

115TH CONGRESS }  
*1st Session* }

SENATE

{ REPORT  
115-133

ANTI-BORDER CORRUPTION  
REAUTHORIZATION ACT OF 2017

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R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

S. 595

TO PROVIDE U.S. CUSTOMS AND BORDER PROTECTION WITH  
ADDITIONAL FLEXIBILITY TO EXPEDITE THE HIRING PROCESS  
FOR APPLICANTS FOR LAW ENFORCEMENT POSITIONS, AND FOR  
OTHER PURPOSES



JULY 24, 2017.—Ordered to be printed

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**Calendar No. 179**

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ANTI-BORDER CORRUPTION REAUTHORIZATION ACT OF  
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Mr. JOHNSON, from the Committee on Homeland Security and  
Governmental Affairs, submitted the following

**R E P O R T**

[To accompany S. 595]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 595) to provide U.S. Customs and Border Protection with additional flexibility to expedite the hiring process for certain applicants for law enforcement positions, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 595, the Anti-Border Corruption Reauthorization Act of 2017, is to provide U.S. Customs and Border Protection (CBP) with additional flexibility to consider applications from certain groups of U.S. veterans and local and state law enforcement officers who are considered to be low-risk for positions available within one of the three subcomponents: the Office of Field Operations (OFO), U.S. Border Patrol (BP), and Air and Marine Operations (AMO). For several years, CBP has struggled to meet its hir-

ing goals. Staffing shortages not only hinder CBP's core mission of securing the U.S. borders and promoting legitimate trade and travel, but they also contribute to low workforce morale.

This bill waives the polygraph requirement for applicants who already meet stringent qualifications, have passed a polygraph, and who have a law enforcement background and the operational skills necessary to fulfill the responsibilities of CBP subcomponents. This bipartisan effort ensures that all applicants meet certain threshold requirements to be granted the polygraph waiver. Ultimately, a well-staffed CBP promotes national security and improves the experience of legitimate travelers at air, sea, and land ports of entry.

## II. BACKGROUND AND THE NEED FOR LEGISLATION

CBP is one of the most important law enforcement organizations in the United States Government. CBP employs more than 60,000 law enforcement and support personnel to carry out a dynamic and evolving mission.<sup>1</sup> Every day, the women and men of CBP screen over one million international travelers, interdict thousands of counterfeit goods, arrest thousands of immigration law violators, seize thousands of pounds of illegal drugs, prevent agricultural pests from damaging U.S. crops, disrupt terrorist and criminal travel, and provide emergency services at and between ports of entry.<sup>2</sup>

Yet CBP is struggling to fill thousands of law enforcement vacancies. According to the component's workforce management projections, as of March 4, 2017, CBP is approximately 2,900 employees short of the congressionally-approved personnel numbers for the OFO, BP, and AMO.<sup>3</sup> At a March 22, 2017 hearing before the Committee, OFO and BP union representatives testified that current staffing shortages are impacting the component's workforce morale and ability to fulfill key responsibilities.<sup>4</sup> Anthony M. Reardon, National Treasury Employees Union President, asserted that OFO officers are required to frequently work overtime and are routinely sent on involuntary Temporary Duty (TDY).<sup>5</sup> This practice has lowered the morale of officers as they are away from their families for long periods of time.<sup>6</sup> Additionally, Mr. Reardon told Committee Members that for some ports of entry, such as the one at San Ysidro, California, CBP is not able to handle the cargo and passenger volume, resulting in long wait-times, supply chain disruptions, and overworked OFO officers who often only have approximately two minutes to make admissibility determinations.<sup>7</sup>

Several internal and external factors have played a role in CBP's staffing challenges. According to the former CBP Commissioner, Gil Kerlikowske, the administration of the polygraph requirement mandated by Congress in 2010 to mitigate corruption and abuse al-

<sup>1</sup> U.S. Customs & Border Protection, *Performance and Accountability Report Fiscal Year 2016* (2016), available at <https://www.cbp.gov/sites/default/files/assets/documents/2017-Mar/FY-2016-CBP-PAR-508C.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> Information DHS provided to Committee Staff (Apr. 6, 2017).

