

Calendar No. 421

114TH CONGRESS }
2d Session }

SENATE

{ REPORT
114-261

FEDERAL BUREAU OF INVESTIGATION WHISTLEBLOWER PROTECTION ENCHANCEMENT ACT OF 2016

MAY 25, 2016.—Ordered to be printed

Mr. GRASSLEY, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 2390]

The Committee on the Judiciary, to which was referred the bill (S. 2390), to provide adequate protections for whistleblowers at the Federal Bureau of Investigation, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

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I. BACKGROUND AND PURPOSE OF THE FEDERAL BUREAU OF INVESTIGATION WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2016

The Federal Bureau of Investigation Whistleblower Protection Act of 2016 (“the Act”) will strengthen and enhance the rights and protections afforded to employees of the Federal Bureau of Investigation (FBI)¹ so that they can more effectively help root out waste, fraud, and abuse. Whistleblowers play a critical role in

¹Consistent with the Act, the term “employee” also encompasses an applicant for a position in the FBI for most of the rights conveyed in the Act.

keeping our government efficient and honest, yet they also risk retaliation from their employers, sometimes being demoted, reassigned, or fired as a result of their actions. The Civil Service Reform Act of 1978 (CSRA) first established statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse.² However, protections for FBI employees were codified in a separate statutory provision—5 U.S.C. 2303—that left enforcement of protections largely to the President.³ Minimal legislative history exists explaining why the FBI was carved out of the whistleblower protection framework created in the CSRA, which is applicable to most federal employees, and covered instead under a separate, more limited, statutory framework in 5 U.S.C. 2303. Comments made by Members of Congress at the time suggest it was a compromise meant to recognize the sensitive nature of the agency but also to address the need to create channels within the FBI to raise whistleblower matters, given past improprieties.⁴ A framework for the handling, disclosure, investigation, and adjudication of FBI whistleblower reprisal complaints was not established until after the President delegated his authority to the Justice Department (DOJ) in 1997,⁵ and final regulations were promulgated by the Justice Department in 1999.⁶

Since the passage of the CSRA in 1978, Congress has amended and strengthened whistleblower protections for employees across the rest of the federal government, but has not made corresponding changes to provisions applicable to employees at the FBI.⁷ This has left protections for FBI whistleblowers inferior to those of other Executive Branch employees. Prior attempts to address these shortcomings were made in the 107th and 108th Congresses.⁸ A renewed examination of the protections provided to FBI whistleblowers and the procedures afforded to them by the Justice Department to protect those limited rights has revealed numerous deficiencies. At the request of Chairman Grassley, the Government Accountability Office (GAO) conducted a review of DOJ's process for

² Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 101, 202, 92 Stat. 1111, 1113-8, 1121-31 (codified as amended at 5 U.S.C. §§ 2301-2306, 1201-1222, respectively).

³ *Id.* § 101, 92 Stat. at 1117 (codified at 5 U.S.C. § 2303).

⁴ See, e.g., 124 Cong. Rec. S14300 (daily ed. Aug. 24, 1978) (statement of Sen. Percy) (stating “the FBI is not held guiltless in some of its activities because of the charges that have been made . . . the public’s erosion of confidence in the Federal Government must be arrested”); 124 Cong. Rec. H9359 (daily ed. Sept. 11, 1978) (statement of Rep. Derwinski) (stating that “[t]he rigorous and dangerous duties performed by the Bureau’s employees do not lend themselves to same [sic] aspects of this legislation. The best argument for exclusion of the FBI is probably the exclusion in the bill of other national security agencies The FBI is a sensitive agency.”); 124 Cong. Rec. H9359-60 (daily ed. Sept. 11, 1978) (statement of Rep. Udall) (stating “the public should have confidence that there are channels within the Government so that people can blow the whistle’ on the FBI just as they can on other agencies.”); 124 Cong. Rec. H11822 (daily ed. Oct. 6, 1978) (statement of Rep. Schroeder) (“Special whistleblower protections are provided in the Federal Bureau of Investigations [sic], necessitated, in part, by the woeful history of this agency in terms of eliminating internal wrongdoing.”).

⁵ Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, Memorandum for the Attorney General, 62 Fed. Reg. 23,123 (Apr. 14, 1997).

⁶ Whistleblower Protection For Federal Bureau of Investigation Employees, 64 Fed. Reg. 58,782 (Nov. 1, 1999). Interim regulations were issued on November 10, 1998 and the Department solicited post-promulgation comments, due January 11, 1999. Whistleblower Protection For Federal Bureau of Investigation Employees, 63 Fed. Reg. 62,937 (Nov. 10, 1998).

⁷ See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 4, 9, 103 Stat. 16, 33, 34-45; Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 101-105, 112, 126 Stat. 1465, 1465-1468, 1472; Presidential Policy Directive/PPD-19, Protecting Whistleblowers with Access to Classified Information (Oct. 10, 2012), available at <https://www.whitehouse.gov/sites/default/files/image/ppd-19.pdf> [hereinafter “PPD-19”]; Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, tit. VI, 128 Stat. 1390, 1414-1422; Intelligence Authorization Act for Fiscal Year 2015, Pub. L. No. 113-293, 310, 128 Stat. 3990, 3999-4000 (2014).

⁸ S. 1974, 107th Cong. (2002); S. 1440, 108th Cong. (2003).

handling FBI whistleblower reprisal complaints, which was issued in January 2015.⁹ In addition, the President directed the Attorney General to assess the efficacy of its regulations in deterring reprisal for protected disclosures and in ensuring appropriate enforcement, and to propose revisions to its regulations that would increase their effectiveness.¹⁰ Both evaluations confirmed that, unlike all other Executive Branch employees, including employees in the intelligence community under statutorily and presidentially created protections,¹¹ FBI employees enjoy no legal protection for making reports of wrongdoing to supervisors or others in their chain of command.¹² Instead, FBI employees may only seek redress for reprisal for reporting wrongdoing to a designated list of nine persons and entities, which includes the Department of Justice's Office of Professional Responsibility (DOJ-OPR), the Department's Office of Inspector General (DOJ-OIG), the FBI Office of Professional Responsibility (FBI-OPR), the FBI Inspection Division Internal Investigations Section, the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, and to the highest ranking official in any FBI field office.¹³

This structure has resulted in legitimate complaints of reprisal being dismissed because the underlying disclosure was initially made to the "wrong" person or entity. GAO reviewed 54 complaints that DOJ had closed over a period of five calendar years where documentation was sufficient to determine why the case had closed.¹⁴ Of these complaints, forty-three percent (23 cases) had at least one claim dismissed because the complainant made his or her disclosure to an official or entity not designated in the regulations.¹⁵ In 17 of these 23 cases, GAO was able to determine, however, that a disclosure was made to someone in the employee's chain of command or management.¹⁶ The findings by GAO are consistent with those made by the Department in its own review of FBI whistleblower cases,¹⁷ and are unsurprising given the FBI's culture that requires a deep respect for the chain of command and FBI's own policy that encourages reporting of wrongdoing to supervisors.¹⁸

The Committee is familiar with individual cases that were dismissed because FBI employees made disclosures of serious wrongdoing to the wrong person or entity, and has received testimony re-

⁹U.S. Gov't Accountability Office, GAO-15-112, *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints* (2015) [hereinafter "GAO Report"].

¹⁰PPD-19, *supra* note 7, at 5. DOJ issued its report in April 2014. U.S. Dep't of Justice, *Report on Regulations Protecting FBI Whistleblowers* (2014) [hereinafter "DOJ Report"].

¹¹5 U.S.C. § 2302(b)(8); PPD-19, *supra* note 7, at 6-7.

¹²GAO Report, *supra* note 9, at 6; DOJ Report, *supra* note 10, at 4.

¹³28 C.F.R. 27.1(a).

¹⁴GAO Report, *supra* note 9, at 14.

¹⁵*Id.*

¹⁶*Id.*

¹⁷DOJ Report, *supra* note 10, at 7 ("OIG reviewed a total of 89 cases . . . Of the 85 cases that were closed, OIG found that 69 were 'non-cognizable.' In a significant portion of cases, the claim was found non-cognizable because it was not made to the proper individual or office under 28 C.F.R. § 27.1(a).").

