

112TH CONGRESS
2^D SESSION

S. 743

AN ACT

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

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Whistleblower Protec-
5 tion Enhancement Act of 2012”.

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

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

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

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

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

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

20 (1) TECHNICAL AND CONFORMING AMEND-
21 MENTS.—Title 5, United States Code, is amended in
22 subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of
23 section 1214, in subsections (a), (e)(1), and (i) of
24 section 1221, and in subsection (a)(2)(C)(i) of sec-
25 tion 2302, by inserting “or section 2302(b)(9)

1 (A)(i), (B), (C), or (D)” after “section 2302(b)(8)”
2 or “(b)(8)” each place it appears.

3 (2) OTHER REFERENCES.—(A) Title 5, United
4 States Code, is amended in subsection (b)(4)(B)(i)
5 of section 1214 and in subsection (e)(1) of section
6 1221, by inserting “or protected activity” after “dis-
7 closure” each place it appears.

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

10 (i) by striking subparagraph (A) and in-
11 serting the following:

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

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

17 “(ii) other than with regard to rem-
18 edying a violation of paragraph (8);”; and

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

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

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

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

5 “(B) the disclosure revealed information that
6 had been previously disclosed;

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

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

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

12 “(F) of the amount of time which has passed
13 since the occurrence of the events described in the
14 disclosure.

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

23 **SEC. 102. DEFINITIONAL AMENDMENTS.**

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

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

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

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

6 “(D) ‘disclosure’ means a formal or informal
7 communication or transmission, but does not include
8 a communication concerning policy decisions that
9 lawfully exercise discretionary authority unless the
10 employee or applicant providing the disclosure rea-
11 sonably believes that the disclosure evidences—

12 “(i) any violation of any law, rule, or regu-
13 lation; or

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

17 **SEC. 103. REBUTTABLE PRESUMPTION.**

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

21 “This subsection shall not be construed to authorize the
22 withholding of information from Congress or the taking
23 of any personnel action against an employee who discloses
24 information to Congress. For purposes of paragraph (8),
25 (i) any presumption relating to the performance of a duty

1 by an employee whose conduct is the subject of a disclo-
 2 sure as defined under subsection (a)(2)(D) may be rebut-
 3 ted by substantial evidence, and (ii) a determination as
 4 to whether an employee or applicant reasonably believes
 5 that such employee or applicant has disclosed information
 6 that evidences any violation of law, rule, regulation, gross
 7 mismanagement, a gross waste of funds, an abuse of au-
 8 thority, or a substantial and specific danger to public
 9 health or safety shall be made by determining whether a
 10 disinterested observer with knowledge of the essential
 11 facts known to and readily ascertainable by the employee
 12 or applicant could reasonably conclude that the actions of
 13 the Government evidence such violations, mismanagement,
 14 waste, abuse, or danger.”.

15 **SEC. 104. PERSONNEL ACTIONS AND PROHIBITED PER-**
 16 **SONNEL PRACTICES.**

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

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

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

23 “(xi) the implementation or enforce-
 24 ment of any nondisclosure policy, form, or
 25 agreement; and”.

1 (b) PROHIBITED PERSONNEL PRACTICE.—

2 (1) IN GENERAL.—Section 2302(b) of title 5,
3 United States Code, is amended—

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

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

8 (C) by inserting after paragraph (12) the
9 following:

10 “(13) implement or enforce any nondisclosure
11 policy, form, or agreement, if such policy, form, or
12 agreement does not contain the following statement:
13 ‘These provisions are consistent with and do not su-
14 perse, conflict with, or otherwise alter the em-
15 ployee obligations, rights, or liabilities created by ex-
16 isting statute or Executive order relating to (1) clas-
17 sified information, (2) communications to Congress,
18 (3) the reporting to an Inspector General of a viola-
19 tion of any law, rule, or regulation, or mismanage-
20 ment, a gross waste of funds, an abuse of authority,
21 or a substantial and specific danger to public health
22 or safety, or (4) any other whistleblower protection.
23 The definitions, requirements, obligations, rights,
24 sanctions, and liabilities created by controlling Exec-

1 utive orders and statutory provisions are incor-
2 porated into this agreement and are controlling.’”.

3 (2) AGENCY WEBSITES.—Agencies making use
4 of any nondisclosure policy, form, or agreement shall
5 also post the statement required under section
6 2302(b)(13) of title 5, United States Code, (as
7 added by this Act) on the agency website, accom-
8 panied by the specific list of controlling Executive
9 orders and statutory provisions.

10 (3) NONDISCLOSURE POLICY, FORM, OR AGREE-
11 MENT IN EFFECT BEFORE THE EFFECTIVE DATE.—
12 With respect to a nondisclosure policy, form, or
13 agreement that was in effect before the effective
14 date of this Act, but that does not contain the state-
15 ment required under section 2302(b)(13) of title 5,
16 United States Code, (as added by this Act) for im-
17 plementation or enforcement—

18 (A) it shall not be a prohibited personnel
19 practice to enforce that policy, form, or agree-
20 ment with regard to a current employee if the
21 agency gives such employee notice of the state-
22 ment; and

23 (B) it shall not be a prohibited personnel
24 practice to enforce that policy, form, or agree-
25 ment after the effective date of this Act with re-

1 gard to a former employee if the agency com-
2 plies with paragraph (2).

3 (c) RETALIATORY INVESTIGATIONS.—

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

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

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

17 “(4) Any corrective action ordered under this
18 section to correct a prohibited personnel practice
19 may include fees, costs, or damages reasonably in-
20 curred due to an agency investigation of the em-
21 ployee, if such investigation was commenced, ex-
22 panded, or extended in retaliation for the disclosure
23 or protected activity that formed the basis of the
24 corrective action.”.

