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S. 372

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

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3, 2009

Mr. AKAKA (for himself, Ms. COLLINS, Mr. GRASSLEY, Mr. LEVIN, Mr. LIEBERMAN, Mr. VOINOVICH, Mr. LEAHY, Mr. KENNEDY, Mr. CARPER, Mr. PRYOR, and Ms. MIKULSKI) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

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

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

1 **SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF IN-**
2 **FORMATION BY FEDERAL EMPLOYEES.**

3 (a) **SHORT TITLE.**—This Act may be cited as the
4 “Whistleblower Protection Enhancement Act of 2009”.

5 (b) **CLARIFICATION OF DISCLOSURES COVERED.**—

6 (1) **IN GENERAL.**—Section 2302(b)(8) of title
7 5, United States Code, is amended—

8 (A) in subparagraph (A)—

9 (i) by striking “which the employee or
10 applicant reasonably believes evidences”
11 and inserting “, without restriction to
12 time, place, form, motive, context, forum,
13 or prior disclosure made to any person by
14 an employee or applicant, including a dis-
15 closure made in the ordinary course of an
16 employee’s duties, that the employee or ap-
17 plicant reasonably believes is evidence of”;

18 (ii) in clause (i), by striking “a viola-
19 tion” and inserting “any violation”; and

20 (iii) by striking “or” at the end;

21 (B) in subparagraph (B)—

22 (i) by striking “which the employee or
23 applicant reasonably believes evidences”
24 and inserting “, without restriction to
25 time, place, form, motive, context, forum,
26 or prior disclosure made to any person by

1 an employee or applicant, including a dis-
 2 closure made in the ordinary course of an
 3 employee’s duties, of information that the
 4 employee or applicant reasonably believes
 5 is evidence of”;

6 (ii) in clause (i), by striking “a viola-
 7 tion” and inserting “any violation (other
 8 than a violation of this section)”; and

9 (iii) in clause (ii), by adding “or” at
 10 the end; and

11 (C) by adding at the end the following:

12 “(C) any disclosure that—

13 “(i) is made by an employee or appli-
 14 cant of information required by law or Ex-
 15 ecutive order to be kept secret in the inter-
 16 est of national defense or the conduct of
 17 foreign affairs that the employee or appli-
 18 cant reasonably believes is direct and spe-
 19 cific evidence of—

20 “(I) any violation of any law,
 21 rule, or regulation;

22 “(II) gross mismanagement, a
 23 gross waste of funds, an abuse of au-
 24 thority, or a substantial and specific
 25 danger to public health or safety; or

1 “(III) a false statement to Con-
2 gress on an issue of material fact; and

3 “(ii) is made to—

4 “(I) a member of a committee of
5 Congress having a primary responsi-
6 bility for oversight of a department,
7 agency, or element of the Federal
8 Government to which the disclosed in-
9 formation relates and who is author-
10 ized to receive information of the type
11 disclosed;

12 “(II) any other Member of Con-
13 gress who is authorized to receive in-
14 formation of the type disclosed; or

15 “(III) an employee of Congress
16 who has the appropriate security
17 clearance and is authorized to receive
18 information of the type disclosed.”.

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

21 (A) TECHNICAL AND CONFORMING AMEND-
22 MENTS.—Title 5, United States Code, is
23 amended in subsections (a)(3), (b)(4)(A), and
24 (b)(4)(B)(i) of section 1214, in subsections (a),
25 (e)(1) and (i) of section 1221, and in subsection

1 (a)(2)(C)(i) of 2302 by inserting “or
2 2302(b)(9) (B) through (D)” after “section
3 2302(b)(8)” or “(b)(8)” each place it appears.

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

10 (c) DEFINITIONAL AMENDMENTS.—

11 (1) DISCLOSURES.—Section 2302(a)(2) of title
12 5, United States Code, is amended—

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

15 (B) in subparagraph (C)(iii), by striking
16 the period at the end and inserting “; and”;
17 and

18 (C) by adding at the end the following:

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

1 “(i) any violation of any law, rule, or regu-
2 lation; or

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

6 (2) CLEAR AND CONVINCING EVIDENCE.—Sec-
7 tions 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5,
8 United States Code, are amended by adding at the
9 end the following: “For purposes of the preceding
10 sentence, ‘clear and convincing evidence’ means evi-
11 dence indicating that the matter to be proved is
12 highly probable or reasonably certain.”.