¹⁸The FBI's October 15, 2011, *Domestic Investigations and Operations Guide* states: "In general, the FBI requires employees to report known or suspected failures to adhere to the law, rules or regulations by themselves or other employees, to any supervisor in the employees' chain of command; any Division Compliance Officer; any Office of the General Counsel Attorney; any FBI-INSID personnel; any FBI Office of Integrity and Compliance staff; or any person designated to receive disclosures pursuant to the FBI Whistleblower Protection Regulation (28 Code of Federal Regulations 27.1), including the Department of Justice Inspector General," available at <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29>.

garding such employees. Michael German, a decorated undercover special agent within the FBI, who successfully risked his life to infiltrate white supremacist and neo-Nazi hate groups across the United States, discovered that a portion of a meeting between two such groups had been illegally recorded by mistake. He testified that his supervisor refused to address the matter and told him to pretend it did not happen.¹⁹ Because he was aware that a failure to provide notice to his chain of command would cause problems, Mr. German called his supervisor to inform the supervisor that he intended to call the assistant special agent in charge (ASAC) in order to tell the ASAC that he, Mr. German, was going to call the Special Agent in Charge (SAC) to make a whistleblower report.²⁰ The ASAC directed him to write the complaint in an email that the ASAC would forward to the SAC.²¹ The FBI would later argue that by transmitting his complaint through the ASAC, Mr. German had forfeited his right to be protected from the reprisals he ultimately faced for sending that email.²² Richard Kiper previously worked at the FBI Training Division in Quantico, where he made multiple disclosures regarding waste, fraud, and abuse to the highest ranking official in the Training Division, the Assistant Director. Following his disclosures, he was demoted two grades through a “Loss-of-Effectiveness” order.²³ Mr. Kiper testified that while the FBI conceded that he made his disclosures to the highest-ranking official within the FBI Academy, the FBI argued that the disclosures were not made to the highest ranking official in any FBI office, and therefore not protected.²⁴

Evaluation of the existing statutory and regulatory protections for FBI whistleblowers also demonstrates that the investigation and adjudication process for these complaints lacks independence, transparency, and efficiency in key regards. All complaints are investigated and adjudicated completely within the Justice Department without any opportunity for independent review. Enforcement of whistleblower protections is statutorily required to be consistent with applicable provisions of sections 1214 and 1221 of title 5 of the U.S. Code, which govern the Office of Special Counsel and Merit Systems Protection Board (where nearly all other federal employees’ whistleblower retaliation claims are investigated and adjudicated), but the Department’s regulatory processes have not provided commensurate protections. Offices within the Department involved in this process have missions that are wholly unrelated to FBI whistleblowers and have stated that competing priorities and resources contribute to delays.²⁵ FBI whistleblowers lack access to

¹⁹ *Whistleblower Retaliation at the FBI: Improving Protections and Oversight: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Michael German, Fellow, Liberty and National Security Program, Brennan Center for Justice at New York University School of Law).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Under FBI Policy, a “Loss-of Effectiveness” order is a management-directed reassignment of an FBI employee based on an employee’s inability to satisfactorily perform his or her duties while remaining in his or her currently assigned position. Federal Bureau of Investigation, Policy Directive 0773D, *Loss of Effectiveness Transfers* (2015).

²⁴ *Whistleblower Retaliation at the FBI: Improving Protections and Oversight: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of J. Richard Kiper, Special Agent, Federal Bureau of Investigation).

²⁵ GAO Report, *supra* note 9, at 23–24; see also Letter from Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary, to Sally Quillian Yates, Deputy Attorney General, U.S. Dept’t of Justice (Sep’t 29, 2015) (citing the Department’s statement to a whistleblower that

case precedent because the Department has failed to publish decisions from prior cases, yet the FBI as a repeat litigant has access to all prior decisions. Moreover, resolution of cases has taken up to more than a decade. GAO reviewed all 62 complaints closed over a period of five calendar years (2009 through 2013) and found that the Department ruled in favor of the whistleblower in just three instances; these three cases lasted from just over eight years to 10.6 years.²⁶

The FBI Whistleblower Protection Act of 2016, S.2390, which has been endorsed by more than 25 organizations and numerous current and former whistleblowers, would address identified deficiencies in the substantive protections applicable to FBI whistleblowers and the procedures by which they may obtain redress by: (1) expanding the list of persons and entities to which FBI employees may make protected disclosures and the definition of a prohibited practice and (2) enhancing procedures for the investigation and adjudication of complaints of reprisal made by FBI whistleblowers. To ensure that FBI employees are protected from reprisal for reporting wrongdoing consistent with other law enforcement personnel, S.2390 specifies persons and entities to which FBI employees may make protected disclosures. This list includes persons and entities already permitted to receive disclosures of wrongdoing pursuant to current law and regulation and it adds to the list supervisors within the employee's chain of command, who were already permitted to receive disclosures of wrongdoing under FBI's policy.²⁷ The list includes the Office of Special Counsel, which is authorized to receive complaints from FBI employees under 5 U.S.C. § 1213²⁸ and reiterates that employees are protected as described by the Lloyd-La Follette Act, 5 U.S.C. 7211.²⁹ The legislation ensures that an FBI employee who is retaliated against for making a protected disclosure to this specific list of individuals and entities may obtain a remedy for the retaliation suffered.

With nearly 35,000 personnel and an enacted budget of almost \$9 billion, the FBI is essential to combating serious and complex criminal activity, protecting the nation against terrorism and espionage, and serving all federal, state, and local law enforcement

"given . . . the demands on [Deputy Attorney General Yates'] time are vast and quite unpredictable, it is not practical to require her to provide the parties with an estimated timeframe . . .").

²⁶ GAO Report, *supra* note 9, at 22.

²⁷ See *Domestic Investigations and Operations Guide*, *supra* note 17.

²⁸ Under 5 U.S.C. § 1213, the Office of Special Counsel may refer such disclosures to the head of the agency which the information concerns for investigation. 5 U.S.C. § 1213(g).

²⁹ In addition to the Lloyd-La Follette Act, under an annual appropriations provision, no funds are available to pay the salary of an FBI officer or employee who:

(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or

(2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance or efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).

Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, div. E, tit. VII, 713, 129 Stat. 2242, 2476 (2015).

agencies with training, laboratory and fingerprint examinations, and centralized crime information. The FBI's vital role in these functions and the protection of our nation make it all the more critical that FBI employees are encouraged to report, without fear of reprisal, incidents that they reasonably believe constitute a violation of the Constitution, rule, law, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. This will serve to create a more effective Bureau for the benefit of the American people.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

A. INTRODUCTION OF THE BILL

On December 10, 2015, Chairman Charles Grassley and Ranking Member Patrick Leahy introduced the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2015. Senators McCaskill, Wyden, Johnson, Tillis, Kirk, Hatch, Markey, Baldwin, and Lee joined as cosponsors. The bill was referred to the Committee on the Judiciary.

B. COMMITTEE CONSIDERATION

The Committee on the Judiciary held a hearing on March 4, 2015 titled, "Whistleblower Retaliation at the FBI: Improving Protections and Oversight."³⁰ The hearing considered the findings and recommendations for improving protections for FBI whistleblowers made by the Department of Justice and the Government Accountability Office in reports issued by each office respectively.³¹ Testimony was received from the first panel of witnesses: Stephen M. Kohn, Attorney Trustee, National Whistleblower Center; Michael German, Fellow, Liberty and National Security Program, Brennan Center for Justice at New York University School of Law; J. Richard Kiper, Special Agent, Federal Bureau of Investigation. A second panel also provided testimony: David C. Maurer, Director, Homeland Security and Justice Issues, Government Accountability Office; Kevin L. Perkins, Associate Deputy Director, Federal Bureau of Investigation; Michael E. Horowitz, Inspector General, Department of Justice.

