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[Report No. 110-232]

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 11, 2007

Mr. AKAKA (for himself, Ms. COLLINS, Mr. GRASSLEY, Mr. LEVIN, Mr. LIEBERMAN, Mr. LEAHY, Mr. VOINOVICH, Mr. CARPER, Mr. DURBIN, Mr. PRYOR, Mr. LAUTENBERG, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

NOVEMBER 16, 2007

Reported by Mr. LIEBERMAN, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

A BILL

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclo-

sure protections, provide certain authority for the Special Counsel, 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. PROTECTION OF CERTAIN DISCLOSURES OF IN-**
4 **FORMATION BY FEDERAL EMPLOYEES.**

5 (a) **SHORT TITLE.**—This Act may be cited as the
6 “Federal Employee Protection of Disclosures Act”.

7 (b) **CLARIFICATION OF DISCLOSURES COVERED.**—
8 Section 2302(b)(8) of title 5, United States Code, is
9 amended—

10 (1) in subparagraph (A)—

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

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

22 (2) in subparagraph (B)—

23 (A) by striking “which the employee or ap-
24 plicant reasonably believes evidences” and in-

1 serting “, without restriction to time, place,
 2 form, motive, context, or prior disclosure made
 3 to any person by an employee or applicant, in-
 4 cluding a disclosure made in the ordinary
 5 course of an employee’s duties, of information
 6 that the employee or applicant reasonably be-
 7 lieves is evidence of”; and

8 (B) in clause (i), by striking “a violation”
 9 and inserting “any violation (other than a viola-
 10 tion of this section)”;.

11 (e) COVERED DISCLOSURES.—Section 2302(a)(2) of
 12 title 5, United States Code, is amended—

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

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

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

18 “(D) ‘disclosure’ means a formal or informal
 19 communication or transmission, but does not include
 20 a communication concerning policy decisions that
 21 lawfully exercise discretionary authority unless the
 22 employee providing the disclosure reasonably believes
 23 that the disclosure evidences—

24 “(i) any violation of any law, rule, or regu-
 25 lation; or

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

4 (d) REBUTTABLE PRESUMPTION.—Section 2302(b)
5 of title 5, United States Code, is amended by amending
6 the matter following paragraph (12) to read as follows:
7 “This subsection shall not be construed to authorize the
8 withholding of information from Congress or the taking
9 of any personnel action against an employee who discloses
10 information to Congress, except that an employee or appli-
11 cant may be disciplined for the disclosure of information
12 described in paragraph (8)(C)(i) to a Member or employee
13 of Congress who is not authorized to receive such informa-
14 tion. For purposes of paragraph (8), a determination as
15 to whether an employee or applicant reasonably believes
16 that they have disclosed information that evidences any
17 violation of law, rule, regulation, gross mismanagement,
18 a gross waste of funds, an abuse of authority, or a sub-
19 stantial and specific danger to public health or safety shall
20 be made by determining whether a disinterested observer
21 with knowledge of the essential facts known to and readily
22 ascertainable by the employee could reasonably conclude
23 that the actions of the Government evidence such viola-
24 tions, mismanagement, waste, abuse, or danger.”.

1 (e) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
2 MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-
3 VESTIGATIONS.—

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

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

9 (B) by redesignating clause (xi) as clause
10 (xiv) and inserting after clause (x) the fol-
11 lowing:

12 “(xi) the implementation or enforce-
13 ment of any nondisclosure policy, form, or
14 agreement;

15 “(xii) a suspension, revocation, or
16 other determination relating to a security
17 clearance or any other access determina-
18 tion by a covered agency;

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

1 (2) PROHIBITED PERSONNEL PRACTICE.—Sec-
2 tion 2302(b) of title 5, United States Code, is
3 amended—

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

6 (B) in paragraph (12), by striking the pe-
7 riod and inserting a semicolon; and

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

10 “~~(13)~~ implement or enforce any nondisclosure
11 policy, form, or agreement, if such policy, form, or
12 agreement does not contain the following statement:
13 “These provisions are consistent with and do not su-
14 persede, conflict with, or otherwise alter the em-
15 ployee obligations, rights, or liabilities created by
16 Executive Order No. 12958; section 7211 of title 5,
17 United States Code (governing disclosures to Con-
18 gress); section 1034 of title 10, United States Code
19 (governing disclosure to Congress by members of the
20 military); section 2302(b)(8) of title 5, United
21 States Code (governing disclosures of illegality,
22 waste, fraud, abuse, or public health or safety
23 threats); the Intelligence Identities Protection Act of
24 1982 (50 U.S.C. 421 et seq.) (governing disclosures
25 that could expose confidential Government agents);