<sup>4</sup> *Perspectives from the DHS Frontline: Evaluating Staffing Resources and Requirements: Hearing on S. 595 Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 115th Cong. (2017) (statement of Anthony M. Reardon, National President, National Treasury Employees Union).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

legations has impacted CBP's ability to hire new officers for all three of its components.<sup>8</sup> Echoing Kerlikowske's concern, CBP's Acting Commissioner, Kevin McAleenan, described the polygraph examination as "both a significant deterrent and point of failure for CBP law enforcement applicants."<sup>9</sup>

Congress has been conducting oversight on this matter given that approximately 65 percent of all applicants fail the polygraph examination.<sup>10</sup> In contrast, other Federal law enforcement agencies report failures at around 30 percent.<sup>11</sup> There are a number of possible reasons for this discrepancy, though no one reason is dispositive. Attrition and mobility limitations also have contributed to low recruitment and retention numbers.<sup>12</sup> CBP will not be able to address retention issues without addressing and resolving the problems responsible for slowing the hiring pipeline.

To enhance CBP's recruitment efforts, Congress passed language in 2016 that gave CBP authority to issue a polygraph waiver to certain veterans holding security clearances.<sup>13</sup> In the first six months that CBP exercised this waiver authority, 90 candidates were considered for the waiver.<sup>14</sup> Twenty applicants met all the requirements to move forward in the hiring process; 65 were denied; and 5 were still under review as of June 2017.<sup>15</sup>

S. 595 would expand CBP's ability to issue a polygraph waiver to certain low-risk local and state law enforcement officers, Federal law enforcement officers, and veterans applying for law enforcement positions at one of the three CBP components. Local and state law enforcement officers who have the power to arrest and apprehend individuals could be considered for the waiver authority if they have served for the last three consecutive years; are not under investigation nor have been found to have engaged in criminal activity or serious misconduct; and have passed a polygraph test in the last ten years.

Similarly, Federal law enforcement officers who have the power to arrest, investigate, bear firearms, and serve warrants could be considered for the waiver authority if they have served for the last three consecutive years; are not under investigation nor have been found to have engaged in criminal activity or serious misconduct; and hold a current Tier 4 or Tier 5 background examination.

Finally, separating Department of Defense service members who have received or are eligible to receive an honorable discharge could be considered for the waiver authority if: they have served

<sup>8</sup>Associated Press, *Two out of three Border Patrol job applicants fail polygraph test, making hiring difficult*, Los Angeles Times (Jan. 13, 2017) available at <http://www.latimes.com/local/lanow/la-me-border-patrol-lies-20170113-story.html>.

<sup>9</sup>Memorandum from the Kevin McAleenan, Acting Comm'r of U.S. Customs & Border Prot., to the Deputy Sec'y of Homeland Sec. on Executive Order Hiring Surge Plan, available at <http://i2.cdn.turner.com/cnn/2017/images/03/07/cbp-memo.pdf>

<sup>10</sup>*Perspectives from the DHS Frontline: Evaluating Staffing Resources and Requirements: Hearing on S. 595 Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 115th Cong. (2017) (statement of Anthony M. Reardon, National President, National Treasury Employees Union).

<sup>11</sup>*The Department of Homeland Security Fiscal Year 2018 Budget Request, Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 115th Cong. (2017).

<sup>12</sup>*Perspectives from the DHS Frontline: Evaluating Staffing Resources and Requirements: Hearing on S. 595 Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 115th Cong. (2017) (statement of Anthony M. Reardon, National President, National Treasury Employees Union).

<sup>13</sup>Pub. L. No. 114-328, § 1049. Note that the authority granted in 2016 is narrower than the authority related to veterans proposed in this bill.

<sup>14</sup>Information provided by DHS to HSGAC staff on June 1, 2017.

<sup>15</sup>*Id.*

for the last three consecutive years; have not engaged in criminal activity or serious misconduct under the military code; held a Secret, Top Secret, or TS compartment clearance in the last five years without a waiver; and had a Tier 4 or Tier 5 background investigation in the last five years.

S. 595 also includes conditions to ensure existing vetting standards are maintained. A key provision of the legislation authorizes CBP to administer a polygraph test on any candidate that received a waiver if the component discovers some derogatory information at any point during the application process. Further, the legislation limits CBP's use of the waiver authority to four years, and requires CBP to justify its use to Congress in a report. S. 595 also requires CBP to consider alternative methodologies to address its polygraph examination challenges, and encourages the components to develop a long-term strategic solution to meet their hiring goals.