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

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

5 “(ii)(I) the Federal Bureau of Inves-
6 tigation, the Central Intelligence Agency,
7 the Defense Intelligence Agency, the Na-
8 tional Geospatial-Intelligence Agency, the
9 National Security Agency, the Office of the
10 Director of National Intelligence, and the
11 National Reconnaissance Office; and

12 “(II) as determined by the President,
13 any executive agency or unit thereof the
14 principal function of which is the conduct
15 of foreign intelligence or counterintel-
16 ligence activities, provided that the deter-
17 mination be made prior to a personnel ac-
18 tion; or”.

19 **SEC. 106. DISCIPLINARY ACTION.**

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

22 “(3)(A) A final order of the Board may im-
23 pose—

24 “(i) disciplinary action consisting of re-
25 moval, reduction in grade, debarment from

1 Federal employment for a period not to exceed
2 5 years, suspension, or reprimand;

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

5 “(iii) any combination of disciplinary ac-
6 tions described under clause (i) and an assess-
7 ment described under clause (ii).

8 “(B) In any case brought under paragraph (1)
9 in which the Board finds that an employee has com-
10 mitted a prohibited personnel practice under section
11 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D),
12 the Board may impose disciplinary action if the
13 Board finds that the activity protected under section
14 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D)
15 was a significant motivating factor, even if other fac-
16 tors also motivated the decision, for the employee’s
17 decision to take, fail to take, or threaten to take or
18 fail to take a personnel action, unless that employee
19 demonstrates, by preponderance of evidence, that
20 the employee would have taken, failed to take, or
21 threatened to take or fail to take the same personnel
22 action, in the absence of such protected activity.”.

23 **SEC. 107. REMEDIES.**

24 (a) ATTORNEY FEES.—Section 1204(m)(1) of title 5,
25 United States Code, is amended by striking “agency in-

1 volved” and inserting “agency where the prevailing party
2 was employed or had applied for employment at the time
3 of the events giving rise to the case”.

4 (b) DAMAGES.—Sections 1214(g)(2) and
5 1221(g)(1)(A)(ii) of title 5, United States Code, are
6 amended by striking all after “travel expenses,” and in-
7 serting “any other reasonable and foreseeable consequen-
8 tial damages, and compensatory damages (including inter-
9 est, reasonable expert witness fees, and costs).” each place
10 it appears.

11 **SEC. 108. JUDICIAL REVIEW.**

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

15 “(b)(1)(A) Except as provided in subparagraph (B)
16 and paragraph (2) of this subsection, a petition to review
17 a final order or final decision of the Board shall be filed
18 in the United States Court of Appeals for the Federal Cir-
19 cuit. Notwithstanding any other provision of law, any peti-
20 tion for review shall be filed within 60 days after the
21 Board issues notice of the final order or decision of the
22 Board.

23 “(B) During the 5-year period beginning on the effec-
24 tive date of the Whistleblower Protection Enhancement
25 Act of 2012, a petition to review a final order or final

1 decision of the Board that raises no challenge to the
2 Board's disposition of allegations of a prohibited personnel
3 practice described in section 2302(b) other than practices
4 described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B),
5 (C), or (D) shall be filed in the United States Court of
6 Appeals for the Federal Circuit or any court of appeals
7 of competent jurisdiction as provided under paragraph
8 (2).”.

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

12 “(d)(1) Except as provided under paragraph (2), this
13 paragraph shall apply to any review obtained by the Direc-
14 tor of the Office of Personnel Management. The Director
15 of the Office of Personnel Management may obtain review
16 of any final order or decision of the Board by filing, within
17 60 days after the Board issues notice of the final order
18 or decision of the Board, a petition for judicial review in
19 the United States Court of Appeals for the Federal Circuit
20 if the Director determines, in the discretion of the Direc-
21 tor, that the Board erred in interpreting a civil service
22 law, rule, or regulation affecting personnel management
23 and that the Board's decision will have a substantial im-
24 pact on a civil service law, rule, regulation, or policy direc-
25 tive. If the Director did not intervene in a matter before

1 the Board, the Director may not petition for review of a
2 Board decision under this section unless the Director first
3 petitions the Board for a reconsideration of its decision,
4 and such petition is denied. In addition to the named re-
5 spondent, the Board and all other parties to the pro-
6 ceedings before the Board shall have the right to appear
7 in the proceeding before the Court of Appeals. The grant-
8 ing of the petition for judicial review shall be at the discre-
9 tion of the Court of Appeals.

10 “(2) During the 5-year period beginning on the effec-
11 tive date of the Whistleblower Protection Enhancement
12 Act of 2012, this paragraph shall apply to any review ob-
13 tained by the Director of the Office of Personnel Manage-
14 ment that raises no challenge to the Board’s disposition
15 of allegations of a prohibited personnel practice described
16 in section 2302(b) other than practices described in sec-
17 tion 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D).
18 The Director of the Office of Personnel Management may
19 obtain review of any final order or decision of the Board
20 by filing, within 60 days after the Board issues notice of
21 the final order or decision of the Board, a petition for judi-
22 cial review in the United States Court of Appeals for the
23 Federal Circuit or any court of appeals of competent juris-
24 diction as provided under subsection (b)(2) if the Director
25 determines, in the discretion of the Director, that the

1 Board erred in interpreting a civil service law, rule, or reg-
 2 ulation affecting personnel management and that the
 3 Board’s decision will have a substantial impact on a civil
 4 service law, rule, regulation, or policy directive. If the Di-
 5 rector did not intervene in a matter before the Board, the
 6 Director may not petition for review of a Board decision
 7 under this section unless the Director first petitions the
 8 Board for a reconsideration of its decision, and such peti-
 9 tion is denied. In addition to the named respondent, the
 10 Board and all other parties to the proceedings before the
 11 Board shall have the right to appear in the proceeding
 12 before the court of appeals. The granting of the petition
 13 for judicial review shall be at the discretion of the court
 14 of appeals.”.