1 and the statutes which protect against disclosures
 2 that could compromise national security, including
 3 sections 641, 793, 794, 798, and 952 of title 18,
 4 United States Code, and section 4(b) of the Subver-
 5 sive Activities Control Act of 1950 (50 U.S.C.
 6 783(b)). The definitions, requirements, obligations,
 7 rights, sanctions, and liabilities created by such Ex-
 8 ecutive order and such statutory provisions are in-
 9 corporated into this agreement and are controlling²;
 10 or

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

17 (3) BOARD AND COURT REVIEW OF ACTIONS
 18 RELATING TO SECURITY CLEARANCES.—

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

22 **“§ 7702a. Actions relating to security clearances**

23 “(a) In any appeal relating to the suspension, revoca-
 24 tion, or other determination relating to a security clear-

1 ance or access determination, the Merit Systems Protec-
2 tion Board or any reviewing court—

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

5 “(2) may not order the President or the des-
6 ignee of the President to restore a security clearance
7 or otherwise reverse a determination of clearance
8 status or reverse an access determination; and

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

11 “(b)(1) If, in any final judgment, the Board or court
12 declares that any suspension, revocation, or other deter-
13 mination with regard to a security clearance or access de-
14 termination was made in violation of paragraph (8) or (9)
15 of section 2302(b), the affected agency shall conduct a re-
16 view of that suspension, revocation, access determination,
17 or other determination, giving great weight to the Board
18 or court judgment.

19 “(2) Not later than 30 days after any Board or court
20 judgment declaring that a security clearance suspension,
21 revocation, access determination, or other determination
22 was made in violation of paragraph (8) or (9) of section
23 2302(b), the affected agency shall issue an unclassified re-
24 port to the congressional committees of jurisdiction (with
25 a classified annex if necessary), detailing the cir-

1 circumstances of the agency's security clearance suspension;
 2 revocation, other determination, or access determination.
 3 A report under this paragraph shall include any proposed
 4 agency action with regard to the security clearance or ac-
 5 cess determination.

6 “(e) An allegation that a security clearance or access
 7 determination was revoked or suspended in retaliation for
 8 a protected disclosure shall receive expedited review by the
 9 Office of Special Counsel, the Merit Systems Protection
 10 Board, and any reviewing court.

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

15 (B) TECHNICAL AND CONFORMING AMEND-
 16 MENT.—The table of sections for chapter 77 of
 17 title 5, United States Code, is amended by in-
 18 serting after the item relating to section 7702
 19 the following:

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

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

23 “(ii)(I) the Federal Bureau of Investiga-
 24 tion, the Central Intelligence Agency, the De-
 25 fense Intelligence Agency, the National Imagery

1 and Mapping Agency, the National Security
2 Agency; and

3 “(H) as determined by the President, any
4 executive agency or unit thereof the principal
5 function of which is the conduct of foreign in-
6 telligence or counterintelligence activities, if the
7 determination (as that determination relates to
8 a personnel action) is made before that per-
9 sonnel action; or”.

10 (g) ATTORNEY FEES.—Section 1204(m)(1) of title 5,
11 United States Code, is amended by striking “agency in-
12 volved” and inserting “agency where the prevailing party
13 is employed or has applied for employment”.

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

16 “(3)(A) A final order of the Board may im-
17 pose—

18 “(i) disciplinary action consisting of re-
19 moval, reduction in grade, debarment from
20 Federal employment for a period not to exceed
21 5 years, suspension, or reprimand;

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

1 “(iii) any combination of disciplinary ac-
2 tions described under clause (i) and an assess-
3 ment described under clause (ii).

4 “(B) In any case in which the Board finds that
5 an employee has committed a prohibited personnel
6 practice under paragraph (8) or (9) of section
7 2302(b), the Board shall impose disciplinary action
8 if the Board finds that the activity protected under
9 paragraph (8) or (9) of section 2302(b) was a sig-
10 nificant motivating factor, even if other factors also
11 motivated the decision, for the employee’s decision to
12 take, fail to take, or threaten to take or fail to take
13 a personnel action, unless that employee dem-
14 onstrates, by preponderance of evidence, that the
15 employee would have taken, failed to take, or threat-
16 ened to take or fail to take the same personnel ac-
17 tion, in the absence of such protected activity.”.

