

115TH CONGRESS }
1st Session }

SENATE

{ REPORT
115-74 }

OFFICE OF SPECIAL COUNSEL
REAUTHORIZATION ACT OF 2017

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 582

TO REAUTHORIZE THE OFFICE OF SPECIAL COUNSEL, AND FOR
OTHER PURPOSES



MAY 18, 2017.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

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Calendar No. 93

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OFFICE OF SPECIAL COUNSEL REAUTHORIZATION ACT
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MAY 18, 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. 582]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 582) to reauthorize the Office of Special Counsel, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 582, the Office of Special Counsel Reauthorization Act of 2017, is to reauthorize the Office of Special Counsel (OSC) through fiscal year 2022 and provide updated authorities to the OSC. The bill will enhance the OSC’s authority to investigate allegations of prohibited personnel practices and to seek corrective actions from Federal agencies, as well as provide additional protec-

tions for Federal employees who make disclosures of waste, fraud, abuse or misconduct in the Federal Government.¹

II. BACKGROUND AND THE NEED FOR LEGISLATION

Congress first created the position of Special Counsel in the Civil Service Reform Act of 1978.² The Special Counsel was originally created as a position within the Merit Systems Protection Board (Board) to investigate disclosures of violations of law and waste, fraud, and abuse in the Federal Government, to investigate allegations of prohibited personnel practices and whistleblower retaliation, and to file complaints against agency officials and Federal employees who engage in these actions.³ Congress removed the Special Counsel from the Board when it established the OSC in the Whistleblower Protection Act of 1989 (WPA).⁴ The WPA authorized the OSC through fiscal year 1992.⁵ Congress reauthorized the OSC from 1993 to 1997⁶ and from 2002 to 2007.⁷ Since 2008, however, the OSC has received funding and continued operating without additional authorizing legislation.

The OSC is responsible for receiving whistleblower disclosures of waste, fraud, and abuse and for receiving and investigating allegations of prohibited personnel practices,⁸ including whistleblower retaliation.⁹ In the case of whistleblower disclosures, the OSC reviews the allegations and determines whether there is a substantial likelihood that the disclosure evidences waste; abuse; violations of laws, rules or regulations; gross mismanagement, or a danger to public health and safety.¹⁰ The OSC provides the disclosure to the appropriate agency head and requires the agency head to investigate the disclosure and report its findings to the OSC, which will be transmitted to the President and Congress.¹¹ For alleged prohibited personnel practices, the OSC investigates the allegations and, if it determines that a prohibited personnel practice occurred, seeks corrective action either from the agency or from the Board.¹²

Special Counsel Carolyn Lerner told the Committee at a January 12, 2016, hearing that “[OSC] is engaged in the most productive period in its history.”¹³ The number of complaints filed with and reviewed by the OSC has steadily increased over the past few years. In fiscal year 2016, roughly 6,000 new cases were filed with the

¹ On May 25, 2016, the Committee approved S. 2968, the Office of Special Counsel Reauthorization Act of 2016. That bill is substantially similar to S. 582. Accordingly, this committee report is in large part a reproduction of Chairman Johnson’s committee report for S. 2968, S. Rep. No. 114–360 (2016).

² Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111, 1122–31 (1978).

³ *Id.* at 1122, 1125.

⁴ Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16, 19–29 (1989).

⁵ *Id.* at 34.

⁶ Pub. L. No. 103–424, 108 Stat. 4361 (to reauthorize the Office of Special Counsel, and for other purposes).

⁷ Pub. L. No. 107–304, 2, 116 Stat. 2363, 2364 (to amend title 5, United States Code, to allow certain catch-up contributions to the Thrift Savings Plan to be made by participants age 50 or over; to reauthorize the Merit Systems Protection Board and the Office of Special Counsel; and for other purposes).

⁸ 5 U.S.C. 2302(b).

⁹ 5 U.S.C. 1212(a).

¹⁰ 5 U.S.C. 1213(a),(b).

¹¹ 5 U.S.C. 1213(c)–(e).

¹² 5 U.S.C. 1214.

¹³ *Nomination of Michael J. Missal to be Inspector General, U.S. Department of Veterans Affairs, and the Honorable Carolyn N. Lerner to be Special Counsel, Office of Special Counsel: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 114th Cong. (2016)* (statement of Carolyn N. Lerner, Special Counsel, Office of Special Counsel).

OSC.¹⁴ Fiscal year 2015 was the first time in the history of the OSC that it received more than 6,000 new cases.¹⁵

With the significant increase in its caseload, there are several challenges the OSC faces that can be addressed through reauthorization legislation. The OSC recommended to Congress changes to help the agency be more productive in light of the increasing workload, to improve its access to agency information, and to improve agency accountability for actions ordered by the OSC.¹⁶

Lack of statutory authority to access documents

On occasion, an obstacle in OSC investigations is the lack of explicit statutory authority by the OSC to request information from agencies. Currently, authority to request information from agencies only exists in regulation.¹⁷ The OSC wrote to the Committee:

Although federal agencies generally work with OSC to fulfill OSC's document requests, some agencies do not provide timely and complete responses to our document requests under 5 C.F.R. 5.4. The failure to provide such responses can significantly delay and impede OSC's investigations. Specifically, agencies sometimes withhold documents and other information responsive to OSC requests by improperly asserting the attorney-client privilege. In these cases, OSC must often engage in prolonged disputes over information to which OSC is clearly entitled. This undermines the effectiveness of whistleblower laws, wastes precious resources, and prolongs OSC investigations.¹⁸

Special Counsel Lerner provided testimony asserting that:

Neither OSC's governing statutes, nor applicable OPM regulations authorize an agency to withhold information from OSC based on an assertion of attorney-client privilege by a government attorney acting on behalf of a government agency and no court has ever held that the attorney-client privilege can be asserted during intra-governmental administrative investigations.¹⁹

The OSC wrote to the Committee:

Although the attorney-client privilege protects certain communications between a lawyer and a client, there is simply no basis for a federal agency to assert privilege during an OSC investigation. Congress has directed OSC to conduct investigations as objective fact-finders, similar to Inspectors General and the Government Accountability Office. Indeed, Congress has made clear that there is a

¹⁴ Office of Special Counsel, Performance and Accountability Report for Fiscal Year 2016, 10 (2016), available at <https://osc.gov/Resources/OSC-FY2016-PAR-15Nov2016.pdf>.

