

In the House of Representatives, U. S.,

September 28, 2012.

Resolved, That the bill from the Senate (S. 743) entitled “An Act to amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices; to require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections; to provide certain authority for the Special Counsel; and for other purposes.”, do pass with the following

AMENDMENT:

Strike out all after the enacting clause and insert:

1 ***SECTION 1. SHORT TITLE.***

2 *This Act may be cited as the “Whistleblower Protection*
3 *Enhancement Act of 2012”.*

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

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

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

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

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

4 **(b) PROHIBITED PERSONNEL PRACTICES UNDER SEC-**
5 **TION 2302(b)(9).—**

6 **(1) TECHNICAL AND CONFORMING AMEND-**
7 **MENTS.—Title 5, United States Code, is amended—**

8 **(A) in subsections (a)(3), (b)(4)(A), and**
9 **(b)(4)(B)(i) of section 1214 and in subsections**
10 **(a), (e)(1), and (i) of section 1221, by inserting**
11 **“or section 2302(b)(9) (A)(i), (B), (C), or (D)”**
12 **after “section 2302(b)(8)” each place it appears;**
13 **and**

14 **(B) in section 2302(a)(2)(C)(i), by inserting**
15 **“or section 2302(b)(9) (A)(i), (B), (C), or (D)”**
16 **after “(b)(8)”**.

17 **(2) OTHER REFERENCES.—(A) Title 5, United**
18 **States Code, is amended in subsection (b)(4)(B)(i) of**
19 **section 1214 and in subsection (e)(1) of section 1221**
20 **by inserting “or protected activity” after “disclosure”**
21 **each place it appears.**

22 **(B) Section 2302(b)(9) of title 5, United States**
23 **Code, is amended—**

24 **(i) by striking subparagraph (A) and in-**
25 **serting the following:**

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

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

6 “(ii) other than with regard to rem-
7 edying a violation of paragraph (8);”; and
8 (ii) in subparagraph (B), by inserting “(i)
9 or (ii)” after “subparagraph (A)”.

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

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

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

18 “(B) the disclosure revealed information that had
19 been previously disclosed;

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

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

23 “(E) the disclosure was made while the employee
24 was off duty; or

1 “(F) of the amount of time which has passed
2 since the occurrence of the events described in the dis-
3 closure.

4 “(2) If a disclosure is made during the normal course
5 of duties of an employee, the disclosure shall not be excluded
6 from subsection (b)(8) if any employee who has authority
7 to take, direct others to take, recommend, or approve any
8 personnel action with respect to the employee making the
9 disclosure, took, failed to take, or threatened to take or fail
10 to take a personnel action with respect to that employee
11 in reprisal for the disclosure.”.

12 **SEC. 102. DEFINITIONAL AMENDMENTS.**

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

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

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

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

20 “(D) ‘disclosure’ means a formal or informal
21 communication or transmission, but does not include
22 a communication concerning policy decisions that
23 lawfully exercise discretionary authority unless the
24 employee or applicant providing the disclosure rea-
25 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 of
4 funds, an abuse of authority, or a substantial
5 and specific danger to public health or safety.”.

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

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

10 *“This subsection shall not be construed to authorize the*
11 *withholding of information from Congress or the taking of*
12 *any personnel action against an employee who discloses in-*
13 *formation to Congress. For purposes of paragraph (8), (i)*
14 *any presumption relating to the performance of a duty by*
15 *an employee whose conduct is the subject of a disclosure as*
16 *defined under subsection (a)(2)(D) may be rebutted by sub-*
17 *stantial evidence, and (ii) a determination as to whether*
18 *an employee or applicant reasonably believes that such em-*
19 *ployee or applicant has disclosed information that evidences*
20 *any violation of law, rule, regulation, gross mismanage-*
21 *ment, a gross waste of funds, an abuse of authority, or a*
22 *substantial and specific danger to public health or safety*
23 *shall be made by determining whether a disinterested ob-*
24 *server with knowledge of the essential facts known to and*
25 *readily ascertainable by the employee or applicant could*

