

Union Calendar No. 656

114TH CONGRESS
2D SESSION

H. R. 5790

[Report No. 114–835]

To provide adequate protections for whistleblowers at the Federal Bureau
of Investigation.

IN THE HOUSE OF REPRESENTATIVES

JULY 14, 2016

Mr. CHAFFETZ (for himself, Mr. JEFFRIES, Mr. SENSENBRENNER, Mr. CONYERS, Mr. POE of Texas, Ms. SPEIER, Mr. COFFMAN, Mr. BLUM, Mr. RICE of South Carolina, and Mr. CUMMINGS) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

NOVEMBER 29, 2016

Additional sponsors: Mr. LYNCH, Mr. VAN HOLLEN, and Miss RICE of New York

NOVEMBER 29, 2016

Committed to the Committee of the Whole House on the State of the Union
and ordered to be printed

A BILL

To provide adequate protections for whistleblowers at the
Federal Bureau of Investigation.

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 “Federal Bureau of In-
5 vestigation Whistleblower Protection Enhancement Act of
6 2016”.

7 **SEC. 2. FBI WHISTLEBLOWER PROTECTIONS.**

8 (a) IN GENERAL.—Section 2303 of title 5, United
9 States Code, is amended to read as follows:

10 **“§ 2303. Prohibited personnel practices in the Fed-**
11 **eral Bureau of Investigation**

12 “(a) DEFINITIONS.—In this section—

13 “(1) the term ‘administrative law judge’ means
14 an administrative law judge appointed by the Attor-
15 ney General under section 3105 or used by the At-
16 torney General under section 3344;

17 “(2) the term ‘Inspector General’ means the In-
18 spector General of the Department of Justice;

19 “(3) the term ‘personnel action’ means any ac-
20 tion described in section 2302(a)(2)(A) with respect
21 to an employee in, or applicant for, a position in the
22 Federal Bureau of Investigation (other than a posi-
23 tion of a confidential, policy-determining, policy-
24 making, or policy-advocating character);

1 “(4) the term ‘prohibited personnel practice’
2 means a prohibited personnel practice described in
3 subsection (b); and

4 “(5) the term ‘protected disclosure’ means any
5 disclosure of information by an employee in, or ap-
6 plicant for, a position in the Federal Bureau of In-
7 vestigation—

8 “(A) made—

9 “(i) in the case of an employee, to a
10 supervisor in the direct chain of command
11 of the employee, up to and including the
12 head of the employing agency;

13 “(ii) to the Inspector General;

14 “(iii) to the Office of Professional Re-
15 sponsibility of the Department of Justice;

16 “(iv) to the Office of Professional Re-
17 sponsibility of the Federal Bureau of In-
18 vestigation;

19 “(v) to the Inspection Division of the
20 Federal Bureau of Investigation;

21 “(vi) as described in section 7211;

22 “(vii) to the Office of Special Counsel;

23 or

24 “(viii) to an employee designated by
25 any officer, employee, office, or division de-

1 scribed in clauses (i) through (vii) for the
2 purpose of receiving such disclosures; and

3 “(B) which the employee or applicant rea-
4 sonably believes evidences—

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

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

11 “(b) PROHIBITED PRACTICES.—Any employee of the
12 Federal Bureau of Investigation or another component of
13 the Department of Justice who has authority to take, di-
14 rect others to take, recommend, or approve any personnel
15 action, shall not, with respect to such authority—

16 “(1) take or fail to take, or threaten to take or
17 fail to take, a personnel action with respect to an
18 employee in, or applicant for, a position in the Fed-
19 eral Bureau of Investigation because of a protected
20 disclosure;

21 “(2) take or fail to take, or threaten to take or
22 fail to take, any personnel action against an em-
23 ployee in, or applicant for, a position in the Federal
24 Bureau of Investigation because of—

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 (1); or

6 “(ii) other than with regard to rem-
7 edying a violation of paragraph (1);

8 “(B) testifying for or otherwise lawfully as-
9 sisting any individual in the exercise of any
10 right referred to in clause (i) or (ii) of subpara-
11 graph (A);

12 “(C) cooperating with or disclosing infor-
13 mation to the Inspector General of an agency,
14 or the Special Counsel, in accordance with ap-
15 plicable provisions of law; or

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

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

22 “(c) PROCEDURES.—

23 “(1) FILING OF A COMPLAINT.—An employee
24 in, or applicant for, a position in the Federal Bureau
25 of Investigation may seek review of a personnel ac-

1 tion alleged to be in violation of subsection (b) by fil-
2 ing a complaint with the Office of the Inspector
3 General.