¹⁵ Office of Special Counsel, Performance and Accountability Report for Fiscal Year 2015, 4, 10 (2015), available at <https://osc.gov/Resources/FY%202015%20PAR-16Nov2015%20Final.pdf>.

¹⁶ *Reauthorization of the U.S. Office of Special Counsel: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015) (statement of Carolyn N. Lerner, Special Counsel, Office of Special Counsel) [hereinafter "House Hearing"].

¹⁷ *Id.* See also 5 C.F.R. 5.4 (2016).

¹⁸ Letter from Carolyn N. Lerner, Special Counsel, Office of Special Counsel, to Senator Ron Johnson, Chairman, and Senator Claire McCaskill, Ranking Member, S. Comm. on Homeland Sec. & Governmental Affairs (March 13, 2017).

¹⁹ *Transparency at TSA: Hearing Before the Subcomm. on Gov't Operation of the H. Comm. on Oversight & Gov't Reform*, 115th Cong. (2017) (statement of Carolyn N. Lerner, Special Counsel, Office of Special Counsel).

strong public interest in exposing government wrongdoing and upholding merit system principles. To uphold this public interest, OSC routinely reviews communications between management officials and agency counsel to determine whether an agency acted with a legitimate or unlawful basis in taking action against a whistleblower. Federal agencies have no legitimate basis to use privileges to conceal evidence of prohibited practices from the agency the Congress charged with investigating them. . . . Congress created OSC as an intra-executive branch investigative agency to investigate whether prohibited conduct occurred. That purpose is frustrated when agencies withhold information.²⁰

For whistleblower disclosure cases, the OSC referred almost 200 disclosures to agencies for further investigation from fiscal years 2013 through 2015²¹ and sent 78 disclosure reports in fiscal year 2016.²² Approximately 90 percent of the disclosures from fiscal years 2013 through 2015 and 87 percent of those in fiscal year 2016 were wholly or partially substantiated by the agencies.²³ However, some of the corrective action plans submitted to the OSC in response to the identified misconduct are “insufficient or incomplete.”²⁴ For this, the OSC recommended to Congress that agencies be required “to provide an explanation if they fail to take action, including disciplinary action, in the case of substantiated misconduct. And . . . OSC should have the statutory authority to request and receive detailed follow-up information.”²⁵

Unauthorized access of medical records

The recent disclosures of fraud, misconduct, and mismanagement within the Department of Veterans Affairs (VA) uncovered another form of whistleblower retaliation. OSC Special Counsel Lerner testified before the House Committee on Veterans Affairs Subcommittee on Oversight and Investigations that:

A[n] . . . ongoing concern is the unlawful accessing of employee medical records in order to discredit whistleblowers. In many instances, VA employees are themselves veterans and receive care at VA hospitals. In several cases, the medical records of whistleblowers have been accessed and information in those records has apparently been used to attempt to discredit the whistleblowers.²⁶

This Committee also heard testimony on September 22, 2015, from Brandon Coleman, a medical professional of the Phoenix, Arizona VA health care system, who alleged that his own medical treatment records were repeatedly accessed by some of his co-workers after he disclosed concerns that the VA was mishandling suici-

²⁰ Letter from Carolyn N. Lerner, *supra* note 18.

²¹ House Hearing, *supra* note 16.

²² Office of Special Counsel, *supra* note 14 at 11.

²³ *Id.* See also House Hearing, *supra* note 16.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Addressing Continued Whistleblower Retaliation Within the VA: Hearing Before the H. Subcomm. on Oversight and Investigations of the Comm. on Veterans Affairs, 114th Cong. (2015)* (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

dal veterans.²⁷ According to Mr. Coleman, the VA then attempted to terminate his employment using information from those improperly-accessed medical records.²⁸ A co-founder of the VA Truth Tellers, an organization of whistleblowers who have experienced retaliation since disclosing misconduct in the VA, testified that he has talked with more than 50 whistleblowers across the country who allege that have had their medical records accessed.²⁹

Onerous requirements to close cases

In light of the “skyrocketing caseloads” of whistleblower complaints from the VA and other agencies, the OSC requested that Congress consider revising the procedural requirements that the OSC must undertake for each and every complaint it receives.³⁰ Under current law, the OSC is required to send several documents to complainants, regardless of whether the complaint is repetitive, adjudicated by the Board, or filed several years after the matter of the complaint occurred.³¹ According to the OSC, “these requirements require us to devote significant resources to closing non-meritorious complaints, instead of focusing on prosecuting and resolving meritorious cases.”³²

Protecting the OSC’s own employees

While OSC is charged with protecting Federal whistleblowers, last year’s results from an annual survey of Federal employees, including employees at OSC, suggests the agency may benefit from additional oversight and enhanced whistleblower protections for its own employees, but this year’s results evidence OSC’s commitment to improving employee engagement and satisfaction.

Each year, OPM conducts the Federal Employee Viewpoint Survey (FEVS), which provides employees an opportunity to “candidly share their perceptions of their work experiences, their agencies, and their leaders.”³³ A significant concern raised by the Partnership for Public Service report on the 2015 FEVS survey is that only 41.5 percent of OSC employees responded positively to the questions “Arbitrary actions, personal favoritism, and coercion for partisan political purposes are not tolerated,” and “I can disclose a suspected violation of any law, rule, or regulation without fear of reprisal.”³⁴ Reports of recent survey results indicate OSC is making progress to address the 2015 survey results.³⁵ For the 2016 FEVS, OSC employees reported double digit improvements from 2015 to these questions, as well as for the question “Prohibited per-

²⁷ *Improving VA Accountability: Examining Firsthand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. (2015) (statement of Brandon Coleman, Sr., Ph.D., Addiction Therapist, Phoenix Veterans Affairs Health Care System).