1 *reasonably conclude that the actions of the Government evi-*
 2 *dence such violations, mismanagement, waste, abuse, or*
 3 *danger.”.*

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

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

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

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

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

15 (b) *PROHIBITED PERSONNEL PRACTICE.*—

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

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

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

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

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

1 *agreement does not contain the following statement:*
2 *‘These provisions are consistent with and do not su-*
3 *persede, conflict with, or otherwise alter the employee*
4 *obligations, rights, or liabilities created by existing*
5 *statute or Executive order relating to (1) classified in-*
6 *formation, (2) communications to Congress, (3) the*
7 *reporting to an Inspector General of a violation of*
8 *any law, rule, or regulation, or mismanagement, a*
9 *gross waste of funds, an abuse of authority, or a sub-*
10 *stantial and specific danger to public health or safety,*
11 *or (4) any other whistleblower protection. The defini-*
12 *tions, requirements, obligations, rights, sanctions, and*
13 *liabilities created by controlling Executive orders and*
14 *statutory provisions are incorporated into this agree-*
15 *ment and are controlling.’”.*

16 (2) *AGENCY WEBSITES.—Agencies making use of*
17 *any nondisclosure policy, form, or agreement shall*
18 *also post the statement required under section*
19 *2302(b)(13) of title 5, United States Code (as added*
20 *by this Act) on the agency website, accompanied by*
21 *the specific list of controlling Executive orders and*
22 *statutory provisions.*

23 (3) *NONDISCLOSURE POLICY, FORM, OR AGREE-*
24 *MENT IN EFFECT BEFORE THE EFFECTIVE DATE.—*
25 *With respect to a nondisclosure policy, form, or agree-*

1 *ment that was in effect before the effective date of this*
2 *Act, but that does not contain the statement required*
3 *under section 2302(b)(13) of title 5, United States*
4 *Code (as added by this Act) for implementation or en-*
5 *forcement—*

6 *(A) it shall not be a prohibited personnel*
7 *practice to enforce that policy, form, or agree-*
8 *ment with regard to a current employee if the*
9 *agency gives such employee notice of the state-*
10 *ment; and*

11 *(B) it shall not be a prohibited personnel*
12 *practice to enforce that policy, form, or agree-*
13 *ment after the effective date of this Act with re-*
14 *gard to a former employee if the agency complies*
15 *with paragraph (2) of this subsection.*

16 *(c) RETALIATORY INVESTIGATIONS.—*

17 *(1) AGENCY INVESTIGATION.—Section 1214 of*
18 *title 5, United States Code, is amended by adding at*
19 *the end the following:*

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

1 *sure or protected activity that formed the basis of the correc-*
2 *tive action.”.*

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

6 “(4) *Any corrective action ordered under this section*
7 *to correct a prohibited personnel practice may include fees,*
8 *costs, or damages reasonably incurred due to an agency in-*
9 *vestigation of the employee, if such investigation was com-*
10 *menced, expanded, or extended in retaliation for the disclo-*
11 *sure or protected activity that formed the basis of the correc-*
12 *tive action.”.*

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

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

17 “(i)(I) *the Federal Bureau of Inves-*
18 *tigation, the Central Intelligence Agency,*
19 *the Defense Intelligence Agency, the Na-*
20 *tional Geospatial-Intelligence Agency, the*
21 *National Security Agency, the Office of the*
22 *Director of National Intelligence, and the*
23 *National Reconnaissance Office; and*

24 “(II) *as determined by the President,*
25 *any Executive agency or unit thereof the*

1 *principal function of which is the conduct*
2 *of foreign intelligence or counterintelligence*
3 *activities, provided that the determination*
4 *be made prior to a personnel action; or”.*

5 **SEC. 106. DISCIPLINARY ACTION.**

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

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

9 “(i) *disciplinary action consisting of removal,*
10 *reduction in grade, debarment from Federal employ-*
11 *ment for a period not to exceed 5 years, suspension,*
12 *or reprimand;*