13 (d) REBUTTABLE PRESUMPTION.—Section 2302(b)
14 of title 5, United States Code, is amended by amending
15 the matter following paragraph (12) to read as follows:
16 “‘This subsection shall not be construed to authorize the
17 withholding of information from Congress or the taking
18 of any personnel action against an employee who discloses
19 information to Congress. For purposes of paragraph (8),
20 any presumption relating to the performance of a duty by
21 an employee who has authority to take, direct others to
22 take, recommend, or approve any personnel action may be
23 rebutted by substantial evidence. For purposes of para-
24 graph (8), a determination as to whether an employee or
25 applicant reasonably believes that they have disclosed in-

1 formation that evidences any violation of law, rule, regula-
 2 tion, gross mismanagement, a gross waste of funds, an
 3 abuse of authority, or a substantial and specific danger
 4 to public health or safety shall be made by determining
 5 whether a disinterested observer with knowledge of the es-
 6 sential facts known to and readily ascertainable by the em-
 7 ployee could reasonably conclude that the actions of the
 8 Government evidence such violations, mismanagement,
 9 waste, abuse, or danger.”.

10 (e) PERSONNEL ACTIONS AND PROHIBITED PER-
 11 SONNEL PRACTICES.—

12 (1) PERSONNEL ACTION.—Section
 13 2302(a)(2)(A) of title 5, United States Code, is
 14 amended—

15 (A) in clause (x), by striking “and” after
 16 the semicolon; and

17 (B) by redesignating clause (xi) as clause
 18 (xiv) and inserting after clause (x) the fol-
 19 lowing:

20 “(xi) the implementation or enforce-
 21 ment of any nondisclosure policy, form, or
 22 agreement;

23 “(xii) a suspension, revocation, or
 24 other determination relating to a security

1 clearance or any other access determina-
2 tion by a covered agency;

3 “(xiii) an investigation, other than
4 any ministerial or nondiscretionary fact
5 finding activities necessary for the agency
6 to perform its mission, of an employee or
7 applicant for employment because of any
8 activity protected under this section; and”

9 (2) PROHIBITED PERSONNEL PRACTICE.—Sec-
10 tion 2302(b) of title 5, United States Code, is
11 amended—

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

14 (B) in paragraph (12), by striking the pe-
15 riod and inserting a semicolon; and

16 (C) by inserting after paragraph (12) the
17 following:

18 “(13) implement or enforce any nondisclosure
19 policy, form, or agreement, if such policy, form, or
20 agreement does not contain the following statement:
21 ‘These provisions are consistent with and do not su-
22 persede, conflict with, or otherwise alter the em-
23 ployee obligations, rights, or liabilities created by
24 Executive Order No. 12958; section 7211 of title 5,
25 United States Code (governing disclosures to Con-

1 gress); section 1034 of title 10, United States Code
2 (governing disclosure to Congress by members of the
3 military); section 2302(b)(8) of title 5, United
4 States Code (governing disclosures of illegality,
5 waste, fraud, abuse, or public health or safety
6 threats); the Intelligence Identities Protection Act of
7 1982 (50 U.S.C. 421 et seq.) (governing disclosures
8 that could expose confidential Government agents);
9 and the statutes which protect against disclosures
10 that could compromise national security, including
11 sections 641, 793, 794, 798, and 952 of title 18,
12 United States Code, and section 4(b) of the Subver-
13 sive Activities Control Act of 1950 (50 U.S.C.
14 783(b)). The definitions, requirements, obligations,
15 rights, sanctions, and liabilities created by such Ex-
16 ecutive order and such statutory provisions are in-
17 corporated into this agreement and are controlling’;
18 or

19 “(14) conduct, or cause to be conducted, an in-
20 vestigation, other than any ministerial or nondis-
21 cretionary fact finding activities necessary for the
22 agency to perform its mission, of an employee or ap-
23 plicant for employment because of any activity pro-
24 tected under this section.”.