²⁸ *Id.*

²⁹ *Id.* (testimony of Shea Wilkes, Licensed Clinical Social Worker, Overton VA Medical Center).

³⁰ *Id.* (statement of Carolyn Lerner, Special Counsel, Office of Special Counsel).

³¹ 5 U.S.C. 1214.

³² *Improving VA Accountability*, *supra* note 39 (statement of Carolyn Lerner).

³³ Office of Personnel Management, Federal Employee Viewpoint Survey Results: Gov’t Mgmt Report, 2 (2015), available at <https://www.fedview.opm.gov/2015FILES/2015-FEVS-Gwide-Final-Report.PDF>.

³⁴ P’ship for Pub. Serv., The Best Places to Work in the Fed. Gov’t, Effective Leadership: Fairness (2015), available at <http://bestplacetowork.org/BPTW/rankings/categories/small/leadership-sub-fairness-15>.

³⁵ Office of Personnel Management, Federal Employee Viewpoint Survey Results (2016), available at <https://unlocktalent.gov/us-office-of-special-counsel>.

sonnel practices . . . are not tolerated.”³⁶ As the agency charged with investigating and redressing prohibited personnel practice violations in other Federal agencies, it is important for OSC to lead by example by continuing to improve on these issues in the eyes of its employees.

The poor results for the OSC in the 2015 employee survey moved Chairman Johnson to request a programmatic review of OSC by the Government Accountability Office (GAO).³⁷ As a part of its review, Chairman Johnson requested that GAO assess “whether there are adequate safeguards in place for proper oversight of OSC.”³⁸ These safeguards include the procedure for OSC employee reporting of disclosures or prohibited personnel practices, the adequacy of the agreement between the OSC and the National Science Foundation Inspector General for such reporting, and the adequacy of the mechanisms to prevent a conflict of interest of the Special Counsel or Deputy Special Counsel in the event of an investigation of OSC by the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency.³⁹

OSC also responded to these employee survey results with an internal performance review that merits application government-wide. In 2016, OSC began evaluating its managers on adherence to whistleblower protection laws and policies as a critical element in their performance plans.⁴⁰ In addition to existing criteria for performance reviews, “managers will be required to foster an environment that promotes disclosures and prevents retaliation.”⁴¹ This performance requirement on whistleblower protection for OSC employees is unique from other Federal agencies, as Federal law does not require agencies’ performance appraisal systems to consider employee adherence to whistleblower protection laws.⁴²

Conclusion

Special Counsel Lerner told the Committee that “reauthorization provides Congress with an opportunity to evaluate OSC’s authorities and responsibilities and make any necessary adjustments.”⁴³ This reauthorization of OSC, which provides OSC with statutory authority to access information, an enhanced ability to oversee agency implementation of corrective actions, and streamlined procedures for reviewing allegations, along with additional whistleblower protections, will help ensure that Federal employees have an avenue for recourse should they be faced with retaliatory personnel actions after disclosing waste, fraud, and abuse in the Federal Government.

³⁶ Office of Special Counsel, Federal Employee ViewPoint Survey Results: 2012–2016 Comparison (2016), available at <https://osc.gov/Resources/fevs-2012-2016-comparison.pdf>.

³⁷ Letter from Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs, to Gene Dodaro, Comptroller General, Gov’t Accountability Off. (Apr. 25, 2016).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Charles S. Clark, *Whistleblower Protection Agency Looks to Clean Up Its Own Backyard*, Government Executive (Apr. 1, 2016), <http://www.govexec.com/oversight/2016/04/whistleblower-protection-agency-looks-clean-its-own-backyard/127189/>.

⁴¹ *Id.*

⁴² 5 U.S.C. 4302.

⁴³ *Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015) (statement of Carolyn N. Lerner, Special Counsel, Office of Special Counsel).

III. LEGISLATIVE HISTORY

S. 582, the Office of Special Counsel Reauthorization Act of 2017, was introduced on March 8, 2017, by Chairman Ron Johnson, Ranking Member Claire McCaskill, and Senator Chuck Grassley. Senators Steve Daines and Ron Wyden joined as co-sponsors on March 9, 2016 and March 21, 2017, respectively. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 582 at a business meeting on March 15, 2017. During the business meeting, one amendment by Ranking Member McCaskill was offered. The amendment removed a provision that denied individuals an opportunity to respond in the event the investigation of their allegation is closed without further inquiry under section 8 of this bill, while still allowing OSC to circumvent previous statutory procedural requirements for closing cases.

Both the McCaskill amendment and the legislation as amended were approved by voice vote *en bloc* with Senators Johnson, Portman, Lankford, Daines, McCaskill, Carper, Tester, Heitkamp, Peters, 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 “Office of Special Counsel Reauthorization Act of 2017.”

Section 2. Adequate access of special counsel to information

This section authorizes the OSC to have timely access to all documents or other information that relate to a matter within the jurisdiction or authority of the OSC that are in the possession of a Federal agency. This section also clarifies that a Federal agency cannot withhold any information from the OSC, an independent Federal agency, on the basis of common law privilege and that providing such information does not waive any assertion of privilege by the Federal agency in any other proceeding. The Attorney General or an Inspector General may withhold material from OSC if disclosure could interfere with an ongoing criminal investigation or prosecution. In the event of such a withholding, the Attorney General or Inspector General must submit a written report to OSC describing the withheld material and the reason for withholding it. If an agency does withhold information or fail to comply with a request by the OSC, the OSC is required to report this to Congress.

Section 3. Information on whistleblower protections

This section delineates the responsibilities of Federal agency heads for preventing prohibited personnel practices, enforcing Federal whistleblower protection laws, and training Federal employees on their rights to make disclosures and their remedies should they be subject to prohibited personnel practices. This section requires agencies to provide training to supervisors on whistleblower protections and how to respond to an allegation of a violation of whistleblower protection laws. This section also requires agencies to notify an employee of his or her appeals rights when subject to an adverse action. This notification must inform the employee of the

available forums in which an appeal can be filed and the effect on the employee's appeal rights based on the selected forum for appeal.