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

15 “(iii) *any combination of disciplinary actions*
16 *described under clause (i) and an assessment de-*
17 *scribed under clause (ii).*

18 “(B) *In any case brought under paragraph (1) in*
19 *which the Board finds that an employee has committed a*
20 *prohibited personnel practice under section 2302(b)(8), or*
21 *2302(b)(9) (A)(i), (B), (C), or (D), the Board may impose*
22 *disciplinary action if the Board finds that the activity pro-*
23 *tected under section 2302(b)(8), or 2302(b)(9) (A)(i), (B),*
24 *(C), or (D) was a significant motivating factor, even if*
25 *other factors also motivated the decision, for the employee’s*

1 *decision to take, fail to take, or threaten to take or fail to*
 2 *take a personnel action, unless that employee demonstrates,*
 3 *by a preponderance of the evidence, that the employee would*
 4 *have taken, failed to take, or threatened to take or fail to*
 5 *take the same personnel action, in the absence of such pro-*
 6 *tected activity.”.*

7 **SEC. 107. REMEDIES.**

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

13 (b) *DAMAGES.*—Sections 1214(g)(2) and
 14 1221(g)(1)(A)(ii) of title 5, *United States Code, are amend-*
 15 *ed by striking all after “travel expenses,” and inserting*
 16 *“any other reasonable and foreseeable consequential dam-*
 17 *ages, and compensatory damages (including interest, rea-*
 18 *sonable expert witness fees, and costs).” each place it ap-*
 19 *pears.*

20 **SEC. 108. JUDICIAL REVIEW.**

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

24 “(b)(1)(A) *Except as provided in subparagraph (B)*
 25 *and paragraph (2) of this subsection, a petition to review*

1 *a final order or final decision of the Board shall be filed*
2 *in the United States Court of Appeals for the Federal Cir-*
3 *cuit. Notwithstanding any other provision of law, any peti-*
4 *tion for review shall be filed within 60 days after the Board*
5 *issues notice of the final order or decision of the Board.*

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

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

22 “(d)(1) *Except as provided under paragraph (2), this*
23 *paragraph shall apply to any review obtained by the Direc-*
24 *tor of the Office of Personnel Management. The Director*
25 *may obtain review of any final order or decision of the*

1 Board by filing, within 60 days after the Board issues no-
2 tice of the final order or decision of the Board, a petition
3 for judicial review in the United States Court of Appeals
4 for the Federal Circuit if the Director determines, in the
5 discretion of the Director, that the Board erred in inter-
6 preting a civil service law, rule, or regulation affecting per-
7 sonnel management and that the Board's decision will have
8 a substantial impact on a civil service law, rule, regulation,
9 or policy directive. If the Director did not intervene in a
10 matter before the Board, the Director may not petition for
11 review of a Board decision under this section unless the Di-
12 rector first petitions the Board for a reconsideration of its
13 decision, and such petition is denied. In addition to the
14 named respondent, the Board and all other parties to the
15 proceedings before the Board shall have the right to appear
16 in the proceeding before the Court of Appeals. The granting
17 of the petition for judicial review shall be at the discretion
18 of the Court of Appeals.

19 “(2) During the 2-year period beginning on the effec-
20 tive date of the Whistleblower Protection Enhancement Act
21 of 2012, this paragraph shall apply to any review obtained
22 by the Director of the Office of Personnel Management that
23 raises no challenge to the Board's disposition of allegations
24 of a prohibited personnel practice described in section
25 2302(b) other than practices described in section 2302(b)(8),