18 (i) SPECIAL COUNSEL AMICUS CURIAE APPEAR-
19 ANCE.—Section 1212 of title 5, United States Code, is
20 amended by adding at the end the following:

21 “(h)(1) The Special Counsel is authorized to appear
22 as amicus curiae in any action brought in a court of the
23 United States related to any civil action brought in con-
24 nection with section 2302(b) (8) or (9), or subchapter III
25 of chapter 73, or as otherwise authorized by law. In any

1 such action, the Special Counsel is authorized to present
 2 the views of the Special Counsel with respect to compli-
 3 ance with section 2302(b) (8) or (9) or subchapter III of
 4 chapter 73 and the impact court decisions would have on
 5 the enforcement of such provisions of law.

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

9 (j) JUDICIAL REVIEW.—

10 (1) IN GENERAL.—Section 7703(b)(1) of title
 11 5, United States Code, is amended to read as fol-
 12 lows:

13 “(b)(1)(A) Except as provided in subparagraph (B)
 14 and paragraph (2), a petition to review a final order or
 15 final decision of the Board shall be filed in the United
 16 States Court of Appeals for the Federal Circuit. Notwith-
 17 standing any other provision of law, any petition for re-
 18 view must be filed within 60 days after the date the peti-
 19 tioner received notice of the final order or decision of the
 20 Board.

21 “(B) During the 5-year period beginning on the effec-
 22 tive date of the Federal Employee Protection of Disclo-
 23 sures Act, a petition to review a final order or final deci-
 24 sion of the Board in a case alleging a violation of para-
 25 graph (8) or (9) of section 2302(b) shall be filed in the

1 United States Court of Appeals for the Federal Circuit
2 or any court of appeals of competent jurisdiction as pro-
3 vided under subsection (b)(2).”.

4 (2) REVIEW OBTAINED BY OFFICE OF PER-
5 SONNEL MANAGEMENT.—Section 7703(d) of title 5,
6 United States Code, is amended to read as follows:
7 “(d)(1) Except as provided under paragraph (2), this
8 paragraph shall apply to any review obtained by the Direc-
9 tor of the Office of Personnel Management. The Director
10 of the Office of Personnel Management may obtain review
11 of any final order or decision of the Board by filing, within
12 60 days after the date the Director received notice of the
13 final order or decision of the Board, a petition for judicial
14 review in the United States Court of Appeals for the Fed-
15 eral Circuit if the Director determines, in his discretion,
16 that the Board erred in interpreting a civil service law,
17 rule, or regulation affecting personnel management and
18 that the Board’s decision will have a substantial impact
19 on a civil service law, rule, regulation, or policy directive.
20 If the Director did not intervene in a matter before the
21 Board, the Director may not petition for review of a Board
22 decision under this section unless the Director first peti-
23 tions the Board for a reconsideration of its decision, and
24 such petition is denied. In addition to the named respond-
25 ent, the Board and all other parties to the proceedings

1 before the Board shall have the right to appear in the pro-
2 ceeding before the Court of Appeals. The granting of the
3 petition for judicial review shall be at the discretion of the
4 Court of Appeals.

5 “(2) During the 5-year period beginning on the effec-
6 tive date of the Federal Employee Protection of Diselo-
7 sures Act, this paragraph shall apply to any review relat-
8 ing to paragraph (8) or (9) of section 2302(b) obtained
9 by the Director of the Office of Personnel Management.
10 The Director of the Office of Personnel Management may
11 obtain review of any final order or decision of the Board
12 by filing, within 60 days after the date the Director re-
13 ceived notice of the final order or decision of the Board,
14 a petition for judicial review in the United States Court
15 of Appeals for the Federal Circuit or any court of appeals
16 of competent jurisdiction as provided under subsection
17 (b)(2) if the Director determines, in his discretion, that
18 the Board erred in interpreting paragraph (8) or (9) of
19 section 2302(b). If the Director did not intervene in a
20 matter before the Board, the Director may not petition
21 for review of a Board decision under this section unless
22 the Director first petitions the Board for a reconsideration
23 of its decision, and such petition is denied. In addition
24 to the named respondent, the Board and all other parties
25 to the proceedings before the Board shall have the right

1 to appear in the proceeding before the court of appeals.
2 The granting of the petition for judicial review shall be
3 at the discretion of the Court of Appeals.”.