Section 4. Additional whistleblower provisions

This section provides additional tools for the OSC, the Board, and Federal agencies to prevent, investigate, or correct whistleblower retaliation in the Federal workplace.

Subsection (a) makes additions to the types of actions that may constitute a prohibited personnel practice. The accessing of a medical record of an employee or applicant for employment can be considered a prohibited personnel practice. A personnel action taken against an employee because the employee cooperated with an internal agency review or investigation or because the employee refused to obey an order that would require the employee to violate a rule or regulation can also be considered a prohibited personnel action. An applicant for employment who made a disclosure before the applicant's appointment to Federal service can be covered under whistleblower protection laws. This subsection also clarifies that an employee with a principal job function of investigating and disclosing wrongdoing will not be excluded from whistleblower protection laws if the employee can demonstrate that a personnel action taken against him or her was in reprisal for a disclosure.

Subsection (b) allows the OSC to request additional information from a Federal agency in its response to a finding by the OSC of a prohibited personnel practice. This subsection also extends the amount of time for the OSC to review a complaint for a substantial likelihood that the complainant discloses information warranting further investigation.

Subsection (c) requires an agency to give priority to the transfer request of an employee who is the subject of an action for which the Board grants a stay.

Subsection (d) allows the OSC to seek corrective action for a Federal agency investigation of an employee that was started, expanded, or extended in retaliation for a disclosure or protected activity by the employee, regardless of whether the agency investigation resulted in a personnel action against the employee.

Section 5. Suicide by employees

This section requires an agency to refer to OSC any instance in which an employee of the agency committed suicide after making a disclosure of wrongdoing and then being subject to a personnel action. OSC shall review the personnel action taken against the employee as a result of the disclosure and take appropriate action.

Section 6. Protection of whistleblowers as criteria in performance appraisals

This section requires agencies to include whistleblower protection in performance evaluations for supervisors.

Subsection (a) requires Federal agencies to develop criteria by which whistleblower protection is evaluated in the performance appraisals for supervisory employees. This criterion will also consider the number of instances in which an agency entered into an agreement with an individual based on an allegation of a prohibited personnel practice committed by the supervisor.

Subsection (b) requires agencies to include the whistleblower protection criteria in the evaluation of a supervisory employee.

Subsection (c) requires Federal agencies to submit an annual report to Congress detailing the number of performance appraisals in which supervisory employees were determined to have unacceptable performance under the whistleblower protection criteria.

Section 7. Discipline of supervisors based on retaliation against whistleblowers

Under this section, an agency head must propose disciplinary action against a supervisor if the agency head, an administrative law judge, the Board, OSC, a United States judge, or the agency Inspector General determines that the supervisor committed a prohibited personnel action. The proposed disciplinary action must be at least a suspension of three days for the first finding of a prohibited personnel action by the supervisor and removal for any subsequent finding of committing a prohibited personnel practice by the supervisor. The supervisor will be entitled to written notice of the proposed disciplinary action and an opportunity to answer and furnish evidence in support of the answer. If the agency head is responsible for deciding whether a supervisor committed a prohibited personnel practice, the agency head cannot delegate that responsibility.

Section 8. Termination of certain investigations by the Office of Special Counsel

This section allows the OSC to terminate certain investigations without being subject to the statutory procedural requirements. The OSC can terminate an investigation under this section if it determines the complaint is not in the jurisdiction of the OSC, if it alleges the same facts and circumstances as a previous complaint investigated by the OSC or filed with the Board, or if the complaint is not timely based on when the complainant knew or should have known of the prohibited personnel practice.

Section 9. Allegations of wrongdoing within the Office of Special Counsel

Under this section, the OSC is required to enter into at least one agreement with a Federal agency inspector general for the purpose of receiving, reviewing, and investigating complaints from OSC employees. This section requires the OSC to provide a direct line of communication between its employees and such inspector general and does not allow the OSC to require any internal approval before an OSC employee can file a complaint with the inspector general.

Section 10. Reporting requirements

This section revises the information required in the annual report submitted to Congress by the OSC. This section also requires OSC to report to Congress when a complaint filed with OSC is resolved by an agreement between the agency and the complainant, including the allegation and any disciplinary action taken by the agency as a result of the complaint.

Section 11. Establishment of survey pilot program

This section suspends the annual survey of complainants to the OSC and creates a pilot program that surveys individuals during the next full fiscal year who filed a complaint or disclosure with the OSC. This survey will be designed to collect information on the individual's treatment at different stages of review by the OSC, not just the disposition of the individual's case as current required in statute. The results of the survey will be published in the annual report by the OSC.

Section 12. Regulations

This section requires OSC to prescribe regulations as necessary to perform its functions within two years of enactment of this bill.

Section 13. Authorization of appropriations

This section authorizes appropriations of sums necessary for the OSC to carry out the provisions of this title through fiscal year 2022.

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

MAY 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. 582, the Office of Special Counsel Reauthorization Act of 2017.

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. 582—Office of Special Counsel Reauthorization Act of 2017

Summary: S. 582 would authorize appropriations for the Office of Special Counsel (OSC) for fiscal years 2017 through 2022. The bill also would amend several of the laws governing the OSC and would extend new legal protections to federal employees (known as whistleblowers) who report abuse, fraud, and waste related to government activities.

CBO estimates that implementing this legislation would cost \$155 million over the 2017–2022 period, assuming appropriation of

the necessary amounts. Enacting S. 582 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 582 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 582 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.