4 “(2) INVESTIGATION.—

5 “(A) IN GENERAL.—The Inspector General
6 shall investigate any complaint alleging a per-
7 sonnel action in violation of subsection (b), con-
8 sistent with the procedures and requirements
9 described in section 1214.

10 “(B) DETERMINATION.—The Inspector
11 General shall issue a decision containing the
12 findings of the Inspector General supporting
13 the determination of the Inspector General.

14 “(C) PRELIMINARY RELIEF.—

15 “(i) IN GENERAL.—If the Inspector
16 General determines under subparagraph
17 (B) that reasonable grounds exist to be-
18 lieve that a personnel action occurred, ex-
19 ists, or is to be taken, in violation of sub-
20 section (b)—

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

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

5 “(ii) GOOD CAUSE.—Upon motion by
6 the Government, after notice and an op-
7 portunity to be heard, and if the adminis-
8 trative law judge determines that there is
9 a particularized showing of good cause that
10 an order should not be issued returning an
11 employee to the position the employee
12 would have held had the personnel action
13 not been taken, the administrative law
14 judge shall issue an order directing that
15 the employee be returned, as nearly as
16 practicable and reasonable, to such posi-
17 tion.

18 “(3) FILING OF OBJECTIONS.—

19 “(A) IN GENERAL.—Not later than 60
20 days after the Inspector General issues a deci-
21 sion under paragraph (2)(B), either party may
22 file objections to the decision and request a
23 hearing on the record.

24 “(B) NO EFFECT ON PRELIMINARY RE-
25 LIEF.—The filing of objections under subpara-

1 graph (A) shall not affect an order issued under
2 clause (i) or (ii) of paragraph (2)(C).

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

7 “(i) the decision is final and not sub-
8 ject to further review; and

9 “(ii) if the Inspector General had de-
10 termined that reasonable grounds exist to
11 believe that a personnel action occurred,
12 exists, or is to be taken, in violation of
13 subsection (b)—

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

18 “(II) upon motion by the em-
19 ployee or applicant, and after an op-
20 portunity for a hearing, an adminis-
21 trative law judge may issue an order
22 that provides for corrective action as
23 described under section 1221(g),
24 which shall be accompanied by a writ-

1 ten decision explaining the grounds
2 for the order.

3 “(4) REVIEW BY ADMINISTRATIVE LAW
4 JUDGE.—

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

10 “(B) CORRECTIVE ACTION.—An adminis-
11 trative law judge may issue an order providing
12 for corrective action as described under section
13 1221(g).

14 “(C) DETERMINATION.—An administrative
15 law judge shall issue a written decision explain-
16 ing the grounds for the determination by the
17 administrative law judge under this paragraph.

18 “(D) EFFECT OF DETERMINATION.—The
19 determination by an administrative law judge
20 under this paragraph shall become the decision
21 of the Department of Justice without further
22 proceedings, unless there is an appeal to, or re-
23 view on motion of, the Attorney General within
24 such time as the Attorney General shall by rule
25 establish.

1 “(5) REVIEW BY ATTORNEY GENERAL.—

2 “(A) TIMEFRAME.—

3 “(i) IN GENERAL.—Upon an appeal
4 to, or review on motion of, the Attorney
5 General under paragraph (4)(D), the At-
6 torney General, through reference to such
7 categories of cases, or other means, as the
8 Attorney General determines appropriate,
9 shall establish and announce publicly the
10 date by which the Attorney General in-
11 tends to complete action on the matter,
12 which shall ensure expeditious consider-
13 ation of the appeal or review, consistent
14 with the interests of fairness and other pri-
15 orities of the Attorney General.

