

110TH CONGRESS  
1ST SESSION

# S. 606

To improve Federal contracting and procurement by eliminating fraud and abuse and improving competition in contracting and procurement and by enhancing administration of Federal contracting personnel, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 15, 2007

Mr. DORGAN (for himself, Mr. BAYH, Mr. BINGAMAN, Mrs. BOXER, Mr. BROWN, Mrs. CLINTON, Mr. CONRAD, Mr. DURBIN, Mr. FEINGOLD, Mrs. FEINSTEIN, Mr. HARKIN, Mr. KENNEDY, Mr. KERRY, Ms. LANDRIEU, Mr. LAUTENBERG, Mr. LEAHY, Mr. MENENDEZ, Ms. MIKULSKI, Mr. NELSON of Florida, Mr. OBAMA, Mr. PRYOR, Mr. REID, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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## A BILL

To improve Federal contracting and procurement by eliminating fraud and abuse and improving competition in contracting and procurement and by enhancing administration of Federal contracting personnel, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Honest Leadership and  
5 Accountability in Contracting Act of 2007”.

**TITLE I—ELIMINATION OF  
FRAUD AND ABUSE**

**SEC. 101. PROHIBITION OF WAR PROFITEERING AND  
FRAUD.**

(a) PROHIBITION.—

(1) IN GENERAL.—Chapter 47 of title 18,  
United States Code, is amended by adding at the  
end the following:

**“§ 1039. War profiteering and fraud**

“(a) PROHIBITION.—

“(1) IN GENERAL.—Whoever, in any matter in-  
volving a contract or the provision of goods or serv-  
ices, directly or indirectly, in connection with a war  
or military action knowingly and willfully—

“(A) executes or attempts to execute a  
scheme or artifice to defraud the United States  
or the entity having jurisdiction over the area  
in which such activities occur;

“(B) falsifies, conceals, or covers up by  
any trick, scheme, or device a material fact;

“(C) makes any materially false, fictitious,  
or fraudulent statements or representations, or  
makes or uses any materially false writing or  
document knowing the same to contain any ma-

1           terially false, fictitious, or fraudulent statement  
2           or entry; or

3           “(D) materially overvalues any good or  
4           service with the specific intent to excessively  
5           profit from the war or military action;

6           shall be fined under paragraph (2), imprisoned not  
7           more than 20 years, or both.

8           “(2) FINE.—A person convicted of an offense  
9           under paragraph (1) may be fined the greater of—

10           “(A) \$1,000,000; or

11           “(B) if such person derives profits or other  
12           proceeds from the offense, not more than twice  
13           the gross profits or other proceeds.

14           “(b) EXTRATERRITORIAL JURISDICTION.—There is  
15           extraterritorial Federal jurisdiction over an offense under  
16           this section.

17           “(c) VENUE.—A prosecution for an offense under  
18           this section may be brought—

19           “(1) as authorized by chapter 211 of this title;

20           “(2) in any district where any act in further-  
21           ance of the offense took place; or

22           “(3) in any district where any party to the con-  
23           tract or provider of goods or services is located.”.

1           (2) CLERICAL AMENDMENT.—The table of sec-  
 2           tions for chapter 47 of title 18, United States Code,  
 3           is amended by adding at the end the following:

“1039. War profiteering and fraud.”.

4           (b) CIVIL FORFEITURE.—Section 981(a)(1)(C) of  
 5 title 18, United States Code, is amended by inserting  
 6 “1039,” after “1032,”.

7           (c) CRIMINAL FORFEITURE.—Section 982(a)(2)(B)  
 8 of title 18, United States Code, is amended by striking  
 9 “or 1030” and inserting “1030, or 1039”.

10          (d) TREATMENT UNDER MONEY LAUNDERING OF-  
 11 FENSE.—Section 1956(c)(7)(D) of title 18, United States  
 12 Code, is amended by inserting the following: “, section  
 13 1039 (relating to war profiteering and fraud)” after “liq-  
 14 uidating agent of financial institution),”.

15 **SEC. 102. SUSPENSION AND DEBARMENT OF UNETHICAL**  
 16 **CONTRACTORS.**

17          (a) IN GENERAL.—Not later than 90 days after the  
 18 date of enactment of this Act, the Federal Acquisition  
 19 Regulation issued pursuant to section 25 of the Office of  
 20 Federal Procurement Policy Act (41 U.S.C. 421) shall be  
 21 revised to provide that no prospective contractor shall be  
 22 considered to have a satisfactory record of integrity and  
 23 business ethics if it—

24           (1) has exhibited a pattern of overcharging the  
 25           Government under Federal contracts; or

1           (2) has exhibited a pattern of failing to comply  
2       with the law, including tax, labor and employment,  
3       environmental, antitrust, and consumer protection  
4       laws.

5       (b) EFFECTIVE DATE.—The revised regulation re-  
6       quired by this section shall apply with respect to all con-  
7       tracts for which solicitations are issued after the date that  
8       is 90 days after the date of the enactment of this Act.

9       **SEC. 103. DISCLOSURE OF AUDIT REPORTS.**

10       (a) DISCLOSURE OF INFORMATION TO CONGRESS.—

11           (1) IN GENERAL.—The head of each executive  
12       agency shall maintain a list of audit reports issued  
13       by the agency during the current and previous cal-  
14       endar years that—

15           (A) describe significant contractor costs  
16       that have been identified as unjustified, unsup-  
17       ported, questioned, or unreasonable under any  
18       contract, task or delivery order, or subcontract;  
19       or

20           (B) identify significant or substantial defi-  
21       ciencies in any business system of any con-  
22       tractor under any contract, task or delivery  
23       order, or subcontract.

24       (2) SUBMISSION OF INDIVIDUAL AUDITS.—The  
25       head of each executive agency shall provide, within

1 14 days of a request in writing by the chairman or  
 2 ranking member of a committee of jurisdiction, a  
 3 full and unredacted copy of—

4 (A) the current version of the list main-  
 5 tained pursuant to paragraph (1); or

6 (B) any audit or other report identified on  
 7 such list.