Estimated cost to the Federal Government: The estimated budgetary effects of S. 582 are shown in the following table. The costs of this legislation fall within budget function 800 (general government).

| | By fiscal year, in millions of dollars— | | | | | | |
|--|---|------|------|------|------|------|-----------|
| | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | 2017–2022 |
| INCREASES IN SPENDING SUBJECT TO APPROPRIATION | | | | | | | |
| Office of Special Counsel: ^a | | | | | | | |
| Estimated Authorization Level | 0 | 26 | 27 | 28 | 29 | 30 | 140 |
| Estimated Outlays | 0 | 24 | 27 | 28 | 29 | 30 | 138 |
| Whistleblower Provisions: | | | | | | | |
| Estimated Authorization Level | 0 | 2 | 2 | 2 | 2 | 2 | 10 |
| Estimated Outlays | 0 | 2 | 2 | 2 | 2 | 2 | 10 |
| Other Provisions: | | | | | | | |
| Estimated Authorization Level | 0 | 2 | 2 | 1 | 1 | 1 | 7 |
| Estimated Outlays | 0 | 2 | 2 | 1 | 1 | 1 | 7 |
| Total Increases: | | | | | | | |
| Estimated Authorization Level | 0 | 30 | 31 | 31 | 32 | 33 | 157 |
| Estimated Outlays | 0 | 28 | 31 | 31 | 32 | 33 | 155 |

a. The Office of Special Council received an appropriation of \$25 million for 2017.

Basis of estimate: For this estimate, CBO assumes that S. 582 will be enacted near the end of fiscal year 2017, that the necessary amounts will be appropriated each year, and that spending will follow historical spending patterns for the agency.

Under current law, the OSC investigates complaints regarding reprisals against federal employees who inform authorities of fraud or other improprieties in the operation of federal programs. The OSC can order corrective action (such as job restoration, back pay, and reimbursement of attorneys’ fees and medical costs) for valid complaints. If agencies fail to take corrective actions, the OSC or the employee can pursue a case through the Merit Systems Protection Board (MSPB) for resolution.

Office of Special Counsel

Section 13 of the bill would authorize appropriations from 2017 through 2022 of whatever amounts may be necessary for OSC operations. In 2017, the OSC received on appropriation \$25 million. CBO estimates that continuing activities at that level and accounting for the effects of anticipated inflation, would cost \$138 million over the 2018–2022 period.

Whistleblower provisions

Under current law, when settling employment disputes between the federal government and employees over prohibited personnel practices, federal agencies are required to pay an employee’s attorney fees, any retroactive salary payments, and any travel or med-

ical costs associated with the claim. S. 582 would expand legal protections for whistleblowers and would allow the OSC to seek corrective action for federal employees who suffered retaliation by their agency.

According to the MSPB and the OSC, those new legal protections would affect a small number of cases, with settlement amounts averaging about \$20,000 per case. Based on information about the probable number of such complaints (less than five per agency) and the cost of similar corrective actions provided by MSPB and OSC, CBO estimates that the new legal protections would increase awards and administrative costs by about \$80,000 for each of the 26 major federal agencies each year—for a total federal cost of about \$2 million annually.

Other provisions

S. 582 also would codify and expand some policies and practices of the federal government designed to prevent retaliation against whistleblowers. Under the bill agencies would be required to conduct additional employee training on those policies and prepare reports on matters pertaining to whistleblowers. Based on information from the OSC, the MSPB, and on the costs of similar requirements, CBO estimates that implementing those provisions would cost about \$7 million over the 2018–2022 period.

Pay-As-You-Go considerations: None.

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 582 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

Intergovernmental and Private-sector impact: S. 582 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal costs: Matthew Pickford; impact on state, local, and tribal governments: Zach Bryum; impact on the private-sector: Paige Piper/Bach.

Estimate 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**

* * * * *

PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

* * * * *

CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

* * * * *

Subchapter II—Office of Special Counsel

* * * * *

SEC. 1212. POWERS AND FUNCTIONS OF THE OFFICE OF SPECIAL COUNSEL

(a) * * *

(b) * * *

(1) * * *

* * * * *

(5)(A) *Except as provided in subparagraph (B), the Special Counsel, in carrying out this subchapter, is authorized to—*

(i) have timely access to all records, data, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable agency that relate to an investigation, review, or inquiry conducted under—

(I) section 1213, 1214, 1215, or 1216 of this title; or

(II) section 4324(a) of title 38;

(ii) request from any agency the information or assistance that may be necessary for the Special Counsel to carry out the duties and responsibilities of the Special Counsel under this subchapter; and

(iii) require, during an investigation, review, or inquiry of an agency, the agency to provide to the Special Counsel any record or other information that relates to an investigation, review, or inquiry conducted under—

(I) section 1213, 1214, 1215, or 1216 of this title; or

(II) section 4324(a) of title 38;

(B)(i) The authorization of the Special Counsel under subparagraph (A) shall not apply with respect to any entity that is an element of the intelligence community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003), unless the Special Counsel is investigating, or otherwise carrying out activities relating to the enforcement of, an action under subchapter III of chapter 73.

(ii) The Attorney General or an Inspector General may withhold from the Special Counsel material described in subparagraph (A) if—

(I) disclosing the material could reasonably be expected to interfere with a criminal investigation or prosecution that is ongoing as of the date on which the Special Counsel submits a request for the material; and

(II) the Attorney General or the Inspector General, as applicable, submits to the Special Counsel a written report that describes—

(aa) the material being withheld; and

(bb) the reason that the material is being withheld.

(C)(i) A claim of common law privilege by an agency, or an officer or employee of an agency, shall not prevent the Special Counsel from obtaining any material described in subparagraph (A)(i) with respect to the agency.

(ii) The submission of material described in subparagraph (A)(i) by an agency to the Special Counsel may not be deemed to waive any assertion of privilege by the agency against a non-Federal entity or against an individual in any other proceeding.

(iii) With respect to any record or other information made available to the Special Counsel by an agency under subparagraph (A), the Special Counsel may only disclose the record or information for a purpose that is in furtherance of any authority provided to the Special Counsel in this subchapter.

(6) The Special Counsel shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and each committee of Congress with jurisdiction over the applicable agency a report regarding any case of contumacy or failure to comply with a request submitted by the Special Counsel under paragraph (5)(A).