1 or 2302(b)(9) (A)(i), (B), (C), or (D). The Director may
2 obtain review of any final order or decision of the Board
3 by filing, within 60 days after the Board issues notice of
4 the final order or decision of the Board, a petition for judi-
5 cial review in the United States Court of Appeals for the
6 Federal Circuit or any court of appeals of competent juris-
7 diction if the Director determines, in the discretion of the
8 Director, that the Board erred in interpreting a civil service
9 law, rule, or regulation affecting personnel management
10 and that the Board's decision will have a substantial im-
11 pact on a civil service law, rule, regulation, or policy direc-
12 tive. If the Director did not intervene in a matter before
13 the Board, the Director may not petition for review of a
14 Board decision under this section unless the Director first
15 petitions the Board for a reconsideration of its decision, and
16 such petition is denied. In addition to the named respon-
17 dent, the Board and all other parties to the proceedings before
18 the Board shall have the right to appear in the proceeding
19 before the court of appeals. The granting of the petition for
20 judicial review shall be at the discretion of the court of ap-
21 peals.”.

1 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**
 2 **THE TRANSPORTATION SECURITY ADMINIS-**
 3 **TRATION.**

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

6 (1) *by redesignating sections 2304 and 2305 as*
 7 *sections 2305 and 2306, respectively; and*

8 (2) *by inserting after section 2303 the following:*

9 **“§2304. Prohibited personnel practices affecting the**
 10 **Transportation Security Administration**

11 *“(a) IN GENERAL.—Notwithstanding any other provi-*
 12 *sion of law, any individual holding or applying for a posi-*
 13 *tion within the Transportation Security Administration*
 14 *shall be covered by—*

15 *“(1) the provisions of section 2302(b) (1), (8),*
 16 *and (9);*

17 *“(2) any provision of law implementing section*
 18 *2302(b) (1), (8), or (9) by providing any right or*
 19 *remedy available to an employee or applicant for em-*
 20 *ployment in the civil service; and*

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

23 *“(b) RULE OF CONSTRUCTION.—Nothing in this sec-*
 24 *tion shall be construed to affect any rights, apart from those*
 25 *described in subsection (a), to which an individual de-*

1 *scribed in subsection (a) might otherwise be entitled under*
 2 *law.”.*

3 (b) *TECHNICAL AND CONFORMING AMENDMENT.—The*
 4 *table of sections for chapter 23 of title 5, United States*
 5 *Code, is amended by striking the items relating to sections*
 6 *2304 and 2305, respectively, and inserting the following:*

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

“2305. Responsibility of the Government Accountability Office.

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

7 (c) *EFFECTIVE DATE.—The amendments made by this*
 8 *section shall take effect on the date of enactment of this sec-*
 9 *tion.*

10 **SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RE-**
 11 **SEARCH, ANALYSIS, OR TECHNICAL INFORMA-**
 12 **TION.**

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

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

17 (2) *the term “applicant” means an applicant for*
 18 *a covered position;*

19 (3) *the term “censorship related to research,*
 20 *analysis, or technical information” means any effort*
 21 *to distort, misrepresent, or suppress research, anal-*
 22 *ysis, or technical information;*

1 (4) the term “covered position” has the meaning
2 given under section 2302(a)(2)(B) of title 5, United
3 States Code;

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

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

9 (b) *PROTECTED DISCLOSURE.*—

10 (1) *IN GENERAL.*—Any disclosure of information
11 by an employee or applicant for employment that the
12 employee or applicant reasonably believes is evidence
13 of censorship related to research, analysis, or tech-
14 nical information—

15 (A) shall come within the protections of sec-
16 tion 2302(b)(8)(A) of title 5, United States Code,
17 if—

18 (i) the employee or applicant reason-
19 ably believes that the censorship related to
20 research, analysis, or technical information
21 is or will cause—

22 (I) any violation of law, rule, or
23 regulation; or

24 (II) gross mismanagement, a gross
25 waste of funds, an abuse of authority,

1 *or a substantial and specific danger to*
2 *public health or safety; and*

3 *(ii) such disclosure is not specifically*
4 *prohibited by law or such information is*
5 *not specifically required by Executive order*
6 *to be kept classified in the interest of na-*
7 *tional defense or the conduct of foreign af-*
8 *fairs; and*

9 *(B) shall come within the protections of sec-*
10 *tion 2302(b)(8)(B) of title 5, United States Code,*
11 *if—*

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

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

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

22 *(ii) the disclosure is made to the Spe-*
23 *cial Counsel, or to the Inspector General of*
24 *an agency or another person designated by*
25 *the head of the agency to receive such disclo-*

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

3 (2) *DISCLOSURES NOT EXCLUDED.*—A disclosure
4 shall not be excluded from paragraph (1) for any rea-
5 son described under section 2302(f)(1) or (2) of title
6 5, United States Code.