8 (b) PUBLICATION OF INFORMATION ON FEDERAL  
 9 CONTRACTOR PENALTIES AND VIOLATIONS.—

10 (1) IN GENERAL.—Not later than 180 days  
 11 after the date of the enactment of this Act, the Fed-  
 12 eral Procurement Data System shall be modified to  
 13 include—

14 (A) information on instances in which any  
 15 major contractor has been fined, paid penalties  
 16 or restitution, settled, plead guilty to, or had  
 17 judgments entered against it in connection with  
 18 allegations of improper conduct; and

19 (B) information on all sole source contract  
 20 awards in excess of \$2,000,000 entered into by  
 21 an executive agency.

22 (2) PUBLICLY AVAILABLE WEBSITE.—The in-  
 23 formation required by paragraph (1) shall be made  
 24 available through the publicly available website of  
 25 the Federal Procurement Data System.

1   **TITLE II—CONTRACT MATTERS**  
2           **Subtitle A—Competition in**  
3           **Contracting**

4   **SEC. 201. PROHIBITION ON AWARD OF MONOPOLY CON-**  
5           **TRACTS.**

6           (a)   CIVILIAN    AGENCY    CONTRACTS.—Section  
7   303H(d) of the Federal Property and Administrative  
8   Services Act of 1949 (41 U.S.C. 253h(d)) is amended by  
9   adding at the end the following new paragraph:

10       “(4)(A) No task or delivery order contract in an  
11   amount estimated to exceed \$100,000,000 (including all  
12   options) may be awarded to a single contractor unless the  
13   head of the agency determines in writing that—

14           “(i) because of the size, scope, or method of  
15   performance of the requirement, it would not be  
16   practical to award multiple task or delivery order  
17   contracts;

18           “(ii) the task orders expected under the con-  
19   tract are so integrally related that only a single con-  
20   tractor can reasonably perform the work; or

21           “(iii) for any other reason, it is necessary in the  
22   public interest to award the contract to a single con-  
23   tractor.

1 “(B) The head of the agency shall notify Congress  
2 within 30 days of any determination under subparagraph  
3 (A)(iii).”.

4 (b) DEFENSE CONTRACTS.—Section 2304a(d) of title  
5 10, United States Code, is amended by adding at the end  
6 the following new paragraph:

7 “(4)(A) No task or delivery order contract in an  
8 amount estimated to exceed \$100,000,000 (including all  
9 options) may be awarded to a single contractor unless the  
10 head of the agency determines in writing that—

11 “(i) because of the size, scope, or method of  
12 performance of the requirement, it would not be  
13 practical to award multiple task or delivery order  
14 contracts;

15 “(ii) the task orders expected under the con-  
16 tract are so integrally related that only a single con-  
17 tractor can reasonably perform the work; or

18 “(iii) for any other reason, it is necessary in the  
19 public interest to award the contract to a single con-  
20 tractor.

21 “(B) The head of the agency shall notify Congress  
22 within 30 days of any determination under subparagraph  
23 (A)(iii).”.



1 **SEC. 202. COMPETITION IN MULTIPLE AWARD CONTRACTS.**

2 (a) REGULATIONS REQUIRED.—Not later than 180  
3 days after the date of the enactment of this section, the  
4 Federal Acquisition Regulation shall be revised to require  
5 competition in the purchase of goods and services by each  
6 executive agency pursuant to multiple award contracts.

7 (b) CONTENT OF REGULATIONS.—(1) The regula-  
8 tions required by subsection (a) shall provide, at a min-  
9 imum, that each individual purchase of goods or services  
10 in excess of \$1,000,000 that is made under a multiple  
11 award contract shall be made on a competitive basis unless  
12 a contracting officer of the executive agency—

13 (A) waives the requirement on the basis of a  
14 determination that—

15 (i) one of the circumstances described in  
16 paragraphs (1) through (4) of section 303J(b)  
17 of the Federal Property and Administrative  
18 Services Act of 1949 (41 U.S.C. 253j(b)) ap-  
19 plies to such individual purchase; or

20 (ii) a statute expressly authorizes or re-  
21 quires that the purchase be made from a speci-  
22 fied source; and

23 (B) justifies the determination in writing.

24 (2) For purposes of this subsection, an individual  
25 purchase of goods or services is made on a competitive  
26 basis only if it is made pursuant to procedures that—

1           (A) require fair notice of the intent to make  
2           that purchase (including a description of the work to  
3           be performed and the basis on which the selection  
4           will be made) to be provided to all contractors offer-  
5           ing such goods or services under the multiple award  
6           contract; and

7           (B) afford all contractors responding to the no-  
8           tice a fair opportunity to make an offer and have  
9           that offer fairly considered by the official making  
10          the purchase.

11          (3) Notwithstanding paragraph (2), notice may be  
12          provided to fewer than all contractors offering such goods  
13          or services under a multiple award contract described in  
14          subsection (c)(2)(A) if notice is provided to as many con-  
15          tractors as practicable.

16          (4) A purchase may not be made pursuant to a notice  
17          that is provided to fewer than all contractors under para-  
18          graph (3) unless—

19                (A) offers were received from at least three  
20                qualified contractors; or

21                (B) a contracting officer of the executive agency  
22                determines in writing that no additional qualified  
23                contractors were able to be identified despite reason-  
24                able efforts to do so.

25          (c) DEFINITIONS.—In this section:

1           (1) The term “individual purchase” means a  
2 task order, delivery order, or other purchase.

3           (2) The term “multiple award contract”  
4 means—

5               (A) a contract that is entered into by the  
6 Administrator of General Services under the  
7 multiple award schedule program referred to in  
8 section 309(b)(3) of the Federal Property and  
9 Administrative Services Act of 1949 (41 U.S.C.  
10 259(b)(3));

11               (B) a multiple award task order contract  
12 that is entered into under the authority of sec-  
13 tions 2304a through 2304d of title 10, United  
14 States Code, or sections 303H through 303K of  
15 the Federal Property and Administrative Serv-  
16 ices Act of 1949 (41 U.S.C. 253h through  
17 253k); and

18               (C) any other indefinite delivery, indefinite  
19 quantity contract that is entered into by the  
20 head of an executive agency with two or more  
21 sources pursuant to the same solicitation.