1 (f) EXCLUSION OF AGENCIES BY THE PRESIDENT.—
2 Section 2302(a)(2)(C) of title 5, United States Code, is
3 amended by striking clause (ii) and inserting the following:

4 “(ii)(I) the Federal Bureau of Investiga-
5 tion, the Central Intelligence Agency, the De-
6 fense Intelligence Agency, the National
7 Geospatial-Intelligence Agency, the National Se-
8 curity Agency; and

9 “(II) as determined by the President, any
10 executive agency or unit thereof the principal
11 function of which is the conduct of foreign in-
12 telligence or counterintelligence activities, if the
13 determination (as that determination relates to
14 a personnel action) is made before that per-
15 sonnel action; or”.

16 (g) DISCIPLINARY ACTION.—Section 1215(a)(3) of
17 title 5, United States Code, is amended to read as follows:

18 “(3)(A) A final order of the Board may im-
19 pose—

20 “(i) disciplinary action consisting of re-
21 moval, reduction in grade, debarment from
22 Federal employment for a period not to exceed
23 5 years, suspension, or reprimand;

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

1 “(iii) any combination of disciplinary ac-
2 tions described under clause (i) and an assess-
3 ment described under clause (ii).

4 “(B) In any case in which the Board finds that
5 an employee has committed a prohibited personnel
6 practice under paragraph (8) or (9) of section
7 2302(b), the Board shall impose disciplinary action
8 if the Board finds that the activity protected under
9 paragraph (8) or (9) of section 2302(b) was a sig-
10 nificant motivating factor, even if other factors also
11 motivated the decision, for the employee’s decision to
12 take, fail to take, or threaten to take or fail to take
13 a personnel action, unless that employee dem-
14 onstrates, by preponderance of evidence, that the
15 employee would have taken, failed to take, or threat-
16 ened to take or fail to take the same personnel ac-
17 tion, in the absence of such protected activity.”.

18 (h) REMEDIES.—

19 (1) ATTORNEY FEES.—Section 1204(m)(1) of
20 title 5, United States Code, is amended by striking
21 “agency involved” and inserting “agency where the
22 prevailing party is employed or has applied for em-
23 ployment”.

24 (2) DAMAGES.—Sections 1214(g)(2) and
25 1221(g)(1)(A)(ii) of title 5, United States Code, are

1 amended by striking all after “travel expenses,” and
2 inserting “any other reasonable and foreseeable con-
3 sequential damages, and compensatory damages (in-
4 cluding attorney’s fees, interest, reasonable expert
5 witness fees, and costs).” each place it appears.

6 (i) JUDICIAL REVIEW.—

7 (1) IN GENERAL.—Section 7703(b)(1) of title
8 5, United States Code, is amended to read as fol-
9 lows:

10 “(b)(1)(A) Except as provided in subparagraph (B)
11 and paragraph (2), a petition to review a final order or
12 final decision of the Board shall be filed in the United
13 States Court of Appeals for the Federal Circuit. Notwith-
14 standing any other provision of law, any petition for re-
15 view must be filed within 60 days after the date the peti-
16 tioner received notice of the final order or decision of the
17 Board.

18 “(B) During the 5-year period beginning on the effec-
19 tive date of the Whistleblower Protection Enhancement
20 Act of 2009, a petition to review a final order or final
21 decision of the Board in a case alleging a violation of para-
22 graph (8) or (9) of section 2302(b) shall be filed in the
23 United States Court of Appeals for the Federal Circuit
24 or any court of appeals of competent jurisdiction as pro-
25 vided under subsection (b)(2).”.