* * * * *

(i) The Special Counsel shall enter into at least 1 agreement with the Inspector General of an agency under which—

(1) the Inspector General shall—

(A) receive, review, and investigate allegations of prohibited personnel practices or wrongdoing filed by employees of the Office of Special Counsel; and

(B) develop a method for an employee of the Office of Special Counsel to directly communicate with the Inspector General; and

(2) the Special Counsel—

(A) may not require an employee of the Office of Special Counsel to seek authorization or approval before directly contacting the Inspector General in accordance with the agreement; and

(B) may reimburse the Inspector General for services provided under the agreement.

SEC. 1213. PROVISIONS RELATING TO DISCLOSURES OF VIOLATIONS OF LAW, GROSS MISMANAGEMENT, AND CERTAIN OTHER MATTERS.

(a) * * *

(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within [15 days] 45 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds,

abuse of authority, or substantial and specific danger to public health and safety.

(c) * * *

(d) * * *

(e)

(1) **Any such report** *Any report required under subsection (c) or paragraph (5) of this subsection shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.*

(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether—

(A) the findings of the head of the agency appear reasonable; and

(B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

(2) *Upon receipt of any report that the head of an agency is required to submit under subsection (c), the Special Counsel shall review the report and determine whether—*

(A) the findings of the head of the agency appear reasonable; and

(B) if the special Counsel requires the head of the agency to submit a supplemental report under paragraph (5), the reports submitted by the head of the agency collectively contain the information required under subsection (d).

(3) The Special Counsel shall transmit any **agency report received pursuant to subsection (c) of this section** *report submitted to the Special Counsel by the head of an agency under subsection (c) or paragraph (5) of this subsection, any comments provided by the complainant pursuant to subsection (e)(1), and any appropriate comments or recommendations by the Special Counsel to the President and the congressional committees with jurisdiction over the agency which the disclosure involves.*

(4) * * *

(5) *If after conducting a review of a report under paragraph (2), the Special counsel concludes that the Special Counsel requires additional information or documentation to determine whether the report submitted by the head of an agency is reasonable and sufficient, the Special Counsel may request that the head of the agency submit a supplemental report—*

(A) containing the additional information or documentation identified by the Special Counsel; and

(B) which the head of the agency shall submit to the Special Counsel within a period of time specified by the Special Counsel.

(f) * * *

(g) * * *

(h) The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel de-

termines that the disclosure of the individual’s identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.】

(h) The Special Counsel may not respond to any inquiry or disclose any information about any person who makes a disclosure under this section except in accordance with section 552a or as required by any other provision of Federal law.

* * * * *

SEC. 1214. INVESTIGATION OF PROHIBITED PERSONNEL PRACTICES; CORRECTIVE ACTION.

(a) * * *

(1) * * *

(A) * * *

* * * * *

(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice *other than a termination of an investigation described in paragraph (6)(A)*, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.

* * * * *

(6)(A) Notwithstanding any other provision of this section, not later than 30 days after receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel may terminate an investigation of the allegation without further inquiry if the Special Counsel determines that—

(i) the same allegation, based on the same set of facts and circumstances had previously been—

(I)(aa) made by the individual; and

(bb) investigated by the Special Counsel; or

(II) filed by the individual with the Merit Systems Protection Board;

(ii) the Special Counsel does not have jurisdiction to investigate the allegation; or

(iii) the individual knew or should have known of the alleged prohibited personnel practice on or before the date that is 3 years before the date on which the Special Counsel received the allegation.

(B) Not later than 30 days after the date on which the Special Counsel terminates an investigation under subparagraph (A), the Special Counsel shall provide a written notification to the individual who submitted the allegation of a prohibited personnel practice that states the basis of the Special Counsel for terminating the investigation.

(b) * * *

(1) * * *

(A) * * *

* * * * *

(E) If the Board grants a stay under subparagraph (A), the head of the agency employing the employee who is the subject of the action shall give priority to a request for a transfer submitted by the employee.

* * * * *

(i) The Special Counsel may petition the Board to order corrective action, including fees, costs, or damages reasonably incurred by an employee due to an investigation of the employee by an agency, if the investigation by an agency was commenced, expanded, or extended in retaliation for a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), even if no personnel action, as defined under section 2302(a), is taken or not taken.

* * * * *

SEC. 1218. ANNUAL REPORT.

【The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i), and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.】 *The Special Counsel shall submit to Congress, on an annual basis, a report on the activities of the Special Counsel, which shall include, for the year preceding the submission of the report—*

(1) the number, types, and disposition of allegations of prohibited personnel practices filed with the Special Counsel and the costs of resolving such allegations;

(2) the number of investigations conducted by the Special Counsel;

(3) the number of stays or disciplinary actions negotiated with agencies by the Special Counsel;

(4) the number of subpoenas issued by the Special Counsel;

(5) the number of instances in which the Special Counsel reopened an investigation after the Special Counsel had made an initial determination with respect to the investigation;

(6) the actions that resulted from reopening investigations as described in paragraph (5);

(7) the number of instances in which the Special Counsel did not make a determination before the end of the 240-day period described in section 1214(b)(2)(A)(i) regarding whether there were reasonable grounds to believe that a prohibited personnel practice had occurred, existed, or was to be taken;

(8) a description of the recommendations and reports made by the Special Counsel to other agencies under this subchapter and the actions taken by the agencies as a result of the recommendations or reports;

(9) *the number of—*

(A) *actions initiated before the Merit Systems Protection Board, including the number of corrective action petitions and disciplinary complaints initiated; and*

(B) *stays and extensions of stays obtained from the Merit Systems Protection Board;*

(10) *the number of prohibited personnel practice complaints that resulted in a favorable action, other than a stay or an extension of stay, for the complainant, organized by actions in—*

(A) *complaints dealing with reprisals against whistleblowers; and*

(B) *all other complaints; and*

(11) *the number of prohibited personnel practice complainants that were resolved by an agreement between an agency and an individual, organized by agency and agency components in—*

(A) *complaints dealing with reprisals against whistleblowers; and*

(B) *all other complaints;*

(12) *the number of corrective actions that the Special Counsel required an agency to take after a finding by the Special Counsel of a prohibited personnel practices, as defined in section 2302(b); and*

(13) *the results for the Office of Special Counsel of any employee viewpoint survey conducted by the Office of Personnel Management or any other agency.*

SEC. 1219. PUBLIC INFORMATION.