### III. LEGISLATIVE HISTORY

S. 595, the Anti-Border Corruption Reauthorization Act of 2017, was introduced on March 9, 2017, by Senator Jeff Flake and was cosponsored by Senators Ron Johnson, John McCain, and Claire McCaskill. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 595 at a business meeting on May 17, 2017. Senator Johnson offered two amendments. Johnson Amendment 1 was a substitute amendment that made changes to some of the waiver criteria and added a sunset provision. The substitute amendment was adopted by unanimous consent, with Senators Johnson, McCain, Portman, Paul, Lankford, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris present. Johnson Amendment 2 clarified the definition of Federal law enforcement officer, and was adopted by voice vote, with Senators Johnson, McCain, Portman, Paul, Lankford, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris present.

Senator Heidi Heitkamp offered two amendments. Heitkamp Amendment 2, as modified, amended the sunset provision, reducing the number of years that the CBP Commissioner is authorized to use the waiver authority from five to four. That amendment was adopted by voice vote with Senators Johnson, McCain, Portman, Paul, Lankford, Daines, McCaskill, Heitkamp, Peters, Hassan, and Harris present.

Heitkamp Amendment 3, as modified, required CBP to include in its report an analysis of different methods available to detect deception and to complement traditional background investigations. That amendment was adopted by voice vote with Senators Johnson, McCain, Portman, Paul, Lankford, Daines, McCaskill, Heitkamp, Peters, Hassan, and Harris present.

Senator Kamala Harris offered five amendments. Harris Amendment 1, as modified, would have removed the bill's waiver authority and replaced it with a requirement that the inspector general for the Department report on the impact of the waiver authority and limit the purpose of the initiative by turning it into a one-year pilot to test the effectiveness of the waiver authority. That amendment was not accepted on a voice vote with Senators Johnson, McCain, Portman, Paul, Lankford, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris present.

Harris Amendment 2 was offered and withdrawn, as was Harris Amendment 5.

Harris Amendment 3 would have transferred the reporting responsibility from the CBP Commissioner to the DHS inspector general and required a final report at the end of the program. That amendment was not accepted on a voice vote with Senators Johnson, McCain, Portman, Paul, Lankford, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris present.

Harris Amendment 4 would have required the Department to provide monthly reports to Congress with detailed information regarding apprehensions and removals. That amendment was not accepted on a voice vote with Senators Johnson, McCain, Portman, Paul, Lankford, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris present.

The Committee ordered S. 595 reported favorably, as amended by Johnson Amendments 1 and 2 and Heitkamp Amendments 2 as modified and 3 as modified, on May 17, 2017, by a roll call vote of 9 yeas to 2 nays. Senators voting in the affirmative were Johnson, McCain, Portman, Paul, Lankford, Daines, McCaskill, Heitkamp, and Peters. Senators voting in the negative were Hassan and Harris. For the record only, Senators Enzi, Hoeven, and Tester voted “aye” by proxy. For the record only, Senator Carper voted “nay” by proxy.

#### IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

##### *Sec. 1. Short title*

This section provides the bill’s short title, the “Anti-Border Corruption Reauthorization Act of 2017.”

##### *Sec. 2. Hiring flexibility*

This section authorizes the Commissioner of CBP to waive the application of a polygraph examination for Federal, state, and local law enforcement officers as well as members of the Armed Forces or veterans who meet the stringent requirements outlined in the section.

Additionally, this section sets a sunset on the Commissioner’s authority to issue a waiver four years after the date of enactment of the bill.

##### *Sec. 3. Supplemental Commissioner authority and definitions*

This section outlines additional authorities and responsibilities of the Commissioner as they relate to the polygraph waiver authorized by the legislation. First, it makes clear that any individual who receives a polygraph waiver is not exempt from other hiring requirements as determined by the Commissioner. Second, it directs that any individual who receives a polygraph waiver and currently holds a Tier 4 background investigation shall be subject to a Tier 5 background investigation. Third, it authorizes the Commissioner to administer a polygraph examination to an individual who was eligible to receive or did receive a waiver if information is gathered during the application process that would warrant such an examination before a final determination on employment.

This section also requires that the Commissioner submit an annual report to Congress that includes details on the use of the poly-

graph waiver authority; an assessment of the impact the authority is having on filling law enforcement positions at CBP; any additional authorities that may be necessary to carry out the waiver program; and an analysis with recommendations on other methods of employment suitability tests that could detect deception.

