

WHISTLEBLOWER PROTECTION
COORDINATION ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1869

TO REAUTHORIZE AND RENAME THE POSITION OF
WHISTLEBLOWER OMBUDSMAN TO BE THE WHISTLEBLOWER
PROTECTION COORDINATOR



DECEMBER 14, 2017.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

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WHISTLEBLOWER PROTECTION COORDINATION ACT

DECEMBER 14, 2017.—Ordered to be printed

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

R E P O R T

[To accompany S. 1869]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1869) to reauthorize and rename the position of Whistleblower Ombudsman to be the Whistleblower Protection Coordinator, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 1869, the Whistleblower Protection Coordination Act, is to permanently reauthorize and change the name of the whistleblower protection program established by the Whistleblower Protection Enhancement Act of 2012 (WPEA) from the Whistleblower Protection Ombudsman (Ombudsman) to the Whistleblower Protection Coordinator (Coordinator). The bill expands the role of the Coordinator to assist agency Inspectors General (OIG) with

handling and examining whistleblower disclosures and communications and coordination between the agency OIG and other offices investigating whistleblower disclosures and whistleblower retaliation.

II. BACKGROUND AND THE NEED FOR LEGISLATION

In 2012, Congress created the Ombudsman in the WPEA.¹ This law required each agency OIG to “appoint a Whistleblower Protection Ombudsman who shall educate employees about prohibitions on retaliation for protected disclosures and who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures.”² Congress created the Ombudsman “to ensure that employees are aware of their rights under the [Whistleblower Protection Act (WPA)] and avenues for redress.”³ The authority for the Ombudsman expired on November 27, 2017.⁴

The role of the Ombudsman at each agency OIG was to:

provide the agency and the employees with an intermediary to ensure that supervisors and leaders within the agency, as well as employees, are aware of prohibited retaliatory actions and employee rights under the WPA. In this intermediary role, the ombudsman could also help provide recommendations for resolving problems between an individual and the employer before any prohibited personnel practices are taken in violation of the WPA.⁵

Congress expressly prohibited the Ombudsman from acting as “a legal representative, agent, or advocate for an employee.”⁶

Government officials and whistleblower advocates recognize the Ombudsman as an important tool in whistleblower protection at Federal agencies and recommend its permanent reauthorization.⁷ According to the Department of Justice (DOJ) OIG Ombudsman:

Ensuring that whistleblowers are comfortable, informed, and protected in coming forward is, therefore, entirely consistent with the OIG’s core mission of detecting and deterring waste, fraud, abuse, and corruption, and the OIG Whistleblower Ombudspersons have played an important role in ensuring that they have the information necessary to enable this to occur.⁸

Furthermore, the U.S. Office of Special Counsel (OSC) found the Ombudsman “has led to more collaboration and information sharing among the various Inspectors General and with OSC. Increased cooperation allows our related offices to share best practices for investigation techniques and training, and to identify and resolve

¹ Whistleblower Protection Enhancement Act, Pub. L. No. 112–199, 1117, 126 Stat. 1465, 1475 (2012).

² *Id.*

³ S. Rep. 112–155, at 32 (2012).

⁴ Whistleblower Protection Enhancement Act, *supra* note 1.

⁵ S. Rep. 112–155, at 32 (2012).

⁶ Whistleblower Protection Enhancement Act, *supra* note 1.

⁷ *Five Years Later: A Review of the Whistleblower Protection Enhancement Act: Hearing Before the H. Subcomm. on Gov’t Operations of the H. Comm. on Oversight and Gov’t Reform*, 115th Cong. (2017) [hereinafter *House Hearing*].