1 (2) REVIEW OBTAINED BY OFFICE OF PER-
2 SONNEL MANAGEMENT.—Section 7703(d) of title 5,
3 United States Code, is amended to read as follows:
4 “(d)(1) Except as provided under paragraph (2), this
5 paragraph shall apply to any review obtained by the Direc-
6 tor of the Office of Personnel Management. The Director
7 of the Office of Personnel Management may obtain review
8 of any final order or decision of the Board by filing, within
9 60 days after the date the Director received notice of the
10 final order or decision of the Board, a petition for judicial
11 review in the United States Court of Appeals for the Fed-
12 eral Circuit if the Director determines, in his discretion,
13 that the Board erred in interpreting a civil service law,
14 rule, or regulation affecting personnel management and
15 that the Board’s decision will have a substantial impact
16 on a civil service law, rule, regulation, or policy directive.
17 If the Director did not intervene in a matter before the
18 Board, the Director may not petition for review of a Board
19 decision under this section unless the Director first peti-
20 tions the Board for a reconsideration of its decision, and
21 such petition is denied. In addition to the named respond-
22 ent, the Board and all other parties to the proceedings
23 before the Board shall have the right to appear in the pro-
24 ceeding before the Court of Appeals. The granting of the

1 petition for judicial review shall be at the discretion of the
2 Court of Appeals.

3 “(2) During the 5-year period beginning on the effec-
4 tive date of the Whistleblower Protection Enhancement
5 Act of 2009, this paragraph shall apply to any review re-
6 lating to paragraph (8) or (9) of section 2302(b) obtained
7 by the Director of the Office of Personnel Management.
8 The Director of the Office of Personnel Management may
9 obtain review of any final order or decision of the Board
10 by filing, within 60 days after the date the Director re-
11 ceived notice of the final order or decision of the Board,
12 a petition for judicial review in the United States Court
13 of Appeals for the Federal Circuit or any court of appeals
14 of competent jurisdiction as provided under subsection
15 (b)(2) if the Director determines, in his discretion, that
16 the Board erred in interpreting paragraph (8) or (9) of
17 section 2302(b). If the Director did not intervene in a
18 matter before the Board, the Director may not petition
19 for review of a Board decision under this section unless
20 the Director first petitions the Board for a reconsideration
21 of its decision, and such petition is denied. In addition
22 to the named respondent, the Board and all other parties
23 to the proceedings before the Board shall have the right
24 to appear in the proceeding before the court of appeals.

1 The granting of the petition for judicial review shall be
 2 at the discretion of the Court of Appeals.”.

3 (j) MERIT SYSTEM PROTECTION BOARD REVIEW OF
 4 SECURITY CLEARANCES.—

5 (1) IN GENERAL.—Chapter 77 of title 5, United
 6 States Code, is amended by inserting after section
 7 7702 the following:

8 **“§ 7702a. Actions relating to security clearances**

9 “(a) In any appeal relating to the suspension, revoca-
 10 tion, or other determination relating to a security clear-
 11 ance or access determination, the Merit Systems Protec-
 12 tion Board or any reviewing court—

13 “(1) shall determine whether paragraph (8) or
 14 (9) of section 2302(b) was violated;

15 “(2) may not order the President or the des-
 16 ignee of the President to restore a security clearance
 17 or otherwise reverse a determination of clearance
 18 status or reverse an access determination; and

19 “(3) subject to paragraph (2), may issue declar-
 20 atory relief and any other appropriate relief.

21 “(b)(1) If, in any final judgment, the Board or court
 22 declares that any suspension, revocation, or other deter-
 23 mination with regard to a security clearance or access de-
 24 termination was made in violation of paragraph (8) or (9)
 25 of section 2302(b), the affected agency shall conduct a re-

1 view of that suspension, revocation, access determination,
2 or other determination, giving great weight to the Board
3 or court judgment.

4 “(2) Not later than 30 days after any Board or court
5 judgment declaring that a security clearance suspension,
6 revocation, access determination, or other determination
7 was made in violation of paragraph (8) or (9) of section
8 2302(b), the affected agency shall issue an unclassified re-
9 port to the congressional committees of jurisdiction (with
10 a classified annex if necessary), detailing the cir-
11 cumstances of the agency’s security clearance suspension,
12 revocation, other determination, or access determination.
13 A report under this paragraph shall include any proposed
14 agency action with regard to the security clearance or ac-
15 cess determination.

16 “(c) An allegation that a security clearance or access
17 determination was revoked or suspended in retaliation for
18 a protected disclosure shall receive expedited review by the
19 Office of Special Counsel, the Merit Systems Protection
20 Board, and any reviewing court.