15 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**
 16 **THE TRANSPORTATION SECURITY ADMINIS-**
 17 **TRATION.**

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

20 (1) by redesignating sections 2304 and 2305 as
 21 sections 2305 and 2306, respectively; and

22 (2) by inserting after section 2303 the fol-
 23 lowing:

1 **“§ 2304. Prohibited personnel practices affecting the**
2 **Transportation Security Administration**

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

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

9 “(2) any provision of law implementing section
10 2302(b) (1), (8), or (9) by providing any right or
11 remedy available to an employee or applicant for em-
12 ployment in the civil service; and

13 “(3) any rule or regulation prescribed under
14 any provision of law referred to in paragraph (1) or
15 (2).

16 “(b) RULE OF CONSTRUCTION.—Nothing in this sec-
17 tion shall be construed to affect any rights, apart from
18 those described in subsection (a), to which an individual
19 described in subsection (a) might otherwise be entitled
20 under law.”.

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

“2304. Prohibited personnel practices affecting the Transportation Security Administration.

“2305. Responsibility of the Government Accountability Office.

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

1 (c) **EFFECTIVE DATE.**—The amendments made by
2 this section shall take effect on the date of enactment of
3 this section.

4 **SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RE-**
5 **SEARCH, ANALYSIS, OR TECHNICAL INFOR-**
6 **MATION.**

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

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

11 (2) the term “applicant” means an applicant
12 for a covered position;

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

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

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

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

4 (b) PROTECTED DISCLOSURE.—

5 (1) IN GENERAL.—Any disclosure of informa-
6 tion by an employee or applicant for employment
7 that the employee or applicant reasonably believes is
8 evidence of censorship related to research, analysis,
9 or technical information—

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

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

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

19 (II) gross mismanagement, a
20 gross waste of funds, an abuse of au-
21 thority, or a substantial and specific
22 danger to public health or safety; and

23 (ii) such disclosure is not specifically
24 prohibited by law or such information is
25 not specifically required by Executive order

1 to be kept classified in the interest of na-
2 tional defense or the conduct of foreign af-
3 fairs; and

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

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

11 (I) any violation of law, rule, or
12 regulation; or

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

17 (ii) the disclosure is made to the Spe-
18 cial Counsel, or to the Inspector General of
19 an agency or another person designated by
20 the head of the agency to receive such dis-
21 closures, consistent with the protection of
22 sources and methods.

23 (2) DISCLOSURES NOT EXCLUDED.—A diselo-
24 sure shall not be excluded from paragraph (1) for

1 any reason described under section 2302(f)(1) or (2)
2 of title 5, United States Code.

3 (3) **RULE OF CONSTRUCTION.**—Nothing in this
4 section shall be construed to imply any limitation on
5 the protections of employees and applicants afforded
6 by any other provision of law, including protections
7 with respect to any disclosure of information be-
8 lieved to be evidence of censorship related to re-
9 search, analysis, or technical information.

10 **SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS**
11 **FOR CRITICAL INFRASTRUCTURE INFORMA-**
12 **TION.**

13 Section 214(c) of the Homeland Security Act of 2002
14 (6 U.S.C. 133(c)) is amended by adding at the end the
15 following: “For purposes of this section a permissible use
16 of independently obtained information includes the disclo-
17 sure of such information under section 2302(b)(8) of title
18 5, United States Code.”.

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

20 Section 2302(e) of title 5, United States Code, is
21 amended by inserting “, including how to make a lawful
22 disclosure of information that is specifically required by
23 law or Executive order to be kept classified in the interest
24 of national defense or the conduct of foreign affairs to the
25 Special Counsel, the Inspector General of an agency, Con-

1 gress, or other agency employee designated to receive such
2 disclosures” after “chapter 12 of this title”.

3 **SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEAR-**
4 **ANCE.**

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

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

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

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

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

23 (b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title
24 5, United States Code, is amended by inserting “, after

1 a finding that a protected disclosure was a contributing
2 factor,” after “ordered if”.

3 **SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
4 **MENTS.**

5 (a) IN GENERAL.—

6 (1) REQUIREMENT.—Each agreement in Stand-
7 ard Forms 312 and 4414 of the Government and
8 any other nondisclosure policy, form, or agreement
9 of the Government shall contain the following state-
10 ment: “These provisions are consistent with and do
11 not supersede, conflict with, or otherwise alter the
12 employee obligations, rights, or liabilities created by
13 existing statute or Executive order relating to (1)
14 classified information, (2) communications to Con-
15 gress, (3) the reporting to an Inspector General of
16 a violation of any law, rule, or regulation, or mis-
17 management, a gross waste of funds, an abuse of
18 authority, or a substantial and specific danger to
19 public health or safety, or (4) any other whistle-
20 blower protection. The definitions, requirements, ob-
21 ligations, rights, sanctions, and liabilities created by
22 controlling Executive orders and statutory provisions
23 are incorporated into this agreement and are con-
24 trolling.”.

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

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
11 required under paragraph (1) may not be im-
12 plemented 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 EFFEC-
17 TIVE DATE.—With respect to a nondisclosure
18 policy, form, or agreement that was in effect
19 before the effective date of this Act, but that
20 does not contain the statement required under
21 paragraph (1) for implementation or enforce-
22 ment—

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

1 rent employee if the agency gives such em-
2 ployee notice of the statement; and

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

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

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

3 **SEC. 116. REPORTING REQUIREMENTS.**

4 (a) GOVERNMENT ACCOUNTABILITY OFFICE.—

5 (1) REPORT.—Not later than 48 months after
6 the date of enactment of this Act, the Comptroller
7 General shall submit a report to the Committee on
8 Homeland Security and Governmental Affairs of the
9 Senate and the Committee on Oversight and Govern-
10 ment Reform of the House of Representatives on the
11 implementation of this title.