22       (d) APPLICABILITY.—The revisions to the Federal  
23 Acquisition Regulation pursuant to subsection (a) shall  
24 take effect not later than 180 days after the date of the  
25 enactment of this Act, and shall apply to all individual

1 purchases of goods or services that are made under mul-  
 2 tiple award contracts on or after the effective date, with-  
 3 out regard to whether the multiple award contracts were  
 4 entered into before, on, or after such effective date.

5 (e) CONFORMING AMENDMENTS TO DEFENSE CON-  
 6 TRACT PROVISION.—Section 803 of the National Defense  
 7 Authorization Act for Fiscal Year 2002 (Public Law 107–  
 8 107; 10 U.S.C. 2304 note) is amended as follows:

9 (1) GOODS COVERED.—(A) The section heading  
 10 is amended by inserting “**GOODS OR**” before  
 11 “**SERVICES**”.

12 (B) Subsection (a) is amended by inserting  
 13 “goods and” before “services”.

14 (C) The following provisions are amended by in-  
 15 serting “goods or” before “services” each place it  
 16 appears:

17 (i) Paragraphs (1), (2), and (3) of sub-  
 18 section (b).

19 (ii) Subsection (d).

20 (D) Such section is amended by adding at the  
 21 end the following new subsection:

22 “(e) APPLICABILITY TO GOODS.—The Secretary shall  
 23 revise the regulations promulgated pursuant to subsection  
 24 (a) to cover purchases of goods by the Department of De-  
 25 fense pursuant to multiple award contracts. The revised

1 regulations shall take effect in final form not later than  
 2 180 days after the date of the enactment of this subsection  
 3 and shall apply to all individual purchases of goods that  
 4 are made under multiple award contracts on or after the  
 5 effective date, without regard to whether the multiple  
 6 award contracts were entered into before, on, or after such  
 7 effective date.”.

8 (f) PROTEST RIGHTS FOR CERTAIN AWARDS.—

9 (1) CIVILIAN AGENCY CONTRACTS.—Section  
 10 303J(d) of the Federal Property and Administrative  
 11 Services Act (41 U.S.C. 253j(d)) is amended by in-  
 12 serting “with a value of less than \$500,000” after  
 13 “task or delivery order”.

14 (2) DEFENSE CONTRACTS.—Section 2304c(d)  
 15 of title 10, United States Code, is amended by in-  
 16 serting “with a value of less than \$500,000” after  
 17 “task or delivery order”.

## 18 **Subtitle B—Contract Personnel** 19 **Matters**

### 20 **SEC. 211. CONTRACTOR CONFLICTS OF INTEREST.**

21 (a) PROHIBITION ON CONTRACTS RELATING TO IN-  
 22 HERENTLY GOVERNMENTAL FUNCTIONS.—The head of  
 23 an agency may not enter into a contract for the perform-  
 24 ance of any inherently governmental function.

1       (b) PROHIBITION ON CONTRACTS FOR CONTRACT  
2 OVERSIGHT.—

3           (1) PROHIBITION.—The head of an agency may  
4 not enter into a contract for the performance of ac-  
5 quisition functions closely associated with inherently  
6 governmental functions with any entity unless the  
7 head of the agency determines in writing that—

8           (A) neither that entity nor any related en-  
9 tity will be responsible for performing any of  
10 the work under a contract which the entity will  
11 help plan, evaluate, select a source, manage or  
12 oversee; and

13          (B) the agency has taken appropriate steps  
14 to prevent or mitigate any organizational con-  
15 flict of interest that may arise because the enti-  
16 ty—

17           (i) has a separate ongoing business  
18 relationship, such as a joint venture or  
19 contract, with any of the contractors to be  
20 overseen;

21           (ii) would be placed in a position to  
22 affect the value or performance of work it  
23 or any related entity is doing under any  
24 other Government contract;

1 (iii) has a reverse role with the con-  
2 tractor to be overseen under one or more  
3 separate Government contracts; or

4 (iv) has some other relationship with  
5 the contractor to be overseen that could  
6 reasonably appear to bias the contractor's  
7 judgment.

8 (2) RELATED ENTITY DEFINED.—In this sub-  
9 section, the term “related entity”, with respect to a  
10 contractor, means any subsidiary, parent, affiliate,  
11 joint venture, or other entity related to the con-  
12 tractor.

13 (c) DEFINITIONS.—In this section:

14 (1) The term “inherently governmental func-  
15 tions” has the meaning given to such term in part  
16 7.5 of the Federal Acquisition Regulation.

17 (2) The term “functions closely associated with  
18 governmental functions” means the functions de-  
19 scribed in section 7.503(d) of the Federal Acquisi-  
20 tion Regulation.

21 (3) The term “organizational conflict of inter-  
22 est” has the meaning given such term in part 9.5 of  
23 the Federal Acquisition Regulation.

1 (d) EFFECTIVE DATE AND APPLICABILITY.—This  
 2 section shall take effect on the date of the enactment of  
 3 this Act and shall apply to—

4 (1) contracts entered into on or after such date;

5 (2) any task or delivery order issued on or after  
 6 such date under a contract entered into before, on,  
 7 or after such date; and

8 (3) any decision on or after such date to exer-  
 9 cise an option or otherwise extend a contract for the  
 10 performance of a function relating to contract over-  
 11 sight regardless of whether such contract was en-  
 12 tered into before, on, or after such date.

