

Calendar No. 363

112TH CONGRESS }
2d Session }

SENATE

{ REPORT
112-159

GOVERNMENT ACCOUNTABILITY OFFICE
IMPROVEMENT ACT OF 2011

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 237

TO AMEND TITLE 31, UNITED STATES CODE, TO ENHANCE THE
OVERSIGHT AUTHORITIES OF THE COMPTROLLER GENERAL,
AND FOR OTHER PURPOSES



APRIL 24 (legislative day, April 23), 2012.—Ordered to be printed

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Mr. LIEBERMAN, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 237]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 237) to amend title 31, United States Code, to enhance the oversight authorities of the Comptroller General, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

S. 237, the Government Accountability Office Improvement Act of 2011, responds to efforts by the executive branch to restrict the ability of the Government Accountability Office (GAO) to aid Congress in performing its oversight functions. GAO is a legislative branch agency that helps Congress by, among other things, investigating Federal agencies' implementation of Federal programs. The bill both confirms and enhances GAO's investigative powers by putting a statutory stop to several steps taken by the executive branch to curtail GAO's authority. Specifically, it makes clear that the Comptroller General (the head of GAO) has standing to pursue litigation to compel access to Federal agency information; GAO has

the right to make and retain copies of agency records; GAO can administer oaths to witnesses when conducting certain types of investigations; and GAO has the authority to access specific categories of records that have been denied to GAO by the Department of Health and Human Services, the Food and Drug Administration, the Federal Trade Commission, and the Department of Justice. S. 237 also confirms GAO's responsibility to protect sensitive information and requires GAO to prescribe the policies necessary to protect proprietary or trade secret information from public disclosure.

II. BACKGROUND AND NEED FOR THE LEGISLATION

In order to carry out its constitutional responsibilities, the Congress must have information about the need for future Federal legislation, as well as how current Federal programs are working. Congress often relies on GAO to help seek, process and analyze that information. GAO evaluates Federal programs and activities, and it informs Congress, executive agencies, and the public whether the government and those involved in implementing Federal programs are doing their jobs well, or are instead running Federal programs in a manner that makes them vulnerable to waste, fraud, abuse, and mismanagement. GAO's audits, evaluations and reports provide reliable assessments as to whether the taxpayers are receiving full value from important government programs.

To carry out this role, Congress long ago gave GAO a statutory right of access to information and records in the possession of Federal agencies. Although GAO has faced sporadic executive branch resistance throughout its history, several efforts by the executive branch have more significantly jeopardized GAO's ability to give Congress the information it needs to legislate effectively, conduct meaningful oversight, and audit the use of appropriated funds. Since existing law is sufficient authorization for GAO to obtain executive branch information, this denial of information is unjustified. S. 237 is intended to increase the effectiveness of GAO by ensuring that GAO is not unreasonably restricted in its efforts to secure necessary information in the course of performing its auditing and investigative functions for the Congress.

STANDING TO BRING CIVIL ACTION TO COMPEL PRODUCTION OF MATERIAL

To begin with, S. 237 responds to a judicial decision that threw into doubt GAO's authority to compel production of material from the executive branch.¹ In 1980, Congress passed legislation authorizing the Comptroller General to "bring a civil action in the district court of the United States for the District of Columbia to require the head of the agency to produce a record[.]"² In February, 2002, GAO sought to use that authority after then-Vice President Cheney's energy task force refused to give GAO records it requested. The U.S. District Court for the District of Columbia dismissed GAO's suit.³

In dismissing GAO's lawsuit, the Court did not rule on the merits of GAO's basic statutory authority to conduct this particular

¹ *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

² Pub. L. No. 96-226, codified at 31 U.S.C. § 716(b)(2).

³ *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

audit or to obtain access to the records in question. Rather, the Court held that the Comptroller General did not have standing to file the lawsuit, finding that the Comptroller General did not suffer an “injury in fact.” The Court found that the Comptroller General suffered no institutional injury because the Comptroller General, acting as an agent of Congress, could suffer only the same injury as Congress and that Congress’ injury was too “vague and amorphous” to confer standing.