On December 10, 2015, Senator Grassley introduced S.2390, the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2015. Senator Leahy was an original cosponsor. The bill was referred to the Committee on the Judiciary.

The Committee on the Judiciary considered S.2390 on April 14, 2016. Senators Grassley and Leahy offered an amendment in the nature of a substitute. The amendment was accepted without objection by a voice vote.

The Committee then voted to report the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, with an amendment in the nature of a substitute, favorably to the Senate by voice vote.

³⁰ *Whistleblower Retaliation at the FBI: Improving Protections and Oversight: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015).

³¹ DOJ Report, *supra* note 10; GAO Report, *supra* note 9.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the “Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016.”

Section 2. FBI whistleblower protections

This section amends section 2303 of title 5 to provide new definitions of a protected disclosure and a prohibited personnel practice and to improve procedures for the investigation and adjudication of FBI whistleblower reprisal complaints.

Definitions

The Act amends section 2303(a) to define terms and phrases used in the Act, including “administrative law judge,” “Inspector General,” “personnel action,” “prohibited personnel practice,” and “protected disclosure.”

The definition of a personnel action for purposes of this bill is made by cross reference to section 2302(a)(2)(A) of title 5 (which is the definition for personnel action as it applies to nearly all other federal employees). “Personnel action” was previously defined for the FBI by reference to section 2302(a)(2)(A), but only clauses (i) through (x). However, Congress amended section 2302 to include additional clauses (xi) and (xii) in 1994 and 2012.³² Corresponding amendments to section 2303 were not made. The Justice Department determined it had authority to include the 1994 addition when it promulgated its regulations in 1999.³³ However, since 2012, the Justice Department has not similarly included clause (xii) in its definition of a personnel action. The revised definition in this Act will ensure that the definition of a personnel action in section 2302 remains consistent with the definition in section 2303, thus bringing protections for FBI employees in line with those of other federal employees under the Whistleblower Protection Enhancement Act.

The Committee intends for a “Loss-of-Effectiveness Order” (LOE) to constitute a personnel action for purposes of section 2302(a)(2), and thus, correspondingly, under section 2303. According to FBI policy, an LOE is a management-directed reassignment of an FBI employee based on the employee’s inability to satisfactorily perform his or her duties while remaining in his or her currently assigned position.³⁴ Such reassignments are clearly within the scope of a “personnel action” under section 2302 and should not be made for reasons of reprisal.

The Act provides for an expanded definition of a protected disclosure. Prior statutory language limited protection to disclosures “made by the employee to the Attorney General (or an employee

³² Pub. L. No. 103–424, 5, 108 Stat. 4361, 4363 (1994) (adding a new clause (x) to read “a decision to order psychiatric testing or examination,” and moving the prior clause (x), which read “any other significant change in duties, responsibilities, or working conditions,” to clause (xi)); Pub. L. No. 112–199, § 104, 126 Stat. at 1467 (adding a new clause (xi) to read, “the implementation or enforcement of any nondisclosure policy, form, or agreement,” and moving the clause regarding a significant change in duties to clause (xii)).

³³ Whistleblower Protection For Federal Bureau of Investigation Employees, 64 Fed. Reg. at 58,784–0984 (“We believe that the Attorney General has authority under 5 U.S.C. [§] 301 to expand the definition of “personnel action” for purposes of these regulations.”).

³⁴ *Loss of Effectiveness Transfers*, *supra* note 23.

designated by the Attorney General for such purpose).³⁵ The Department of Justice promulgated regulations limiting disclosures to nine designated persons and entities.³⁶ The new definition of protected disclosure encompasses all persons and entities designated by the Department. It also adds supervisors in the employee's direct chain of command up to and including the head of the employing agency. This new language defining a protected disclosure as including an employee's supervisor is the same as is applicable to employees of the intelligence community as provided by the President in Presidential Policy Directive 19.³⁷ In testimony and statements provided to the Judiciary Committee, FBI Director James Comey,³⁸ Attorney General Loretta Lynch,³⁹ and the Department of Justice Inspector General endorsed providing protections for employees who report wrongdoing to their supervisor.⁴⁰ The GAO Report also explicitly recommended that such protections be considered by Congress.⁴¹ The definition of a protected disclosure also reiterates that employees may make disclosures as described by the Lloyd-La Follette Act, 5 U.S.C. § 7211, and to the Office of Special Counsel, which is statutorily authorized to receive complaints from FBI employees under 5 U.S.C. § 1213. In response to questions from Committee Chairman Grassley, the FBI has acknowledged the applicability of section 7211 to its employees.⁴²

Most employees in the Executive Branch generally do not have a proscribed list of persons or entities to which they may make disclosures of protected information. Given the nature of the work

³⁵ 5 U.S.C. § 2303.

³⁶ 28 C.F.R. § 27.1(a).

³⁷ PPD-19, *supra* note 7, at 7.

³⁸ Chairman GRASSLEY. First question, do you support legal protections for FBI employees who follow FBI's own policies and report wrongdoing to their supervisors? If not, why not?

Director COMEY. I do, very much. *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015).

³⁹ Chairman GRASSLEY. * * * Do you support legal protections for FBI employees who report wrongdoings to their supervisor?

Attorney General LYNCH. Well, thank you, sir. I think certainly I do support the protection of whistleblowers in general. The situation that you raised I think is also one that we—all of us in law enforcement have an obligation to support and protect as well. * * * [W]e certainly support protecting those who report within their chain of command, and as you, yourself, noted within the intelligence community. *Oversight of the Justice Department: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2016).

⁴⁰ *Whistleblower Retaliation at the FBI: Improving Protections and Oversight: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Michael E. Horowitz, Inspector Gen., Dep't of Justice) (“One particularly important proposed change recommended by that group, was expanding the definition of persons to whom a protected disclosure can be made, which the OIG endorses.”).

⁴¹ GAO Report, *supra* note 9, at 41 (“To ensure that the purposes of 5 U.S.C. § 2303—which prohibits a personnel action taken against an FBI employee as a reprisal for a protected disclosure—are met, Congress may wish to consider whether FBI employees should have a means to obtain corrective action for retaliation for disclosures of wrongdoing made to supervisors and others in the employee's chain of command who are not already designated officials.”).

⁴² Chairman GRASSLEY. [S]hould DOJ's regulations be amended to clearly protect the FBI employee disclosures to Congress, and if not, why not?

Associate Deputy Director PERKINS. I think it falls within the realm if someone's disclosing whistleblower type of role, and disclosure to Congress, certainly it's something that should be protected with. *Whistleblower Retaliation at the FBI: Improving Protections and Oversight: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015).

Although the whistleblower protection provisions set out at 5 U.S.C. § 2303 and 28 C.F.R. Part 27 do not encompass disclosures to Congress, a separate Federal law provides that “[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.” (5 U.S.C. § 7211.)

Answers from FBI Associate Deputy Director Perkins to Questions for the Record from Chairman Grassley Arising from the March 4, 2015, Hearing Before the Senate Committee on the Judiciary Regarding “Whistleblower Retaliation at the FBI: Improving Protections and Oversight” (Mar. 27, 2015), available at <https://www.judiciary.senate.gov/imo/media/doc/Perkins%20Responses%20to%20Grassley.pdf>

conducted by the FBI, coupled with the carve-out under which its whistleblower protection authority has been functioning for some time, such a list of entities is appropriate to ensure the rights of employees are protected while addressing concerns the agency has expressed about protecting sensitive information.

The definition of protected disclosure is not intended to alter or amend any statutory or Executive Branch protections for classified information. FBI employees who make protected disclosures containing such information must comply with rules regarding the proper handling and safeguarding of such information and ensure that recipients have proper authorization and facilities to receive such information securely.

Prohibited Practices

The revised definition of a prohibited personnel practice continues to protect employees who make disclosures that they reasonably believe evidence wrongdoing under the same standard as 5 U.S.C. § 2303, with modifications made to conform to current language applicable to other federal employees, as most recently amended by the Whistleblower Protection Enhancement Act of 2012.⁴³ In 1989, the Whistleblower Protection Act amended section 2302 to protect “gross mismanagement,” as opposed to “mismanagement.”⁴⁴ A corresponding change was not made to section 2303. The new definition of prohibited personnel practice accounts for this change and other amendments made to section 2302(b)(8).