⁸ *Id.* (statement of Robert Storch, Deputy Inspector General, U.S. Dep’t of Justice), available at <https://oig.justice.gov/testimony/t170201a.pdf>.

issues quickly and effectively.”⁹ The Government Accountability Project considers the Ombudsman to be “an unqualified success.”¹⁰

While the Ombudsman is fulfilling its intent of educating and assisting Federal employees on whistleblower protections, areas of improvement have been identified in the five years since its establishment. First, the DOJ OIG Ombudsman expressed concern that:

[T]he work we do under the WPEA generally does not include much of what is often done by traditional ombudsmen, and indeed, some such things might be seen as inconsistent with our independent role and consideration of complaints as OIGs. Given the current title, there have been some concerns expressed that some employees may be confused and expect us to perform such functions, even though the WPEA specifically provides that the ombudsman shall not act as a legal representative, agent, or advocate.¹¹

The word “ombudsman” is defined as “a government official appointed to receive and investigate complaints made by individual against abuses or capricious acts of public officials” or “one that investigates, reports on, and helps settle complaints.”¹² However, the role of the Ombudsman, as envisioned by the WPEA, is more educational than investigatory, so the name of the position may be misleading to whistleblowers. It is possible for Federal employees to have difficulty understanding the role of the Ombudsman due to the title of the position.

According to the DOJ OIG Ombudsman, there have been growing numbers of whistleblower retaliation cases in OIG offices.¹³ The DOJ OIG Ombudsman explained that whistleblower retaliation investigations, as well as whistleblower protection educational activities and outreach, “are resource intensive, and our ability to fulfill these responsibilities and do so in a timely fashion is significantly impacted by the limitations on our available staffing and resources.”¹⁴ He also predicted that whistleblower retaliation investigations increase “as [whistleblower] protections are expanded and made permanent, and as there is additional information disseminated by OIGs and others about whistleblower rights and protections.”¹⁵ As investigations increase and OIG resources are stretched thin, it is even more important to ensure that whistleblowers have access to a dedicated coordinator who can explain their rights and help them understand the process for redress of their grievances.

The Whistleblower Protection Coordination Act will make permanent this important role for whistleblower protection in agencies across the Federal government and address issues identified during the initial implementation of the Ombudsman role. The bill will

⁹ *Id.* (statement of Eric Bachman, Deputy Special Counsel, U.S. Off. of Special Counsel), available at <https://oversight.house.gov/wp-content/uploads/2017/02/Bachman-OSC-Statement-Whistleblower-2-1.pdf>

¹⁰ *Id.* (statement of Tom Devine, Government Accountability Project), available at <https://oversight.house.gov/wp-content/uploads/2017/02/Devine-GAP-Statement-Whistleblower-2-1.pdf>.

¹¹ *House Hearing*, *supra* note 8.

¹² *Ombudsman Definition*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/ombudsman> (last visited Oct. 19, 2017).

¹³ *House Hearing*, *supra* note 8.

¹⁴ *Id.*

¹⁵ *Id.*

change the name of the Ombudsman to Coordinator in order to reduce confusion about the Coordinator's authorities and responsibilities. The bill will also require the Coordinator to assist the agency OIG to timely and efficiently investigate whistleblower disclosures and whistleblower retaliation claims. The Coordinator will also be responsible for liaising between agency OIGs, OSC, Congress, or any other Federal entity that is investigating a whistleblower disclosure or retaliation claim in order to ensure the most efficient use of staff and resources. The bill also requires the Council of Inspectors General on Integrity and Efficiency (CIGIE) to develop best practices for the Coordinator to follow in carrying out these responsibilities.

The Committee notes that this bill seeks information on whether a settlement exists. It does not seek to publish any personal information or anything that would identify individuals involved in the matter or breach a confidentiality agreement.

III. LEGISLATIVE HISTORY

S. 1869, the Whistleblower Protection Coordination Act, was introduced on September 27, 2017, by Senator Charles Grassley, Ranking Member Claire McCaskill, Chairman Ron Johnson and Senator Ron Wyden. The bill was referred to the Committee on Homeland Security and Governmental Affairs. The Committee considered S. 1869 at a business meeting on October 4, 2017.