4 (k) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
5 MENTS.—

6 (1) IN GENERAL.—

7 (A) REQUIREMENT.—Each agreement in
8 Standard Forms 312 and 4414 of the Govern-
9 ment and any other nondisclosure policy, form,
10 or agreement of the Government shall contain
11 the following statement: “These restrictions are
12 consistent with and do not supersede, conflict
13 with, or otherwise alter the employee obliga-
14 tions, rights, or liabilities created by Executive
15 Order No. 12958; section 7211 of title 5,
16 United States Code (governing disclosures to
17 Congress); section 1034 of title 10, United
18 States Code (governing disclosure to Congress
19 by members of the military); section 2302(b)(8)
20 of title 5, United States Code (governing disclo-
21 sures of illegality, waste, fraud, abuse or public
22 health or safety threats); the Intelligence Iden-
23 tities Protection Act of 1982 (50 U.S.C. 421 et
24 seq.) (governing disclosures that could expose
25 confidential Government agents); and the stat-

1 utes which protect against disclosure that may
2 compromise the national security, including sec-
3 tions 641, 793, 794, 798, and 952 of title 18,
4 United States Code, and section 4(b) of the
5 Subversive Activities Act of 1950 (50 U.S.C.
6 783(b)). The definitions, requirements, obliga-
7 tions, rights, sanctions, and liabilities created
8 by such Executive order and such statutory
9 provisions are incorporated into this agreement
10 and are controlling.”.

11 (B) ENFORCEABILITY.—Any nondisclosure
12 policy, form, or agreement described under sub-
13 paragraph (A) that does not contain the state-
14 ment required under subparagraph (A) may not
15 be implemented or enforced to the extent such
16 policy, form, or agreement is inconsistent with
17 that statement.

18 (2) PERSONS OTHER THAN GOVERNMENT EM-
19 PLOYEES.—Notwithstanding paragraph (1), a non-
20 disclosure policy, form, or agreement that is to be
21 executed by a person connected with the conduct of
22 an intelligence or intelligence-related activity, other
23 than an employee or officer of the United States
24 Government, may contain provisions appropriate to
25 the particular activity for which such document is to

1 be used. Such form or agreement shall, at a min-
2 imum, require that the person will not disclose any
3 classified information received in the course of such
4 activity unless specifically authorized to do so by the
5 United States Government. Such nondisclosure
6 forms shall also make it clear that such forms do
7 not bar disclosures to Congress or to an authorized
8 official of an executive agency or the Department of
9 Justice that are essential to reporting a substantial
10 violation of law.

11 (l) CLARIFICATION OF WHISTLEBLOWER RIGHTS
12 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
13 214(e) of the Homeland Security Act of 2002 (6 U.S.C.
14 133(e)) is amended by adding at the end the following:
15 “For purposes of this section a permissible use of inde-
16 pendentlly obtained information includes the disclosure of
17 such information under section 2302(b)(8) of title 5,
18 United States Code.”.

19 (m) ADVISING EMPLOYEES OF RIGHTS.—Section
20 2302(e) of title 5, United States Code, is amended by in-
21 serting “, including how to make a lawful disclosure of
22 information that is specifically required by law or Execu-
23 tive order to be kept secret in the interest of national de-
24 fense or the conduct of foreign affairs to the Special Coun-
25 sel, the Inspector General of an agency, Congress, or other

1 agency employee designated to receive such disclosures”
 2 after “chapter 12 of this title”.

3 (n) SCOPE OF DUE PROCESS.—

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

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

13 (o) EFFECTIVE DATE.—This Act shall take effect 30
 14 days after the date of enactment of this Act.

15 **SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF IN-**
 16 **FORMATION BY FEDERAL EMPLOYEES.**

17 (a) *SHORT TITLE.*—*This Act may be cited as the*
 18 *“Federal Employee Protection of Disclosures Act”.*

19 (b) *CLARIFICATION OF DISCLOSURES COVERED.*—*Sec-*
 20 *tion 2302(b)(8) of title 5, United States Code, is amended—*

21 (1) *in subparagraph (A)—*

22 (A) *by striking “which the employee or ap-*
 23 *plicant reasonably believes evidences” and insert-*
 24 *ing “, without restriction to time, place, form,*
 25 *motive, context, or prior disclosure made to any*

1 *person by an employee or applicant, including a*
 2 *disclosure made in the ordinary course of an em-*
 3 *ployee’s duties, that the employee or applicant*
 4 *reasonably believes is evidence of”;*

5 *(B) in clause (i), by striking “a violation”*
 6 *and inserting “any violation”;* and

7 *(C) by striking “or” at the end;*

8 *(2) in subparagraph (B)—*

9 *(A) by striking “which the employee or ap-*
 10 *plicant reasonably believes evidences” and insert-*
 11 *ing “, without restriction to time, place, form,*
 12 *motive, context, or prior disclosure made to any*
 13 *person by an employee or applicant, including a*
 14 *disclosure made in the ordinary course of an em-*
 15 *ployee’s duties, of information that the employee*
 16 *or applicant reasonably believes is evidence of”;*