The new definition of prohibited personnel practice additionally prohibits retaliation against FBI employees because of the exercise of any appeal, complaint, or grievance right related to a protected disclosure or as otherwise granted by law, rule, or regulation; testifying or lawfully assisting any individual in the exercise of such rights; cooperating with or disclosing information to the Department of Justice Office of Inspector General, which has the authority to conduct reviews of the operations of the FBI, or to the Office of Special Counsel, which has authority to require the head of an agency to conduct an investigation of 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 and submit a written report to the Office of Special Counsel; or refusing to obey an order that would require the individual to violate a law. These protections are equivalent to those granted to other employees in the Executive Branch under 5 U.S.C. § 2303(b)(9).

The Act prohibits the FBI from implementing or enforcing any nondisclosure policy, form, or agreement that does not contain the statement described in 5 U.S.C. § 2302(b)(13). That statement reads as follows:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or

⁴³ 5 U.S.C. § 2302(b)(8).

⁴⁴ Pub. L. No. 101-0912, § 104, 103 Stat. at 32.

mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.⁴⁵

Such a requirement has been applicable to the FBI via a provision in its annual appropriations act.⁴⁶ Thus, it is not a new requirement but one that already exists in statute and is made permanent by this Act.

Procedures

The Department's current process for investigating and adjudicating FBI whistleblower reprisal complaints is contained in 28 C.F.R. part 27. Those procedures are required to be consistent with applicable provisions of 5 U.S.C. §§ 1214, 1221.⁴⁷ As further detailed below, the procedures provided for by the Act maintain consistency with these sections, but also specify requirements intended to address deficiencies in DOJ's process, including where DOJ's regulations had failed to ensure protections commensurate with sections 1214 and 1221.

Filing of a complaint

The Act provides for new and enhanced procedures for the investigation and adjudication of allegations of FBI whistleblower reprisal. FBI employees or applicants may seek review of a personnel action alleged to have been taken in retaliation for a protected activity by submitting a complaint to the Department of Justice Office of Inspector General. Any other office that receives such an allegation is expected to forward such complaint to the Office of Inspector General. The Committee intends for the Office of Inspector General to continue its current practice of reviewing complaints from other sources, notably the FBI Inspection Division.⁴⁸

Investigation

Under the Act, the Office of Inspector General is the sole entity responsible for investigating whistleblower reprisal complaints. This investigatory responsibility is similarly granted to inspectors general for intelligence community agencies under Presidential Policy Directive 19.⁴⁹ Justice Department regulations had additionally authorized DOJ–OPR to conduct such reviews.⁵⁰ That office is not appropriately suited for such duties given that its primary responsibility is to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice.⁵¹ Moreover, DOJ–OPR

⁴⁵ 5 U.S.C. § 2302(b)(13).

⁴⁶ See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, div. E, tit. VII, 744 (2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, div. E, tit. VII, 1A747, 128 Stat. 2129, 2392 (2014).

⁴⁷ 5 U.S.C. § 2303(b); Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, Memorandum for the Attorney General, 62 Fed. Reg. 23,123 (Apr. 14, 1997).

⁴⁸ See GAO Report, *supra* note 9, at 9 n.17.

⁴⁹ PPD–19, *supra* note 7, at 2.

⁵⁰ 28 C.F.R. § 27.3.

⁵¹ 28 C.F.R. § 0.39a.

does not have the same independence protections as those provided to the Office of Inspector General.⁵²

The Office of Inspector General continues to be required to investigate complaints consistent with the procedures and requirements for the Office of Special Counsel as described in 5 U.S.C. § 1214.⁵³ Accordingly, timeframes and reporting requirements applicable to the Office of Special Counsel are also applicable to the Office of Inspector General. For example, the Office of Inspector General must notify the complainant that it has received the complaint and provide the name of a contact person within the office within 15 days of receiving the complaint.⁵⁴ It also includes the authority to request a stay from an Administrative Law Judge (ALJ) of any personnel action for 45 days, subject to extension, if the Inspector General 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.⁵⁵

The Inspector General is required by the Act to issue a decision containing the findings supporting his or her determination. The Committee expects the Office of Inspector General to continue its practices instituted in response to GAO's report. This includes providing complainants with the opportunity to comment on the Office of Inspector General's decision to terminate a complaint without initiating an investigation and providing more specificity to complainants about the reasons a complaint does not meet jurisdictional requirements.⁵⁶ Prior to GAO's review, the Office of Inspector General generally did not send a proposed termination report to complainants when the office declined to investigate their cases, and although the Office of Inspector General did generally send a final termination report to these complainants, it did not always include the reasons for its decision in the report.⁵⁷ GAO found that providing this information helps ensure that complainants have the information they need to make decisions about their complaints and the Office of Inspector General recognized the benefits of providing such information.⁵⁸

Preliminary relief

The Act provides for automatic preliminary relief at the conclusion of the Office of Inspector General's investigation if the Inspector General determines that reasonable grounds exist to believe that a personnel action occurred, exists, or is to be taken, in violation of subsection (b) of section 2303. The legislation specifies that once the Inspector General has made his or her determination, the Inspector General is required to request from an ALJ an order of

⁵² Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1102, as amended (5 U.S.C. app. §§ 1-13).

⁵³ To the extent that requirements applicable to the Office of Special Counsel are subsequently amended, such amended requirements shall be applicable to the Office of Inspector General.

⁵⁴ 5 U.S.C. § 1214(a)(1)(B).

⁵⁵ 5 U.S.C. § 1214(b)(1).

⁵⁶ GAO report, *supra* note 9, at 39-40; *Whistleblower Retaliation at the FBI: Improving Protections and Oversight: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Michael E. Horowitz, Inspector Gen., Dep't of Justice) ("We also modified our procedures with respect to decisions not to initiate an investigation. In the past we closed such complaints in a brief declination letter. In the interest of enhancing transparency and giving whistleblowers the fullest possible opportunity to provide relevant information, our declination letters now identified deficiencies in complaints and provide complainants an opportunity to submit additional information prior to the declaration becoming final.")

⁵⁷ GAO Report, *supra* note 9, at 36-37.

⁵⁸ *Id.* at 39.

preliminary relief from the identified retaliatory personnel action consistent with the Inspector General's determination. The ALJ must then issue an order providing for this relief without further proceedings. The intent of this provision is to provide relief as a matter of course to a complainant once the Office of Inspector General has concluded its investigation and found that reasonable grounds exist to believe that reprisal has occurred.

While authority to stay a personnel action has existed under DOJ's FBI whistleblower regulations, as described above,⁵⁹ it has rarely been exercised within the Department. In comparison, stays of personnel actions are more frequently used by the Office of Special Counsel. The Committee believes that preliminary relief is appropriate and fair once an Inspector General has concluded that reasonable grounds exist to believe that reprisal has occurred.⁶⁰ Such a practice encourages settlement and gives effect to the investigative findings of the Office of Inspector General.⁶¹ The Inspector General and ALJs are also encouraged to use stays earlier in the proceedings as provided for in sections 1214 and 1221 and as currently authorized under Justice Department regulations.⁶²

In the rare instance in which a personnel action has already been effectuated and the FBI makes a particularized showing that good cause exists not to return the employee to the position that the employee would have held had the personnel action not been taken, the ALJ is provided with authority to, instead, return the employee, as nearly as practicable and reasonable, to such position. This provision is intended to address the concern that, in rare instances, it may not be appropriate to return the employee to the exact same position. For example, the ALJ could determine that the employee could be assigned to an equivalent investigation with equivalent responsibilities and duties as preliminary relief. The Committee emphasizes that such an accommodation should not be the normal course and expects the FBI to make this request infrequently.