The Committee ordered the bill reported favorably by voice vote en bloc with Senators Johnson, Lankford, Daines, McCaskill, Tester, Heitkamp, Hassan, and Harris present.

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

Section 1. Short title

This section establishes the short title of the bill as the "Whistleblower Protection Coordination Act of 2017."

Section 2. Reauthorization

This section reauthorizes, renames, and adds additional responsibilities for the whistleblower protection program under the Inspector General Act of 1978.

Subsection (a) renames the Ombudsman to the Coordinator and requires the Coordinator to have direct access to the agency OIG. This subsection charges the Coordinator with informing employees of their available options to file a whistleblower retaliation complaint and of any available alternative dispute resolution mechanisms and potential relief. The Coordinator is also required to assist the agency OIG to timely and appropriately investigate whistleblower disclosures and retaliation complaints. This subsection also requires the Coordinator to assist the agency OIG in communicating and coordinating with the OSC, CIGIE, the agency, Congress, and any other relevant entity to timely and appropriately investigate whistleblower disclosures and retaliation complaints.

Subsection (b) requires CIGIE to assist the Coordinator and to develop best practices for coordinating and communicating between agencies to timely and efficiently handle and investigate whistleblower disclosures, allegations of whistleblower retaliation, and

other matters in the implementation and administration of whistleblower protection laws.

Subsection (c) adds requirements to the semiannual reports submitted by agency OIGs. This subsection requires these reports to include a detailed description of instances of whistleblower retaliation, any consequences imposed on the official determined to have committed the retaliation, and any settlement agreements the agency entered into with the official determined to have committed the retaliation.

Subsection (d) is a technical change from “Ombudsman” to “Coordinator” in a different federal law that requires training on the handling of whistleblower complaints.

Subsection (e) permanently reauthorizes the Whistleblower Protection Coordinator.

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 and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the bill 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

DECEMBER 5, 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. 1869, the Whistleblower Protection Coordination Act.

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.

Enclosure.

S. 1869—Whistleblower Protection Coordination Act

S. 1869 would permanently extend the authority of all Inspector General (IG) offices to hire whistleblower protection ombudsmen. The specific authority to hire such employees has expired. Each of the 72 IG offices of the federal government currently have such an ombudsman. The bill also would create additional responsibilities for the ombudsmen and require additional reporting by IGs, agencies, and the Council of the Inspectors General on Integrity and Efficiency (CIGIE).

Information from CIGIE and some IGs indicates that most of the additional responsibilities and reporting requirements in the bill would not impose a significant administrative burden. In addition, CBO expects that much of the work of the ombudsmen (whose job title would change to whistleblower protection coordinator under

the bill) would be continued under current law. Therefore, CBO estimates that implementing S. 1869 would cost less than \$500,000 annually; such spending would be subject to the availability of appropriated funds.

Enacting S. 1869 could affect direct spending by agencies that are not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would be negligible. Enacting the bill would not affect revenues.

CBO estimates that enacting S. 1869 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 1869 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

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

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

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

UNITED STATES CODE

* * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

APPENDIX

* * * * *

INSPECTOR GENERAL ACT OF 1978

* * * * *

SEC. 3. APPOINTMENT OF INSPECTOR GENERAL; SUPERVISION; REMOVAL; POLITICAL ACTIVITIES; APPOINTMENT OF ASSISTANT INSPECTOR GENERAL FOR AUDITING AND ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS.

(a) * * *

* * * * *

(d) * * *

(1) * * *

(A) * * *

(B) * * *

(C) designate a Whistleblower Protection **【Ombudsman who shall educate agency employees—】** *Coordinator who shall—*

(i) *educate agency employees—*

【i】 *(I) about prohibitions **【on retaliation】** against retaliation for protected disclosures; and*

【ii】 *(II) who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures**【.】**; including—*

(aa) the means by which employees may seek review of any allegation of reprisal, including the roles of the Office of Inspector General, the Office of Special Counsel, the Merit Systems Protection Board, and any other relevant entities; and

(bb) general information about the timeliness of such cases, the availability of any alternative dispute mechanisms, and avenues for potential relief.