17 *(B) in clause (i), by striking “a violation”*
 18 *and inserting “any violation (other than a viola-*
 19 *tion of this section)”;* and

20 *(C) in clause (ii), by adding “or” at the*
 21 *end; and*

22 *(3) by adding at the end the following:*

23 *“(C) any disclosure that—*

24 *“(i) is made by an employee or appli-*
 25 *cant of information required by law or Ex-*

1 *ecutive order to be kept secret in the interest*
2 *of national defense or the conduct of foreign*
3 *affairs that the employee or applicant rea-*
4 *sonably believes is direct and specific evi-*
5 *dence of—*

6 *“(I) any violation of any law,*
7 *rule, or regulation;*

8 *“(II) gross mismanagement, a*
9 *gross waste of funds, an abuse of au-*
10 *thority, or a substantial and specific*
11 *danger to public health or safety; or*

12 *“(III) a false statement to Con-*
13 *gress on an issue of material fact; and*

14 *“(ii) is made to—*

15 *“(I) a member of a committee of*
16 *Congress having a primary responsi-*
17 *bility for oversight of a department,*
18 *agency, or element of the Federal Gov-*
19 *ernment to which the disclosed infor-*
20 *mation relates and who is authorized*
21 *to receive information of the type dis-*
22 *closed;*

23 *“(II) any other Member of Con-*
24 *gress who is authorized to receive infor-*
25 *mation of the type disclosed; or*

1 “(III) an employee of Congress
2 who has the appropriate security clear-
3 ance and is authorized to receive infor-
4 mation of the type disclosed.”.

5 (c) *COVERED DISCLOSURES*.—Section 2302(a)(2) of
6 title 5, United States Code, is amended—

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

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

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

12 “(D) ‘disclosure’ means a formal or informal
13 communication or transmission, but does not include
14 a communication concerning policy decisions that
15 lawfully exercise discretionary authority unless the
16 employee providing the disclosure reasonably believes
17 that the disclosure evidences—

18 “(i) any violation of any law, rule, or regu-
19 lation; or

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

23 (d) *REBUTTABLE PRESUMPTION*.—Section 2302(b) of
24 title 5, United States Code, is amended by amending the
25 matter following paragraph (12) to read as follows:

1 *“This subsection shall not be construed to authorize the*
 2 *withholding of information from Congress or the taking of*
 3 *any personnel action against an employee who discloses in-*
 4 *formation to Congress. For purposes of paragraph (8), any*
 5 *presumption relating to the performance of a duty by an*
 6 *employee who has authority to take, direct others to take,*
 7 *recommend, or approve any personnel action may be rebut-*
 8 *ted by substantial evidence. For purposes of paragraph (8),*
 9 *a determination as to whether an employee or applicant*
 10 *reasonably believes that they have disclosed information*
 11 *that evidences any violation of law, rule, regulation, gross*
 12 *mismanagement, a gross waste of funds, an abuse of author-*
 13 *ity, or a substantial and specific danger to public health*
 14 *or safety shall be made by determining whether a disin-*
 15 *terested observer with knowledge of the essential facts known*
 16 *to and readily ascertainable by the employee could reason-*
 17 *ably conclude that the actions of the Government evidence*
 18 *such violations, mismanagement, waste, abuse, or danger.”.*

19 *(e) NONDISCLOSURE POLICIES, FORMS, AND AGREE-*
 20 *MENTS; SECURITY CLEARANCES; AND RETALIATORY INVES-*
 21 *TIGATIONS.—*

22 *(1) PERSONNEL ACTION.—Section 2302(a)(2)(A)*
 23 *of title 5, United States Code, is amended—*

24 *(A) in clause (x), by striking “and” after*
 25 *the semicolon; and*

1 (B) by redesignating clause (xi) as clause
2 (xiv) and inserting after clause (x) the following:

3 “(xi) the implementation or enforce-
4 ment of any nondisclosure policy, form, or
5 agreement;

6 “(xii) a suspension, revocation, or
7 other determination relating to a security
8 clearance or any other access determination
9 by a covered agency;

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

16 (2) *PROHIBITED PERSONNEL PRACTICE.*—Sec-
17 tion 2302(b) of title 5, United States Code, is amend-
18 ed—

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

21 (B) in paragraph (12), by striking the pe-
22 riod and inserting a semicolon; and