Finally, Section 3 defines key terms: “federal law enforcement officer”, “veteran”, a “serious military or civil offense”, and “Tier 4 and Tier 5”.

#### 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 act and determined that the act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the act contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

#### VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JUNE 12, 2017.

Hon. RON JOHNSON, 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. 595, the Anti-Border Corruption Reauthorization Act of 2017.

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

Sincerely,

KEITH HALL.

Enclosure.

#### *S. 595—Anti-Border Corruption Reauthorization Act of 2017*

Current law requires U.S. Customs and Border Protection (CBP) to administer polygraph examinations to nearly all applicants for law enforcement positions. S. 595 would broaden the criteria for waiving the polygraph requirement for certain applicants. Based on information from CBP, CBO estimates that implementing the bill would have no significant effect on the agency’s spending to vet applicants for law enforcement positions, because the expanded exemption would probably not affect very many people.

Enacting the legislation would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting S. 595 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 595 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.

On May 12, 2017, CBO transmitted a cost estimate for H.R. 2213, the Anti-Border Corruption Reauthorization Act of 2017, as ordered reported by the House Committee on Homeland Security

on May 3, 2017. The two bills are similar and CBO's estimates of the budgetary effects are the same.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

#### VII. CHANGES IN EXISTING LAW MADE BY THE ACT, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 595 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in *italics*, and existing law in which no change is proposed is shown in roman):

### UNITED STATES CODE

\* \* \* \* \*

#### TITLE 6—DOMESTIC SECURITY

\* \* \* \* \*

#### CHAPTER 1—HOMELAND SECURITY ORGANIZATION

\* \* \* \* \*

#### Subchapter IV—Border, Maritime, and Transportation Security

\* \* \* \* \*

#### PART B—U.S. CUSTOMS AND BORDER PROTECTION

\* \* \* \* \*

#### SEC. 221. REQUIREMENTS WITH RESPECT TO ADMINISTERING POLYGRAPH EXAMINATIONS TO LAW ENFORCEMENT PERSONNEL OF U.S. CUSTOMS AND BORDER PROTECTION.

(a) \* \* \*

[(b) WAIVER.—The Commissioner of U.S. Customs and Border Protection may waive the polygraph examination requirement under subsection (a)(1) for any applicant who—

[(1) is deemed suitable for employment;

[(2) holds a current, active Top Secret/Sensitive Compartmented Information Clearance;

[(3) has a current Single Scope Background Investigation;

[(4) was not granted any waivers to obtain his or her clearance; and

[(5) is a veteran (as defined in section 2108 of title 5).]

(B) WAIVER AUTHORITY.—*The Commissioner of U.S. Customs and Border Protection may waive the application of subsection (a)(1) for any of the following applicants:*

(1) *In the case of a current, full-time law enforcement officer employed by a State or local law enforcement agency, if such officer—*

(A) *has served as a law enforcement officer for not fewer than three years with no break in service;*

*(B) is authorized by law to engage in or supervise the prevention, detection, investigation or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers for arrest or apprehension;*

*(C) is not currently under investigation, has not been found to have engaged in criminal activity or serious misconduct, has not resigned from a law enforcement officer position under investigation or in lieu of termination, and has not been dismissed from a law enforcement officer position; and*

*(D) has, within the past ten years, successfully completed a polygraph examination as a condition of employment with such officer's current law enforcement agency.*

*(2) In the case of a current, full-time Federal law enforcement officer, if such officer—*

*(A) has served as a law enforcement officer for not fewer than three years with no break in service;*

*(B) has authority to make arrests, conduct investigations, conduct searches, make seizures, carry firearms, and serve orders, warrants, and other processes;*

*(C) is not currently under investigation, has not been found to have engaged in criminal activity or serious misconduct, has not resigned from a law enforcement officer position under investigation or in lieu of termination, and has not been dismissed from a law enforcement officer position; and*

*(D) holds a current Tier 4 background investigation or current Tier 5 background investigation.*

*(3) In the case of an individual who is a member of the Armed Forces (or a reserve component thereof) or a veteran, if such individual—*

*(A) has served in the Armed Forces for not less than three years;*

*(B) holds, or has held during the past five years, a Secret, Top Secret, or Top Secret/Sensitive Compartmented Information clearance;*