12 (2) CONTENTS.—The report under this para-
13 graph shall include—

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

19 (B) the outcome of the cases described
20 under subparagraph (A), including whether or
21 not the United States Merit Systems Protection
22 Board, the Federal Circuit Court of Appeals, or
23 any other court determined the allegations to be
24 frivolous or malicious;

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

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

9 (b) MERIT SYSTEMS PROTECTION BOARD.—

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

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

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

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

1 actment of this Act shall include an addendum re-
2 quired under that subparagraph that covers the pe-
3 riod beginning on the effective date of this Act and
4 ending at the end of the fiscal year in which such
5 effective date occurs.

6 **SEC. 117. ALTERNATIVE REVIEW.**

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

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

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

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

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

24 “(B) Upon initiation of any action under subpara-
25 graph (A), the Board shall stay any other claims of such

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

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

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

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

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

24 “(B) no final order or decision is issued by the
25 Board within 270 days after the date on which a re-

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

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

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

12 “(A) an employee, former employee, or appli-
13 cant for employment—

14 “(i) seeks corrective action from the Merit
15 Systems Protection Board under section
16 1221(a) based on an alleged prohibited per-
17 sonnel practice described in section 2302(b) (8)
18 or (9) (A)(i), (B), (C), or (D) for which the as-
19 sociated personnel action is an action covered
20 under section 7512 or 7542; or

21 “(ii) files an appeal under section 7701(a)
22 alleging as an affirmative defense the commis-
23 sion of a prohibited personnel practice described
24 in section 2302(b) (8) or (9) (A)(i), (B), (C),
25 or (D) for which the associated personnel action

1 is an action covered under section 7512 or
2 7542;

3 “(B)(i) within 30 days after the date on which
4 the request for corrective action or appeal was duly
5 submitted, such employee, former employee, or appli-
6 cant for employment files a motion requesting a cer-
7 tification consistent with subparagraph (C) to the
8 Board, any administrative law judge appointed by
9 the Board under section 3105 of this title and as-
10 signed to the case, or any employee of the Board
11 designated by the Board and assigned to the case;
12 and

13 “(ii) such employee has not previously filed a
14 motion under clause (i) related to that request for
15 corrective action or that appeal; and

16 “(C) the Board, any administrative law judge
17 appointed by the Board under section 3105 of this
18 title and assigned to the case, or any employee of
19 the Board designated by the Board and assigned to
20 the case certifies that—

21 “(i) under the standards applicable to the
22 review of motions to dismiss under rule
23 12(b)(6) of the Federal Rules of Civil Proce-
24 dure, including rule 12(d), the request for cor-
25 rective action or the appeal (including any alle-

1 gations made with the motion under subpara-
2 graph (B)) would not be subject to dismissal;
3 and

4 “(ii)(I) the Board is not likely to dispose
5 of the case within 270 days after the date on
6 which the request for corrective action or the
7 appeal has been duly submitted; or

8 “(II) the case—

9 “(aa) consists of multiple claims;

10 “(bb) requires complex or extensive
11 discovery;

12 “(cc) arises out of the same set of op-
13 erative facts as any civil action against the
14 Government filed by the employee, former
15 employee, or applicant pending in a Fed-
16 eral court; or

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

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

24 “(6)(A) Any decision of the Board, any administra-
25 tive law judge appointed by the Board under section 3105

1 of this title and assigned to the case, or any employee of
2 the Board designated by the Board and assigned to the
3 case to grant or deny a certification described under para-
4 graph (4)(ii) shall be reviewed on appeal of a final order
5 or decision of the Board under section 7703 only if—

6 “(i) a motion requesting a certification was de-
7 nied; and

8 “(ii) the reviewing court vacates the decision of
9 the Board on the merits of the claim under the
10 standards set forth in section 7703(c).

11 “(B) The decision to deny the certification shall be
12 overturned by the reviewing court, and an order granting
13 certification shall be issued by the reviewing court, if such
14 decision is found to be arbitrary, capricious, or an abuse
15 of discretion.

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

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

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

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

5 “(C) the court—

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

8 “(ii) may award any relief which the court
9 considers appropriate under subsection (g), ex-
10 cept—

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

13 “(II) relief may not include punitive
14 damages; and

15 “(iii) notwithstanding subsection (e)(2),
16 may not order relief if the agency demonstrates
17 by a preponderance of the evidence that the
18 agency would have taken the same personnel
19 action in the absence of such disclosure; and

20 “(D) the Special Counsel may not represent the
21 employee, former employee, or applicant for employ-
22 ment.

23 “(8) An appeal from a final decision of a district
24 court in an action under this subsection shall be taken

1 to the Court of Appeals for the Federal Circuit or any
2 court of appeals of competent jurisdiction.

3 “(9) This subsection applies with respect to any ap-
4 peal, petition, or other request for corrective action duly
5 submitted to the Board, whether under section
6 1214(b)(2), the preceding provisions of this section, sec-
7 tion 7513(d), section 7701, or any otherwise applicable
8 provisions of law, rule, or regulation.”.