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

1 “(13) *implement or enforce any nondisclosure*
2 *policy, form, or agreement, if such policy, form, or*
3 *agreement does not contain the following statement:*
4 *‘These provisions are consistent with and do not su-*
5 *persede, conflict with, or otherwise alter the employee*
6 *obligations, rights, or liabilities created by Executive*
7 *Order No. 12958; section 7211 of title 5, United*
8 *States Code (governing disclosures to Congress); sec-*
9 *tion 1034 of title 10, United States Code (governing*
10 *disclosure to Congress by members of the military);*
11 *section 2302(b)(8) of title 5, United States Code (gov-*
12 *erning disclosures of illegality, waste, fraud, abuse, or*
13 *public health or safety threats); the Intelligence Iden-*
14 *tities Protection Act of 1982 (50 U.S.C. 421 et seq.)*
15 *(governing disclosures that could expose confidential*
16 *Government agents); and the statutes which protect*
17 *against disclosures that could compromise national*
18 *security, including sections 641, 793, 794, 798, and*
19 *952 of title 18, United States Code, and section 4(b)*
20 *of the Subversive Activities Control Act of 1950 (50*
21 *U.S.C. 783(b)). The definitions, requirements, obliga-*
22 *tions, rights, sanctions, and liabilities created by such*
23 *Executive order and such statutory provisions are in-*
24 *corporated into this agreement and are controlling’;*
25 *or*

1 “(14) conduct, or cause to be conducted, an in-
 2 vestigation, other than any ministerial or nondis-
 3 cretionary fact finding activities necessary for the
 4 agency to perform its mission, of an employee or ap-
 5 plicant for employment because of any activity pro-
 6 tected under this section.”.

7 (3) *BOARD AND COURT REVIEW OF ACTIONS RE-*
 8 *LATING TO SECURITY CLEARANCES.—*

9 (A) *IN GENERAL.—*Chapter 77 of title 5,
 10 *United States Code, is amended by inserting*
 11 *after section 7702 the following:*

12 **“§ 7702a. Actions relating to security clearances**

13 “(a) *In any appeal relating to the suspension, revoca-*
 14 *tion, or other determination relating to a security clearance*
 15 *or access determination, the Merit Systems Protection*
 16 *Board or any reviewing court—*

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

19 “(2) *may not order the President or the designee*
 20 *of the President to restore a security clearance or oth-*
 21 *erwise reverse a determination of clearance status or*
 22 *reverse an access determination; and*

23 “(3) *subject to paragraph (2), may issue declara-*
 24 *tory relief and any other appropriate relief.*

1 “(b)(1) If, in any final judgment, the Board or court
2 declares that any suspension, revocation, or other deter-
3 mination with regard to a security clearance or access de-
4 termination was made in violation of paragraph (8) or (9)
5 of section 2302(b), the affected agency shall conduct a re-
6 view of that suspension, revocation, access determination,
7 or other determination, giving great weight to the Board
8 or court judgment.

9 “(2) Not later than 30 days after any Board or court
10 judgment declaring that a security clearance suspension,
11 revocation, access determination, or other determination
12 was made in violation of paragraph (8) or (9) of section
13 2302(b), the affected agency shall issue an unclassified re-
14 port to the congressional committees of jurisdiction (with
15 a classified annex if necessary), detailing the circumstances
16 of the agency’s security clearance suspension, revocation,
17 other determination, or access determination. A report
18 under this paragraph shall include any proposed agency
19 action with regard to the security clearance or access deter-
20 mination.

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

1 “(d) For purposes of this section, corrective action may
 2 not be ordered if the agency demonstrates by a preponder-
 3 ance of the evidence that it would have taken the same per-
 4 sonnel action in the absence of such disclosure.”.

5 (B) *TECHNICAL AND CONFORMING AMEND-*
 6 *MENT.—The table of sections for chapter 77 of*
 7 *title 5, United States Code, is amended by in-*
 8 *serting after the item relating to section 7702 the*
 9 *following:*

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

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

13 “(i)(I) *the Federal Bureau of Investigation,*
 14 *the Central Intelligence Agency, the Defense In-*
 15 *telligence Agency, the National Imagery and*
 16 *Mapping Agency, the National Security Agency;*
 17 *and*

18 “(II) *as determined by the President, any*
 19 *executive agency or unit thereof the principal*
 20 *function of which is the conduct of foreign intel-*
 21 *ligence or counterintelligence activities, if the de-*
 22 *termination (as that determination relates to a*
 23 *personnel action) is made before that personnel*
 24 *action; or”.*

1 (g) *ATTORNEY FEES.*—Section 1204(m)(1) of title 5,
2 *United States Code*, is amended by striking “agency in-
3 *involved*” and inserting “agency where the prevailing party
4 *is employed or has applied for employment*”.