The decision in *Walker v. Cheney* is inconsistent with the Comptroller General’s role and responsibility as set forth in GAO’s statute and the Congress’ intent when enacting it. The decision undermines GAO’s ability to successfully carry out the investigative responsibilities delegated to it by Congress as well as Congress’ constitutional prerogatives to determine how best to carry out its oversight responsibilities. Both GAO and Congress face cognizable injury when the Comptroller General is denied access to agency records sought to fulfill his statutory mission to inform Congress. This “informational” injury is sufficient to satisfy the constitutional requirement of a justiciable “case or controversy” to enable the Comptroller General to pursue a civil action to enforce GAO’s statutory right to access agency records to fulfill its reporting responsibilities to Congress. S. 237 reaffirms and makes explicit the authorization that Congress gave to the Comptroller General to redress the injury-in-fact sustained when agencies improperly withhold material from GAO, by initiating a lawsuit, without the need for additional approval.

It is this Committee’s expectation that before pursuing such litigation the Comptroller General will, as he did prior to filing *Walker v. Cheney*, first exhaust other avenues that are available to obtain the necessary information. Should such attempts fail, however, it is the intention of Congress to allow the Comptroller General to seek a judicial remedy to enforce GAO’s right to information under the law.

STATUTORY RIGHT TO MAKE AND RETAIN COPIES OF AGENCY RECORDS

S. 237 also reaffirms that GAO has the statutory right not only to inspect agency records,⁴ but also to make and retain copies of agency records. A number of court precedents have established that the statutory right to inspect a record implies the right to inspect them in an effective manner, which would include the copying of documents.⁵ In order for GAO to effectively carry out its statutory responsibilities, it is necessary for GAO to make and retain copies of such records. At times, however, GAO has found its audit, evaluation, and investigative efforts frustrated and delayed by agencies that insist that GAO review records only on site, without making copies, even in situations that do not involve sensitive information or any other practical justifications for denying GAO the ability to copy necessary records. Accordingly, S. 237 specifies that GAO has a right to make and retain copies of records.

⁴ 31 U.S.C. § 716(a).

⁵ See *Westside Ford, Inc. v. United States*, 206 F.2d 627, 634 (9th Cir. 1953); *Riley v. McGarry*, 248 F. Supp. 545 (D. Mass. 1966).

EXPANDING GAO'S AUTHORITY TO ADMINISTER OATHS

S. 237 further strengthens GAO's investigative powers by expanding the Comptroller General's authority to administer oaths. Presently, the Comptroller General may administer oaths only "when auditing and settling accounts."⁶ When GAO was established in 1921 as the General Accounting Office, its principal focus was auditing accounts, but that is no longer the case. Congress has since called upon the Comptroller General to perform many other audit, investigative, and evaluative roles. These roles periodically entail situations involving potential fraud or attempts to defraud the United States or irregularities or misconduct of an employee or agent of the United States. The government has a critical interest in obtaining truthful and complete testimony from those with whom GAO speaks in the course of such investigations. Authorizing GAO to administer oaths in such cases will ensure that those talking to GAO fully understand the importance of truthful testimony as well as the potential consequences to themselves if they do not truthfully testify. When investigating such matters, the ability to administer oaths can be an important tool for the Comptroller General to accomplish GAO's work for the Congress.

GAO ACCESS TO SPECIFIC AGENCY RECORDS

Finally, S. 237 addresses longstanding problems GAO has faced with certain Federal agencies that have resisted GAO scrutiny. Four Federal agencies in particular have asserted that the failure of their authorizing statutes specifically to identify GAO as an approved recipient of documents acts as an implicit exception to the broad authorization GAO's governing statute gives it to obtain agency material. The bill makes clear that GAO's governing statute trumps the agency-specific ones, affirming GAO's existing right to access information at the Department of Health and Human Services (HHS), the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), and the Department of Justice (DOJ).