Filing of Objections; Review by Administrative Law Judge; Review by Attorney General

The Act provides for either party to file objections to the decision of the Inspector General within 60 days, which is the amount of time currently provided for under 5 U.S.C. § 1214 and DOJ's regulations.⁶³ Under the Act, ALJs are responsible for reviewing deci-

⁵⁹ 28 C.F.R. § 27.4 ("Conducting Office may request the Director to order a stay of any personnel action for 45 calendar days if it determines that there are reasonable grounds to believe that a reprisal has been or is to be taken.").

⁶⁰ In addition to the Office of Special Counsel's practice of requesting stays of a personnel action, interim relief exists in other whistleblower contexts. *See, e.g.*, 49 U.S.C. § 31105 (requiring a preliminary order for relief where the Department of Labor determines after investigation that it is reasonable to believe a violation occurred).

⁶¹ Under the current regulatory process, the investigations of the Office of Inspector General are rendered meaningless even where, at the end of the independent fact-finding, the Inspector General has made a determination that there is a reasonable basis to conclude that reprisal has occurred. This issue was detailed in testimony provided at the Committee hearing on FBI whistleblowers:

Chairman GRASSLEY. Okay. And then a follow-up, should the department have to defer to your independent investigative findings and if not, what's the point in having your office do an independent review?

Inspector General HOROWITZ. I've asked that question on a number of occasions . . . *Whistleblower Retaliation at the FBI: Improving Protections and Oversight: Hearing Before the S. Comm. on the Judiciary, 114th Cong.* (2015).

⁶² 28 C.F.R. § 27.4(b), (d).

⁶³ 28 C.F.R. § 27.4(c).

sions of the Office of Inspector General, should either party file objections. The filing of objections does not affect an order of preliminary relief issued under section 2303(c)(2)(C). If no objections are filed, the ALJ is required to provide for an order of permanent relief from the personnel action consistent with the preliminary order. The ALJ may issue an order for further corrective action as described under section 1221(g), such as attorney fees and compensatory damages, after an opportunity for a hearing.

If objections to the decision of the Inspector General are filed by either party, the Act provides for the ALJ to review the decision on the record after opportunity for an agency hearing. Accordingly, the formal adjudication procedures of the Administrative Procedure Act (APA) apply to these adjudications.⁶⁴ Under DOJ's current FBI whistleblower regulations, hearings are discretionary by the Office of Attorney Recruitment and Management⁶⁵ (OARM) and have generally not been held. Consistent with the APA, the bill provides that the ALJ must issue a written decision explaining the grounds for his or her determination. The provisions of the APA provide for, among other things, the ALJ to regulate the course of the hearing, issue subpoenas, rule on offers of proof and receive relevant evidence, take depositions or have depositions taken, hold settlement conferences, rule on procedural requests, and make findings of fact and conclusions of law.⁶⁶ ALJ decisions must be supported by reliable and substantial evidence.⁶⁷ ALJ positions are designed to promote independent decision making and various requirements are aimed to ensure that ALJs are autonomous and operate free from agency influence.⁶⁸ An agency must appoint ALJs as are necessary for proceedings required to be conducted under sections 556 and 557 of title 5, but may use ALJs from and with the consent of other agencies when the agency is occasionally or temporarily insufficiently staffed with ALJs.⁶⁹ The Department should consider borrowing ALJs from the Department of Labor, Occupational Safety & Health Administration, which has authority to protect workers from retaliation under twenty-two federal laws and whose ALJs are experienced in the adjudication of whistleblower cases.

The ALJ may order corrective action as provided for in section 1221(g). Under the Justice Department's current regulatory framework, corrective action may be awarded consistent with section 1221. However, after section 1221 was amended in 2012,⁷⁰ the Department did not amend its regulations to ensure such corrective action was available to FBI whistleblowers.⁷¹ The Department committed to do so in April 2014, but, to date, has not.⁷² Moreover, the Department has remained silent on whether it will amend its regulations consistent with section 1221(g)(4), as amended in 2012,

⁶⁴ 5 U.S.C. § 554.

⁶⁵ 28 C.F.R. § 27.4(e)(3).

⁶⁶ 5 U.S.C. §§ 556(c), 557(c).

⁶⁷ 5 U.S.C. § 556(d).

⁶⁸ See 5 U.S.C. 554(d), 5 C.F.R. §§ 930.201(f)(3), 930.206(a).

⁶⁹ 5 U.S.C. §§ 3105, 3344.

⁷⁰ Pub. L. No. 112-199, § 104, 126 Stat. 1465, 1468-69 (inserting "any other any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs)" and providing that corrective action "may include 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").

⁷¹ See 28 C.F.R. 27.4(f).

⁷² DOJ Report, *supra* note 10, at 12.

which provides for corrective action to “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.”⁷³ All forms of corrective action under 1221(g) have been available to FBI whistleblowers by operation of the amendments to section 1221 since 2012, despite DOJ’s failure to timely update its regulations. All forms of corrective action provided for under section 1221 may be awarded, as appropriate, by an ALJ and must be accounted for in the Department’s regulations following the enactment of this Act.

Unless appealed to the Attorney General, the decision of the ALJ is final. While the Attorney General does not owe deference to the ALJ’s decision under the APA,⁷⁴ the Committee anticipates that the Attorney General will recognize the investigative and adjudicative record before him or her and not unduly delay resolution of these cases, particularly where, as here, an independent fact-finder has produced a decision supported by reliable and substantial evidence. Moreover, the Attorney General may consider delegating his or her authority to review such decisions to an independent entity. For example, the Secretary of Labor, who has the authority to administer the whistleblower provisions of twenty-two statutes, has generally delegated her responsibility to issue final agency decisions to the Administrative Review Board.⁷⁵

Consistent with law applicable to the Merit Systems Protection Board, this legislation requires the Attorney General to establish and announce publicly the date by which the Attorney General intends to complete his or her review of the matter.⁷⁶ If a delay is expected to be more than 30 days, the Attorney General is required to publicly announce a new date by which the review is intended to be completed. The requirement for the Attorney General to report the date on which the decision shall be completed and provide updates should it not be met is also consistent with a recommendation made by GAO to the Department to provide parties with an estimated timeframe for returning each decision and, if the timeframe shifts, communicating a revised estimate to the parties.⁷⁷ DOJ concurred with this recommendation, but it is unclear if the Department is fulfilling this obligation. For example, in one instance, the Office of the Deputy Attorney General (ODAG) informed the Committee that the Deputy Attorney General would not provide an estimated timeframe for completing her review of a particular whistleblower’s complaint.⁷⁸ At the time of the letter, the

⁷³ 5 U.S.C. § 1221(g)(4); see also 5 U.S.C. § 1214(h).

⁷⁴ 5 U.S.C. § 557(b).

⁷⁵ *Delegation of Authority and Assignment of Responsibility to the Administrative Review Board*, 75 Fed. Reg. 3924 (Jan. 25, 2010); see also U.S. Dep’t of Labor, *Information for Whistleblowers, ARB/OALJ*, available at <http://www.dol.gov/appeals/whistleblowers.htm>; U.S. Gov’t Accountability Office, GAO–09–106, *Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency* 20, 55–56 (2009).

⁷⁶ 5 U.S.C. § 7701.

⁷⁷ GAO Report, *supra* note 9, at 42 (“OARM and ODAG should provide parties with an estimated time frame for returning each decision, including whether the complaint meets threshold regulatory requirements, merits, and appeals. If the time frame shifts, OARM and ODAG should timely communicate a revised estimate to the parties.”).

⁷⁸ Letter from Peter J. Kadzik, Assistant Attorney General, U.S. Dep’t of Justice, to Charles E. Grassley, Chairmen, U.S. Senate Committee on the Judiciary (Oct. 13, 2015). The Department stated that an estimated timeframe will not be provided to the whistleblower until staff assigned to the matter complete their review and provide their recommendation to the Office of the Deputy Attorney General. *Id.* This effectively negates the intent of GAO’s recommenda-

complaint at issue had been pending with the Deputy Attorney General for almost one year and the whistleblower had not been provided an estimated timeframe as to its completion. Given this, the legislation makes such requirements mandatory, as they are for the Merit Systems Protection Board. The Committee expects that such reviews will be completed expeditiously without sacrificing the quality or thoroughness of the review process.