21 “(d) For purposes of this section, corrective action
22 may not be ordered if the agency demonstrates by a pre-
23 ponderance of the evidence that it would have taken the
24 same personnel action in the absence of such disclosure.”.

1 (2) TECHNICAL AND CONFORMING AMEND-
 2 MENT.—The table of sections for chapter 77 of title
 3 5, United States Code, is amended by inserting after
 4 the item relating to section 7702 the following:

“7702a. Actions relating to security clearances.”.

5 (k) PROHIBITED PERSONNEL PRACTICES AFFECT-
 6 ING THE TRANSPORTATION SECURITY ADMINISTRA-
 7 TION.—

8 (1) IN GENERAL.—Chapter 23 of title 5, United
 9 States Code, is amended—

10 (A) by redesignating sections 2304 and
 11 2305 as sections 2305 and 2306, respectively;
 12 and

13 (B) by inserting after section 2303 the fol-
 14 lowing:

15 **“§ 2304. Prohibited personnel practices affecting the**
 16 **Transportation Security Administration**

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

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

23 “(2) any provision of law implementing section
 24 2302(b) (1), (8), or (9) by providing any right or

1 remedy available to an employee or applicant for em-
 2 ployment in the civil service; and

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

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

11 (2) TECHNICAL AND CONFORMING AMEND-
 12 MENT.—The table of sections for chapter 23 of title
 13 5, United States Code, is amended by striking the
 14 items relating to sections 2304 and 2305, respec-
 15 tively, and by inserting the following:

“Sec. 2304. Prohibited personnel practices affecting the Transportation Secu-
 rity Administration.

“Sec. 2305. Responsibility of the Government Accountability Office.

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

16 (3) EFFECTIVE DATE.—The amendments made
 17 by this section shall take effect on the date of enact-
 18 ment of this section.

19 (1) DISCLOSURE OF CENSORSHIP RELATED TO RE-
 20 SEARCH, ANALYSIS, OR TECHNICAL INFORMATION.—

21 (1) DEFINITIONS.—In this section—

22 (A) the term “applicant” means an appli-
 23 cant for a covered position;

1 (B) the term “censorship related to re-
2 search, analysis, or technical information”
3 means any effort to alter, misrepresent, or sup-
4 press research, analysis, or technical informa-
5 tion;

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

9 (D) the term “employee” means an em-
10 ployee in a covered position; and

11 (E) the term “disclosure” has the meaning
12 given under section 2302(a)(2)(D) of title 5,
13 United States Code.

14 (2) PROTECTED DISCLOSURE.—

15 (A) IN GENERAL.—Any disclosure of infor-
16 mation by an employee or applicant for employ-
17 ment that the employee or applicant reasonably
18 believes is evidence of censorship related to re-
19 search, analysis, or technical information shall
20 come within the protections of section
21 2302(b)(8)(A) of title 5, United States Code,
22 if—

23 (i) the employee or applicant reason-
24 ably believes that the censorship related to

1 research, analysis, or technical information
2 is or will cause—

3 (I) any violation of law, rule, or
4 regulation; or

5 (II) gross mismanagement, a
6 gross waste of funds, an abuse of au-
7 thority, or a substantial and specific
8 danger to public health or safety;

9 (ii) the disclosure and information
10 satisfy the conditions stated in the matter
11 following clause (ii) of section
12 2302(b)(8)(A) of title 5, United States
13 Code; and

14 (iii) shall come within the protections
15 of section 2302(b)(8)(B) of title 5, United
16 States Code, if—

17 (I) the conditions under clause
18 (i) of this subparagraph are satisfied;
19 and

20 (II) the disclosure is made to an
21 individual referred to in the matter
22 preceding clause (i) of section
23 2302(b)(8)(B) of title 5, United
24 States Code, for the receipt of disclo-
25 sures.

1 (B) APPLICATION.—Paragraph (1) shall
2 apply to any disclosure of information by an
3 employee or applicant without restriction to
4 time, place, form, motive, context, forum, or
5 prior disclosure made to any person by an em-
6 ployee or applicant, including a disclosure made
7 in the ordinary course of an employee’s duties.