*(C) holds, or has undergone within the past five years, a current Tier 4 background investigation or current Tier 5 background investigation;*

*(D) received, or is eligible to receive, an honorable discharge from service in the Armed Forces and has not engaged in criminal activity or committed a serious military or civil offense under the Uniform Code of Military Justice; and*

*(E) was not granted any waivers to obtain the clearance referred to subparagraph (B).*

*(c) TERMINATION OF WAIVER AUTHORITY.—The authority to issue a waiver under subsection (b) shall terminate on the date that is four years after the date of the enactment of the Anti-Border Corruption Reauthorization Act of 2017.*

## **ANTI-BORDER CORRUPTION ACT OF 2010**

\* \* \* \* \*

**[SEC. 4. PROGRESS REPORT.**

**[**Not later than 180 days after the date of the enactment of this Act, and every 180 days thereafter through the date that is 2 years after such date of enactment, the Secretary of Homeland Security shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives a report on the progress made by U.S. Customs and Border Protection toward complying with section 3.**]**

**SEC. 4. SUPPLEMENTAL COMMISSIONER AUTHORITY.**

(a) *NON-EXEMPTION.*—An individual who receives a waiver under subsection (b) of section 3 is not exempt from other hiring requirements relating to suitability for employment and eligibility to hold a national security designated position, as determined by the Commissioner of U.S. Customs and Border Protection.

(b) *BACKGROUND INVESTIGATIONS.*—Any individual who receives a waiver under subsection (b) of section 3 who holds a current Tier 4 background investigation shall be subject to a Tier 5 background investigation.

(c) *ADMINISTRATION OF POLYGRAPH EXAMINATION.*—The Commissioner of U.S. Customs and Border Protection is authorized to administer a polygraph examination to an applicant or employee who is eligible for or receives a waiver under subsection (b) of section 3 if information is discovered prior to the completion of a background investigation that results in a determination that a polygraph examination is necessary to make a final determination regarding suitability for employment or continued employment, as the case may be.

**SEC. 5. REPORTING REQUIREMENTS.**

(a) *ANNUAL REPORT.*—Not later than one year after the date of the enactment of the Anti-Border Corruption Reauthorization Act of 2017, and annually thereafter while the waiver authority under section 3(b) is in effect, the Commissioner of U.S. Customs and Border Protection shall submit a report to Congress that includes, with respect to the reporting period—

(1) the number of waivers requested, granted, and denied under section 3(b);

(2) the reasons for any denials of such waiver;

(3) the percentage of applicants who were hired after receiving a waiver;

(4) the number of instances that a polygraph was administered to an applicant who initially received a waiver and the results of such polygraph;

(5) an assessment of the current impact of the polygraph waiver program on filling law enforcement positions at U.S. Customs and Border Protection; and

(6) additional authorities needed by U.S. Customs and Border Protection to better utilize the polygraph waiver program for its intended goals.

(b) *ADDITIONAL INFORMATION.*—The first report submitted under subsection (a) shall include

(1) an analysis of other methods of employment suitability tests that detect deception and could be used in conjunction

*with traditional background investigations to evaluate potential employees for suitability; and*

*(2) a recommendation regarding whether a test referred to in paragraph (1) should be adopted by U.S. Customs and Border Protection when the polygraph examination requirement is waived pursuant to section 3(b).*

**SEC. 6. DEFINITIONS.**

*In this Act:*

*(1) FEDERAL LAW ENFORCEMENT OFFICER.—The term ‘Federal law enforcement officer’ means a ‘law enforcement officer’, as defined in section 8331(20) or 8401(17) of title 5, United States Code.*

*(2) VETERAN.—The term ‘veteran’ has the meaning given such term in section 101(2) of title 38, United States Code.*

*(3) SERIOUS MILITARY OR CIVIL OFFENSE.—The term ‘serious military or civil offense’ means an offense for which—*

*(A) a member of the Armed Forces may be discharged or separated from service in the Armed Forces; and*

*(B) a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial, as pursuant to Army Regulation 635-200 chapter 11 14-12.*

*(4) TIER 4; TIER 5.—The terms ‘Tier 4’ and ‘Tier 5’ with respect to background investigations have the meaning given such terms under the 2012 Federal Investigative Standards.*