5 (h) *DISCIPLINARY ACTION.*—Section 1215(a)(3) of title
6 *5, United States Code*, is amended to read as follows:

7 “(3)(A) A final order of the Board may im-
8 pose—

9 “(i) disciplinary action consisting of re-
10 moval, reduction in grade, debarment from Fed-
11 eral employment for a period not to exceed 5
12 years, suspension, or reprimand;

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

15 “(iii) any combination of disciplinary ac-
16 tions described under clause (i) and an assess-
17 ment described under clause (ii).

18 “(B) In any case in which the Board finds that
19 an employee has committed a prohibited personnel
20 practice under paragraph (8) or (9) of section
21 2302(b), the Board shall impose disciplinary action if
22 the Board finds that the activity protected under
23 paragraph (8) or (9) of section 2302(b) was a signifi-
24 cant motivating factor, even if other factors also moti-
25 vated the decision, for the employee’s decision to take,

1 *fail to take, or threaten to take or fail to take a per-*
 2 *sonnel action, unless that employee demonstrates, by*
 3 *preponderance of evidence, that the employee would*
 4 *have taken, failed to take, or threatened to take or fail*
 5 *to take the same personnel action, in the absence of*
 6 *such protected activity.”.*

7 (i) *SPECIAL COUNSEL AMICUS CURIAE APPEAR-*
 8 *ANCE.—Section 1212 of title 5, United States Code, is*
 9 *amended by adding at the end the following:*

10 “(h)(1) *The Special Counsel is authorized to appear*
 11 *as amicus curiae in any action brought in a court of the*
 12 *United States related to any civil action brought in connec-*
 13 *tion with section 2302(b) (8) or (9), or subchapter III of*
 14 *chapter 73, or as otherwise authorized by law. In any such*
 15 *action, the Special Counsel is authorized to present the*
 16 *views of the Special Counsel with respect to compliance*
 17 *with section 2302(b) (8) or (9) or subchapter III of chapter*
 18 *73 and the impact court decisions would have on the en-*
 19 *forcement of such provisions of law.*

20 “(2) *A court of the United States shall grant the appli-*
 21 *cation of the Special Counsel to appear in any such action*
 22 *for the purposes described in subsection (a).”.*

23 (j) *JUDICIAL REVIEW.—*

24 (1) *IN GENERAL.—Section 7703(b)(1) of title 5,*
 25 *United States Code, is amended to read as follows:*

1 “(b)(1)(A) *Except as provided in subparagraph (B)*
 2 *and paragraph (2), a petition to review a final order or*
 3 *final decision of the Board shall be filed in the United*
 4 *States Court of Appeals for the Federal Circuit. Notwith-*
 5 *standing any other provision of law, any petition for review*
 6 *must be filed within 60 days after the date the petitioner*
 7 *received notice of the final order or decision of the Board.*

8 “(B) *During the 5-year period beginning on the effec-*
 9 *tive date of the Federal Employee Protection of Disclosures*
 10 *Act, a petition to review a final order or final decision of*
 11 *the Board in a case alleging a violation of paragraph (8)*
 12 *or (9) of section 2302(b) shall be filed in the United States*
 13 *Court of Appeals for the Federal Circuit or any court of*
 14 *appeals of competent jurisdiction as provided under sub-*
 15 *section (b)(2).”.*

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

19 “(d)(1) *Except as provided under paragraph (2), this*
 20 *paragraph shall apply to any review obtained by the Direc-*
 21 *tor of the Office of Personnel Management. The Director of*
 22 *the Office of Personnel Management may obtain review of*
 23 *any final order or decision of the Board by filing, within*
 24 *60 days after the date the Director received notice of the*
 25 *final order or decision of the Board, a petition for judicial*

1 review in the United States Court of Appeals for the Federal
2 Circuit if the Director determines, in his discretion, that
3 the Board erred in interpreting a civil service law, rule,
4 or regulation affecting personnel management and that the
5 Board's decision will have a substantial impact on a civil
6 service law, rule, regulation, or policy directive. If the Di-
7 rector did not intervene in a matter before the Board, the
8 Director may not petition for review of a Board decision
9 under this section unless the Director first petitions the
10 Board for a reconsideration of its decision, and such peti-
11 tion is denied. In addition to the named respondent, the
12 Board and all other parties to the proceedings before the
13 Board shall have the right to appear in the proceeding be-
14 fore the Court of Appeals. The granting of the petition for
15 judicial review shall be at the discretion of the Court of
16 Appeals.