13 **SEC. 212. ELIMINATION OF REVOLVING DOOR BETWEEN**  
 14 **FEDERAL PERSONNEL AND CONTRACTORS.**

15 (a) ELIMINATION OF LOOPHOLES ALLOWING  
 16 FORMER FEDERAL OFFICIALS TO ACCEPT COMPENSA-  
 17 TION FROM CONTRACTORS OR RELATED ENTITIES.—

18 (1) IN GENERAL.—Paragraph (1) of subsection  
 19 (d) of section 27 of the Office of Federal Procure-  
 20 ment Policy Act (41 U.S.C. 423) is amended—

21 (A) by striking “or consultant” and insert-  
 22 ing “consultant, lawyer, or lobbyist”;

23 (B) by striking “one year” and inserting  
 24 “two years”; and



1 (C) in subparagraph (C), by striking “per-  
2 sonally made for the Federal agency—” and in-  
3 serting “participated personally and substan-  
4 tially in—”.

5 (2) DEFINITION.—Paragraph (2) of such sub-  
6 section is amended to read as follows:

7 “(2) For purposes of paragraph (1), the term ‘con-  
8 tractor’ includes any division, affiliate, subsidiary, parent,  
9 joint venture, or other related entity of a contractor.”.

10 (b) PROHIBITION ON AWARD OF GOVERNMENT CON-  
11 TRACTS TO FORMER EMPLOYERS.—Such section is fur-  
12 ther amended by adding at the end the following new sub-  
13 section:

14 “(i) PROHIBITION ON INVOLVEMENT BY CERTAIN  
15 FORMER CONTRACTOR EMPLOYEES IN PROCURE-  
16 MENTS.—A former employee of a contractor who becomes  
17 an employee of the Federal Government shall not be per-  
18 sonally and substantially involved with any Federal agency  
19 procurement involving the employee’s former employer, in-  
20 cluding any division, affiliate, subsidiary, parent, joint  
21 venture, or other related entity of the former employer,  
22 for a period of two years beginning on the date on which  
23 the employee leaves the employment of the contractor un-  
24 less the designated agency ethics officer for the agency  
25 determines in writing that the government’s interest in the

1 former employee's participation in a particular procure-  
 2 ment outweighs any appearance of impropriety.”.

3 (c) REQUIREMENT FOR FEDERAL PROCUREMENT  
 4 OFFICERS TO DISCLOSE JOB OFFERS MADE TO REL-  
 5 ATIVES.—Subsection (c)(1) of such section is amended by  
 6 inserting after “that official” the following: “, or for a rel-  
 7 ative of that official (as defined in section 3110 of title  
 8 5, United States Code),”.

9 (d) ADDITIONAL CRIMINAL PENALTIES.—Paragraph  
 10 (1) of subsection (e) of such section is amended to read  
 11 as follows:

12 “(1) CRIMINAL PENALTIES.—Whoever engages  
 13 in conduct constituting a violation of—

14 “(A) subsection (a) or (b) for the purpose  
 15 of either—

16 “(i) exchanging the information cov-  
 17 ered by such subsection for anything of  
 18 value, or

19 “(ii) obtaining or giving anyone a  
 20 competitive advantage in the award of a  
 21 Federal agency procurement contract; or

22 “(B) subsection (c) or (d);

23 shall be imprisoned for not more than 5 years, fined  
 24 as provided under title 18, United States Code, or  
 25 both.”.

1 (e) REGULATIONS.—Such section is further amended  
 2 by adding at the end the following new subsection:

3 “(j) REGULATIONS.—The Director of the Office of  
 4 Government Ethics, in consultation with the Adminis-  
 5 trator, shall—

6 “(1) promulgate regulations to carry out and  
 7 ensure the enforcement of this section; and

8 “(2) monitor and investigate individual and  
 9 agency compliance with this section.”.

## 10 **TITLE III—OTHER PERSONNEL** 11 **MATTERS**

### 12 **SEC. 301. MINIMUM REQUIREMENTS FOR POLITICAL AP-** 13 **POINTEES HOLDING PUBLIC CONTRACTING** 14 **AND SAFETY POSITIONS.**

15 (a) IN GENERAL.—A position specified in subsection  
 16 (b) may not be held by any political appointee who does  
 17 not meet the requirements of subsection (c).

18 (b) SPECIFIED POSITIONS.—A position specified in  
 19 this subsection is any position as follows:

20 (1) A public contracting position.

21 (2) A public safety position.

22 (c) MINIMUM REQUIREMENTS.—An individual shall  
 23 not, with respect to any position, be considered to meet  
 24 the requirements of this subsection unless such indi-  
 25 vidual—

1           (1) has academic, management, and leadership  
2           credentials in one or more areas relevant to such po-  
3           sition;

4           (2) has a superior record of achievement in one  
5           or more areas relevant to such position;

6           (3) has training and expertise in one or more  
7           areas relevant to such position; and

8           (4) has not, within the 2-year period ending on  
9           the date of such individual's nomination for or ap-  
10          pointment to such position, been a lobbyist for any  
11          entity or other client that is subject to the authority  
12          of the agency within which, if appointed, such indi-  
13          vidual would serve.

14          (d) POLITICAL APPOINTEE.—For purposes of this  
15          section, the term “political appointee” means any indi-  
16          vidual who—

17               (1) is employed in a position listed in sections  
18               5312 through 5316 of title 5, United States Code  
19               (relating to the Executive Schedule);

20               (2) is a limited term appointee, limited emer-  
21               gency appointee, or noncareer appointee in the Sen-  
22               ior Executive Service; or

23               (3) is employed in the executive branch of the  
24               Government in a position which has been excepted  
25               from the competitive service by reason of its policy-

1 determining, policy-making, or policy-advocating  
2 character.

3 (e) PUBLIC CONTRACTING POSITION.—For purposes  
4 of this section, the term “public contracting position”  
5 means the following:

6 (1) The Administrator for Federal Procurement  
7 Policy.

8 (2) The Administrator of the General Services  
9 Administration.

10 (3) The Chief Acquisition Officer of any execu-  
11 tive agency, as appointed or designated pursuant to  
12 section 16 of the Office of Federal Procurement Pol-  
13 icy Act (41 U.S.C. 414).