9 (b) SUNSET.—

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

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

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

20 **JUDGMENT.**

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

23 (1) by redesignating paragraph (3) as para-
24 graph (4);

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

3 “(3) With respect to a request for corrective ac-
4 tion based on an alleged prohibited personnel prac-
5 tice described in section 2302(b) (8) or (9) (A)(i),
6 (B), (C), or (D) for which the associated personnel
7 action is an action covered under section 7512 or
8 7542, the Board, any administrative law judge ap-
9 pointed by the Board under section 3105 of this
10 title, or any employee of the Board designated by
11 the Board may, with respect to any party, grant a
12 motion for summary judgment when the Board or
13 the administrative law judge determines that there is
14 no genuine issue as to any material fact and that
15 the moving party is entitled to a judgment as a mat-
16 ter of law.”.

17 (b) SUNSET.—

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

22 (2) PENDING CLAIMS.—The amendments made
23 by this section shall continue to apply with respect
24 to any claim pending before the Board on the last

1 day of the 5-year period described under paragraph
2 (1).

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

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

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

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

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

11 “(C) any communication that complies
12 with subsection (a)(1), (d), and (h) of section
13 8H of the Inspector General Act of 1978 (5
14 U.S.C. App.);”.

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

18 (1) in subsection (a)(1), by adding at the end
19 the following:

20 “(D) An employee of any agency, as that
21 term is defined under section 2302(a)(2)(C) of
22 title 5, United States Code, who intends to re-
23 port to Congress a complaint or information
24 with respect to an urgent concern may report
25 the complaint or information to the Inspector

1 General (or designee) of the agency at which
2 that employee is employed.”;

3 (2) in subsection (c), by striking “intelligence
4 committees” and inserting “appropriate commit-
5 tees”;

6 (3) in subsection (d)—

7 (A) in paragraph (1), by striking “either
8 or both of the intelligence committees” and in-
9 serting “any of the appropriate committees”;
10 and

11 (B) in paragraphs (2) and (3), by striking
12 “intelligence committees” each place that term
13 appears and inserting “appropriate commit-
14 tees”;

15 (4) in subsection (h)—

16 (A) in paragraph (1)—

17 (i) in subparagraph (A), by striking
18 “intelligence”; and

19 (ii) in subparagraph (B), by inserting
20 “or an activity involving classified informa-
21 tion” after “an intelligence activity”; and

22 (B) by striking paragraph (2), and insert-
23 ing the following:

24 “(2) The term ‘appropriate committees’ means
25 the Permanent Select Committee on Intelligence of

1 the House of Representatives and the Select Com-
2 mittee on Intelligence of the Senate, except that with
3 respect to disclosures made by employees described
4 in subsection (a)(1)(D), the term ‘appropriate com-
5 mittees’ means the committees of appropriate juris-
6 diction.”.

7 **SEC. 120. WHISTLEBLOWER PROTECTION OMBUDSMAN.**

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

11 “(d)(1) Each Inspector General shall, in accordance
12 with applicable laws and regulations governing the civil
13 service—

14 “(A) appoint an Assistant Inspector General for
15 Auditing who shall have the responsibility for super-
16 vising the performance of auditing activities relating
17 to programs and operations of the establishment;

18 “(B) appoint an Assistant Inspector General for
19 Investigations who shall have the responsibility for
20 supervising the performance of investigative activi-
21 ties relating to such programs and operations; and

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

24 “(i) about prohibitions on retaliation for
25 protected disclosures; and

1 “(ii) who have made or are contemplating
2 making a protected disclosure about the rights
3 and remedies against retaliation for protected
4 disclosures.

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

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

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

15 “(B) as determined by the President, any execu-
16 tive agency or unit thereof the principal function of
17 which is the conduct of foreign intelligence or
18 counter intelligence activities.”.

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

22 (1) by striking “section 3(d)(1)” and inserting
23 “section 3(d)(1)(A)”; and

24 (2) by striking “section 3(d)(2)” and inserting
25 “section 3(d)(1)(B)”.

1 (c) SUNSET.—

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

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

11 **TITLE II—INTELLIGENCE COM-**
12 **MUNITY WHISTLEBLOWER**
13 **PROTECTIONS**

14 **SEC. 201. PROTECTION OF INTELLIGENCE COMMUNITY**
15 **WHISTLEBLOWERS.**

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

19 **“§ 2303A. Prohibited personnel practices in the intel-**
20 **ligence community**

21 “(a) DEFINITIONS.—In this section—

22 “(1) the term ‘agency’ means an executive de-
23 partment or independent establishment, as defined
24 under sections 101 and 104, that contains an intel-

1 intelligence community element, except the Federal Bu-
2 reau of Investigation;

3 “(2) the term ‘intelligence community ele-
4 ment’—

5 “(A) means—

6 “(i) the Central Intelligence Agency,
7 the Defense Intelligence Agency, the Na-
8 tional Geospatial-Intelligence Agency, the
9 National Security Agency, the Office of the
10 Director of National Intelligence, and the
11 National Reconnaissance Office; and

12 “(ii) any executive agency or unit
13 thereof determined by the President under
14 section 2302(a)(2)(C)(ii) of title 5, United
15 States Code, to have as its principal func-
16 tion the conduct of foreign intelligence or
17 counterintelligence activities; and

18 “(B) does not include the Federal Bureau
19 of Investigation; and

20 “(3) the term ‘personnel action’ means any ac-
21 tion described in clauses (i) through (x) of section
22 2302(a)(2)(A) with respect to an employee in a posi-
23 tion in an intelligence community element (other
24 than a position of a confidential, policy-determining,
25 policymaking, or policy-advocating character).