Publication of determinations

Under the Act, decisions issued by an ALJ and the Attorney General must be made publicly available consistent with the requirements under the Freedom of Information Act, and the Department must also proactively publish these decisions as does the Merit Systems Protection Board.⁷⁹ Unfortunately, the Justice Department has never made available to FBI whistleblowers litigating reprisal cases the precedent of the Office of Attorney Recruitment and Management or the Deputy Attorney General. This puts litigants at an extreme disadvantage when trying to assert their rights in a contested proceeding. In April 2014, the Department committed to examining the feasibility of making these decisions available, but has yet to publish a decision.⁸⁰ Language in this provision was revised in the managers' amendment in consultation with Senator Flake to make clear that decisions are to be published consistent with the practices of the Merit Systems Protection Board, which currently makes such decisions available for public review and copying in the Board's Headquarters' Library and on the Board's website.⁸¹

Language in the Act makes clear that the publication of decisions is subject to limitations on the disclosure of information as provided for in law or regulation. In the rare cases in which, for example, Privacy Act or classified information must be redacted or otherwise withheld, the ALJ and Attorney General retain the authority to do so. The Attorney General may further provide for such a process in regulations required to be issued under section 2303(d), as amended by this Act.

Judicial review

The Act provides for judicial review in a federal circuit court of appeals as provided under chapter 7 of title 5. This is consistent with whistleblower cases under the Whistleblower Protection Enhancement Act on appeal from the Merit Systems Protection Board.⁸² Judicial review is intended to improve the process by ensuring that a truly independent avenue of appeal completely outside the Justice Department is available. Its necessity has been demonstrated by the lengthy delays and lack of transparency in the

tion, which is to enhance accountability to complainants and provide additional assurance about DOJ management's commitment to improve efficiency. See GAO Report, *supra* note 9, at 27.

⁷⁹ 5 U.S.C. § 552(a)(2)(A) (requiring that final opinions in the adjudication of cases be made available for inspection and copying); see also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153–54 (1975) (observing that the proactive disclosure provision “represents a strong congressional aversion to ‘secret [agency] law,’ . . . and represents an affirmative congressional purpose to require disclosure of documents which have ‘the force and effect of law’” (quoting H.R. Rep. No. 89–1497, at 7 (1966)); Attorney General Holder's FOIA Guidelines, available at <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> (“[A]gencies should readily and systematically post information online in advance of any public request.”).

⁸⁰ DOJ Report, *supra* note 10, at 18.

⁸¹ 5 C.F.R. § 1204.2(d).

⁸² 5 U.S.C. § 7701.

Justice Department's current regulatory process for hearing these cases internally. In promulgating the FBI whistleblower regulations in 1999, the Department stated that section 2302 did not provide for judicial review, even though the President was directed to provide for enforcement consistent with section 1214 and 1221, which do provide for judicial review of whistleblower claims.⁸³ The Department has maintained this position.⁸⁴ Regardless of the Department's view, the legislation unequivocally provides for judicial review of FBI whistleblower cases. Courts may set aside decisions that are, among other things, arbitrary and capricious, unsupported by substantial evidence, or without observance of procedure required by law.⁸⁵

The FBI already is required to defend against whistleblower reprisal allegations in federal court for its veteran's preference eligible employees, who constitute between 15 and 20 percent of the Bureau.⁸⁶ Under precedent of the Federal Circuit Court of Appeals, preference eligible employees may raise whistleblower reprisal as a defense to an adverse personnel action before the Merit Systems Protection Board and before a federal court of appeals.⁸⁷ The court explicitly considered and rejected the Department's assertions that allowing whistleblower reprisal claims by employees within the intelligence community raises serious security concerns.⁸⁸ Federal courts are competent to hear and decide cases involving even sensitive and classified matters, in the rare instances such information is relevant. GAO has specifically found that intelligence agencies have experience preparing case files in adverse action and equal employment opportunity cases and can convert classified materials into unclassified publicly available documents where necessary, through declassification and redaction.⁸⁹ Moreover, they have experience dealing with judges and attorneys who have security clearances in appeals to the Equal Employment Opportunity Commission and in court cases.⁹⁰ GAO also found that very few adverse action cases involve sensitive information in any event.⁹¹ In particular, in its review of FBI whistleblower reprisal cases that had closed over a period of five calendar years, according to GAO officials, GAO did not identify any adjudicative case files containing classified information.

Regulations

The Justice Department is required to issue regulations to provide for the enforcement of this Act, as it was when the original

⁸³ Whistleblower Protection For Federal Bureau of Investigation Employees, 64 Fed. Reg. at 58,785–86.

⁸⁴ DOJ Report, *supra* note 10, at 19.

⁸⁵ 5 U.S.C. § 706.

⁸⁶ Information on number of individuals who work at the FBI who have been identified as veterans and individuals who claimed their eligibility for veteran preference obtained from the Office of Personnel Management, Enterprise Human Resources Integration—Statistical Data Mart, current as of September 2015.

⁸⁷ *Parkinson v. U.S. Dep't of Justice*, 815 F.3d 757 (Fed. Cir. 2016).

⁸⁸ *Id.* at 771–773.

⁸⁹ U.S. Gov't Accountability Office, *GAO/NSIAD-96-6, Intelligence Agencies: Personnel Practices at CIA, NSA, and DIA Compared With Those of Other Agencies* 5–6 (1996). GAO reviewed all available adverse action case files at the National Security Agency and Defense Intelligence Agency for a two-year period (40 cases), and all available case files at the Merit Systems Protection Board for these agencies and the Central Intelligence Agency for a five-year period (14 cases). *Id.* at 14–15. GAO reviewed selected court cases files relating to claims of equal employment opportunity discrimination. *Id.* at 15.

⁹⁰ *Id.* at 6.

⁹¹ *Id.* at 5.

section 2303 was enacted. The legislation requires the Justice Department to provide regulations to:

(1) Ensure that a prohibited personnel practice is not taken against an employee or applicant for employment with the FBI.

(2) Provide for the administration and enforcement of the Act in a manner consistent with sections 1214 and 1221, which govern the Office of Special Counsel and Merit Systems Protection Board, as well as the Administrative Procedure Act. The Justice Department was previously required to provide for regulations consistent with sections 1214 and 1221. In addition to other provisions described in those sections, the burdens of proof governing these cases as derived from those sections shall continue to apply. In particular, the whistleblower has the burden of showing, by a preponderance of the evidence, that the protected activity was a contributing factor in the personnel action that was taken or is to be taken against him or her. Corrective action 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.⁹²

(3) Ensure that FBI employees are informed of the rights and remedies available to employees under this section, including how to make a lawful disclosure of information that is specifically required by law or Executive Order to be kept classified in the interest of national defense or the conduct of foreign affairs. These same obligations already attach to the head of each agency under the Whistleblower Protection Enhancement Act.⁹³ This Act is not intended to authorize the disclosure of information in a manner that is unauthorized under law, regulation, or Executive Order and it is imperative that FBI employees know how to make disclosures appropriately.

(4) Provide for the protection of classified information and intelligence sources and methods. The Justice Department is required to ensure that the process provided for under this section adequately protects the handling and transmission of classified information. The current case processing directive of the Office of Attorney Recruitment and Management states that “parties shall not file any classified information with [the Office of Attorney Recruitment and Management]. In the event such information becomes relevant to the proceedings before [the Office of Attorney Recruitment and Management], appropriate arrangements for the protection, transmission, and handling of such materials must be in compliance with FBI and other applicable requirements regarding classified materials.”⁹⁴ Classified information is rarely relevant to a reprisal action, but, in the event that it is, it is critical that the Justice Department transparently provide for procedures to accommodate such information to give confidence to FBI whistleblowers

⁹² 5 U.S.C. § 1221(e).

⁹³ 5 U.S.C. § 2302(c).