7 (3) *RULE OF CONSTRUCTION.*—Nothing in this
8 section shall be construed to imply any limitation on
9 the protections of employees and applicants afforded
10 by any other provision of law, including protections
11 with respect to any disclosure of information believed
12 to be evidence of censorship related to research, anal-
13 ysis, or technical information.

14 **SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR**
15 **CRITICAL INFRASTRUCTURE INFORMATION.**

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

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

23 Section 2302(c) of title 5, United States Code, is
24 amended by inserting “, including how to make a lawful
25 disclosure of information that is specifically required by

1 *law or Executive order to be kept classified in the interest*
2 *of national defense or the conduct of foreign affairs to the*
3 *Special Counsel, the Inspector General of an agency, Con-*
4 *gress, or other agency employee designated to receive such*
5 *disclosures” after “chapter 12 of this title”.*

6 **SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEARANCE.**

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

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

17 *“(2) A court of the United States shall grant the appli-*
18 *cation of the Special Counsel to appear in any such action*
19 *for the purposes described under subsection (a).”.*

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

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

1 (b) *INDIVIDUAL ACTION*.—Section 1221(e)(2) of title 5,
2 *United States Code*, is amended by inserting “, after a find-
3 *ing that a protected disclosure was a contributing factor,*”
4 after “ordered if”.

5 **SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
6 **MENTS.**

7 (a) *IN GENERAL*.—

8 (1) *REQUIREMENT*.—Each agreement in *Stand-*
9 *ard Forms 312 and 4414 of the Government and any*
10 *other nondisclosure policy, form, or agreement of the*
11 *Government shall contain the following statement:*
12 *“These provisions are consistent with and do not su-*
13 *persede, conflict with, or otherwise alter the employee*
14 *obligations, rights, or liabilities created by existing*
15 *statute or Executive order relating to (1) classified in-*
16 *formation, (2) communications to Congress, (3) the*
17 *reporting to an Inspector General of a violation of*
18 *any law, rule, or regulation, or mismanagement, a*
19 *gross waste of funds, an abuse of authority, or a sub-*
20 *stantial and specific danger to public health or safety,*
21 *or (4) any other whistleblower protection. The defini-*
22 *tions, requirements, obligations, rights, sanctions, and*
23 *liabilities created by controlling Executive orders and*
24 *statutory provisions are incorporated into this agree-*
25 *ment and are controlling.”.*

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

7 (3) *ENFORCEABILITY.*—

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

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

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

1 *ployee if the agency gives such employee no-*
2 *tice of the statement; and*

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

8 *(b) PERSONS OTHER THAN GOVERNMENT EMPLOY-*
9 *EES.—Notwithstanding subsection (a), a nondisclosure pol-*
10 *icy, form, or agreement that is to be executed by a person*
11 *connected with the conduct of an intelligence or intelligence-*
12 *related activity, other than an employee or officer of the*
13 *United States Government, may contain provisions appro-*
14 *priate to the particular activity for which such document*
15 *is to be used. Such policy, form, or agreement shall, at a*
16 *minimum, require that the person will not disclose any*
17 *classified information received in the course of such activity*
18 *unless specifically authorized to do so by the United States*
19 *Government. Such nondisclosure policy, form, or agreement*
20 *shall also make it clear that such forms do not bar disclo-*
21 *tures to Congress or to an authorized official of an executive*
22 *agency or the Department of Justice that are essential to*
23 *reporting a substantial violation of law, consistent with the*
24 *protection of sources and methods.*

1 **SEC. 116. REPORTING REQUIREMENTS.**

2 (a) *GOVERNMENT ACCOUNTABILITY OFFICE.*—

3 (1) *REPORT.*—Not later than 4 years after the
4 date of enactment of this Act, the Comptroller General
5 shall submit a report to the Committee on Homeland
6 Security and Governmental Affairs of the Senate and
7 the Committee on Oversight and Government Reform
8 of the House of Representatives on the implementa-
9 tion of this title.

