115TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
115–342

TO AMEND TITLE 5, UNITED STATES CODE, TO ALLOW WHISTLEBLOWERS TO DISCLOSE INFORMATION TO CERTAIN RECIPIENTS

OCTOBER 10, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOWDY, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 2196]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 2196) to amend title 5, United States Code, to allow whistleblowers to disclose information to certain recipients, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 2196 amends Title 5 to protect classified whistleblower disclosures to the inspector general of an agency, supervisors in an employee's chain of command, the Director of National Intelligence, or the Inspector General of the Intelligence Community.

BACKGROUND AND NEED FOR LEGISLATION

The Civil Service Reform Act of 1978 (CSRA) created a dual system of protecting from reprisal those who make whistleblower disclosures. It established broad protections for disclosures "not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. . . ."[1] The law protected disclosures meeting all other requisite requirements if made to the Office of Special Counsel (OSC), the Inspector General of an agency, or another employee designated by the head of the agency.[2]

H.R. 2196 would update the CSRA to protect disclosures of classified information to supervisors for agencies that fall within OSC's jurisdiction. This reflects a consensus that has emerged in recent years on the important public policy reasons for protecting disclosures to supervisors. Some recent reports have addressed this need. According to an April 2014 report from the Department of Justice:

> In OSC's view, whistleblower protection laws are most productive at encouraging the disclosure of wrongdoing, and therefore at making the government more efficient, if protections extend to the employee's specific work site, where most government inefficiencies occur and can be eliminated.[3]

A Government Accountability Office report issued in January 2015 noted "employees who initially raise a concern to their supervisors not expecting that this action would ever be a whistleblower disclosure."[4] The report continued:

> [I]t is common practice for employees to report wrongdoing to their supervisors before reporting it to a more senior official. . . . [I]t is typical for employees who become aware of a problem to report it to their supervisors, expecting to resolve the issue at that level.[5]

Reflecting these considerations, the FBI Whistleblower Protection Enhancement Act of 2016 updated the CSRA to protect Federal Bureau of Investigation employee disclosures "to a supervisor in the direct chain of command of the employee, up to and including the head of the employing agency," as well as to the Inspector General, to the Office of Special Counsel, and to others.[6] In the 114th Con-

---

[1] Pub. L. No. 95–454 § 101, 92 Stat. 1111, 1116 (codified at 5 U.S.C. § 2302(b)(8)(A)).
[2] 5 U.S.C. 2302(b)(8)(B).
[3] Dep't of Justice, Department of Justice Report on Regulations Protecting FBI Whistleblowers 13–14 (Apr. 2014).
[4] Gov't Accountability Office, GAO–15–112, Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints 19 (Jan. 2015).
[5] *Id.*
[6] Pub. L. No. 114–302 § 2, 130 Stat. 1516, 1516 (codified at 5 U.S.C. § 2303(a)(1)).

gress, the House passed this bill by a vote of 404–0, and the Senate approved it by voice vote.

The public policy rationales for protecting disclosures to supervisors are particularly applicable for disclosures in the national security context because the government has an interest in perceived problems involving classified information being resolved within the management chain.

H.R. 2196 is modeled on Presidential Policy Directive 19 (PPD–19), issued by the President on October 10, 2012. That directive prohibited the use of personnel actions or actions affecting eligibility for access to classified information, such as security clearance determinations, to retaliate for protected disclosures.[7] Section (F)(5)(a) defined a "protected disclosure" as the following:

> [A] disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency or Intelligence Community Element, to the Director of National Intelligence, to the Inspector General of the Intelligence Community, or to an employee designated by any of the above officials for the purpose of receiving such disclosures. . . .[8]

H.R. 2196, in addition to protecting disclosures to supervisors, would protect disclosures to the Director of National Intelligence or the Inspector General of the Intelligence Community.

LEGISLATIVE HISTORY

On April 27, 2017, Representative Steve Russell (R–OK) introduced H.R. 2196, with Ranking Member Elijah Cummings (D–MD) and Representative Steve Lynch (D–MA). Representative Blake Farenthold (R–TX) became a cosponsor on May 2, 2017. H.R. 2196 was referred to the Committee on Oversight and Government Reform. The Committee considered H.R. 2196 at a business meeting on May 2, 2017, and ordered the bill reported favorably by voice vote.