14 (4) The Under Secretary of Defense for Acqui-  
15 sition, Technology, and Logistics.

16 (5) Any position (not otherwise identified under  
17 any of the preceding provisions of this subsection) a  
18 primary function of which involves government pro-  
19 curement and procurement policy, as identified by  
20 the head of each employing agency in consultation  
21 with the Office of Personnel Management.

22 (f) PUBLIC SAFETY POSITION.—For purposes of this  
23 section, the term “public safety position” means the fol-  
24 lowing:

1           (1) The Under Secretary for Emergency Pre-  
2       paredness and Response, Department of Homeland  
3       Security.

4           (2) The Director of the Federal Emergency  
5       Management Agency, Department of Homeland Se-  
6       curity.

7           (3) Each regional director of the Federal Emer-  
8       gency Management Agency, Department of Home-  
9       land Security.

10          (4) The Recovery Division Director of the Fed-  
11       eral Emergency Management Agency, Department  
12       of Homeland Security.

13          (5) The Assistant Secretary for Immigration  
14       and Customs Enforcement, Department of Home-  
15       land Security.

16          (6) The Assistant Secretary for Public Health  
17       Emergency Preparedness, Department of Health  
18       and Human Services.

19          (7) The Assistant Administrator for Solid  
20       Waste and Emergency Response, Environmental  
21       Protection Agency.

22          (8) Any position (not otherwise identified under  
23       any of the preceding provisions of this subsection) a  
24       primary function of which involves responding to a  
25       direct threat to life or property or a hazard to

1 health, as identified by the head of each employing  
2 agency in consultation with the Office of Personnel  
3 Management.

4 (g) PUBLICATION OF POSITIONS.—Beginning not  
5 later than 30 days after the date of the enactment of this  
6 Act, the head of each agency shall maintain on such agen-  
7 cy’s public website a current list of all public contracting  
8 positions and public safety positions within such agency.

9 (h) COORDINATION WITH OTHER REQUIREMENTS.—  
10 The requirements set forth in subsection (c) shall be in  
11 addition to, and not in lieu of, any requirements that  
12 might otherwise apply with respect to any particular posi-  
13 tion.

14 (i) DEFINITIONS.—In this section:

15 (1) The term “agency” means an Executive  
16 agency (as defined by section 105 of title 5, United  
17 States Code).

18 (2) The terms “limited term appointee”, “lim-  
19 ited emergency appointee”, and “noncareer ap-  
20 pointee” have the meanings given such terms in sec-  
21 tion 3132 of title 5, United States Code.

22 (3) The term “Senior Executive Service” has  
23 the meaning given such term by section 2101a of  
24 title 5, United States Code.

1           (4) The term “competitive service” has the  
 2           meaning given such term by section 2102 of title 5,  
 3           United States Code.

4           (5) The terms “lobbyist” and “client” have the  
 5           respective meanings given them by section 3 of the  
 6           Lobbying Disclosure Act of 1995 (2 U.S.C. 1602).

7           (j) CONFORMING AMENDMENT.—Section 16(a) of the  
 8           Office of Federal Procurement Policy Act (41 U.S.C.  
 9           414(a)) is amended by striking “non-career employee as”.

10   **SEC. 302. PROTECTION OF CERTAIN DISCLOSURES OF IN-**  
 11           **FORMATION BY FEDERAL EMPLOYEES.**

12           (a) CLARIFICATION OF DISCLOSURES COVERED.—  
 13           Section 2302(b)(8) of title 5, United States Code, is  
 14           amended—

15                   (1) in subparagraph (A)—

16                           (A) by striking “which the employee or ap-  
 17                           plicant reasonably believes evidences” and in-  
 18                           serting “, without restriction to time, place,  
 19                           form, motive, context, or prior disclosure made  
 20                           to any person by an employee or applicant, in-  
 21                           cluding a disclosure made in the ordinary  
 22                           course of an employee’s duties, that the em-  
 23                           ployee or applicant reasonably believes is evi-  
 24                           dence of”; and



1 (B) in clause (i), by striking “a violation”  
2 and inserting “any violation”;

3 (2) in subparagraph (B)—

4 (A) by striking “which the employee or ap-  
5 plicant reasonably believes evidences” and in-  
6 serting “, without restriction to time, place,  
7 form, motive, context, or prior disclosure made  
8 to any person by an employee or applicant, in-  
9 cluding a disclosure made in the ordinary  
10 course of an employee’s duties, of information  
11 that the employee or applicant reasonably be-  
12 lieves is evidence of”; and

13 (B) in clause (i), by striking “a violation”  
14 and inserting “any violation (other than a viola-  
15 tion of this section)”; and

16 (3) by adding at the end the following:

17 “(C) any disclosure that—

18 “(i) is made by an employee or appli-  
19 cant of information required by law or Ex-  
20 ecutive order to be kept secret in the inter-  
21 est of national defense or the conduct of  
22 foreign affairs that the employee or appli-  
23 cant reasonably believes is direct and spe-  
24 cific evidence of—

1 “(I) any violation of any law,  
2 rule, or regulation;

3 “(II) gross mismanagement, a  
4 gross waste of funds, an abuse of au-  
5 thority, or a substantial and specific  
6 danger to public health or safety; or

7 “(III) a false statement to Con-  
8 gress on an issue of material fact; and  
9 “(ii) is made to—

10 “(I) a member of a committee of  
11 Congress;

12 “(II) any other Member of Con-  
13 gress; or

14 “(III) an employee of Congress  
15 who has the appropriate security  
16 clearance and is authorized to receive  
17 information of the type disclosed.”.