1 “(b) IN GENERAL.—Any employee of an agency who
2 has authority to take, direct others to take, recommend,
3 or approve any personnel action, shall not, with respect
4 to such authority, take or fail to take a personnel action
5 with respect to any employee of an intelligence community
6 element as a reprisal for a disclosure of information by
7 the employee to the Director of National Intelligence (or
8 an employee designated by the Director of National Intel-
9 ligence for such purpose), or to the head of the employing
10 agency (or an employee designated by the head of that
11 agency for such purpose), which the employee reasonably
12 believes evidences—

13 “(1) a violation of any law, rule, or regulation;
14 or

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

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

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

23 “(1) preempt or preclude any employee, or ap-
24 plicant for employment, at the Federal Bureau of
25 Investigation from exercising rights currently pro-

1 vided under any other law, rule, or regulation, in-
2 cluding section 2303;

3 “(2) repeal section 2303; or

4 “(3) provide the President or Director of Na-
5 tional Intelligence the authority to revise regulations
6 related to section 2303, codified in part 27 of the
7 Code of Federal Regulations.”.

8 (b) TECHNICAL AND CONFORMING AMENDMENT.—

9 The table of sections for chapter 23 of title 5, United
10 States Code, is amended by inserting after the item relat-
11 ing to section 2303 the following:

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

12 **SEC. 202. REVIEW OF SECURITY CLEARANCE OR ACCESS**

13 **DETERMINATIONS.**

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

17 (1) in the matter preceding paragraph (1), by
18 striking “Not” and inserting “Except as otherwise
19 provided, not”;

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

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

24 (4) by inserting after paragraph (6) the fol-
25 lowing:

1 “(7) not later than 180 days after the date of
2 enactment of the Whistleblower Protection Enhance-
3 ment Act of 2011—

4 “(A) developing policies and procedures
5 that permit, to the extent practicable, individ-
6 uals who in good faith appeal a determination
7 to suspend or revoke a security clearance or ac-
8 cess to classified information to retain their
9 government employment status while such chal-
10 lenge is pending; and

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

1 “Any limitation period applicable to an agency appeal
2 under paragraph (7) shall be tolled until the head of the
3 agency (or in the case of any component of the Depart-
4 ment of Defense, the Secretary of Defense) determines,
5 with the concurrence of the Director of National Intel-
6 ligence, that the policies and procedures described in para-
7 graph (7) have been established for the agency or the Di-
8 rector of National Intelligence promulgates the policies
9 and procedures under paragraph (7). The policies and pro-
10 cedures for appeals developed under paragraph (7) shall
11 be comparable to the policies and procedures pertaining
12 to prohibited personnel practices defined under section
13 2302(b)(8) of title 5, United States Code, and provide—

14 “(A) for an independent and impartial fact-
15 finder;

16 “(B) for notice and the opportunity to be
17 heard, including the opportunity to present relevant
18 evidence, including witness testimony;

19 “(C) that the employee or former employee may
20 be represented by counsel;

21 “(D) that the employee or former employee has
22 a right to a decision based on the record developed
23 during the appeal;

24 “(E) that not more than 180 days shall pass
25 from the filing of the appeal to the report of the im-

1 partial fact-finder to the agency head or the des-
2 ignee of the agency head, unless—

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

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

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

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

24 (b) RETALIATORY REVOCATION OF SECURITY
25 CLEARANCES AND ACCESS DETERMINATIONS.—Section

1 3001 of the Intelligence Reform and Terrorism Prevention
2 Act of 2004 (50 U.S.C. 435b) is amended by adding at
3 the end the following:

4 “(j) RETALIATORY REVOCATION OF SECURITY
5 CLEARANCES AND ACCESS DETERMINATIONS.—

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

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

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

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

1 “(B) any disclosure to the Inspector Gen-
2 eral of an agency or another employee des-
3 ignated by the head of the agency to receive
4 such disclosures, of information which the em-
5 ployee reasonably believes evidences—

6 “(i) a violation of any law, rule, or
7 regulation; or

8 “(ii) gross mismanagement, a gross
9 waste of funds, an abuse of authority, or
10 a substantial and specific danger to public
11 health or safety;

12 “(C) any communication that complies
13 with—

14 “(i) subsection (a)(1), (d), and (h) of
15 section 8H of the Inspector General Act of
16 1978 (5 U.S.C. App.);

17 “(ii) subsection (d)(5)(A), (D), and
18 (G) of section 17 of the Central Intel-
19 ligence Agency Act of 1949 (50 U.S.C.
20 403q); or

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

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

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

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

18 “(2) RULE OF CONSTRUCTION.—Consistent
19 with the protection of sources and methods, nothing
20 in paragraph (1) shall be construed to authorize the
21 withholding of information from the Congress or the
22 taking of any personnel action against an employee
23 who discloses information to the Congress.

24 “(3) DISCLOSURES.—

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

3 “(i) the disclosure was made to a per-
4 son, including a supervisor, who partici-
5 pated in an activity that the employee rea-
6 sonably believed to be covered by para-
7 graph (1)(A)(ii);

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

10 “(iii) of the employee’s motive for
11 making the disclosure;

12 “(iv) the disclosure was not made in
13 writing;

14 “(v) the disclosure was made while
15 the employee was off duty; or

16 “(vi) of the amount of time which has
17 passed since the occurrence of the events
18 described in the disclosure.

19 “(B) REPRISALS.—If a disclosure is made
20 during the normal course of duties of an em-
21 ployee, the disclosure shall not be excluded from
22 paragraph (1) if any employee who has author-
23 ity to take, direct others to take, recommend, or
24 approve any personnel action with respect to
25 the employee making the disclosure, took, failed

1 to take, or threatened to take or fail to take a
2 personnel action with respect to that employee
3 in reprisal for the disclosure.