(a)

(1) **[a list of noncriminal matters referred to heads of agencies under subsection (c) of section 1213, together with reports from heads of agencies under subsection (c)(1)(B) of such section relating to such matters;] a list of any noncriminal matters referred to the head of an agency under section 1213(c), together with—**

(A) *a copy of the information transmitted to the head of the agency under section 1213(c)(1);*

(B) *any report from the agency under section 1213(c)(1)(B) relating to the matter;*

(C) *if appropriate, not otherwise prohibited by law, and consented to by the complainant, any comments from the complainant under section 1213(e)(1) relating to the matter; and*

(D) *the comments or recommendations of the Special Counsel under paragraph (3) or (4) of section 1213(e).*

* * * * *

SEC. 1219. TRANSMITTAL OF INFORMATION TO CONGRESS.

(a) *IN GENERAL.—The Special Counsel [The Special Counsel] or any employee of the Special Counsel designated by the Special Counsel shall transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and the Special Counsel’s view on functions, responsibilities, or other matters relating to the Office. Such information shall be transmitted concurrently to the President and any other appropriate agency in the executive branch.*

(b) **ADDITIONAL REPORT REQUIRED.—**

(1) *IN GENERAL.—If an allegation submitted to the Special Counsel is resolved by an agreement between an agency and an individual, the Special Counsel shall submit to Congress and each congressional committee with jurisdiction over the agency a report regarding the agreement.*

(2) *CONTENTS.—The report required under paragraph (1) shall identify, with respect to an agreement described in that paragraph—*

(A) the agency that entered into the agreement;

(B) the position and employment location of the employee who submitted the allegation that formed the basis of the agreement;

(C) the position and employment location of any employee alleged by an employee described in subparagraph (B) to have committed a prohibited personnel practice, as defined in section 2302(a)(1);

(D) a description of the allegation described in subparagraph (B); and

(E) whether the agency that entered into the agreement has agreed to pursue any disciplinary action as a result of the allegation described in subparagraph (B).

* * * * *

SEC. 1221. INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES.

(a) * * *

* * * * *

(k) If the Board grants a stay under subsection (c) and the employee who is the subject of the action is in probationary status, the head of the agency employing the employee shall give priority to a request for a transfer submitted by the employee.

* * * * *

PART III—EMPLOYEES

* * * * *

Subpart A—General Provisions

* * * * *

CHAPTER 23—MERIT SYSTEMS PRINCIPLES

* * * * *

SEC. 2302. PROHIBITED PERSONNEL PRACTICES.

(a) * * *

(b) * * *

(1) * * *

* * * * *

(9) * * *

(A) * * *

(B) * * *

(C) cooperating with or disclosing information to the Inspector General (*or any other component responsible for internal investigation or review*) 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, rule, or regulation;

* * * * *

(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 and 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[.]; or

(14) access the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13).

[(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.]

(c)(1) In this subsection—

(A) the term “new employee” means an individual—

(i) appointed to a position as an employee on or after the date of enactment of the Office of Special Counsel Reauthorization Act of 2017; and

(ii) who has not previously served as an employee; and

(B) the term “whistleblower protections” means the protections against and remedies for a prohibited personnel practice described in paragraph (8) or subparagraph (A)(i), (B), (C), or (D) of paragraph (9) of subsection (b).

(2) The head of each agency shall be responsible for—

(A) preventing prohibited personnel practices;

(B) complying with and enforcing applicable civil service laws, rules, and regulations, and other aspects of personnel management; and

(C) ensuring, in consultation with the Special Counsel and the Inspector General of the agency, that employees of the agency are informed of the rights and remedies available to the employees under this chapter and chapter 12, including—

(i) information with respect to whistleblower protections available to new employees during a probationary period;

(ii) the role of the Office of Special Counsel and the Merit Systems Protection Board with respect to whistleblower protections; and

(iii) the means by which, with respect to information that is otherwise required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, an employee may make a lawful disclosure of the information to—

(I) the Special Counsel;

(II) the Inspector General of an agency;

(III) Congress; or

(IV) another employee of the agency who is designated to receive such a disclosure.

(3) The head of each agency shall ensure that the information described in paragraph (2) is provided to each new employee of the agency not later than 180 days after the date on which the new employee is appointed.

(4) The head of each agency shall make available information regarding whistleblower protections applicable to employees of the agency on the public website of the agency and on any online portal that is made available only to employees of the agency, if such portal exists.

(5) Any employee to whom the head of an agency delegates authority for any aspect of personnel management shall, within the limits of the scope of the delegation, be responsible for the activities described in paragraph (2).

* * * * *

(f)

(1)

(A) * * *

* * * * *

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

(F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or

[F] (G) of the amount of time which was 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.]

(2) If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regu-

larly investigate and disclose wrongdoing (in this paragraph referred to as the ‘disclosing employee’), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take, recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

* * * * *

Subpart C—Employee Performance

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CHAPTER 43—PERFORMANCE APPRAISAL

* * * * *

Subchapter I—General Provisions

* * * * *

SEC. 4301. DEFINITIONS.

[For the purpose of] *Except as otherwise expressly provided, for the purpose of this subchapter—*

* * * * *

SEC. 4302. ESTABLISHMENT OF PERFORMANCE APPRAISAL SYSTEMS.