For example, HHS has construed the Social Security Act as precluding GAO access to the National Directory of New Hires, a database of employment information critical to investigations of fraud in certain Social Security Act programs, because GAO is not expressly listed as an authorized recipient of the data. The new 31 U.S.C. § 721(a) would prohibit HHS from denying or limiting GAO's access to any material merely because governing statutes do not expressly identify GAO as a recipient of information or provide for its access to information, thereby confirming GAO's existing statutory right of access in these types of cases.

Similarly, the FDA has construed a provision of the Federal Food, Drug, and Cosmetic Act to authorize it to disclose trade secrets information to GAO only for studies requested by a chair of a committee or subcommittee of jurisdiction, and only when the requests specifically refer to GAO's need for trade secrets information. FDA does not separate trade secrets information from other information on regulated entities that is needed for audits and investigations and, thus, according to GAO, FDA's view has adversely affected GAO's access to a wide range of information be-

⁶31 U.S.C. § 711(4).

yond trade secrets. Gaining access to needed information has involved time-consuming procedural steps, including the redaction of trade secrets information, and substantial delays in GAO's work. The new section 721(b) would remove any doubt as to GAO's authority to obtain trade secrets information from the FDA, regardless of who initiated the project for which GAO seeks the information.

The FTC and the DOJ have denied GAO information based on their reading of the Hart-Scott-Rodino Act, which requires companies to file information with the FTC and DOJ before mergers and other transactions can be consummated. The FTC and DOJ have routinely denied GAO access to pre-merger information and argue that the Hart-Scott-Rodino Act and related case law permit them to provide such information only to a Congressional Committee or Subcommittee Chair. The Committee believes that GAO already should have access to these pre-merger filings under GAO's basic access authority, but the bill, by adding new section 31 U.S.C. § 721(c), makes GAO's authority to obtain this information from the FTC and the DOJ indisputably clear.

The Committee recognizes GAO's exemplary record of protecting the most sensitive information it routinely obtains from agencies across government—ranging from highly classified national security documents to taxpayer return information—and the Committee is confident that GAO will rigorously maintain the confidentiality of information obtained under these new sections.

APPLICATION OF GAO AUTHORITIES TO JUDICIAL BRANCH

S. 237 responds primarily to long-standing problems GAO has faced in its efforts to obtain information and material from executive branch agencies. During the Committee's consideration of the bill, the Judicial Conference of the United States expressed concerns about how these authorities would apply to it. It shared its view that the judicial branch has a unique role, structure, operations, and mission different from that of the executive branch. It believes that questions remain regarding the appropriate process and procedures under which GAO accesses and obtains certain information from the judicial branch. Those questions are outside the immediate scope of this bill. The Committee expects GAO, in consultation with the Administrative Office of the U.S. Courts (AOUSC) and other appropriate entities, to develop GAO protocols outlining the procedures it will follow in future reviews relating to the judicial branch. GAO and the AOUSC should inform this and other relevant Committees when they have completed this effort and whether they believe additional legislative action is warranted.

III. LEGISLATIVE HISTORY

Senators McCaskill and Collins introduced S. 237 on, January 31, 2011. The bill was read twice and referred to the Senate Committee on Homeland Security and Governmental Affairs. Chairman Lieberman cosponsored the bill. As introduced, S. 237 was identical to S. 2991, as favorably reported by the Committee in the 111th Congress.

The Committee considered S. 237 on October 19, 2011. The Committee first adopted by voice vote an amendment to the bill offered

by Senator Coburn and then by voice vote ordered the bill favorably reported as amended. Members present for both votes were Senators Lieberman, Akaka, Carper, Pryor, McCaskill, Begich, Collins, Brown, Johnson and Moran.

The amendment offered by Senator Coburn added a new section to the bill requiring GAO to notify Congress if an agency does not comply with a GAO request for information within 30 days after receipt of the request.

IV. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1: Short title

The short title of the bill is the “Government Accountability Office Improvement Act of 2011.”

Section 2: Authority to obtain records

Section 2(a) amends 31 U.S.C. § 716(a) to explicitly reaffirm that Congress has authorized GAO to pursue civil actions if Federal agencies withhold records from GAO.