18 (b) COVERED DISCLOSURES.—Section 2302(a)(2) of  
19 title 5, United States Code, is amended—

20 (1) in subparagraph (B)(ii), by striking “and”  
21 at the end;

22 (2) in subparagraph (C)(iii), by striking the pe-  
23 riod at the end and inserting “; and”; and

24 (3) by adding at the end the following:

1           “(D) ‘disclosure’ means a formal or informal  
 2           communication or transmission, but does not include  
 3           a communication concerning policy decisions that  
 4           lawfully exercise discretionary authority unless the  
 5           employee providing the disclosure reasonably believes  
 6           that the disclosure evidences—

7                   “(i) any violation of any law, rule, or regu-  
 8                   lation; or

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

12       (c) REBUTTABLE PRESUMPTION.—Section 2302(b)  
 13 of title 5, United States Code, is amended by amending  
 14 the matter following paragraph (12) to read as follows:  
 15 “This subsection shall not be construed to authorize the  
 16 withholding of information from Congress or the taking  
 17 of any personnel action against an employee who discloses  
 18 information to Congress. For purposes of paragraph (8),  
 19 any presumption relating to the performance of a duty by  
 20 an employee who has authority to take, direct others to  
 21 take, recommend, or approve any personnel action may be  
 22 rebutted by substantial evidence. For purposes of para-  
 23 graph (8), a determination as to whether an employee or  
 24 applicant reasonably believes that they have disclosed in-  
 25 formation that evidences any violation of law, rule, regula-

1 tion, gross mismanagement, a gross waste of funds, an  
 2 abuse of authority, or a substantial and specific danger  
 3 to public health or safety shall be made by determining  
 4 whether a disinterested observer with knowledge of the es-  
 5 sential facts known to and readily ascertainable by the em-  
 6 ployee would reasonably conclude that the actions of the  
 7 Government evidence such violations, mismanagement,  
 8 waste, abuse, or danger.”.

9 (d) NONDISCLOSURE POLICIES, FORMS, AND AGREE-  
 10 MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-  
 11 VESTIGATIONS.—

12 (1) PERSONNEL ACTION.—Section  
 13 2302(a)(2)(A) of title 5, United States Code, is  
 14 amended—

15 (A) in clause (x), by striking “and” after  
 16 the semicolon; and

17 (B) by redesignating clause (xi) as clause  
 18 (xiv) and inserting after clause (x) the fol-  
 19 lowing:

20 “(xi) the implementation or enforce-  
 21 ment of any nondisclosure policy, form, or  
 22 agreement;

23 “(xii) a suspension, revocation, or  
 24 other determination relating to a security

clearance or any other access determination by a covered agency;

“(xiii) an investigation, other than any ministerial or nondiscretionary fact finding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section; and”.

(2) PROHIBITED PERSONNEL PRACTICE.—Section 2302(b) of title 5, United States Code, is amended—

(A) in paragraph (11), by striking “or” at the end;

(B) in paragraph (12), by striking the period and inserting a semicolon; and

(C) by inserting after paragraph (12) the following:

“(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 Executive Order No. 12958; section 7211 (governing disclosures to Congress); section 1034 of title 10

1 (governing disclosure to Congress by members of the  
2 military); section 2302(b)(8) (governing disclosures  
3 of illegality, waste, fraud, abuse, or public health or  
4 safety threats); the Intelligence Identities Protection  
5 Act of 1982 (50 U.S.C. 421 et seq.) (governing dis-  
6 closures that could expose confidential Government  
7 agents); and the statutes which protect against dis-  
8 closures that could compromise national security, in-  
9 cluding sections 641, 793, 794, 798, and 952 of title  
10 18 and section 4(b) of the Subversive Activities Con-  
11 trol Act of 1950 (50 U.S.C. 783(b)). The defini-  
12 tions, requirements, obligations, rights, sanctions,  
13 and liabilities created by such Executive order and  
14 such statutory provisions are incorporated into this  
15 agreement and are controlling; or

16 “(14) conduct, or cause to be conducted, an in-  
17 vestigation, other than any ministerial or nondis-  
18 cretionary fact finding activities necessary for the  
19 agency to perform its mission, of an employee or ap-  
20 plicant for employment because of any activity pro-  
21 tected under this section.”.

22 (3) BOARD AND COURT REVIEW OF ACTIONS  
23 RELATING TO SECURITY CLEARANCES.—

1 (A) IN GENERAL.—Chapter 77 of title 5,  
2 United States Code, is amended by inserting  
3 after section 7702 the following:

4 **“§ 7702a. Actions relating to security clearances**

5 “(a) In any appeal relating to the suspension, revoca-  
6 tion, or other determination relating to a security clear-  
7 ance or access determination, the Merit Systems Protec-  
8 tion Board or any reviewing court—

9 “(1) shall determine whether paragraph (8) or  
10 (9) of section 2302(b) was violated;

11 “(2) may not order the President or the des-  
12 ignee of the President to restore a security clearance  
13 or otherwise reverse a determination of clearance  
14 status or reverse an access determination; and

15 “(3) subject to paragraph (2), may issue declar-  
16 atory relief and any other appropriate relief.

17 “(b)(1) If, in any final judgment, the Board or court  
18 declares that any suspension, revocation, or other deter-  
19 mination with regards to a security clearance or access  
20 determination was made in violation of paragraph (8) or  
21 (9) of section 2302(b), the affected agency shall conduct  
22 a review of that suspension, revocation, access determina-  
23 tion, or other determination, giving great weight to the  
24 Board or court judgment.

1       “(2) Not later than 30 days after any Board or court  
 2 judgment declaring that a security clearance suspension,  
 3 revocation, access determination, or other determination  
 4 was made in violation of paragraph (8) or (9) of section  
 5 2302(b), the affected agency shall issue an unclassified re-  
 6 port to the congressional committees of jurisdiction (with  
 7 a classified annex if necessary), detailing the cir-  
 8 cumstances of the agency’s security clearance suspension,  
 9 revocation, other determination, or access determination.  
 10 A report under this paragraph shall include any proposed  
 11 agency action with regards to the security clearance or ac-  
 12 cess determination.

13       “(c) An allegation that a security clearance or access  
 14 determination was revoked or suspended in retaliation for  
 15 a protected disclosure shall receive expedited review by the  
 16 Office of Special Counsel, the Merit Systems Protection  
 17 Board, and any reviewing court.