⁹⁴ Office of Attorney Recruitment and Management Procedures for FBI Whistleblower Reprisal Claims Brought Pursuant to 28 C.F.R. Part 27 (eff. Jan. 4, 2016), at 5, available at <https://www.justice.gov/oarm/file/809851/download>; see also Office of Attorney Recruitment and Management Procedures for FBI Whistleblower Reprisal Claims Brought Pursuant to 28 C.F.R. Part 27 (eff. Oct. 14, 2011), at 5.

and other stakeholders that such information is adequately protected.⁹⁵ The language establishing this obligation is the same that applies to agencies in the intelligence community under Presidential Policy Directive 19.⁹⁶

Reporting

Annual reporting requirements currently exist for the Justice Department pursuant to Presidential delegation.⁹⁷ This Act codifies such requirements with minor amendments—such as how many cases were resolved through the Justice Department’s new mediation program—and provides for public availability. The Justice Department has previously stated that it had no objection to making such reports public.⁹⁸

Rules of construction

The rules of construction under this Act are intended to make clear that certain types of laws and regulations are unaffected by the new provisions. The preexisting jurisdiction of any office to conduct an investigation or determine whether a prohibited personnel practice has been or will be taken is not affected by this Act. Similar language is contained in DOJ’s FBI whistleblower regulations⁹⁹ and in Office of Special Counsel authorizing language.¹⁰⁰

The second rule of construction provided by this legislation is intended to ensure that rules, including penalties for violations thereof, governing the appropriate safeguarding of information, including classified information, are adhered to by all parties involved in disclosing, receiving, handling, investigating, and adjudicating FBI whistleblower disclosures or reprisal complaints as provided for in this Act. Nothing in this Act abrogates or amends any law, regulation, or Executive Order regarding the handling or disclosure of information, including classified information. A provision was included in the managers’ amendment to this effect. Whistleblowers who make lawful disclosures of sensitive information must ensure that the persons or entities to whom they make such disclosures are entitled to receive them. Employees who fail to do so may be subject to penalties. It is equally important that adverse personnel actions are not taken against employees under the guise of information protection when such personnel actions are, in reality, because of a protected disclosure.

GAO Report

This section requires GAO to issue a report, not later than four years after the enactment of this Act, to evaluate the amendments made by this Act. GAO issued a report in 2014 that thoroughly assessed the Justice Department’s FBI whistleblower regulations.¹⁰¹

⁹⁵ The Merit Systems Protection Board provides for a process to address sensitive and classified information in its Judges’ Handbook. For example, when classified material is relevant to a case, a hearing officer with the appropriate level of security clearance will be assigned, and the Handbook describes the authority of administrative judges to seals parts of the record and sanitize initial decisions. U.S. Merit Systems Protection Board, *Judges’ Handbook* (2007), at 74, 76–77.

⁹⁶ PPD–19, *supra* note 7, at 2.

⁹⁷ Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, Memorandum for the Attorney General, 62 Fed. Reg. 23,123 (Apr. 14, 1997).

⁹⁸ DOJ report, *supra* note 10, at 19.

⁹⁹ 28 C.F.R. § 27.3.

¹⁰⁰ 5 U.S.C. § 1214(a)(5).

¹⁰¹ GAO Report, *supra* note 9.

Instead of waiting almost 30 years to assess the state of protections for FBI whistleblowers, as occurred before, this statutorily required report will provide the Congress with information needed much more quickly to assess the program in a reasonable time frame and make any adjustments as needed. The review of the process of investigating and adjudicating FBI whistleblower reprisal complaints is to include, among other things, the recently established mediation program. The Committee is pleased that the Department has initiated a program that is aimed at producing settlements and reducing the costs of these disputes, especially in light of GAO's finding that corrective action may take more than a decade.¹⁰²

GAO is also directed to report on the number and type of disciplinary actions taken in instances of a prohibited personnel practice. Discipline of employees who retaliate against others for their lawful protected activity must be effectuated by the Bureau, as punishment of these employees sends the critical message to FBI employees that such behavior will not be tolerated.

GAO's evaluation of the FBI whistleblower program is intended to provide for best practices and lessons learned not only for the regime under the unique statutory carve-out for FBI whistleblowers, but also the whistleblower protection regimes affecting whistleblowers in the Executive Branch and in the intelligence community.

Effective Date; Implementation

This section provides that the Act is effective upon enactment and applies to pending complaints at the Justice Department, subject to specified exceptions. This general effective provision means that substantive changes made to the definition of a protected disclosure are effective immediately such that FBI employees will be protected for making a disclosure of wrongdoing to a supervisor in his or her chain of command, among other changes. Such substantive requirements similarly apply to cases currently pending in the investigative or adjudicative stage within the Justice Department, meaning that such cases may not be dismissed solely because the FBI employee or applicant made a disclosure of information to a person or entity that is now, but was not previously, included in DOJ's FBI whistleblower regulations.

Department of Justice regulations are necessary to implement the new procedures established by this Act. The legislation provides ample time—18 months—for the Department to issue such regulations and the Committee expects that such regulations will be adopted no later than that time. Prior to the adoption of such regulations, FBI whistleblower protection cases will continue to be investigated and adjudicated as provided for in DOJ's current regulations, although, as detailed above, the amendments made to section 2303(a) and (b) will be effective. At the time that DOJ's regulations are issued, reprisal complaints that are pending in the review stage (i.e., at OARM or ODAG) will continue to be adjudicated under DOJ's preexisting regulatory procedures. Cases that are pending in the investigative stage will conclude the investigation under DOJ's prior FBI whistleblower regulations, and then transition to the new statutory and regulatory procedures for the adju-

¹⁰² *Id.* at 22.

dication stage. As such, in the case of an appeal, these cases will be heard by an ALJ and subject to review in federal court.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974 was not available for inclusion in this report. The estimate will be printed in either a supplemental report or the Congressional Record when it is available.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2390. In order to carry out this Act, the Attorney General is required to issue amended regulations that, among other things, ensure that prohibited personnel practices shall not be taken against an employee in, or an applicant for, a position in the FBI and that provide for the administration and enforcement of this Act. These regulations merely establish procedures under which FBI employees or applicants for employment with the FBI may make certain protected disclosures of information and establish procedures under which allegations of reprisal against such individuals will be investigated and adjudicated.

VI. CONCLUSION

The Federal Bureau of Investigation Whistleblower Protection Act of 2016, S. 2390, addresses serious deficiencies in both the substance of protections and process for remedying the violations thereof for whistleblowers at the FBI. The reforms instituted as a result of this Act will help ensure that FBI employees are protected from reprisal when they take action to help root out waste, fraud, and abuse in our Government.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2390, 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):

UNITED STATES CODE

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

CHAPTER 23—MERIT SYSTEM PRINCIPLES

* * * * *

§ 2303. Prohibited personnel practices in the Federal Bureau of Investigation

[(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences—

[(1) a violation of any law, rule, or regulation, or

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

For the purpose of this subsection, “personnel action” means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).]

(a) *DEFINITIONS.—In this section—*

(1) *the term ‘administrative law judge’ means an administrative law judge appointed by the Attorney General under section 3105 or used by the Attorney General under section 3344;*

(2) *the term ‘Inspector General’ means the Inspector General of the Department of Justice;*

(3) *the term ‘personnel action’ means any action described in section 2302(a)(2)(A) with respect to an employee in, or applicant for, a position in the Federal Bureau of Investigation (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character);*

(4) *the term ‘prohibited personnel practice’ means a prohibited personnel practice described in subsection (b); and*

(5) *the term ‘protected disclosure’ means any disclosure of information by an employee in, or applicant for, a position in the Federal Bureau of Investigation—*

(A) *made—*

(i) *in the case of an employee, to a supervisor in the direct chain of command of the employee, up to and including the head of the employing agency;*

(ii) *to the Inspector General;*

(iii) *to the Office of Professional Responsibility of the Department of Justice;*

(iv) *to the Office of Professional Responsibility of the Federal Bureau of Investigation;*

(v) *to the Inspection Division of the Federal Bureau of Investigation;*

(vi) *as described in section 7211;*

(vii) *to the Office of Special Counsel; or*

(viii) *to an employee designated by any officer, employee, office, or division described in clauses (i) through (vii) for the purpose of receiving such disclosures; and*

(B) *which the employee or applicant reasonably believes evidences—*

- (i) any violation of any law, rule, or regulation; or
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) *PROHIBITED PRACTICES.*—Any employee of the Federal Bureau of Investigation or another component of the Department of Justice who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) take or fail to take, or threaten to take or fail to take, a personnel action with respect to an employee in, or applicant for, a position in the Federal Bureau of Investigation because of a protected disclosure;

(2) take or fail to take, or threaten to take or fail to take, any personnel action against an employee in, or applicant for, a position in the Federal Bureau of Investigation because of—

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

(i) with regard to remedying a violation of paragraph (1); or

(ii) other than with regard to remedying a violation of paragraph (1);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in clause (i) or (ii) of subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law; or

(3) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the statement described in section 2302(b)(13).