(ii) assist the Inspector General in promoting the timely and appropriate handling and consideration of protected disclosures and allegations of reprisal, to the extent practicable, by the Inspector General; and

(iii) assist the Inspector General in facilitating communication and coordination with the Special Counsel, the Council of the Inspectors General on Integrity and Efficiency, the agency, Congress, and any other relevant entity regarding the timely and appropriate handling and consideration of protected disclosures, allegations of reprisal, and general matters regarding the implementation and administration of whistleblower protection laws, rules, and regulations.

(2) The Whistleblower Protection **【Ombudsman】** *Coordinator* shall not act as a legal representative, agent, or advocate of the employee or former employee.

(3) *The Whistleblower Protection Coordinator shall have direct access to the Inspector General as needed to accomplish the requirements of this subsection.*

【(3)】 (4) For the purposes of this section, the requirement of the designation of a Whistleblower Protection **【Ombudsman】** *Coordinator* under paragraph (1)(C) shall not apply to—

(A) any agency that is an element of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)) **【50 U.S.C. 3003(4)】**;
or

(B) as determined by the President, any executive agency or unit thereof the principal functions of which is the conduct of foreign intelligence or counter intelligence activities.

* * * * *

SEC. 5. SEMIANNUAL REPORTS; TRANSMITTAL TO CONGRESS; AVAILABILITY TO PUBLIC; IMMEDIATE REPORT ON SERIOUS OR FLAGRANT PROBLEMS; DISCLOSURE OF INFORMATIONAL DEFINITIONS.

- (a) * * *
 - (1) * * *
 - * * * * *
 - (20)(A) a detailed description of any instance of whistleblower retaliation, including information about the official found to have engaged in retaliation; and
 - (B) what, if any consequences the establishment *actually* imposed to hold that official *described in subparagraph (A)* accountable;
 - * * * * *

- (b) * * *
 - (1) * * *
 - (2) * * *
 - (3) * * *
 - (A) * * *
 - * * * * *
 - (D) for which no final action has been taken by the end of the reporting period; **[and]**
 - (4) *whether the establishment entered into a settlement agreement with the official described in subsection (a)(20)(A), which shall be reported regardless of any confidentiality agreement relating to the settlement agreement; and*
 - [4]** (5) a statement with respect to audit reports on which management decisions have been made but final action has not been taken, other than audit reports on which a management decision was made within the preceding year, containing—
 - (A) a list of such audit reports and the date each such report was issued;
 - (B) the dollar value of disallowed costs for each report;
 - (C) the dollar value of recommendations that funds be put to better use agreed to by management for each report; and
 - (D) an explanation of the reasons final action has not been taken with respect to such audit report.
 - * * * * *

SEC. 11. ESTABLISHMENT OF THE COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY.

- (a) * * *
- (b) * * *
- (c) * * *
 - (1) * * *
 - * * * * *
 - (5) *ADDITIONAL RESPONSIBILITIES RELATING TO WHISTLEBLOWER PROTECTION.—The Council shall—*
 - (A) *facilitate the work of the Whistleblower Protection Coordinators designated under section 3(d)(C); and*
 - (B) *in consultation with the Office of Special Counsel and Whistleblower Protection Coordinators from the member offices of the Inspector General, develop best practices for co-*

ordination and communication in promoting the timely and appropriate handling and consideration of protected disclosures, allegations of reprisal, and general matters regarding the implementation and administration of whistleblower protection laws, in accordance with Federal law.

* * * * *

**WHISTLEBLOWER PROTECTION
ENHANCEMENT ACT OF 2012**

* * * * *

SEC. 117. WHISTLEBLOWER PROTECTION OMBUDSMAN.

(a) * * *

(b) * * *

[(c) SUNSET.—

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

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