18       “(d) For purposes of this section, corrective action  
 19 may not be ordered if the agency demonstrates by a pre-  
 20 ponderance of the evidence that it would have taken the  
 21 same personnel action in the absence of such disclosure.”.

22                       (B) TECHNICAL AND CONFORMING AMEND-  
 23                       MENT.—The table of sections for chapter 77 of  
 24                       title 5, United States Code, is amended by in-



1           serting after the item relating to section 7702  
2           the following:

“7702a. Actions relating to security clearances.”.

3           (e) EXCLUSION OF AGENCIES BY THE PRESIDENT.—  
4 Section 2302(a)(2)(C) of title 5, United States Code, is  
5 amended by striking clause (ii) and inserting the following:

6                   “(ii)(I) the Federal Bureau of Investiga-  
7                   tion, the Office of the Director of National In-  
8                   telligence, the Central Intelligence Agency, the  
9                   Defense Intelligence Agency, the National  
10                  Geospatial-Intelligence Agency, and the Na-  
11                  tional Security Agency; and

12                   “(II) as determined by the President, any  
13                   executive agency or unit thereof the principal  
14                   function of which is the conduct of foreign in-  
15                   telligence or counterintelligence activities, if the  
16                   determination (as that determination relates to  
17                   a personnel action) is made before that per-  
18                   sonnel action; or”.

19           (f) ATTORNEY FEES.—Section 1204(m)(1) of title 5,  
20 United States Code, is amended by striking “agency in-  
21 volved” and inserting “agency where the prevailing party  
22 is employed or has applied for employment”.

23           (g) DISCIPLINARY ACTION.—Section 1215(a)(3) of  
24 title 5, United States Code, is amended to read as follows:

1           “(3)(A) A final order of the Board may im-  
2       pose—

3           “(i) disciplinary action consisting of re-  
4       moval, reduction in grade, debarment from  
5       Federal employment for a period not to exceed  
6       5 years, suspension, or reprimand;

7           “(ii) an assessment of a civil penalty not to  
8       exceed \$1,000; or

9           “(iii) any combination of disciplinary ac-  
10      tions described under clause (i) and an assess-  
11      ment described under clause (ii).

12          “(B) In any case in which the Board finds that  
13      an employee has committed a prohibited personnel  
14      practice under paragraph (8) or (9) of section  
15      2302(b), the Board shall impose disciplinary action  
16      if the Board finds that the activity protected under  
17      paragraph (8) or (9) of section 2302(b) was a sig-  
18      nificant motivating factor, even if other factors also  
19      motivated the decision, for the employee’s decision to  
20      take, fail to take, or threaten to take or fail to take  
21      a personnel action, unless that employee dem-  
22      onstrates, by preponderance of evidence, that the  
23      employee would have taken, failed to take, or threat-  
24      ened to take or fail to take the same personnel ac-  
25      tion, in the absence of such protected activity.”.

1 (h) SPECIAL COUNSEL AMICUS CURIAE APPEAR-  
 2 ANCE.—Section 1212 of title 5, United States Code, is  
 3 amended by adding at the end the following:

4 “(h)(1) The Special Counsel is authorized to appear  
 5 as amicus curiae in any action brought in a court of the  
 6 United States related to any civil action brought in con-  
 7 nection with section 2302(b) (8) or (9), or subchapter III  
 8 of chapter 73, or as otherwise authorized by law. In any  
 9 such action, the Special Counsel is authorized to present  
 10 the views of the Special Counsel with respect to compli-  
 11 ance with section 2302(b) (8) or (9) or subchapter III of  
 12 chapter 77 and the impact court decisions would have on  
 13 the enforcement of such provisions of law.

14 “(2) A court of the United States shall grant the ap-  
 15 plication of the Special Counsel to appear in any such ac-  
 16 tion for the purposes described in subsection (a).”.

17 (i) JUDICIAL REVIEW.—

18 (1) IN GENERAL.—Section 7703(b)(1) of title  
 19 5, United States Code, is amended to read as fol-  
 20 lows:

21 “(b)(1)(A) Except as provided in subparagraph (B)  
 22 and paragraph (2), a petition to review a final order or  
 23 final decision of the Board shall be filed in the United  
 24 States Court of Appeals for the Federal Circuit. Notwith-  
 25 standing any other provision of law, any petition for re-

1 view must be filed within 60 days after the date the peti-  
 2 tioner received notice of the final order or decision of the  
 3 Board.

4 “(B) During the 5-year period beginning on the effec-  
 5 tive date of this subsection, a petition to review a final  
 6 order or final decision of the Board in a case alleging a  
 7 violation of paragraph (8) or (9) of section 2302(b) shall  
 8 be filed in the United States Court of Appeals for the Fed-  
 9 eral Circuit or any court of appeals of competent jurisdic-  
 10 tion as provided under subsection (b)(2).”.

11 (2) REVIEW OBTAINED BY OFFICE OF PER-  
 12 SONNEL MANAGEMENT.—Section 7703(d) of title 5,  
 13 United States Code, is amended to read as follows:

14 “(d)(1) Except as provided under paragraph (2), this  
 15 paragraph shall apply to any review obtained by the Direc-  
 16 tor of the Office of Personnel Management. The Director  
 17 of the Office of Personnel Management may obtain review  
 18 of any final order or decision of the Board by filing, within  
 19 60 days after the date the Director received notice of the  
 20 final order or decision of the Board, a petition for judicial  
 21 review in the United States Court of Appeals for the Fed-  
 22 eral Circuit if the Director determines, in his discretion,  
 23 that the Board erred in interpreting a civil service law,  
 24 rule, or regulation affecting personnel management and  
 25 that the Board’s decision will have a substantial impact

1 on a civil service law, rule, regulation, or policy directive.  
2 If the Director did not intervene in a matter before the  
3 Board, the Director may not petition for review of a Board  
4 decision under this section unless the Director first peti-  
5 tions the Board for a reconsideration of its decision, and  
6 such petition is denied. In addition to the named respond-  
7 ent, the Board and all other parties to the proceedings  
8 before the Board shall have the right to appear in the pro-  
9 ceeding before the Court of Appeals. The granting of the  
10 petition for judicial review shall be at the discretion of the  
11 Court of Appeals.