16 “(ii) FAILURE TO MEET DEADLINE.—
17 If the Attorney General fails to complete
18 action on an appeal or review by the an-
19 nounced date, and the expected delay will
20 exceed 30 days, the Attorney General shall
21 publicly announce the new date by which
22 the Attorney General intends to complete
23 action on the appeal or review.

24 “(B) DETERMINATION.—The Attorney
25 General shall issue a written decision explaining

1 the grounds for the determination by the Attor-
2 ney General in an appeal or review under para-
3 graph (4)(D).

4 “(6) PUBLICATION OF DETERMINATIONS.—

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

12 “(i) to the maximum extent prac-
13 ticable, consistent with the manner in
14 which the Merit Systems Protection Board
15 makes decisions of the Board available to
16 the public; and

17 “(ii) in accordance with section 552.

18 “(B) RULE OF CONSTRUCTION.—Nothing
19 in subparagraph (A) shall be construed to limit
20 the authority of an administrative law judge or
21 the Attorney General to limit the public dislo-
22 sure of information under law or regulations.

23 “(7) JUDICIAL REVIEW.—Any determination by
24 an administrative law judge or the Attorney General
25 under this subsection shall be subject to judicial re-

1 view under chapter 7. A petition for judicial review
2 of such a determination shall be filed in the United
3 States Court of Appeals for the Federal Circuit or
4 any court of appeals of competent jurisdiction.

5 “(d) REGULATIONS.—Not later than 18 months after
6 the date of enactment of the Federal Bureau of Investiga-
7 tion Whistleblower Protection Enhancement Act of 2016,
8 the Attorney General shall prescribe regulations to carry
9 out subsection (c) that—

10 “(1) ensure that prohibited personnel practices
11 shall not be taken against an employee in, or appli-
12 cant for, a position in the Federal Bureau of Inves-
13 tigation;

14 “(2) provide for the administration and enforce-
15 ment of subsection (c) in a manner consistent with
16 applicable provisions of sections 1214 and 1221 and
17 in accordance with the procedures under subchapter
18 II of chapter 5 and chapter 7;

19 “(3) ensure that employees of the Federal Bu-
20 reau of Investigation are informed of the rights and
21 remedies available to the employees under this sec-
22 tion, including how to make a lawful disclosure of
23 information that is specifically required by law or
24 Executive order to be kept classified in the interest

1 of national defense or the conduct of foreign affairs;
2 and

3 “(4) provide for the protection of classified in-
4 formation and intelligence sources and methods.

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

8 “(1) the number and nature of allegations of a
9 prohibited personnel practice received during the
10 previous year;

11 “(2) the disposition of each allegation of a pro-
12 hibited personnel practice resolved during the pre-
13 vious year;

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

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

23 “(5) the number of instances during the pre-
24 vious year in which the Inspector General found rea-
25 sonable grounds existed to believe that a prohibited

1 personnel practice had occurred that were appealed
2 by the Federal Bureau of Investigation; and

3 “(6) the number of allegations of a prohibited
4 personnel practice resolved through settlement, in-
5 cluding the number that were resolved as a result of
6 mediation.

7 “(f) RULES OF CONSTRUCTION.—Nothing in this
8 section shall be construed to—

9 “(1) limit the jurisdiction of any office under
10 any other provision of law to conduct an investiga-
11 tion to determine whether a prohibited personnel
12 practice has been or will be taken; or

13 “(2) alter or amend any law, regulation, or Ex-
14 ecutive order regarding the handling or disclosure of
15 information, including classified information.”.

16 (b) GAO REPORT.—

17 (1) DEFINITION.—In this subsection, the term
18 “prohibited personnel practice” means a prohibited
19 personnel practice described in section 2303(b) of
20 title 5, United States Code, as amended by sub-
21 section (a).