(c) *Procedures.*—

(1) *FILING OF A COMPLAINT.*—An employee in, or applicant for, a position in the Federal Bureau of Investigation may seek review of a personnel action alleged to be in violation of subsection (b) by filing a complaint with the Office of the Inspector General.

(2) *INVESTIGATION.*—

(A) *IN GENERAL.*—The Inspector General shall investigate any complaint alleging a personnel action in violation of subsection (b), consistent with the procedures and requirements described in section 1214.

(B) *DETERMINATION.*—The Inspector General shall issue a decision containing the findings of the Inspector General supporting the determination of the Inspector General.

(C) *PRELIMINARY RELIEF.*—

(i) *In General.*—If the Inspector General determines under subparagraph (B) that reasonable grounds exist to believe that a personnel action occurred, exists, or is to be taken, in violation of subsection (b)—

(I) the Inspector General shall request from an administrative law judge a preliminary order providing relief from the personnel action; and

(II) except as provided in clause (ii), the administrative law judge, without further proceedings, shall issue such an order.

(ii) *GOOD CAUSE*.—Upon motion by the Government, after notice and an opportunity to be heard, and if the administrative law judge determines that there is a particularized showing of good cause that an order should not be issued returning an employee to the position the employee would have held had the personnel action not been taken, the administrative law judge shall issue an order directing that the employee be returned, as nearly as practicable and reasonable, to such position.

(3) *FILING OF OBJECTIONS*.—

(A) *IN GENERAL*.—Not later than 60 days after the Inspector General issues a decision under paragraph (2)(B), either party may file objections to the decision and request a hearing on the record.

(B) *NO EFFECT ON PRELIMINARY RELIEF*.—The filing of objections under subparagraph (A) shall not affect an order issued under clause (i) or (ii) of paragraph (2)(C).

(C) *NO OBJECTIONS FILED*.—If no party has filed objections as of the date that is 61 days after the date the Inspector General issues a decision—

(i) the decision is final and not subject to further review; and

(ii) if the Inspector General had determined that reasonable grounds exist to believe that a personnel action occurred, exists, or is to be taken, in violation of subsection (b)—

(I) an administrative law judge, without further proceedings, shall issue an order providing permanent relief from the personnel action; and

(II) upon motion by the employee or applicant, and after an opportunity for a hearing, an administrative law judge may issue an order that provides for corrective action as described under section 1221(g), which shall be accompanied by a written decision explaining the grounds for the order.

(4) *REVIEW BY ADMINISTRATIVE LAW JUDGE*.—

(A) *IN GENERAL*.—If objections are filed under paragraph (3)(A), an administrative law judge shall review the decision by the Inspector General on the record after opportunity for agency hearing.

(B) *CORRECTIVE ACTION*.—An administrative law judge may issue an order providing for corrective action as described under section 1221(g).

(C) *DETERMINATION*.—An administrative law judge shall issue a written decision explaining the grounds for the determination by the administrative law judge under this paragraph.

(D) *EFFECT OF DETERMINATION*.—The determination by an administrative law judge under this paragraph shall become the decision of the Department of Justice without

further proceedings, unless there is an appeal to, or review on motion of, the Attorney General within such time as the Attorney General shall by rule establish.

(5) REVIEW BY ATTORNEY GENERAL.—

(A) TIMEFRAME.—

(i) IN GENERAL.—Upon an appeal to, or review on motion of, the Attorney General under paragraph (4)(D), the Attorney General, through reference to such categories of cases, or other means, as the Attorney General determines appropriate, shall establish and announce publicly the date by which the Attorney General intends to complete action on the matter, which shall ensure expeditious consideration of the appeal or review, consistent with the interests of fairness and other priorities of the Attorney General.

(ii) FAILURE TO MEET DEADLINE.—If the Attorney General fails to complete action on an appeal or review by the announced date, and the expected delay will exceed 30 days, the Attorney General shall publicly announce the new date by which the Attorney General intends to complete action on the appeal or review.

(B) DETERMINATION.—*The Attorney General shall issue a written decision explaining the grounds for the determination by the Attorney General in an appeal or review under paragraph (4)(D).*

(6) PUBLICATION OF DETERMINATIONS.—

(A) PUBLIC AVAILABILITY.—*Except as provided in subparagraph (B), the Attorney General shall make written decisions issued by administrative law judges under paragraph (3)(C) or (4)(C) and written decisions issued by the Attorney General under paragraph (5)(B) publicly available in a manner that is—*

(i) to the maximum extent practicable, consistent with the manner in which the Merit Systems Protection Board makes decisions of the Board available to the public; and

(ii) in accordance with section 552.

(B) RULE OF CONSTRUCTION.—*Nothing in subparagraph (A) shall be construed to limit the authority of an administrative law judge or the Attorney General to limit the public disclosure of information under law or regulations.*

(7) JUDICIAL REVIEW.—*Any determination by an administrative law judge or the Attorney General under this subsection shall be subject to judicial review under chapter 7. A petition for judicial review of such a determination shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.*

[(b) The] *(d) Regulations.—Not later than 18 months after the date of enactment of the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, the Attorney General shall prescribe regulations to carry out subsection (c) that—*

(1) [to] ensure [such a personnel action] that prohibited personnel practices shall not be taken against an employee [of the] in, or applicant for, a position in the Federal Bureau of

Investigation; [as a reprisal for any disclosure of information described in subsection (a) of this section.]

[(c) The President shall] (2) provide for the *administration and enforcement of [this section] subsection (c)* in a manner consistent with applicable provisions of sections 1214 and 1221 [of this title.] *and in accordance with the procedures under subchapter II of chapter 5 and chapter 7;*

(3) *ensure that employees of the Federal Bureau of Investigation are informed of the rights and remedies available to the employees under this section, including how to make a lawful disclosure of information that is specifically required by law or Executive Order to be kept classified in the interest of national defense or the conduct of foreign affairs; and*

(4) *provide for the protection of classified information and intelligence sources and methods.*

(e) *REPORTING.—Not later than March 1 of each year, the Attorney General shall make publicly available a report containing—*

(1) *the number and nature of allegations of a prohibited personnel practice received during the previous year;*

(2) *the disposition of each allegation of a prohibited personnel practice resolved during the previous year;*

(3) *the number of unresolved allegations of a prohibited personnel practice pending as of the end of the previous year and, for each such unresolved allegation, how long the allegation had been pending as of the end of the previous year;*

(4) *the number of disciplinary investigations and actions taken with respect to each allegation of a prohibited personnel practice during the previous year;*

(5) *the number of instances during the previous year in which the Inspector General found reasonable grounds existed to believe that a prohibited personnel practice had occurred that were appealed by the Federal Bureau of Investigation; and*

(6) *the number of allegations of a prohibited personnel practice resolved through settlement, including the number that were resolved as a result of mediation.*

(f) *Rules of Construction.—Nothing in this section shall be construed to—*

(1) *limit the jurisdiction of any office under any other provision of law to conduct an investigation to determine whether a prohibited personnel practice has been or will be taken; or*

(2) *alter or amend any law, regulation, or Executive Order regarding the handling or disclosure of information, including classified information.”.*

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