Section 2(b) also amends 31 U.S.C. § 716(a) to make clear that the Comptroller General has the right not only to inspect agency records, but also to make and retain copies of such records.

Section 3: Administering oaths

Section 3 amends 31 U.S.C. § 711 to modernize the Comptroller General’s authority, subject to appropriate safeguards, to administer oaths to witnesses in specific types of GAO investigations. Section 3 amends GAO’s existing authority to allow the Comptroller General to administer oaths to witnesses when investigating fraud, attempts to defraud the United States, or irregularities or misconduct by a Federal employee or agent.

Section 4: Access to certain information

Section 4(a) adds a new statutory section, 31 U.S.C. § 721, which makes clear that the Social Security Act, the Federal Food, Drug, and Cosmetic Act, and the Hart-Scott-Rodino Act do not limit GAO’s right of access to information.

New Section 721(a) confirms GAO’s existing authority to review information at the Department of Health and Human Services, including the National Directory of New Hires.

New Section 721(b) confirms GAO’s existing authority to review trade secret information held by the Food and Drug Administration.

New Section 721(c) confirms that GAO has the authority to access pre-merger filing information with the Federal Trade Commission and the Department of Justice.

New Section 721(d), in recognition of the sensitivity of the information that agencies may provide to GAO, requires GAO to prescribe policies and procedures necessary to protect proprietary or trade secrets information from public disclosure. It also states that it does not modify 18 U.S.C. § 1905, which prohibits the disclosure of trade secrets and other sensitive information, or affect the applicability of 31 U.S.C. § 716(e), which requires GAO to safeguard the confidentiality of information and also protects against unauthorized disclosure.

New Section 721(e) makes clear that the references to specific statutory provisions in this section are not intended to affect GAO's access to information under existing statutes that are not specifically identified in the new section 721. The Committee expects that agencies will treat situations covered by the new section 721 and analogous situations not expressly addressed in a similar manner, thus giving full effect to GAO's existing right of access and facilitating rather than impeding congressional oversight.

Section 5: Notice to Congress if agencies do not provide requested information

This section adds a new statutory section, 31 U.S.C. § 722, which requires GAO to notify Congress if an agency fails to respond within 30 days to a GAO request for information. The new section requires that any notice of an agency's failure to respond to a request for information should be provided to any Committee(s) or Member(s) of Congress who made a request to GAO that is relevant to the information requested from the agency. The Committee anticipates that this new notice requirement will provide an incentive for agencies to provide requested information to GAO in a timely manner.

Section 6: Agency reports

This section amends 31 U.S.C. § 720(b) to give agencies more flexibility in reporting to Congress on their responses to GAO recommendations. Currently, agencies must report two months after issuance of a GAO report on "action taken." This provision allows the agency to report on actions "planned" or taken in response to a GAO recommendation. In addition, the section expands the list of recipients of an agency report to include GAO and the congressional committees of jurisdiction over the agency program or activity that is the subject of the recommendation.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. The Committee agrees with the Congressional Budget Office that the bill contains no intergovernmental or private sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments. The enactment of this legislation will not have significant regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 27, 2011.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 237, the Government Accountability Office Improvement Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 237—Government Accountability Office Improvement Act of 2011

S. 237 would provide additional authorities to the Government Accountability Office (GAO), including the ability to obtain certain records and information, and to administer oaths. The legislation also would require GAO to establish procedures to protect certain proprietary information that it collects when carrying out its responsibilities and report on agencies that do not provide information requested by GAO.

CBO expects that complying with the bill's provisions would increase the administrative costs of the GAO. We estimate, however, that implementing S. 237 would cost less than \$500,000 annually, assuming the availability of appropriated funds. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 237 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the following changes in existing law made by S. 237, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

TITLE 31—MONEY AND FINANCE

Subtitle I—General

CHAPTER 7—GOVERNMENT ACCOUNTABILITY OFFICE

Subchapter I—Definitions and General Organization

Section	*	*	*	*	*	*	*
701. Definitions	*	*	*	*	*	*	*
721. <i>Access to certain information.</i>	*	*	*	*	*	*	*

SEC. 711. GENERAL AUTHORITY.