10 (2) *CONTENTS.*—The report under this subsection
11 shall include—

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

17 (B) the outcome of the cases described under
18 subparagraph (A), including whether or not the
19 Merit Systems Protection Board, the United
20 States Court of Appeals for the Federal Circuit,
21 or any other court determined the allegations to
22 be frivolous or malicious as well as a rec-
23 ommendation whether Congress should grant the
24 Merit Systems Protection Board summary judg-
25 ment authority for cases described under sub-
26 paragraph (A);

1 (C) a recommendation regarding whether
2 Congress should grant jurisdiction for some sub-
3 set of cases described under subparagraph (A) to
4 be decided by a district court of the United
5 States and an evaluation of the impact that
6 would have on the Merit Systems Protection
7 Board and the Federal court system; and

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

10 (b) *MERIT SYSTEMS PROTECTION BOARD.*—

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

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

22 (B) The number of such cases filed in the
23 regional and field offices, and the number of pe-
24 titions for review filed in such cases, during the
25 period covered by such report, and the outcomes

1 *of any such cases or petitions for review (irre-*
2 *spective of when filed) decided during such pe-*
3 *riod.*

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

11 **SEC. 117. WHISTLEBLOWER PROTECTION OMBUDSMAN.**

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

15 “(d)(1) *Each Inspector General shall, in accordance*
16 *with applicable laws and regulations governing the civil*
17 *service—*

18 “(A) *appoint an Assistant Inspector General for*
19 *Auditing who shall have the responsibility for super-*
20 *vising the performance of auditing activities relating*
21 *to programs and operations of the establishment;*

22 “(B) *appoint an Assistant Inspector General for*
23 *Investigations who shall have the responsibility for*
24 *supervising the performance of investigative activities*
25 *relating to such programs and operations; and*

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

3 “(i) about prohibitions on retaliation for
4 protected disclosures; and

5 “(ii) who have made or are contemplating
6 making a protected disclosure about the rights
7 and remedies against retaliation for protected
8 disclosures.

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

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

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

19 “(B) as determined by the President, any execu-
20 tive agency or unit thereof the principal function of
21 which is the conduct of foreign intelligence or counter
22 intelligence activities.”.

23 (b) TECHNICAL AND CONFORMING AMENDMENT.—Sec-
24 tion 8D(j) of the Inspector General Act of 1978 (5 U.S.C.
25 App.) is amended—

1 (1) *by striking “section 3(d)(1)” and inserting*
2 *“section 3(d)(1)(A)”*; and

3 (2) *by striking “section 3(d)(2)” and inserting*
4 *“section 3(d)(1)(B)”*.

5 (c) *SUNSET.—*

6 (1) *IN GENERAL.—The amendments made by*
7 *this section shall cease to have effect on the date that*
8 *is 5 years after the date of enactment of this Act.*

9 (2) *RETURN TO PRIOR AUTHORITY.—Upon the*
10 *date described in paragraph (1), section 3(d) and sec-*
11 *tion 8D(j) of the Inspector General Act of 1978 (5*
12 *U.S.C. App.) shall read as such sections read on the*
13 *day before the date of enactment of this Act.*

14 ***TITLE II—SAVINGS CLAUSE;***
15 ***EFFECTIVE DATE***

16 ***SEC. 201. SAVINGS CLAUSE.***

17 *Nothing in this Act shall be construed to imply any*
18 *limitation on any protections afforded by any other provi-*
19 *sion of law to employees and applicants.*

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

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

Attest:

Clerk.

112TH CONGRESS
2^D SESSION

S. 743

AMENDMENT