(a) * * *

(b)(1) *The head of each agency, in consultation with the Director of the Office of Personnel Management and the Special Counsel, shall develop criteria that—*

(A) *the head of the agency shall use as a critical element for establishing the job requirements of a supervisory employee; and*

(B) *promote the protection of whistleblowers.*

(2) *The criteria required under paragraph (1) shall include—*

(A) *principles for the protection of whistleblowers, such as the degrees to which supervisory employees—*

(i) *respond constructively when employees of the agency make disclosures described in subparagraph (A) or (B) of section 2302(b)(8);*

(ii) *take responsible actions to resolve such disclosure described in clause (i); and*

(iii) *foster an environment in which employees of the agency feel comfortable making such disclosures to supervisory employees or other appropriate authorities; and*

(B) *for each supervisory employee—*

(i) *whether the agency entered into an agreement with an individual who alleged that the supervisory employee committed a prohibited personnel practice; and*

(ii) *if the agency entered into an agreement described in clause (i), the number of instances in which the agency entered into such an agreement with respect to the supervisory employee.*

(3) *In this subsection—*

(A) *the term “agency” means any entity the employees of which are covered by paragraphs (8) and (9) of section 2302(b), without regard to whether any other provision of this section is applicable to the entity;*

(B) *the term “prohibited personnel practice” has the meaning given the term in section 2302(a)(1);*

(C) *the term “supervisory employee” means an employee who would be a supervisor, as defined in section 7103(a), if the agency employing the employee was an agency for purposes of chapter 71; and*

(D) *the term “whistleblower” means an employee who makes a disclosure described in section 2302(b)(8).*

[b] (c) * * *
[c] (d) * * *

* * * * *

Subchapter II—Performance Appraisal in the Senior Executive Service

* * * * *

SEC. 4313. CRITERIA FOR PERFORMANCE APPRAISALS.

(1) * * *

* * * * *

(4) *other indications of the effectiveness, productivity, and performance quality of the employees for whom the senior executive is responsible; [and]*

(5) *meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with the merit systems principles set forth under section 2301 of this title[.]; and*

(6) *protecting whistleblowers, as described in section 4302(b)(2).*

* * * * *

Subpart D—Pay and Allowances

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CHAPTER 55—PAY ADMINISTRATION

* * * * *

Subchapter I—General Provisions

* * * * *

SEC. 5509. APPROPRIATIONS.

* * * * *

MERIT SYSTEMS AND PROTECTION BOARD AND OFFICE OF SPECIAL COUNSEL; AUTHORIZATION OF APPROPRIATIONS; RESTRICTION ON APPROPRIATIONS.

“(a)
“(1)

“(2) for each of fiscal years [2003, 2004, 2005, 2006, and 2007] 2017 through 2022 such sums as necessary to carry out subchapter II of chapter 12 of title 5, United States Code (as amended by this Act).”

* * * * *

Subpart F—Labor-Management and Employee Relations

* * * * *

CHAPTER 75—ADVERSE ACTIONS

* * * * *

Subchapter II—Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, Furlough for 30 Days or Less

* * * * *

Table of sections

- Sec.
- 7511. Definitions; application.
- 7512. Actions covered.
- 7513. Cause and procedure.
- 7514. Regulations.
- 7515. *Discipline of supervisors based on retaliation against whistleblowers.*

* * * * *

SEC. 7515. DISCIPLINE OF SUPERVISORS BASED ON RETALIATION AGAINST WHISTLEBLOWERS.

- (a) **DEFINITIONS.**—*In this section—*
 - (1) *the term “agency”—*
 - (A) *has the meaning given the term in section 2302(a)(2)(C), without regard to whether any other provision of this chapter is applicable to the entity; and*
 - (B) *does not include any entity that is an element of the intelligence community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003);*
 - (2) *the term “prohibited personnel action” means taking or failing to take an action in violation of paragraph (8) or (9) of section 2302(b) against an employee of an agency; and*
 - (3) *the term “supervisor” means an employee who would be a supervisor, as defined in section 7103(a), if the entity employing the employee was an agency.*
- (b) **PROPOSED DISCIPLINARY ACTIONS.**—
 - (1) **IN GENERAL.**—*If the head of the agency in which a supervisor is employed, an administrative law judge, the Merit Systems Protection Board, the Special Counsel, a judge of the United States, or the Inspector General of the agency in which a supervisor is employed has determined that the supervisor committed a prohibited personnel action, the head of the agency in which the supervisor is employed, consistent with the procedures required under paragraph (2)—*
 - (A) *for the first prohibited personnel action committed by the supervisor—*

(i) shall propose suspending the supervisor for a period that is not less than 3 days; and

(ii) may propose an additional action determined appropriate by the head of the agency, including a reduction in grade or pay; and

(B) for the second prohibited personnel action committed by the supervisor, shall propose removing the supervisor.

(2) PROCEDURES.—

(A) NOTICE.—A supervisor against whom an action is proposed to be taken under paragraph (1) is entitled to written notice that—

(i) states the specific reasons for the proposed action; and

(ii) informs the supervisor about the right of the supervisor to review the material that constitutes the factual support on which the proposed action is based.

(B) ANSWER AND EVIDENCE.—

(i) IN GENERAL.—A supervisor who receives notice under subparagraph (A) may, not later than 14 days after receiving the notice, submit an answer and furnish evidence in support of that answer.

(ii) NO EVIDENCE FURNISHED; INSUFFICIENT EVIDENCE FURNISHED.—If, after the end of the 14-day period described in clause (i), a supervisor does not furnish any evidence as described in that clause, or if the head of the agency in which the supervisor is employed determines that the evidence furnished by the supervisor is insufficient, the head of the agency shall carry out the action proposed under subparagraph (A) or (B) of paragraph (1).

(C) SCOPE OF PROCEDURES.—An action carried out under this section—

(i) except as provided in clause (ii), shall be subject to the same requirements and procedures, including those with respect to an appeal, as an action under section 7503, 7513, or 7543; and

(ii) shall not be subject to—

(I) paragraphs (1) and (2) of section 7503(b);

(II) paragraphs (1) and (2) of subsection (b) and subsection (c) of section 7513; and

(III) paragraphs (1) and (2) of subsection (b) and subsection (c) of section 7543.

(3) NON-DELEGATION.—If the head of an agency is responsible for determining whether a supervisor has committed a prohibited personnel action for purposes of paragraph (1), the head of the agency may not delegate that responsibility.