22 (2) REPORT.—Not later than 4 years after the
23 date of enactment of this Act, the Comptroller Gen-
24 eral of the United States shall submit to Congress
25 a report on the protections for whistleblowers at the

1 Federal Bureau of Investigation and the process of
2 investigating and adjudicating complaints of reprisal
3 by whistleblowers under the amendments made by
4 this Act, which shall include—

5 (A) the number and nature of com-
6 plaints—

7 (i) that were filed;

8 (ii) that were investigated;

9 (iii) that were adjudicated; and

10 (iv) that were appealed to a court of
11 appeals of the United States;

12 (B) the number of decisions made publicly
13 available under 2303(c)(6) of title 5, United
14 States Code, as amended by this Act, and the
15 nature of any limitations on public disclosure of
16 the decisions;

17 (C) the nature of corrective action provided
18 in instances of a prohibited personnel practice;

19 (D) the number and type of disciplinary
20 actions taken in instances of a prohibited per-
21 sonnel practice;

22 (E) an evaluation of the timeliness of reso-
23 lution of allegations of a prohibited personnel
24 practice;

1 (F) an assessment of the mediation process
2 of the Department of Justice;

3 (G) a discussion of how the use of adminis-
4 trative law judges and review under chapters 5
5 and 7 of title 5, United States Code, affected
6 the process of investigating and resolving alle-
7 gations of a prohibited personnel practice; and

8 (H) a discussion of the perspectives of key
9 stakeholders on the effects of the amendments
10 made by this Act on the Federal Bureau of In-
11 vestigation.

12 (c) EFFECTIVE DATE; IMPLEMENTATION.—

13 (1) IN GENERAL.—Except as provided in para-
14 graph (2), this Act and the amendments made by
15 this Act shall—

16 (A) take effect on the date of enactment of
17 this Act; and

18 (B) apply to any matter pending on, or
19 commenced on or after, the date of enactment
20 of this Act.

21 (2) IMPLEMENTATION OF INVESTIGATION AND
22 REVIEW PROCEDURES FOR PENDING COMPLAINTS
23 AND COMPLAINTS MADE DURING TRANSITION PE-
24 RIOD.—

1 (A) DEFINITION.—In this paragraph, the
2 term “covered complaint” means a complaint
3 alleging a personnel action in violation of sec-
4 tion 2303 of title 5, United States Code—

5 (i) made—

6 (I) before, on, or after the date
7 of enactment of this Act; and

8 (II) before the effective date of
9 the regulations prescribed by the At-
10 torney General under section 2303(d)
11 of title 5, United States Code, as
12 amended by this Act; and

13 (ii) for which an investigation or re-
14 view is pending on or after the date of en-
15 actment of this Act.

16 (B) APPLICATION OF EXISTING PROCE-
17 DURES UNTIL RULES ISSUED.—Subject to sub-
18 paragraph (C), for any covered complaint—

19 (i) the procedures under section
20 2303(c) of title 5, United States Code, as
21 amended by this Act, shall not apply; and

22 (ii) the covered complaint shall be in-
23 vestigated and reviewed in accordance with
24 the regulations and procedures prescribed
25 under section 2303 of title 5, United

1 States Code, as in effect on the day before
2 the date of enactment of this Act.

3 (C) APPLICATION OF NEW REVIEW PROCE-
4 DURES TO PENDING INVESTIGATIONS.—For any
5 covered complaint for which the investigation is
6 pending on the effective date of the regulations
7 prescribed by the Attorney General under sec-
8 tion 2303(d) of title 5, United States Code, as
9 amended by this Act—

10 (i) the procedures under paragraphs
11 (1), (2), and (3) of section 2303(c) of title
12 5, United States Code, as amended by this
13 Act, shall not apply; and

14 (ii) if either party files objections and
15 requests a hearing on the record not later
16 than 60 days after the date on which the
17 investigation is completed, the covered
18 complaint shall be subject to review in ac-
19 cordance with paragraphs (4), (5), (6), and
20 (7) of section 2303(c) of title 5, United
21 States Code, as amended by this Act.

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