The Comptroller General may—

(1) * * *

* * * * *

[(4) administer oaths to witnesses when auditing and settling accounts.]

(4) administer oaths to witnesses when auditing and settling accounts and, with the prior express approval of the Comptroller General, when investigating fraud or attempts to defraud the United States, or irregularity or misconduct of an employee or agent of the United States.

* * * * *

TITLE 31—MONEY AND FINANCE

Subtitle I—General

CHAPTER 7—GOVERNMENT ACCOUNTABILITY OFFICE

Subchapter II—General Duties and Powers

* * * * *

SEC. 716. AVAILABILITY OF INFORMATION AND INSPECTION OF RECORDS.

(a)(1) The Comptroller General is authorized to obtain such agency records as the Comptroller General requires to discharge his duties (including audit, evaluation, and investigative duties), including through the bringing of civil actions under this section. In reviewing a civil action in this section, the court shall recognize the continuing force and effect of the authorization in the preceding sentence until such time as the authorization is repealed pursuant to law.

[(a)](2) Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may **[inspect an agency record]** *inspect, and make and retain copies of, an agency record* to get the information. This subsection does not apply to expenditures made under section 3524 or 3526(e) of this title.

* * * * *

SEC. 720. AGENCY REPORTS.

(a) * * *

(b) When the Comptroller General makes a report that includes a recommendation to the head of an agency, the head of the agency shall submit a written statement on action taken *or planned* on the recommendation by the head of the agency. The statement shall be submitted to—

[(1) the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives before the 61st day after the date of the report; and]

(1) the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, the congressional committees with jurisdiction over the agency program or activity that is the subject of the recommendation, and the Government Accountability Office before the 61st day after the date of the report; and

(2) the Committees on Appropriations of both Houses of Congress in the first request for appropriations submitted more than 60 days after the date of the report.

* * * * *

SEC. 721. ACCESS TO CERTAIN INFORMATION.

(a) No provision of the Social Security Act, including section 453(1) of that Act (42 U.S.C. 653(1)), shall be construed to limit, amend or supersede the authority of the Comptroller General to obtain any information or to inspect or copy any record under section 716 of this title.

(b) No provision of the Federal, Food, Drug and Cosmetic Act, including section 301(j) of that Act (21 U.S.C. 331(j)), shall be construed to limit, amend, or supersede the authority of the Comptroller General to obtain any information or to inspect or copy any record under section 716 of this title.

(c) No provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Public Law 94-435) and the amendments made by that Act shall be construed to limit, amend, or supersede the authority of the Comptroller General to obtain any information or to inspect or copy any record under section 716 of this title, including with respect to any information disclosed to the Assistant Attorney General of the Antitrust Division of the Department of Justice or the Federal Trade Commission for purposes of pre-merger review under section 7A of the Clayton Act (15 U.S.C. 18a).

(d)(1) The Comptroller General shall prescribe such policies and procedures as are necessary to protect from public disclosure proprietary or trade secret information obtained consistent with this section.

(2) Nothing in this section shall be construed—

(A) to alter or amend the prohibitions against the disclosure of trade secret or other sensitive information prohibited by section 1905 of title 18 and other applicable laws; or

(B) to affect the applicability of section 716(e) of this title, including the protections against unauthorized disclosure contained in that section, to information obtained consistent with this section.

(e) Specific references to statutes in this section shall not be construed to affect access by the Government Accountability Office to information under statutes that are not so referenced.

SEC. 722. NOTICE TO CONGRESS IF AGENCIES DO NOT PROVIDE REQUESTED INFORMATION.

If in the discharge of the official duties of the Comptroller General (including any audit, evaluation, or investigative duties) relating to any request from a committee of Congress or a Member of Congress, the Comptroller General requests information from an agency and the agency does not provide that information within 30 days after the date of receiving the request, the Comptroller General shall submit notice that the agency has not provided the information to the Comptroller General to—

(1) any committee of Congress that made the related request to the Comptroller General; or

(2) any Member of Congress who made the related request to the Comptroller General.