SECTION-BY-SECTION

Section 1. Recipients of whistleblower disclosures

This section amends section 2302(b)(8)(B) of title 5, United States Code, by adding to the list of individuals to whom classified disclosures can be made: the inspector general of an agency, the Director of National Intelligence, the Inspector General of the Intelligence Community, or a supervisor in an employee's chain of command up to and including the head of the employing agency.

EXPLANATION OF AMENDMENTS

There were no amendments offered during Committee consideration of H.R. 2196.

---

[7] Pres. Policy Directive 19 (Oct. 10, 2012).
[8] *Id.* at 7.

COMMITTEE CONSIDERATION

On May 2, 2017, the Committee met in open session and ordered reported favorably the bill, H.R. 2196, by voice vote, a quorum being present.

ROLL CALL VOTES

There were no roll call votes during consideration of H.R. 2196.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill amends title 5, United States Code, to allow whistleblowers to disclose information to certain recipients. As such, this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is to amend title 5, United States Code, to allow whistleblowers to disclose information to certain recipients.

DUPLICATION OF FEDERAL PROGRAMS

In accordance with clause 2(c)(5) of rule XIII no provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of section 551 of title 5, United States Code.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds the legislation does not establish or authorize the establishment of an advisory committee within the definition of Section 5(b) of the appendix to title 5, United States Code.

UNFUNDED MANDATES STATEMENT

Pursuant to section 423 of the Congressional Budget and Impoundment Control Act (Pub. L. 113–67) the Committee has included a letter received from the Congressional Budget Office below.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the House of Representatives.

COMMITTEE ESTIMATE

Pursuant to clause 3(d)(2)(B) of rule XIII of the Rules of the House of Representatives, the Committee includes below a cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

NEW BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the House of Representatives, the cost estimate prepared by the Congressional Budget Office and submitted pursuant to section 402 of the Congressional Budget Act of 1974 is as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 22, 2017.

Hon. JASON CHAFFETZ,
Chairman, Committee on Oversight and Government Reform, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2196, a bill to amend title 5, United States Code, to allow whistleblowers to disclose information to certain recipients.

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

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 2196—A bill to amend title 5, United States Code, to allow whistleblowers to disclose information to certain recipients

H.R. 2196 would amend the Whistleblower Protection Act (WPA) to extend protections to disclosures of classified information to any supervisor in an employee's chain of command. Under current law, only disclosures to a direct supervisor are protected.

The Merit Systems Protection Board (MSPB) hears claims against federal agencies brought by whistleblowers. Expanding the scope of the protections to include additional supervisors could increase the number of such hearings and any related costs (such as those related to job restoration, back pay, reimbursement of attor-

neys' fees, and medical costs). However, based on information from the MSPB and the Office of Special Counsel about the likely number of additional cases under the bill, CBO expects that additional cases dealing with disclosures of classified information would be very limited in number. Thus, CBO estimates that implementing H.R. 2196 would have no significant cost.

Enacting the legislation could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. However, CBO estimates that any net increase in spending by those agencies would be negligible. Enacting H.R. 2196 would not affect revenues.

CBO estimates that enacting H.R. 2196 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 2196 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contacts for this estimate are Matthew Pickford and William Ma. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * * * *

PART III—EMPLOYEES

* * * * * * *

SUBPART A—GENERAL PROVISIONS

* * * * * * *

CHAPTER 23—MERIT SYSTEM PRINCIPLES

* * * * * * *

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title or under title 38;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination;

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) "agency" means an Executive agency and the Government Publishing Office, but does not include—

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8) or section 2302(b)(9) (A)(i), (B), (C), or (D);

(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or

(iii) the Government Accountability Office; and

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

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

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

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, [or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures] *the Inspector General of an agency, a supervisor in the employee's direct chain of command up to and including the head of the employing agency, the Director of National Intelligence, the Inspector General of the Intelligence Community, or to an employee designated by any of the aforementioned individuals for the purpose of receiving such disclosures*, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

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

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

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

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title; or

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.".

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)(1) For the purpose of this section, the term "veterans' preference requirement" means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f), 7281(e), and 7802(5) of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

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

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

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

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

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

* * * * * * *

○