12 “(2) During the 5-year period beginning on the effec-  
13 tive date of this subsection, this paragraph shall apply to  
14 any review relating to paragraph (8) or (9) of section  
15 2302(b) obtained by the Director of the Office of Per-  
16 sonnel Management. The Director of the Office of Per-  
17 sonnel Management may obtain review of any final order  
18 or decision of the Board by filing, within 60 days after  
19 the date the Director received notice of the final order or  
20 decision of the Board, a petition for judicial review in the  
21 United States Court of Appeals for the Federal Circuit  
22 or any court of appeals of competent jurisdiction as pro-  
23 vided under subsection (b)(2) if the Director determines,  
24 in his discretion, that the Board erred in interpreting  
25 paragraph (8) or (9) of section 2302(b). If the Director

1 did not intervene in a matter before the Board, the Direc-  
 2 tor may not petition for review of a Board decision under  
 3 this section unless the Director first petitions the Board  
 4 for a reconsideration of its decision, and such petition is  
 5 denied. In addition to the named respondent, the Board  
 6 and all other parties to the proceedings before the Board  
 7 shall have the right to appear in the proceeding before  
 8 the court of appeals. The granting of the petition for judi-  
 9 cial review shall be at the discretion of the Court of Ap-  
 10 peals.”.

11 (j) NONDISCLOSURE POLICIES, FORMS, AND AGREE-  
 12 MENTS.—

13 (1) IN GENERAL.—

14 (A) REQUIREMENT.—Each agreement in  
 15 Standard Forms 312 and 4414 of the Govern-  
 16 ment and any other nondisclosure policy, form,  
 17 or agreement of the Government shall contain  
 18 the following statement: “These restrictions are  
 19 consistent with and do not supersede, conflict  
 20 with, or otherwise alter the employee obliga-  
 21 tions, rights, or liabilities created by Executive  
 22 Order No. 12958; section 7211 of title 5,  
 23 United States Code (governing disclosures to  
 24 Congress); section 1034 of title 10, United  
 25 States Code (governing disclosure to Congress

1 by members of the military); section 2302(b)(8)  
2 of title 5, United States Code (governing disclo-  
3 sures of illegality, waste, fraud, abuse or public  
4 health or safety threats); the Intelligence Iden-  
5 tities Protection Act of 1982 (50 U.S.C. 421 et  
6 seq.) (governing disclosures that could expose  
7 confidential Government agents); and the stat-  
8 utes which protect against disclosure that may  
9 compromise the national security, including sec-  
10 tions 641, 793, 794, 798, and 952 of title 18,  
11 United States Code, and section 4(b) of the  
12 Subversive Activities Act of 1950 (50 U.S.C.  
13 783(b)). The definitions, requirements, obliga-  
14 tions, rights, sanctions, and liabilities created  
15 by such Executive order and such statutory  
16 provisions are incorporated into this agreement  
17 and are controlling.”.

18 (B) ENFORCEABILITY.—Any nondisclosure  
19 policy, form, or agreement described under sub-  
20 paragraph (A) that does not contain the state-  
21 ment required under subparagraph (A) may not  
22 be implemented or enforced to the extent such  
23 policy, form, or agreement is inconsistent with  
24 that statement.

1           (2) PERSONS OTHER THAN GOVERNMENT EM-  
2       PLOYEES.—Notwithstanding paragraph (1), a non-  
3       disclosure policy, form, or agreement that is to be  
4       executed by a person connected with the conduct of  
5       an intelligence or intelligence-related activity, other  
6       than an employee or officer of the United States  
7       Government, may contain provisions appropriate to  
8       the particular activity for which such document is to  
9       be used. Such form or agreement shall, at a min-  
10      imum, require that the person will not disclose any  
11      classified information received in the course of such  
12      activity unless specifically authorized to do so by the  
13      United States Government. Such nondisclosure  
14      forms shall also make it clear that such forms do  
15      not bar disclosures to Congress or to an authorized  
16      official of an executive agency or the Department of  
17      Justice that are essential to reporting a substantial  
18      violation of law.

19      (k) CLARIFICATION OF WHISTLEBLOWER RIGHTS  
20      FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section  
21      214(c) of the Homeland Security Act of 2002 (6 U.S.C.  
22      133(c)) is amended by adding at the end the following:  
23      “For purposes of this section a permissible use of inde-  
24      pendently obtained information includes the disclosure of



1 such information under section 2302(b)(8) of title 5,  
 2 United States Code.”.

3 (l) ADVISING EMPLOYEES OF RIGHTS.—Section  
 4 2302(c) of title 5, United States Code, is amended by in-  
 5 serting “, including how to make a lawful disclosure of  
 6 information that is specifically required by law or Execu-  
 7 tive order to be kept secret in the interest of national de-  
 8 fense or the conduct of foreign affairs to the Special Coun-  
 9 sel, the Inspector General of an agency, Congress, or other  
 10 agency employee designated to receive such disclosures”  
 11 after “chapter 12 of this title”.

12 (m) SCOPE OF DUE PROCESS.—

13 (1) SPECIAL COUNSEL.—Section  
 14 1214(b)(4)(B)(ii) of title 5, United States Code, is  
 15 amended by inserting “, after a finding that a pro-  
 16 tected disclosure was a contributing factor,” after  
 17 “ordered if”.

18 (2) INDIVIDUAL ACTION.—Section 1221(e)(2)  
 19 of title 5, United States Code, is amended by insert-  
 20 ing “, after a finding that a protected disclosure was  
 21 a contributing factor,” after “ordered if”.

22 (n) EFFECTIVE DATE.—This section and the amend-  
 23 ment made by this section shall take effect 30 days after  
 24 the date of the enactment of this Act.