8 (C) RULE OF CONSTRUCTION.—Nothing in
9 this section shall be construed to imply any lim-
10 itation on the protections of employees and ap-
11 plicants afforded by any other provision of law,
12 including protections with respect to any diselo-
13 sure of information believed to be evidence of
14 censorship related to research, analysis, or tech-
15 nical information.

16 (m) CLARIFICATION OF WHISTLEBLOWER RIGHTS
17 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
18 214(e) of the Homeland Security Act of 2002 (6 U.S.C.
19 133(c)) is amended by adding at the end the following:
20 “For purposes of this section a permissible use of inde-
21 pendentlly obtained information includes the disclosure of
22 such information under section 2302(b)(8) of title 5,
23 United States Code.”.

24 (n) ADVISING EMPLOYEES OF RIGHTS.—Section
25 2302(c) of title 5, United States Code, is amended by in-

1 serring “, including how to make a lawful disclosure of
2 information that is specifically required by law or Execu-
3 tive order to be kept secret in the interest of national de-
4 fense or the conduct of foreign affairs to the Special Coun-
5 sel, the Inspector General of an agency, Congress, or other
6 agency employee designated to receive such disclosures”
7 after “chapter 12 of this title”.

8 (o) SPECIAL COUNSEL AMICUS CURIAE APPEAR-
9 ANCE.—Section 1212 of title 5, United States Code, is
10 amended by adding at the end the following:

11 “(h)(1) The Special Counsel is authorized to appear
12 as amicus curiae in any action brought in a court of the
13 United States related to any civil action brought in con-
14 nection with section 2302(b) (8) or (9), or subchapter III
15 of chapter 73, or as otherwise authorized by law. In any
16 such action, the Special Counsel is authorized to present
17 the views of the Special Counsel with respect to compli-
18 ance with section 2302(b) (8) or (9) or subchapter III of
19 chapter 73 and the impact court decisions would have on
20 the enforcement of such provisions of law.

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

24 (p) SCOPE OF DUE PROCESS.—

1 (1) SPECIAL COUNSEL.—Section
2 1214(b)(4)(B)(ii) of title 5, United States Code, is
3 amended by inserting “, after a finding that a pro-
4 tected disclosure was a contributing factor,” after
5 “ordered if”.

6 (2) INDIVIDUAL ACTION.—Section 1221(e)(2)
7 of title 5, United States Code, is amended by insert-
8 ing “, after a finding that a protected disclosure was
9 a contributing factor,” after “ordered if”.

10 (q) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
11 MENTS.—

12 (1) IN GENERAL.—

13 (A) REQUIREMENT.—Each agreement in
14 Standard Forms 312 and 4414 of the Govern-
15 ment and any other nondisclosure policy, form,
16 or agreement of the Government shall contain
17 the following statement: “These restrictions are
18 consistent with and do not supersede, conflict
19 with, or otherwise alter the employee obliga-
20 tions, rights, or liabilities created by Executive
21 Order No. 12958; section 7211 of title 5,
22 United States Code (governing disclosures to
23 Congress); section 1034 of title 10, United
24 States Code (governing disclosure to Congress
25 by members of the military); section 2302(b)(8)

1 of title 5, United States Code (governing disclo-
2 sures of illegality, waste, fraud, abuse or public
3 health or safety threats); the Intelligence Iden-
4 tities Protection Act of 1982 (50 U.S.C. 421 et
5 seq.) (governing disclosures that could expose
6 confidential Government agents); and the stat-
7 utes which protect against disclosure that may
8 compromise the national security, including sec-
9 tions 641, 793, 794, 798, and 952 of title 18,
10 United States Code, and section 4(b) of the
11 Subversive Activities Act of 1950 (50 U.S.C.
12 783(b)). The definitions, requirements, obliga-
13 tions, rights, sanctions, and liabilities created
14 by such Executive order and such statutory
15 provisions are incorporated into this agreement
16 and are controlling.”.

17 (B) ENFORCEABILITY.—Any nondisclosure
18 policy, form, or agreement described under sub-
19 paragraph (A) that does not contain the state-
20 ment required under subparagraph (A) may not
21 be implemented or enforced to the extent such
22 policy, form, or agreement is inconsistent with
23 that statement.