4 “(4) AGENCY ADJUDICATION.—

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

20 “(B) CORRECTIVE ACTION.—If, in the
21 course of proceedings authorized under sub-
22 paragraph (A), it is determined that the ad-
23 verse security clearance or access determination
24 violated paragraph (1) of this subsection, the
25 agency shall take specific corrective action to

1 return the employee or former employee, as
2 nearly as practicable and reasonable, to the po-
3 sition such employee or former employee would
4 have held had the violation not occurred. Such
5 corrective action shall include reasonable attor-
6 ney's fees and any other reasonable costs in-
7 curred, and may include back pay and related
8 benefits, travel expenses, and compensatory
9 damages not to exceed \$300,000.

10 “(C) CONTRIBUTING FACTOR.—In deter-
11 mining whether the adverse security clearance
12 or access determination violated paragraph (1)
13 of this subsection, the agency shall find that
14 paragraph (1) of this subsection was violated if
15 a disclosure described in paragraph (1) was a
16 contributing factor in the adverse security clear-
17 ance or access determination taken against the
18 individual, unless the agency demonstrates by a
19 preponderance of the evidence that it would
20 have taken the same action in the absence of
21 such disclosure, giving the utmost deference to
22 the agency's assessment of the particular threat
23 to the national security interests of the United
24 States in the instant matter.

1 “(5) APPELLATE REVIEW OF SECURITY CLEAR-
2 ANCE ACCESS DETERMINATIONS BY DIRECTOR OF
3 NATIONAL INTELLIGENCE.—

4 “(A) DEFINITION.—In this paragraph, the
5 term ‘Board’ means the appellate review board
6 established under section 204 of the Whistle-
7 blower Protection Enhancement Act of 2012.

8 “(B) APPEAL.—Within 60 days after re-
9 ceiving notice of an adverse final agency deter-
10 mination under a proceeding under paragraph
11 (4), an employee or former employee may ap-
12 peal that determination to the Board.

13 “(C) POLICIES AND PROCEDURES.—The
14 Board, in consultation with the Attorney Gen-
15 eral, Director of National Intelligence, and the
16 Secretary of Defense, shall develop and imple-
17 ment policies and procedures for adjudicating
18 the appeals authorized by subparagraph (B).
19 The Director of National Intelligence and Sec-
20 retary of Defense shall jointly approve any
21 rules, regulations, or guidance issued by the
22 Board concerning the procedures for the use or
23 handling of classified information.

24 “(D) REVIEW.—The Board’s review shall
25 be on the complete agency record, which shall

1 be made available to the Board. The Board may
2 not hear witnesses or admit additional evidence.
3 Any portions of the record that were submitted
4 ex parte during the agency proceedings shall be
5 submitted ex parte to the Board.

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

17 “(F) DE NOVO DETERMINATION.—The
18 Board shall make a de novo determination,
19 based on the entire record and under the stand-
20 ards specified in paragraph (4), of whether the
21 employee or former employee received an ad-
22 verse security clearance or access determination
23 in violation of paragraph (1). In considering the
24 record, the Board may weigh the evidence,
25 judge the credibility of witnesses, and determine

1 controverted questions of fact. In doing so, the
2 Board may consider the prior fact-finder's op-
3 portunity to see and hear the witnesses.

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

19 “(H) REMEDIES.—

20 “(i) CORRECTIVE ACTION.—If the
21 Board finds that the adverse security
22 clearance or access determination violated
23 paragraph (1), it shall order the agency
24 head to take specific corrective action to
25 return the employee or former employee,

1 as nearly as practicable and reasonable, to
2 the position such employee or former em-
3 ployee would have held had the violation
4 not occurred. Such corrective action shall
5 include reasonable attorney's fees and any
6 other reasonable costs incurred, and may
7 include back pay and related benefits, trav-
8 el expenses, and compensatory damages
9 not to exceed \$300,000. The Board may
10 recommend, but may not order, reinstatement
11 or hiring of a former employee. The
12 Board may order that the former employee
13 be treated as though the employee were
14 transferring from the most recent position
15 held when seeking other positions within
16 the executive branch. Any corrective action
17 shall not include the reinstating of any se-
18 curity clearance or access determination.
19 The agency head shall take the actions so
20 ordered within 90 days, unless the Director
21 of National Intelligence, the Secretary of
22 Energy, or the Secretary of Defense, in the
23 case of any component of the Department
24 of Defense, determines that doing so would
25 endanger national security.

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

9 “(I) CONGRESSIONAL NOTIFICATION.—

10 “(i) ORDERS.—Consistent with the
11 protection of sources and methods, at the
12 time the Board issues an order, the Chair-
13 person of the Board shall notify—

14 “(I) the Committee on Homeland
15 Security and Government Affairs of
16 the Senate;

17 “(II) the Select Committee on In-
18 telligence of the Senate;

19 “(III) the Committee on Over-
20 sight and Government Reform of the
21 House of Representatives;

22 “(IV) the Permanent Select Com-
23 mittee on Intelligence of the House of
24 Representatives; and

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

14 “(ii) RECOMMENDATIONS.—If the
15 agency head and the head of the entity se-
16 lected under subsection (b) do not follow
17 the Board’s recommendation to reinstate a
18 clearance, the head of the entity selected
19 under subsection (b) shall notify the com-
20 mittees described in subclauses (I) through
21 (V) of clause (i).

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

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

1 “(B) action of the appellate review board
2 established under section 204 of the Whistle-
3 blower Protection Enhancement Act of 2012.

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

8 (c) ACCESS DETERMINATION DEFINED.—Section
9 3001(a) of the Intelligence Reform and Terrorism Preven-
10 tion Act of 2004 (50 U.S.C. 435b(a)) is amended by add-
11 ing at the end the following:

12 “(9) The term ‘access determination’ means the
13 determination regarding whether an employee—

14 “(A) is eligible for access to classified in-
15 formation in accordance with Executive Order
16 12968 (60 Fed. Reg. 40245; relating to access
17 to classified information), or any successor
18 thereto, and Executive Order 10865 (25 Fed.
19 Reg. 1583; relating to safeguarding classified
20 information with industry); and

21 “(B) possesses a need to know under that
22 Order.”.

