subsection (c) of section 1213, together with reports from heads of agencies under subsection (c)(1)(B) of such section relating to such matters;**]**

(1) a list of any noncriminal matter referred to an agency head under section 1213(c), together with—

(A) the applicable transmittal of the matter to the agency head under section 1213(c)(1);

(B) any report from agency head under section 1213(c)(1)(B) relating to such matter;

(C) if appropriate, not otherwise prohibited by law, and with the consent of the complainant, any comments from the complainant under section 1213(e)(1) relating to the matter; and

(D) the Special Counsel's comments or recommendations under section 1213(e)(3) or (4) relating to the matter;

(2) a list of matters referred to heads of agencies under section 1215(c)(2);

(3) a list of matters referred to heads of agencies under subsection (e) of section 1214, together with certifications from heads of agencies under such subsection; and

(4) reports from heads of agencies under section 1213(g)(1).

(b) The Special Counsel shall take steps to ensure that any list or report made available to the public under this section does not contain any information the disclosure of which is prohibited by

law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

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PART III—EMPLOYEES

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SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS

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CHAPTER 73—SUITABILITY, SECURITY, AND CONDUCT

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SUBCHAPTER III—POLITICAL ACTIVITIES

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[§ 7326. Penalties

[An employee or individual who violates section 7323 or 7324 shall be subject to removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.**]**

§ 7326. Penalties

An employee or individual who violates section 7323 or 7324 shall be subject to—

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

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

(3) any combination of the penalties described in paragraph (1) or (2).

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