24 (2) PERSONS OTHER THAN GOVERNMENT EM-
25 PLOYEES.—Notwithstanding paragraph (1), a non-

1 disclosure policy, form, or agreement that is to be
2 executed by a person connected with the conduct of
3 an intelligence or intelligence-related activity, other
4 than an employee or officer of the United States
5 Government, may contain provisions appropriate to
6 the particular activity for which such document is to
7 be used. Such form or agreement shall, at a min-
8 imum, require that the person will not disclose any
9 classified information received in the course of such
10 activity unless specifically authorized to do so by the
11 United States Government. Such nondisclosure
12 forms shall also make it clear that such forms do
13 not bar disclosures to Congress or to an authorized
14 official of an executive agency or the Department of
15 Justice that are essential to reporting a substantial
16 violation of law.

17 (r) REPORTING REQUIREMENTS.—

18 (1) GOVERNMENT ACCOUNTABILITY OFFICE.—

19 (A) IN GENERAL.—

20 (i) REPORT.—Not later than 40
21 months after the date of enactment of this
22 Act, the Comptroller General shall submit
23 a report to the Committee on Homeland
24 Security and Governmental Affairs of the
25 Senate and the Committee on Oversight

1 and Government Reform of the House of
2 Representatives on the implementation of
3 this Act.

4 (ii) CONTENTS.—The report under
5 this paragraph shall include—

6 (I) an analysis of any changes in
7 the number of cases filed with the
8 United States Merit Systems Protec-
9 tion Board alleging violations of sec-
10 tion 2302(b)(8) or (9) of title 5,
11 United States Code, since the effective
12 date of the Act;

13 (II) the outcome of the cases de-
14 scribed under clause (i), including
15 whether or not the United States
16 Merit Systems Protection Board, the
17 Federal Circuit Court of Appeals, or
18 any other court determined the allega-
19 tions to be frivolous or malicious; and

20 (III) any other matter as deter-
21 mined by the Comptroller General.

22 (B) STUDY ON REVOCATION OF SECURITY
23 CLEARANCES.—

24 (i) STUDY.—The Comptroller General
25 shall conduct a study of security clearance

1 revocations of Federal employees at a se-
2 lect sample of executive branch agencies.
3 The study shall consist of an examination
4 of the number of security clearances re-
5 voked, the process employed by each agen-
6 cy in revoking a clearance, the pay and
7 employment status of agency employees
8 during the revocation process, how often
9 such revocations result in termination of
10 employment or reassignment, how often
11 such revocations are based on an improper
12 disclosure of information, and such other
13 factors the Comptroller General deems ap-
14 propriate.

15 (ii) REPORT.—Not later than 18
16 months after the date of enactment of this
17 Act, the Comptroller General shall submit
18 to the Committee on Homeland Security
19 and Governmental Affairs of the Senate
20 and the Committee on Oversight and Gov-
21 ernment Reform of the House of Rep-
22 resentatives a report on the results of the
23 study required under this subparagraph.

24 (2) MERIT SYSTEMS PROTECTION BOARD.—

1 (A) IN GENERAL.—Each report submitted
2 annually by the Merit Systems Protection
3 Board under section 1116 of title 31, United
4 States Code, shall, with respect to the period
5 covered by such report, include as an addendum
6 the following:

7 (i) Information relating to the out-
8 come of cases decided during the applicable
9 year of the report in which violations of
10 section 2302(b)(8) or (9) of title 5, United
11 States Code, were alleged.

12 (ii) The number of such cases filed in
13 the regional and field offices, the number
14 of petitions for review filed in such cases,
15 and the outcomes of such cases.

16 (B) FIRST REPORT.—The first report de-
17 scribed under subparagraph (A) submitted after
18 the date of enactment of this Act shall include
19 an addendum required under that subparagraph
20 that covers the period beginning on January 1,
21 2009 through the end of the fiscal year 2009.

22 (s) EFFECTIVE DATE.—This Act shall take effect 30
23 days after the date of enactment of this Act.

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