23 (d) RULE OF CONSTRUCTION.—Nothing in section
24 3001 of the Intelligence Reform and Terrorism Prevention
25 Act of 2004 (50 U.S.C. 435b), as amended by this Act,

1 shall be construed to require the repeal or replacement of
2 agency appeal procedures implementing Executive Order
3 12968 (60 Fed. Reg. 40245; relating to classified national
4 security information), or any successor thereto, and Exec-
5 utive Order 10865 (25 Fed. Reg. 1583; relating to safe-
6 guarding classified information with industry), or any suc-
7 cessor thereto, that meet the requirements of section
8 3001(b)(7) of such Act, as so amended.

9 **SEC. 203. REVISIONS RELATING TO THE INTELLIGENCE**
10 **COMMUNITY WHISTLEBLOWER PROTECTION**
11 **ACT.**

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

14 (1) in subsection (b)—

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

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

17 “(2) If the head of an establishment determines that
18 a complaint or information transmitted under paragraph
19 (1) would create a conflict of interest for the head of the
20 establishment, the head of the establishment shall return
21 the complaint or information to the Inspector General with
22 that determination and the Inspector General shall make
23 the transmission to the Director of National Intelligence
24 and, if the establishment is within the Department of De-
25 fense, to the Secretary of Defense. In such a case, the

1 requirements of this section for the head of the establish-
2 ment apply to each recipient of the Inspector General’s
3 transmission. Each recipient of the Inspector General’s
4 transmission shall consult with the members of the appel-
5 late review board established under section 204 of the
6 Whistleblower Protection Enhancement Act of 2012 re-
7 garding all transmissions under this paragraph.”;

8 (2) by designating subsection (h) as subsection
9 (i); and

10 (3) by inserting after subsection (g), the fol-
11 lowing:

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

18 (b) CENTRAL INTELLIGENCE AGENCY.—Section
19 17(d)(5) of the Central Intelligence Agency Act of 1949
20 (50 U.S.C. 403q) is amended—

21 (1) in subparagraph (B)—

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

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

24 “(ii) If the Director determines that a complaint or
25 information transmitted under paragraph (1) would create

1 a conflict of interest for the Director, the Director shall
2 return the complaint or information to the Inspector Gen-
3 eral with that determination and the Inspector General
4 shall make the transmission to the Director of National
5 Intelligence. In such a case, the requirements of this sub-
6 section for the Director apply to the Director of National
7 Intelligence. The Director of National Intelligence shall
8 consult with the members of the appellate review board
9 established under section 204 of the Whistleblower Protec-
10 tion Enhancement Act of 2012 regarding all transmissions
11 under this clause.”; and

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

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

19 **SEC. 204. REGULATIONS; REPORTING REQUIREMENTS;**
20 **NONAPPLICABILITY TO CERTAIN TERMI-**
21 **NATIONS.**

22 (a) DEFINITIONS.—In this section—

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

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

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

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

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

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

13 (A) means—

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

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

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

3 (b) REGULATIONS.—

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

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

22 (A) to hear whistleblower appeals related
23 to security clearance access determinations de-
24 scribed in section 3001(j) of the Intelligence

1 Reform and Terrorism Prevention Act of 2004
2 (50 U.S.C. 435b), as added by this Act; and

3 (B) that shall include a subpanel that re-
4 flects the composition of the intelligence com-
5 munity, which shall—

6 (i) be composed of intelligence com-
7 munity elements and inspectors general
8 from intelligence community elements, for
9 the purpose of hearing cases that arise in
10 elements of the intelligence community;
11 and

12 (ii) include the Inspector General of
13 the Intelligence Community and the In-
14 spector General of the Department of De-
15 fense.

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

22 (d) NONAPPLICABILITY TO CERTAIN TERMI-
23 NATIONS.—Section 2303A of title 5, United States Code,
24 as added by this Act, and section 3001 of the Intelligence
25 Reform and Terrorism Prevention Act of 2004 (50 U.S.C.

1 435b), as amended by this Act, shall not apply if the af-
2 fected employee is concurrently terminated under—

3 (1) section 1609 of title 10, United States
4 Code;

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

8 (A) the Director personally summarily ter-
9 minates the individual; and

10 (B) the Director—

11 (i) determines the termination to be in
12 the interest of the United States;

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

19 (iii) not later than 5 days after such
20 termination, notifies the congressional
21 oversight committees of the termination;

22 (3) the authority of the Director of the Central
23 Intelligence Agency under section 104A(e) of the
24 National Security Act of 1947 (50 U.S.C. 403–
25 4a(e)), if—

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

3 (B) the Director—

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

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

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

15 (4) section 7532 of title 5, United States Code,
16 if—

17 (A) the agency head personally terminates
18 the individual; and

19 (B) the agency head—

20 (i) determines the termination to be in
21 the interest of the United States;

22 (ii) determines that the procedures
23 prescribed in other provisions of law that
24 authorize the termination of the employ-
25 ment of such employee cannot be invoked

1 in a manner consistent with the national
2 security; and

3 (iii) not later than 5 days after such
4 termination, notifies the congressional
5 oversight committees of the termination.

6 **TITLE III—SAVINGS CLAUSE;**
7 **EFFECTIVE DATE**

8 **SEC. 301. SAVINGS CLAUSE.**

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

12 **SEC. 302. EFFECTIVE DATE.**

13 This Act shall take effect 30 days after the date of
14 enactment of this Act.

Passed the Senate May 8, 2012.

Attest:

Secretary.

112TH CONGRESS
2^D SESSION

S. 743

AN ACT

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