17 “(2) During the 5-year period beginning on the effec-
18 tive date of the Federal Employee Protection of Disclosures
19 Act, this paragraph shall apply to any review relating to
20 paragraph (8) or (9) of section 2302(b) obtained by the Di-
21 rector of the Office of Personnel Management. The Director
22 of the Office of Personnel Management may obtain review
23 of any final order or decision of the Board by filing, within
24 60 days after the date the Director received notice of the
25 final order or decision of the Board, a petition for judicial

1 *review in the United States Court of Appeals for the Federal*
 2 *Circuit or any court of appeals of competent jurisdiction*
 3 *as provided under subsection (b)(2) if the Director deter-*
 4 *mines, in his discretion, that the Board erred in inter-*
 5 *preting paragraph (8) or (9) of section 2302(b). If the Di-*
 6 *rector did not intervene in a matter before the Board, the*
 7 *Director may not petition for review of a Board decision*
 8 *under this section unless the Director first petitions the*
 9 *Board for a reconsideration of its decision, and such peti-*
 10 *tion is denied. In addition to the named respondent, the*
 11 *Board and all other parties to the proceedings before the*
 12 *Board shall have the right to appear in the proceeding be-*
 13 *fore the court of appeals. The granting of the petition for*
 14 *judicial review shall be at the discretion of the Court of*
 15 *Appeals.”.*

16 *(k) NONDISCLOSURE POLICIES, FORMS, AND AGREE-*
 17 *MENTS.—*

18 *(1) IN GENERAL.—*

19 *(A) REQUIREMENT.—Each agreement in*
 20 *Standard Forms 312 and 4414 of the Govern-*
 21 *ment and any other nondisclosure policy, form,*
 22 *or agreement of the Government shall contain the*
 23 *following statement: “These restrictions are con-*
 24 *sistent with and do not supersede, conflict with,*
 25 *or otherwise alter the employee obligations,*

1 *rights, or liabilities created by Executive Order*
2 *No. 12958; section 7211 of title 5, United States*
3 *Code (governing disclosures to Congress); section*
4 *1034 of title 10, United States Code (governing*
5 *disclosure to Congress by members of the mili-*
6 *tary); section 2302(b)(8) of title 5, United States*
7 *Code (governing disclosures of illegality, waste,*
8 *fraud, abuse or public health or safety threats);*
9 *the Intelligence Identities Protection Act of 1982*
10 *(50 U.S.C. 421 et seq.) (governing disclosures*
11 *that could expose confidential Government*
12 *agents); and the statutes which protect against*
13 *disclosure that may compromise the national se-*
14 *curity, including sections 641, 793, 794, 798,*
15 *and 952 of title 18, United States Code, and sec-*
16 *tion 4(b) of the Subversive Activities Act of 1950*
17 *(50 U.S.C. 783(b)). The definitions, require-*
18 *ments, obligations, rights, sanctions, and liabil-*
19 *ities created by such Executive order and such*
20 *statutory provisions are incorporated into this*
21 *agreement and are controlling.”.*

22 (B) *ENFORCEABILITY.*—*Any nondisclosure*
23 *policy, form, or agreement described under sub-*
24 *paragraph (A) that does not contain the state-*
25 *ment required under subparagraph (A) may not*

1 *be implemented or enforced to the extent such*
2 *policy, form, or agreement is inconsistent with*
3 *that statement.*

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

21 (i) *CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR*
22 *CRITICAL INFRASTRUCTURE INFORMATION.—Section*
23 *214(c) of the Homeland Security Act of 2002 (6 U.S.C.*
24 *133(c)) is amended by adding at the end the following: “For*
25 *purposes of this section a permissible use of independently*

1 *obtained information includes the disclosure of such infor-*
 2 *mation under section 2302(b)(8) of title 5, United States*
 3 *Code.”.*

4 (m) *ADVISING EMPLOYEES OF RIGHTS.*—Section
 5 *2302(c) of title 5, United States Code, is amended by insert-*
 6 *ing “, including how to make a lawful disclosure of infor-*
 7 *mation that is specifically required by law or Executive*
 8 *order to be kept secret in the interest of national defense*
 9 *or the conduct of foreign affairs to the Special Counsel, the*
 10 *Inspector General of an agency, Congress, or other agency*
 11 *employee designated to receive such disclosures” after*
 12 *“chapter 12 of this title”.*

13 (n) *SCOPE OF DUE PROCESS.*—

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

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

23 (o) *EFFECTIVE DATE.*—*This Act shall take effect 30*
 24 *days after the date of enactment of this Act.*

Calendar No. 513

110TH CONGRESS
1ST Session

S. 274

[Report No. 110-232]

A BILL

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

NOVEMBER 16, 2007

Reported with an amendment